

In the United States Bankruptcy Court

for the Northern District of Iowa

GARY L. FEICKERT and DEBORAH J.
FEICKERT

Bankruptcy No. 96-10007KC

Debtors.

Chapter 7

DIANE K. DEMUTH, f/k/a DIANE K.D.
HANSON

Adversary No. 96-1020KC

Plaintiff

vs.

GARY L. FEICKERT d/b/a GARY L.
FEICKERT CONSTRUCTION

Defendant.

ORDER RE: APPLICATION FOR COSTS AND ATTORNEY'S FEES

This matter came on for hearing on February 27, 1997 pursuant to assignment on Debtor's Application for Costs and Attorney's Fees. Attorney Janet Hong represented Defendant/Debtor Gary L. Feickert; attorney Gregory Epping represented Plaintiff Diane K. Demuth. After the presentation of evidence and argument, the Court took the matter under advisement. This is a core proceeding pursuant to 28 U.S.C. 157(b)(2)(I).

STATEMENT OF THE CASE

Plaintiff's adversary complaint asserts that Debtor owes her \$5,000 under an indemnity agreement. Plaintiff claimed that this debt should be excepted from discharge for fraud pursuant to 523(a)(2)(A) and/or defalcation while acting in a fiduciary capacity under 523(a)(4). The Court entered judgment against Plaintiff on January 10, 1997, finding that Plaintiff's claim is not excepted from discharge under either ground. Debtor now requests compensation for attorney fees and costs under 523(d).

FINDINGS OF FACT

The facts underlying the Court's judgment in this adversary proceeding are as follows. Plaintiff hired Debtor Gary Feickert, a general contractor, to perform restoration work on her home in 1993. During the course of the project, Debtor hired D & S Sheet Metal as a subcontractor to perform the gutter work on the home. Debtor later fired D & S because of the poor quality of its work. D & S filed a mechanic's lien against Plaintiff's real estate. Debtor entered into an indemnity agreement with Plaintiff agreeing that he would defend against and be responsible for any damages arising out of the D & S mechanic's lien. Plaintiff requested this agreement before she paid Debtor the final payment under their construction contract.

D & S filed an action based on its mechanic's lien. Debtor defended against the action until he could no longer afford it. Eventually, Plaintiff settled with D & S Sheet Metal by agreeing to pay the sum of \$5,000 before trial.

As the basis for her 523(a)(2)(A) fraud claim, Plaintiff asserted that when Debtor entered into the indemnity agreement, he made representations without any belief that he would perform under the Indemnity Agreement. Alternatively, she asserted that Debtor made the representations in reckless disregard of whether the representations were true or false.

Plaintiff secondly claimed that the execution of the indemnity agreement created a fiduciary relationship between herself and Debtor. Plaintiff asserted that Debtor's failure to pay his attorneys and to present evidence at trial in the D & S mechanic's lien foreclosure action constituted a defalcation of his fiduciary duty under the indemnity agreement under 523(a)(4).

The Court concluded as follows: "Plaintiff has failed to prove any of the five elements necessary to except a debt from discharge under 523(a)(2)(A)." Order filed Jan. 10, 1997, at p. 7. "Plaintiff's claim is not excepted from discharge under 523(a)(4) as she has failed to prove the existence of a fiduciary relationship or fraud or defalcation." Id. at p. 9.

CONCLUSIONS OF LAW

In his answer to Plaintiff's complaint, Debtor asserts that he is entitled to attorney fees and costs under 523(d). That section states:

If a creditor requests a determination of dischargeability of a consumer debt under subsection (a)(2), 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).

In order to receive attorney's fees under this section, the debtor must prove that (1) the creditor requested a determination of dischargeability under 523(a)(2), (2) the debt is a consumer debt, and (3) the debt was discharged. In re Harvey, 172 B.R. 314, 317 (B.A.P. 9th Cir. 1994); FCC Nat'l Bank v. Dobbins, 151 B.R. 509, 512 (W.D. Mo. 1992). Once the debtor meets the burden of proof on these elements, the burden shifts to the creditor to prove that its actions were substantially justified. Dobbins, 151 B.R. at 511.

In order to be "substantially justified", the complaint must have a reasonable basis in law and fact in light of the factors relevant to the claim of nondischargeability. Dobbins, 151 B.R. at 512. A creditor is not substantially justified when it proceeds to trial knowing that it lacks sufficient evidence to sustain its burden of proof and then fails to establish a single necessary element of its claim. Manufacturers Hanover Trust Co. v. Hudgins, 72 B.R. 214, 220 (N.D. Ill. 1987).

The stated purpose for 523(d) is to discourage creditors from commencing actions in an effort to obtain a settlement from an honest debtor who may not be able to pay for an attorney to handle an adversary proceeding. In re Stewart, 91 B.R. 489, 497 (Bankr. S.D. Iowa 1988). It is meant to discourage frivolous objections to discharge. In re Williamson, 181 B.R. 403, 409 (Bankr. W.D. Mo.

1995). "Congress was justifiably concerned that creditors would be able to use the threat of a section 523 nondischargeability proceeding to extract settlements from debtors" who are less able to afford to pay counsel and litigate. Id.

The second of the three elements which debtors are required to prove under 523(d), that the debt is a consumer debt, promotes these purposes. The term "consumer debt" has been given a narrow construction for purposes of 523(d). In re Stewart, 201 B.R. 996, 1005 (Bankr. N.D. Okla. 1996). "Consumer debt" is defined in 101(8) as a "debt incurred by an individual primarily for a personal, family or household purpose." This definition was adapted from consumer protection laws which have been construed to exclude debts incurred with a profit motive. Burns, 894 F.2d at 363.

The court in In re Burns, 894 F.2d 361, 363 (10th Cir. 1990), held that a bank loan taken out to play the stock market was not a consumer debt because the transaction was entered into with a profit motive. The debt in Burns was not the easy-credit situation at which 523(d) is aimed; it was a commercial-style bank loan obtained through a bank loan officer. Stewart, 201 B.R. at 1005. It was not "personal" within the literal terms of 101(8).

The record indicates that Plaintiff requested a determination of dischargeability under 523(a)(2) in her Claim for Fraud in her adversary complaint. The Court denied that claim in its January 10, 1997 Order and concluded that the debt is discharged. Thus, Debtor has met two elements of his claim for attorney fees under 523(d). Before Plaintiff is required to prove that her complaint was substantially justified, however, Debtor must prove the final element under 523(d), that Plaintiff's claim is a "consumer debt".

Plaintiff's claim arises out of the indemnity agreement Debtor entered prior to receiving final payment on his construction contract with Plaintiff. Clearly, Debtor had a business rather than personal purpose in entering into this agreement. Plaintiff would not make the final payment without the indemnity agreement. Debtor was in the construction business to make a profit. He would have lost profit on his contract with Plaintiff had he not agreed to indemnify Plaintiff against the D & S mechanics' lien action.

The Court concludes that attorney fees under 523(d) are not warranted in this case. The debt Plaintiff sought to except from discharge is not a consumer debt. It is a business debt created through Debtor's efforts to earn a profit from his construction contract with Plaintiff.

WHEREFORE, Debtor's Application for Costs and Attorney's Fees under 11 U.S.C. 523(d) is **DENIED**.

SO ORDERED this 18th day of March, 1997.

Paul J. Kilburg
U.S. Bankruptcy Judge