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In the United States Bankruptcy Court  
for the  
Southern District of Georgia  
Brunswick Division

In the matter of:	)	
	)	Adversary Proceeding
JAMES EDDIE SMITH	)	
DIAN JEANETTE SMITH	)	Number <u>93-2025</u>
(Chapter 7 Case <u>93-20193</u> )	)	
	)	
<i>Debtors</i>	)	
	)	
	)	
C. T. WHISENANT	)	
	)	
<i>Plaintiff</i>	)	
	)	
	)	
v.	)	
	)	
JAMES EDDIE SMITH	)	
DIAN JEANETTE SMITH	)	
	)	
<i>Defendants</i>	)	

**MEMORANDUM AND ORDER ON REAFFIRMATION AGREEMENT**

Plaintiff instituted this proceeding on June 7, 1993, seeking to have the debt which Debtors owe to him declared nondischargeable under 11 U.S.C. Sections 523 and 727. According to Plaintiff's complaint, the original amount of the debt was \$3,305.55 as set forth by a restitution order of the Superior Court of Glynn County, Georgia, entered June 19, 1991. Plaintiff has apparently made several payments to Plaintiff, and the remaining balance on the debt is \$2,138.00. At a pre-trial conference held on July 13, 1993, the parties

announced that Plaintiff had tendered, in settlement of this proceeding, a reaffirmation agreement calling for the Debtors to reaffirm the debt and pay to Plaintiff a total of \$2,558.55. This amount reflects the \$2,138.55 balance remaining on the debt plus \$300.00 in attorney's fees and \$120.00 in court costs which Plaintiff alleges to have incurred in initiating and prosecuting this proceeding. Debtors indicated that they would be willing to reaffirm the debt but were unwilling to have Plaintiff's attorney's fees and court costs added to the debt as part of the reaffirmation agreement.

At the hearing I directed the parties to submit briefs within two weeks and took the matter under advisement. Debtors' submitted a brief on July 27, 1993, but Plaintiff failed to submit a brief within the time allowed.

### **CONCLUSIONS OF LAW**

The Bankruptcy Code makes no provision for the awarding of attorney's fees or court costs to a creditor, prevailing or otherwise. *See e.g.*, 11 U.S.C. Section 523(d) (giving the court discretion to award costs and reasonable attorney's fees to the *debtor* for a proceeding to determine the dischargeability of a debt under section 523(a)(2), if the court finds that the position of the creditor in the proceeding was frivolous or not substantially justified). Nonetheless, the Eleventh Circuit Court of Appeals has held that a creditor, who is successful in a dischargeability proceeding, may recover its attorney's fees as part of the nondischargeable debt when such fees are provided for by an enforceable contract between the parties. Transouth Fin. Corp. of Fla. v. Johnson, 931 F.2d 1505, 1507 (11th Cir. 1991).

However, the subject debt arose out of an Order entered by the Glynn County Superior Court directing the Debtor to make restitution to the Plaintiff in lieu of criminal prosecution for Theft by Taking, Theft of Services and Unlawful Transfer of Property Subject to Security Interest. Thus, at no time was there a contract, written or otherwise, in place between the parties which provided for the payment of attorney's fees or any other costs. Therefore, the attorney's fees and costs which Plaintiff seeks to have included in the reaffirmation agreement cannot be considered part of the debt owed to Plaintiff, and Plaintiff would not, were he to proceed to trial and ultimately have the debt declared nondischargeable, be entitled to an award of attorney's fees.<sup>1</sup>

With that background, I turn to the question of whether attorney's fees may be included in Plaintiff's proposed reaffirmation agreement. The few courts which have considered the issue have concluded, under general principles of freedom of contract, that parties are free to negotiate for the assessment of attorneys' fees in reaffirmation agreements. See In re Hutchins, 99 B.R. 56 (Bankr. D.Colo. 1989); In re Pendlebury, 94 B.R. 120 (Bankr. E.D.Tenn. 1988); In re Sholos, 11 B.R. 782 (Bankr. W.D.Pa. 1981). "On the theory that reaffirmation contemplates a *voluntary* post-petition agreement between the debtor and creditor and a renegotiation process, the courts rule that a creditor cannot not [sic] be denied attorney's fees. In re Hutchins, 99 B.R. at 58 (*quoting In re Pendlebury*, 94 B.R. at 122.) (emphasis original).

The freedom to include attorney's fees within a reaffirmation agreement is

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<sup>1</sup> Bankruptcy Rule 9054(b) provides that "[t]he court may allow costs to the prevailing party except when a statute of the United States or these rules otherwise provide."

generally limited by a standard of reasonableness to prevent over-reaching by a creditor who has leverage over a debtor and can therefore dictate the terms of the agreement. In re Hutchins, 99 B.R. at 58; In re Sholos, 11 B.R. at 785. Cf. In re Pendlebury, 94 B.R. at 124. "While the creditor may be entitled to attorney's fees, it is entitled only to reasonable attorney's fees and costs." In re Hutchins, 99 B.R. at 58.

I therefore conclude that Plaintiff and Debtor are free to negotiate and agree upon attorney's fees and costs as part of their reaffirmation agreement subject to this court's review of the agreement's provisions regarding these items. Such a review is necessary to ensure that the fees and costs agreed to are reasonable and are not the result of overreaching by Plaintiff. Consequently, Plaintiff's request for attorney's fees and court costs in his proposed reaffirmation agreement will not be stricken as a matter of law. Nor may attorney's fees be mandated by the court. It is a matter of contract between the parties and it is permissible for such fees to be included, or omitted from any reaffirmation. Since the record is unclear as to whether Debtors are willing to enter into Plaintiff's proposed reaffirmation agreement as it is written with the inclusion of attorney's fees and costs, I will give the parties ten days to renegotiate and determine whether they wish to enter an agreement on the attorney's fee issue. If not resolved consensually the case will be assigned for trial on the next available calendar.

#### ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that Debtors' motion to strike the attorney's fee and court

costs provisions of Plaintiff's proposed reaffirmation agreement is hereby DENIED.

IT IS THE FURTHER ORDERED that Debtors be given ten (10) days from the entry of this Order to conclude a reaffirmation agreement or proceed to trial.

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Lamar W. Davis, Jr.  
United States Bankruptcy Judge

Dated at Savannah, Georgia

This \_\_\_ day of September, 1993.