

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA**

In re

**Case No. 02-17132-BKC-AJC
Chapter 7**

NELSON IZQUIERDO,

Debtor.

_____/
CITIBANK (SOUTH DAKOTA), N.A.,

Adv. No. 02-1478-BKC-AJC-A

Plaintiff,

vs.

NELSON IZQUIERDO,

Defendant.

_____/

ORDER DISMISSING COMPLAINT

THIS CAUSE came on for continued pretrial conference on August 6, 2003. At the initial pretrial conference in January 2003, counsel for Plaintiff requested a default due to the Defendant's failure to answer the Complaint. The Court entered the default with the admonition that the Complaint did not seem to allege sufficient facts to entitle Plaintiff to a judgment of non-dischargeability. The Court advised counsel for the Plaintiff to submit an affidavit to establish Plaintiff's right to a judgment of non-dischargeability.

On May 27, 2003, Plaintiff filed a *Motion for Entry of Default Final Judgment*. On July 1, 2003, the Court denied the motion and set a further pretrial conference. At the pretrial conference held August 6, 2003, counsel for the Plaintiff offered nothing further to the Court in support of its case. A further review of the record in this case leaves the Court with the firm conviction that its prior ruling was correct, and Plaintiff's motion was properly denied and this case should be dismissed.

In support of its motion for default final judgment, the Plaintiff submitted the affidavit of Leslie Andrews, Unit Manager in the Bankruptcy Department of Citibank (South Dakota) N.A., who swore that the Plaintiff issued a credit card to the Debtor with a line of credit of \$11,400 and that “shortly prior to the filing” the Debtor made purchases and cash advances in the amount of \$2,521.88.

Citibank states in paragraph 8 of the affidavit that it would not have allowed Debtor to incur the charges if it believed Debtor “had neither the intent nor the ability to repay the charges.” A profound observation indeed, but not a scintilla of evidence relating to Debtor’s intent. As for Debtor’s ability, Citibank had already determined Debtor to be creditworthy up to \$11,400.

Citibank further states in paragraph 9 that “at the time the Defendant incurred the charges, Plaintiff had no information or knowledge that the Defendant was unable to repay the charges....” This statement makes the Court wonder: If Citibank had no knowledge that Defendant was unable to repay, why did Citibank extend credit? The lack of knowledge of whether Defendant was considering filing bankruptcy is a far cry from affirmative evidence that Defendant was actually considering filing bankruptcy at the time the subject charges were incurred.

Finally, Citibank, in paragraph 7 of the affidavit, swears it relied on the Debtor’s execution of the account agreement. If that is the standard in dischargeability proceedings, and a mere promise to repay a credit advance renders that debt non-dischargeable, then the bankruptcy courts might as well shut their doors and discontinue dischargeability proceedings altogether, as that standard would render every loan extended on a promise to repay a non-dischargeable debt.

For reasons unknown, Citibank has attached three months of statements to the affidavit and circled two charges made on April 14, 2002, for \$12.08 and May 4, 2002, for \$11.00 to Pantry Liquors. Perhaps the intent was to classify the \$23.08 as outrageous luxury items charged by the

Debtor. Another interpretation might be that the Debtor became aware of the friendly and generous 28.665% interest rate charged by Citibank and needed a couple of drinks to steady his nerves.

The Plaintiff has failed to provide evidence to prove false pretenses, false representations and actual fraud as alleged in paragraph 6 of Plaintiff's Complaint, and no allegations or proffer of evidence supports the §727 count of the Complaint. It was therefore proper and appropriate to have denied the motion for default final judgment. Accordingly, it is

ORDERED AND ADJUDGED that the Amended Complaint (CP 5) is DISMISSED for failure of Plaintiff to properly plead or prove its claims.

DONE AND ORDERED in the Southern District of Florida this 26th day of August, 2003.

A. JAY CRISTOL, JUDGE
UNITED STATES BANKRUPTCY COURT