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FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

FILED  
03 MAR 21 PM 2:11  
U.S. BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
CLEVELAND

In re:	)	Case No. 02-12538
	)	
CURTIS L. DAVIS,	)	Chapter 7
	)	
Debtor.	)	Judge Pat E. Morgenstern-Clarren
_____	)	
	)	
WACHOVIA BANK, N.A.,	)	Adversary Proceeding No. 02-1222
	)	
Plaintiff,	)	
	)	
v.	)	<b><u>MEMORANDUM OF OPINION</u></b>
	)	
CURTIS L. DAVIS,	)	
	)	
Defendant.	)	

The Debtor filed a motion for an award of costs and fees under Bankruptcy Code § 523(d), after the Court entered judgment in favor of the Debtor on a nondischargeability complaint brought by Wachovia Bank, N.A. The Bank opposes the motion. The parties submitted this issue for decision on the briefs. For the reasons stated below, the motion is denied.

**JURISDICTION**

Jurisdiction exists under 28 U.S.C. § 1334 and General Order No. 84 entered by the United States District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C. § 157(b)(2)(I).

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**DISCUSSION**

**11 U.S.C. § 523(d)**

Under Bankruptcy Code § 523(d), a debtor may recover his costs and attorney's fees incurred in defending dischargeability litigation if the creditor's position was not substantially justified:

If a creditor requests a determination of dischargeability of a consumer debt under subsection (a)(2) of this section, and such debt is discharged, the court shall grant judgment in favor of the debtor for the costs of, and a reasonable attorney's fee for, the proceeding if the court finds that the position of the creditor was not substantially justified, except that the court shall not award such costs and fees if special circumstances would make the award unjust.

11 U.S.C. § 523(d). "Congress enacted section 523(d) out of concern that creditors were using the threat of litigation to induce consumer debtors to settle for reduced sums, even though the debtors were in many cases entitled to discharge." *Martin v. Bank of Germantown (In re Martin)*, 761 F.2d 1163, 1167-68 (6<sup>th</sup> Cir. 1985) (discussing the earlier version of § 523(d) and citing H.R. Rep. No. 595, 95<sup>th</sup> Cong., 1st Sess. 364, *reprinted in* 1978 U.S.C.C.A.N. 5787, 6092). Congress added the substantially justified standard to give the bankruptcy court greater discretion in deciding whether fees should be awarded. *See Am. Savings Bank v. Harvey (In re Harvey)*, 172 B.R. 314, 318 (B.A.P. 9<sup>th</sup> Cir. 1994) (noting that before the 1984 amendment "§ 523(d) required an award of costs and fees unless the creditor could show that the award would be clearly inequitable."). *See also Thorp Credit, Inc. v. Carmen (In re Carmen)*, 723 F.2d 16 (6<sup>th</sup> Cir. 1983) (discussing the requirements for an award under the earlier version of § 523(d)).

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To prevail on a motion for costs and fees, a debtor must prove that: (1) the creditor requested a dischargeability decision; (2) the debt is a consumer debt; and (3) the debt was discharged. After the debtor establishes these elements, the burden shifts to the creditor to prove that its actions were substantially justified or that special circumstances make an award unjust. *See Stine v. Flynn (In re Flynn)*, 254 B.R. 244, 249 (B.A.P. 9<sup>th</sup> Cir. 2000). *See also Colabianchi v. Thomas (In re Thomas)*, 258 B.R. 167, 168 (Bankr.N.D. Ohio 2001); *Providian Bancorp v. Stockard (In re Stockard)*, 216 B.R. 237, 240 (Bankr. M.D. Tenn. 1977).

In this case, the Bank stipulates that it filed a dischargeability complaint, the debt was discharged as a result of this Court's decision, and there are no special circumstances that would make an award unjust. (Bank's Opposition Brief at n. 3) (Docket 24). The Bank opposes the motion on the grounds that (1) its action did not involve consumer debt; and (2) its position was substantially justified.

**Did the action involve consumer debt?**

Consumer debt is defined as "debt incurred by an individual primarily for a personal, family, or household purpose[.]" 11 U.S.C. § 101(8). Debt which is incurred with a profit motive is not consumer debt. *See Internal Revenue Service v. Westberry (In re Westberry)*, 215 F.3d 589, 593 (6<sup>th</sup> Cir. 2000) (noting that use of the profit motive analysis is appropriate to determine whether a debt falls outside the category of consumer debt).

Based on the record established at trial, this action did not involve consumer debt. The Bank's complaint alleged that the Debtor obtained two loans to finance two car purchases by

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means of false representations.<sup>1</sup> The Bank argued that the Debtor “executed and/or permitted his agents to execute” the notes related to the purchases as part of a broad scheme of fraudulent activity and for profit. (Bank’s Trial Brief) (Docket 14 at 4). The Bank introduced evidence to support its allegations. Additionally, the Debtor admitted that he had participated in similar transactions to earn extra money and in fact received an \$1,800.00 fee for his efforts in one such transaction. While the Debtor argues that the car loan debts were consumer debt because they were based on the purchase of vehicles for his personal use, there was no evidence to support that characterization of the debt. As noted above, the Debtor bears the burden of proof on this issue. Although the Bank ultimately failed to prove that the Debtor was liable for the two car loans, all of the evidence points to the fact that the car loan transactions were part of a scheme to make a profit and, therefore, are not consumer debt.

**Was the Bank’s position substantially justified?**

Alternatively, even if the debt is viewed as consumer debt, the Debtor is not entitled to relief because the Bank showed that it was substantially justified in pursuing this action. The standard of substantial justification has been interpreted to mean justified to a degree that would satisfy a reasonable person. *See Bridgewater Credit Union v. McCarthy (In re McCarthy)*, 243 B.R. 203, 207 (B.A.P. 1<sup>st</sup> Cir. 2000) (noting that this standard is derived from a similar provision in the Equal Access to Justice Act; 28 U.S.C. § 2412(d)(1)(A), and citing *Pierce v. Underwood*, 487 U.S. 552 (1988) which interprets that section). All of the circumstances must be considered, with this three part inquiry aiding in the analysis: (1) was there a reasonable basis in truth for the

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<sup>1</sup> The complaint cited both §§ 523(a)(2)(A) and (B) as a basis for the nondischargeability, but the Bank ultimately dropped its § 523(a)(2)(A) claim.

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facts alleged; (2) was there a reasonable basis in law for the theory propounded; and (3) was there a reasonable connection between the facts alleged and the legal theory advanced. *See In re McCarthy*, 243 B.R. at 208-9; *Bank of Am. v. Miller (In re Miller)*, 250 B.R. 294, 296 (Bankr. E.D. Ky. 2000). The requirement that a creditor's actions be substantially justified is ongoing throughout the litigation. Therefore, the extent of a creditor's pretrial investigation is relevant as is a creditor's decision to proceed with litigation after it learns it will be unable to prove its case. *In re Miller*, 250 B.R. at 296; *In re Stockard*, 216 B.R. at 240.

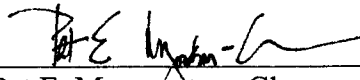
The Bank acted reasonably in its pursuit of this matter. It investigated the facts before filing the adversary proceeding and also conducted discovery after the filing. (*See the attachments to the Bank's Opposition Brief (Docket 24)*). The two car loans in question were clearly obtained through the use of a false earnings statement, the question being whether the Debtor participated in providing that statement to the Bank. The Bank proceeded under the theory that it did not matter whether the Debtor signed the loan documents or submitted the false earnings statement himself because the loans were incurred as part of a fraudulent scheme involving others. There was a reasonable basis for the facts and legal theory under which the Bank went forward. This Court ultimately found the Debtor to be credible when he denied authorizing anyone else to sign the loan documents on his behalf; this led in part to the Court's conclusion that the Debtor was not liable on the loans and did not submit the false earnings statement. If the Court had found otherwise on the credibility issue, the decision might well have been different. The Bank was, therefore, substantially justified in prosecuting this action.

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CONCLUSION

For the reasons stated, the Debtor's motion for an award of costs and attorney's fees under 11 U.S.C. § 523(d) is denied. A separate judgment will be entered in accordance with this Memorandum of Opinion.

Date: 21 Mar 2003

  
\_\_\_\_\_  
Pat E. Morgenstern-Clarren  
United States Bankruptcy Judge

Served by mail on: Stephen Hobt, Esq.  
Tim Collins, Esq.

By: Joyce L. Gordon, Secretary  
Date: 3/21/03

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WACHOVIA BANK, N.A.,	)	Adversary Proceeding No. 02-1222
	)	
Plaintiff,	)	
	)	
v.	)	<b><u>JUDGMENT</u></b>
	)	
CURTIS L. DAVIS,	)	
	)	
Defendant.	)	

For the reasons stated in the Memorandum of Opinion filed this same date, the Debtor's motion for an award of costs and attorney's fees under 11 U.S.C. § 523(d) is denied. (Docket 22).

IT IS SO ORDERED.

Date: 21 March 2003

Pat E. Morgenstern-Clarren  
Pat E. Morgenstern-Clarren  
United States Bankruptcy Judge

Served by mail on: Stephen Hobt, Esq.  
Tim Collins, Esq.

By: Joyce L. Gordon, Secretary

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