IT IS SO ORDERED.

Kay Woods

Kay Woods
United States Bankruptcy Judge

Dated: February 23, 2011
02:56:08 PM

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:	*	
KRISTY L. MARTIN,	*	CASE NUMBER 10-43102
Debtor.	*	
* * * * * * * * * * * * * * * *	*	
CHASE BANK USA, N.A.,	*	ADVERSARY NUMBER 10-04260
Plaintiff,	*	
v.	*	
KRISTY L. MARTIN,	*	HONORABLE KAY WOODS
Defendant.	*	

****
ORDER DENYING MOTION TO DISMISS COUNTERCLAIM
****

This cause is before the Court on (i) Plaintiff's Motion to Dismiss for Failure to State a Claim upon which Relief Can Be Granted ("Motion"), and (ii) Brief on Behalf of Chase Bank USA, N.A.

in Support of its Motion to Dismiss for Failure to State a Claim upon which Relief Can Be Granted ("Brief") (collectively, "Motion to Dismiss") (Doc. # 9) filed by Plaintiff/Counter-Defendant Chase Bank USA, N.A. ("Chase") on January 7, 2011. Chase requests the Court to dismiss the Counterclaim asserted in Defendant's Answer and Counterclaim ("Answer and Counterclaim") (Doc. # 8) filed by Defendant/Counter-Claimant Kristy L. Martin ("Debtor") on December 20, 2010. The Debtor did not file a response to the Motion to Dismiss.

This Court has jurisdiction pursuant to 28 U.S.C. § 1334 and the general order of reference (General Order No. 84) entered in this district pursuant to 28 U.S.C. § 157(a). Venue in this Court is proper pursuant to 28 U.S.C. §§ 1391(b), 1408, and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). The following constitutes the Court's findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052.

I. PROCEDURAL AND FACTUAL BACKGROUND

On August 17, 2010, the Debtor filed a voluntary petition pursuant to chapter 7 of the Bankruptcy Code ("Petition Date"). On December 12, 2010, Chase filed Complaint to Determine the Non-Dischargeability of Debt to Chase Bank USA, N.A. ("Complaint"), which commenced the instant adversary proceeding. Chase alleges that the Debtor incurred charges in the amount of $2,516.67 ("Debt") on her Chase Credit Card on June 11, 2010 — sixty-seven days prior

to the Petition Date.[1] (Compl. ¶¶ 4, 7.) Chase asserts that the Debt constitutes a consumer debt for luxury goods or services incurred within ninety days before the Petition Date and, thus, is presumed to be nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(C)(i)(I). (*Id.* ¶¶ 7-9.) Chase requests the Court to (i) enter an order determining that the Debt is nondischargeable, and (ii) enter judgment against the Debtor in the amount of $2,516.67, plus interest. (*Id.* at 4-5.)

The Debtor filed the Answer and Counterclaim on December 20, 2010. In the Counterclaim, the Debtor argues, "[Chase]'s position in filing the present action is not substantially justified entitling [the Debtor] to reasonable attorney fees and costs under 11 U.S.C. 523(d) upon this Court's grant of judgment in [the Debtor]'s favor." (Ans. & Countercl. at 2.)

On January 7, 2011, Chase filed the Motion to Dismiss on the basis that the Counterclaim fails to state a claim upon which relief can be granted. (Mot. at 1.) In particular, Chase alleges that the Debtor "has failed to set forth any facts which establish that the position of [Chase] is not reasonable." (Br. at 3.)

II. LEGAL STANDARD AND ANALYSIS

A. Failure to State a Claim.

Federal Rule of Civil Procedure 12(b)(6), made applicable to

[1] Chase states that the Debt was incurred on June 1, 2010. (Compl. ¶ 7.) However, the Statement of Account, attached to the Complaint as Exhibit 1, indicates that the Debt was actually incurred on June 11, 2010, which was sixty-seven days prior to the August 17, 2010 Petition Date. (Compl., Ex. 1, at 1.)

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the instant adversary proceeding by Federal Rule of Bankruptcy Procedure 7012(b), requires that a pleading containing a claim for relief be dismissed if it fails to "state a claim upon which relief can be granted." FED. R. CIV. P. 12 (West 2010); FED. R. BANKR. P. 7012 (West 2010). A claim will be dismissed if it fails to allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the [claimant] pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). "[T]o survive a motion to dismiss, [claimants] must state 'plausible' grounds for relief[;] . . . the basic rule [is] that [claimants] must plead only the basic elements of a claim, not develop all of the facts necessary to support the claim." *Hebron v. Shelby County*, 2010 U.S. App. LEXIS 26028, *4-5 (6th Cir. Dec. 22, 2010) (unpublished) (citing *Iqbal*, 129 S. Ct. at 1949; *Twombly*, 550 U.S. at 556-57, 562).

In determining whether a claim alleges enough facts to survive a motion to dismiss, the court must "construe the [pleading] in the light most favorable to the [claimant], accept its allegations as true, and draw all reasonable inferences in favor of the [claimant]." *Directv, Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007); *see also Twombly*, 550 U.S. at 555. Although the court "must accept all well-pleaded factual allegations . . . as true, [it] need not 'accept as true a legal conclusion couched as a factual

allegation.'" *Hensley Mfg., Inc. v. ProPride, Inc.*, 579 F.3d 603, 609 (6th Cir. 2009) (quoting *Twombly*, 550 U.S. at 555). As a consequence, a claim "'must contain either direct or inferential allegations respecting all material elements to sustain a recovery under some viable legal theory.'" *Bishop v. Lucent Techs., Inc.*, 520 F.3d 516, 519 (6th Cir. 2008) (quoting *Mezibov v. Allen*, 411 F.3d 712, 716 (6th Cir. 2005)).

B. Section 523.

The basis of the Complaint is that the Debt is nondischargeable pursuant to § 523(a)(2). Section 523(a)(2) states, in pertinent part:

> (a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt—
>
> * * *
>
> (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—
>
> (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;
>
> * * *
>
> (C)(i) for purposes of subparagraph (A)—
>
> (I) consumer debts owed to a single creditor and aggregating more than $600 for luxury goods or services incurred by an individual debtor on or within 90 days before the order for relief under this title are presumed to be nondischargeable[.]

11 U.S.C. § 523 (West 2010). Chase asserts that the Debt is presumed to be nondischargeable because it is a consumer debt for luxury goods or services incurred within ninety days before the

Petition Date. (Compl. ¶¶ 7-9.)

In the Counterclaim, the Debtor contends that she will be entitled to costs and attorney's fees, pursuant to § 523(d), when the Court determines that the Debt is dischargeable. (Ans. & Countercl. at 2.) Section 523(d) states:

> (d) 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 (West 2010). The Debtor argues that she is entitled to costs and attorney's fees because "the present action is not substantially justified." (Ans. & Countercl. at 2.)

A debtor is entitled to costs and attorney's fees pursuant to § 523(d) if (i) the creditor filed a complaint pursuant to § 523(a)(2), (ii) the complaint concerned a consumer debt, (iii) the debt was found to be dischargeable, (iv) the position of the creditor was not substantially justified, and (v) no special circumstances exist to make an award unjust. *Colabianchi v. Thomas (In re Thomas)*, 258 B.R. 167, 168 (Bankr. N.D. Ohio 2001). "The debtor must show that the creditor brought an unsuccessful complaint on the discharge of a consumer debt. The burden then shifts to the creditor to prove substantial justification or special circumstances by a preponderance of the evidence." *Id.* (citing *Am. Sav. Bank v. Harvey (In re Harvey)*, 172 B.R. 314, 318 (B.A.P. 9th Cir. 1994);

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Firstbanks v. Goss (In re Goss), 149 B.R. 460 (Bankr. E.D. Mich. 1992)).

As set forth above, the burden is on the Debtor to establish that (i) Chase filed the Complaint pursuant to § 523(a)(2), (ii) the Debt is a consumer debt, and (iii) the Court determined that the Debt is dischargeable. First, it is apparent from the face of the Complaint that Chase brought this cause of action pursuant to § 523(a)(2). (Comp. ¶ 22) ("Pursuant to 11 USC § 523(a)(2) . . . [Debtor] should not be granted a discharge of this debt . . . .") Second, Chase expressly states in the Complaint that the Debt "is a 'consumer debt', as defined by 11 U.S.C.§ 101(8) in that the extension of credit was for personal, family or household use."[2] (*Id.* ¶ 8.) Finally, resolution of this proceeding will determine whether the Debt is dischargeable. Thus, the Debtor has pled sufficient facts to state a claim upon which relief can be granted. *See First Nat'l Bank v. Bernhardy (In re Bernhardy)*, 103 B.R. 198, 200 (Bankr. N.D. Ill. 1989) (emphasis in original) ("[A]ll a debtor must do to obtain an award under Code § 523(d) is to submit a *timely* request in a form sufficient to apprise the creditor of grounds therefor. . . . [F]or until [disposition of the adversary proceeding] she could not be certain that the alleged debt would be discharged.")

Chase asserts that the Counterclaim fails to state a claim

[2] The Court notes that the Debtor denies that the Debt is a consumer debt "for want of knowledge sufficient to form a belief as to the truth of the matters asserted." (Ans. & Countercl. ¶ 1.)

because the Debtor "has failed to set forth any facts which establish that the position of [Chase] is not reasonable." (Br. at 3.) However, the burden is not on the Debtor to establish that Chase's Complaint is not substantially justified. If the Court determines that the Debt is dischargeable, the burden will be on Chase to establish that its position was substantially justified. *Colabianchi*, 258 B.R. at 168. Furthermore, by filing the Complaint, Chase was put on notice that the Debtor may be entitled to costs and attorney's fees. *Davis v. Melcher (In re Melcher)*, 322 B.R. 1, 5 (Bankr. D.D.C. 2005) ("[S]ince § 523(d) clearly states that the debtor is entitled to costs and reasonable attorney's fees, the creditor is on notice that loss of his claim could result in his being assessed those fees and costs."); *Nat'l Real Estate Invs., LLC v. Greer (In re Greer)*, 2002 Bankr. LEXIS 738, *4 (Bankr. D. Col. July 12, 2002) (quoting *Mercantile Bank v. Williamson (In re Williamson)*, 181 B.R. 403, 409 (Bank. W.D. Mo. 1995)) ("'The language [of § 523(d)] is mandatory, so creditors are on notice of its potential applicability.'")

For the reasons set forth above, the Court hereby denies Chase's Motion to Dismiss.

IT IS SO ORDERED.

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