

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AT&T UNIVERSAL CARD SERVICES, : CIVIL ACTION
CORP. :
 :
v. :
 :
TAMELA M. MCIVOR : No. 97-4734

MEMORANDUM and ORDER

Norma L. Shapiro, J.

December 4, 1997

Tamela McIvor ("Mrs. McIvor") appeals Bankruptcy Judge Cosetti's ("Judge Cosetti") denial of her request for attorney's fees under 11 U.S.C. § 523(d). AT&T Universal Card Services, Corp. ("AT&T") initiated an adversary proceeding against Mrs. McIvor to prevent discharge of Mrs. McIvor's AT&T debt under § 523(a)(2)(A). Judge Cosetti rejected AT&T's claim and discharged the debt, but also rejected Mrs. McIvor's counterclaim for attorney's fees because he found special circumstances precluding such an award. The parties agree to Judge Cosetti's findings of fact summarized below.¹

Donald McIvor ("Mr. McIvor"), a police officer, obtained a

¹ The parties agree to Judge Cosetti's findings of fact with one exception. Judge Cosetti stated that appellant took a cash advance of \$175 on her credit card shortly before filing the voluntary petition. The parties agree that the amount withdrawn was actually \$150 not \$175. A district court reviews the bankruptcy court's findings of fact for clear error. See Chemetron Corp. v. Jones, 72 F.3d 341, 345 (3d Cir. 1995). A review of the record reveals that the bankruptcy court clearly erred in finding a cash advance of \$175 rather than \$150 charged to her account before November 14, 1995.

credit card from AT&T on March 1, 1994. In February, 1995, Mr. McIvor was placed on suspension and suffered an income decline. Mr. McIvor stopped using his credit card in August, 1995. Mr. McIvor made one further minimum payment but failed to make payments thereafter. Previously, Mr. McIvor had always made the minimum payment.

Mrs. McIvor received an unsolicited application and credit card from AT&T in June, 1995. Mrs. McIvor accepted the card by returning the signed application. She made numerous charges on the card, mostly for clothing, but made payments only in August (\$30) and October, 1995 (\$100). See Account Statements, attached as Schedule A to complaint ["Account Statements"].

On December 8, 1995, Mr. and Mrs. McIvor filed a voluntary bankruptcy petition. Mrs. McIvor had taken a cash advance of \$150 on her credit card sometime between October 14 and November 14, 1995.

AT&T, commencing separate adversary actions against Mr. McIvor and Mrs. McIvor, claimed their debts were excepted from discharge by 28 U.S.C. § 523(a)(2)(A), because the debts were incurred under false or fraudulent pretenses. Mr. and Mrs. McIvor, filing counterclaims for attorney's fees under § 523(d), claimed that AT&T's allegations were "not substantially justified."

Judge Cosetti determined AT&T had failed to meet its burden

of establishing fraud under § 523(a)(2)(A) because it had not proved either intent to deceive or justifiable reliance. The debts were discharged. Judge Cosetti awarded Mr. McIvor attorney's fees under § 523(d) because he found that AT&T's claims of non-dischargeability were not substantially justified and no special circumstances existed to preclude the award; however, he denied attorney's fees to Mrs. McIvor, because "the use of the credit card for cash within one month of filing raises special circumstances" precluding an award under § 523(d).

The first issue is whether the standard of review is "plenary" or "abuse of discretion." Mrs. McIvor argues Judge Cosetti's determination that taking a \$150 cash advance constituted special circumstances should be reviewed de novo as an application of a rule of law to facts. See Chemetron Corp. v. Jones, 72 F.3d 341, 345 (3d Cir. 1995) ("When reviewing mixed questions of law and fact, we exercise plenary review over the bankruptcy court's choice, interpretation, and application of the underlying rule of law."); see also In re Rosen, 208 B.R. 345 (D.N.J. 1997); Edison Brothers Stores, Inc. et al. v. Edison Brothers Stores, 1996 WL 534853 (D. Del. 1996). AT&T argues the appropriate standard of review regarding the existence of special circumstances under § 523(d) is whether the bankruptcy ruling was an abuse of discretion.

Section 523(d) was modeled after the Equal Access to Justice

Act ("EAJA"), 28 U.S.C. § 2412(d)(1)(A), provision governing attorney's fees claimed by litigants against the federal government.² An attorney fee award under the EAJA is reviewed under an abuse of discretion standard. See Pierce v. Underwood, 487 U.S. 552, 565, (1988); Dewalt v. Sullivan, 963 F.2d 27, 28 (3d Cir. 1992). An award of attorney's fees under § 523(d) should be reviewed under an abuse of discretion standard also. See In re Hingson, 954 F.2d 428 (7th Cir. 1992) ("The language of section § 523(d) is drawn from the [EAJA], which governs claims for attorney's fees by litigants against the federal government. Appellate review is deferential under that act, and we can think of no reason why it should not be equally so under section § 523(d)." (citations omitted)); In re Kennedy, 1994 WL 721508 at *4 (D. Kan. 1994) ("The standard of appellate review of bankruptcy courts' awards of attorney fees is abuse of

² The Senate Report to § 523(d) provides:

The Committee, after due consideration, has concluded that amendment of this provision to incorporate the standard for award of attorney's fees contained in the Equal Access to Justice Act strikes the appropriate balance between protecting the debtor from unreasonable challenges to dischargeability of debts and not deterring creditors from making challenges when it is reasonable to do so. This standard provides that the court shall award attorney's fees to a prevailing debtor where the court finds that the creditor was not substantially justified in challenging the dischargeability of the debt, unless special circumstances would make such an award unjust.

S. Rep. No. 65, 98th Cong., 1st Sess. 9-10 (1983).

discretion."); In re Glazier, 1991 WL 177698 at *2 (D. Kan. 1991) (same); Manufacturers Hanover Trust, Co. v. Hudgins, 72 B.R. 214, 218 (N.D. Ill. 1987) (no abuse of discretion in bankruptcy court's award of attorney's fees under § 523(d)); see also In re Christiansen, 193 B.R. 863 (N.D. Ill. 1996) (affirming bankruptcy court's award of fees because it "was not clearly erroneous").

In Signet Bank, N.A. v. Leslie, 1992 WL 212196 (E.D. Pa. 1992), Judge Green upheld the bankruptcy court's determination that a creditor's claim was substantially justified under an abuse of discretion standard of review. The reasoning in Leslie is correct; the abuse of discretion standard is the appropriate standard of review.

Section 523(d) provides:

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 reasonable attorney's fees 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 make the award unjust.

Section 523(d) is mandatory. "[B]y its express terms, section 523(d) mandates an award of attorney's fees to a prevailing debtor unless the court determines the facts of the case fall within the exceptions to that provision." Carthage Bank v. Kirkland, 121 B.R. 496 (S.D. Miss. 1990); see In re VanBuren, 66 B.R. 422 (S.D. Ohio 1986).

In the absence of section 523(d), the threat of litigation over the discharge exception of section 523(a)(2) and the attendant costs of litigation could induce debtors to settle for a reduced sum. Thus, creditors with marginal cases could compel at least part of their claims to be excepted from discharge or reaffirmed, despite the weakness of their cases. To balance the scales, Congress enacted section [523(d)]. The purpose is to discourage creditors from bringing objectively weak . . . litigation in the hopes of extracting settlement from a debtor anxious to avoid paying attorney's fees to defend the action.

4 Collier on Bankruptcy, 523.08[8], p. 523-59 (Lawrence P. King ed. 15th ed. 1997).

When a creditor's § 523(a)(2) claim is dismissed there are only two circumstances precluding an award of attorney's fees to the debtor: (i) if the court finds the creditor's claim was substantially justified; or (ii) if the court finds that special circumstances make the award unjust. Even if the court finds that the creditor's claim was not substantially justified, it may deny an award if the court finds that special circumstances make such an award unjust.

There is little case law regarding "special circumstances" under § 523(d); EAJA cases are relevant. In In re Woods, 69 B.R. 999 (Bankr. E.D. Pa. 1987), the bankruptcy court, adopting the EAJA's test, held that special circumstances exist where: (i) the creditor has advanced a novel legal theory; or (ii) the debtor has unclean hands. Id. at 1004. Similarly, in In re Kirkland, 121 B.R. 496, 499 (Bankr. S.D. Miss. 1990), the court noted that equitable principles apply to an EAJA application for attorney's

fees, but in the § 523(d) context, these equitable principals must "be tempered by [532(d)]'s stated goal of deterring creditors from filing for unwarranted exceptions to discharge." Id.

In Mr. McIvor's case, Judge Cosetti determined AT&T's claim of non-dischargeability was not substantially justified and no special circumstances existed; one-half the attorney's fees claimed were awarded to him under § 523(d). In Mrs. McIvor's case, Judge Cosetti stated special circumstances existed precluding the award of attorney's fees to her under § 523(d). Judge Cosetti's denial of attorney's fees to Mrs. McIvor was not based upon a finding that AT&T's claim was "substantially justified," but on "special circumstances."

Mrs. McIvor argues that her case is indistinguishable from Mr. McIvor's and that Judge Cosetti should have awarded her attorney's fees. Mrs. McIvor contends Judge Cosetti's finding of "special circumstances" is inconsistent with In re Woods because AT&T did not advance a novel legal theory or establish that she had unclean hands. See In re Woods, 69 B.R. at 1004. To discourage creditors from filing unwarranted challenges to discharge, "special circumstances" must be more than the facts unsuccessfully offered to prevent discharge of the debt; otherwise the policy behind § 523(d) will be defeated.

AT&T cites In re Carolan, 204 B.R. 980 (B.A.P. 9th Cir.

1996) and In re Akdogan, 204 B.R. 90 (Bankr. E.D.N.Y. 1997) in support of its argument that an award of attorney's fees to Mrs. McIvor was not warranted. However, both Carolan and Akdogan involved "substantial justification" not "special circumstances" under § 523(d). AT&T also argues that Mrs. McIvor had unclean hands by accepting the credit card within six months of filing the petition, making numerous charges for clothing thereafter, obtaining a \$150 cash advance within a month of filing the petition and failing to make the minimum payments. AT&T distinguishes Mr. McIvor's claim because he possessed his card for one year before filing for bankruptcy, made minimum payments and ceased making purchases when he realized his serious financial situation.

Under § 523(a)(2)(C), consumer debts aggregating more than \$1,000 for "luxury goods or services incurred by an individual debtor" within sixty days before the order for bankruptcy relief or cash advances "aggregating more than \$1,000" within sixty days before the order of relief are presumed non-dischargeable. But here there is no evidence of the use of credit for "luxury goods or services"; there is no evidence the charges were for anything other than goods or services reasonably acquired for the support or maintenance of the debtor. The cash advances obtained by the credit card totaled no more than \$625 from June through December and the amount within sixty days of bankruptcy could not have

been more than \$250; the parties' briefs suggest it was no more than \$150. If there is no presumption under § 523(a)(2)(C), there must be something more than the mere fact of non-payment (such as unclean hands) to establish "special circumstances" where the bankruptcy judge finds the creditor's complaint was not substantially justified. Otherwise the words have no meaning and the statutory purpose of protecting debtors against unreasonable challenges to dischargeability of debts would be frustrated. Attorneys would be reluctant to represent credit card debtors who, without the assistance of counsel, would be pressed to settle non-dischargeable debts.

Judge Cosetti held Mrs. McIvor's credit card debt dischargeable because there was insufficient evidence of her fraudulent intent and no justifiable reliance by AT&T. He also found AT&T's claims were not substantially justified but the use of the credit card for cash within one month of filing for bankruptcy relief raised "special circumstances." Since there was no evidence of intent to defraud by the debtor, no justifiable reliance by the creditor and no substantial justification for the creditor's filing of the claim, the evidence that was insufficient to establish a presumption of non-dischargeability was insufficient to constitute "special circumstances."

The differential treatment of Mr. and Mrs. McIvor appears

without sufficient basis in the evidence; denying Mrs. McIvor attorney's fees for "special circumstances" was an abuse of discretion and will be reversed.

AT&T, objecting to the \$5,679.52 joint request for attorney's fees, argues Mrs. McIvor's counsel inflated the amount of attorney's fees requested. Because this court has no record evidence upon which to determine the amount of attorney's fees to be awarded Mrs. McIvor, this matter will be remanded to the bankruptcy court for that determination.

An appropriate Order follows.

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ORDER

AND NOW, this 4th day of December, 1997, upon consideration of defendant Tamela M. McIvor's appeal of the bankruptcy court's decision, plaintiff AT&T Universal Card Services, Inc.'s response thereto, and in accordance with the attached Memorandum, it is hereby **ORDERED** that:

1. The decision of the bankruptcy court finding "special circumstances" precluded Tamela M. McIvor from recovering attorney's fees is **REVERSED**.

2. This case is **REMANDED** to the bankruptcy court for a determination of reasonable attorney's fees in favor of Tamela M. McIvor.

Norma L. Shapiro, J.