

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

In the matter of:)
)
 ALIXANDRA LOUISE FABIE)
 (Chapter 7 Number 97-20171))
)
 Debtor)
)
)
 FIRST CARD)
)
 Plaintiff)
)
 v.)
)
 ALIXANDRA LOUISE FABIE)
)
 Defendant)

Adversary Proceeding
Number 97-2044

FILED
 at 4 O'clock & 19 min. P.M.
 Date 5-21-98
 MARY C. BECTON, CLERK
 United States Bankruptcy Court
 Savannah, Georgia

ORDER ON DEFENDANT'S MOTION FOR ATTORNEY'S FEES

Defendant Alixandra Fabie filed a Motion for Attorney's Fees and Expenses pursuant to 11 U.S.C. Section 523(d) on January 8, 1998. A prior Order of this Court, entered December 19, 1997, discharged the debt of Fabie owed to Plaintiff, First Card. This Court held an evidentiary hearing on February 12, 1998. Upon review of the applicable authorities and evidence submitted by the parties, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

The relevant facts to this Court's judgment on December 19, 1997, are enumerated in that Order and will be briefly summarized here. Fabie received an unsolicited, pre-approved application from First Card in June of 1996 and was subsequently issued a credit card pursuant to that application. From June until September 1996, Fabie made several charges on the card, including a personal computer; additionally, Fabie attempted twice, once successfully, to transfer a large existing balance from another charge card onto the card issued by First Card. Fabie made two payments, in September and October, and made no more payments prior to filing a Chapter 7 petition in February 1997. Neither of the two payments met even the minimum payment required for that billing cycle.

This Court found that the debt would be nondischargeable under an "actual fraud" theory only if First Card could prove, by a preponderance of the evidence, that Fabie's promise to pay was false when she signed her charge tickets. Based upon a nonexhaustive list of factors utilized in other courts, I found that First Card had failed to meet its burden under Section 523(a)(2) of the Code. In re Fabie, Ch. 7 No. 97-20171, Adv. 97-2044, slip op. at 10-12 (Bankr. S.D.Ga. Dec. 19, 1997) (Davis, J.). Following entry of judgment, Fabie filed this motion for fees and costs in the amount of \$ 1959.30, alleging that First Card was not substantially justified in prosecuting its complaint.

CONCLUSIONS OF LAW

Section 523 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 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 an award unjust.

11 U.S.C. § 523(d). Congress enacted this section of the Bankruptcy Code to address the leverage held over debtors by creditors using dischargeability actions to coerce settlements from debtors who cannot afford the costs of litigation. H.Rep. No. 595, 95th Cong., 1st Sess., 131 (1977). Under the plain language of the Code, a bankruptcy court must award attorney's fees "*if the court finds that the position of the creditor was not substantially justified.*" 11 U.S.C. § 523(d) (emphasis supplied). Because a finding of a lack of substantial justification must, by the terms of the statute, precede any award, I find that it is Fabie's burden to prove such a lack of merit.

Fabie argues that First Card lacked substantial justification because First Card did not investigate Fabie's financial condition at any time prior to filing the complaint. Moreover, First Card did not attend the 341 meeting. Fabie contends that First Card failed to respond to discovery requests and "attempted to extort a settlement

agreement from Defendant.” (Def.’s Mot. Atty. Fees, ¶ 7, unnumbered p.2). As evidence of First Card’s “extortion,” Fabie attaches copies of letters which were exchanged between the parties preceding the trial in October. (Def.’s Ex. E, F, G). The Rule 2004 examination was held in Savannah, rather than in Brunswick where the case was filed, which Fabie contends caused unnecessary increases in her costs.

The “substantially justified” requirement of § 523(d) is derived from the Equal Access to Justice Act.¹ Collier on Bankruptcy, Vol. 4, ¶ 523.08(8) (15th ed. revised 1997). The phrase is not defined in the Bankruptcy Code, but Justice Scalia, writing for the majority, interpreted the phrase as it is used in the EAJA as follows:

. . . We are not, however, dealing with a field of law that provides no guidance in this matter. Judicial review of agency action, the field at issue here, regularly proceeds under the rubric of “substantial evidence” set forth in the Administrative Procedure Act. That phrase does not mean a large or considerable amount of evidence, but rather “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion”. In an area related to the present case in another way, the test for avoiding the imposition of attorney’s fees for resisting discovery in district court is whether the resistance was “substantially justified.” To our knowledge, that has never been described as meaning “justified to a high degree,” but rather has been said to be satisfied if there is a “genuine dispute,” or “if reasonable people could differ as to [the appropriateness of the contested action].”

¹ 28 U.S.C. § 2412(d)

We are of the view, therefore, that as between the two commonly used connotations of the word "substantially," the one most naturally conveyed by the phrase before us here is not "justified to a high degree," but rather "justified in substance or in the main"--that is, justified to a degree that could satisfy a reasonable person. That is no different from the "reasonable basis both in law and fact" formulation adopted by the Ninth Circuit and the vast majority of other Courts of Appeals that have addressed this issue.

Pierce v. Underwood, 487 U.S. 552, 564-565, 108 S.Ct. 2541, 2550, 101 L.Ed.2d 490 (1988). This interpretation has been adopted with regard to the Bankruptcy Code and Section 523(d) as well. See In re Hingson, 954 F.2d 428 (7th Cir. 1992), *reh'g denied* (1992); In re Stockard, 216 B.R. 237 (Bankr. M.D.Tenn. 1997); In re Poirier, 214 B.R. 53 (Bankr. D.Conn. 1997); In re Cordova, 153 B.R. 352 (Bankr. M.D.Fl. 1993)

The Eleventh Circuit has not spoken directly to the issue of attorney's fees under §523(d), and other courts have not been entirely consistent in granting or denying such awards. For example, the Ninth Circuit Bankruptcy Appellate Panel reversed an award of attorney's fees where a debtor made several charges over a ten-day period, some of which "arguably could have been construed as luxury items." In re Carolan, 204 B.R. 980, 988 (9th Cir. B.A.P. 1996). The debtor in Carolan made these charges, also on a First Card charge card, at a time when his monthly expenses exceeded his monthly income. Considering the factors "in their totality," the court concluded that

First Card was substantially justified in bringing its complaint. Carolan, 204 B.R. at 988.

In contrast, where a creditor agreed to voluntarily dismiss its complaint, the bankruptcy court awarded fees to the debtor. In re Chinchilla, 202 B.R. 1010 (Bankr. S.D.Fl. 1996). In that case, the debtor made the minimum payments at all times, although he exceeded his credit limit on one occasion. The court noted that the creditor's response to the debtor's going over the limit was to *raise* the limit by \$ 2,000. Id. at 1015, 1016. Important factual distinctions exist between Fabie and the debtor in Chinchilla. Fabie did not even once meet the minimum required payment on a card that she willingly applied for and used. Moreover, bankruptcy in the Chinchilla case was precipitated by a disability and ensuing unemployment of the debtor's wife, which materially altered the ratio of expenses to income. Id. at 1017. While Fabie suffered a loss of child support, her expenses remained higher than her income even if the child support were paid. Fabie, Adv. 97-2044, slip op. at 2.

This Court is mindful of the danger presented by creditors filing bad faith nondischargeability actions in order to bully debtors into settlement. On the other hand, though, "this concern must be balanced against the risk that imposing the expense of debtor's attorney's fees . . . may chill creditor efforts to have debts that were procured through fraud declared nondischargeable." Carolan, 208 B.R. at 987. A debtor's intent

to repay a debt is a subjective inquiry of fact. Apart from a written confession by a debtor, a creditor is forced to show through circumstantial evidence that a debtor lacked intent to pay. Although First Card had only minimal evidence at the filing of this case to support its complaint, there did not exist such an abysmal lack of justification for filing the complaint that Rule 11 sanctions would be appropriate, nor have any been asked for. I conclude that in determining whether an action was substantially justified, the Court should look at the evidence as ultimately presented to the Court at trial to determine whether the debtor has met the burden of showing that the creditor's position was not substantially justified. Therefore, while First Card did not have all of the evidence in hand at the time it filed its complaint, its evidence was sufficient to meet the Rule 11 threshold at filing.

The question then is whether the evidence as finally established at trial was so weak that the creditor's position can be found to lack substantial justification. I conclude that although the ultimate ruling was adverse to First Card, its prosecution of this case was substantially justified in light of the factors which it knew when it filed the complaint. These include, but are not limited to: the short period of time between the charges and the filing of the bankruptcy, the Debtor's failure to ever make even a single minimum monthly payment and the fairly short time between the issuance of the card and Debtor reaching the limit on the card, coupled with what it later learned and proved at trial. This additional evidence included the Debtor's use of the credit card to purchase

a personal computer, to transfer a large balance owing another company, and the Debtor's experience as a paralegal at a firm which engages in some bankruptcy work. These are sufficient factors to constitute substantial justification for bringing the matter to trial.

Essentially, First Card argued for the adoption of a "per se" rule that debtors' objective inability to pay the debts they have incurred is sufficient under 523(a)(2). First Card supported this argument with case law and noted that in the wake of the addition of "actual fraud" to the statute, the Eleventh Circuit's decision in Roddenberry was not dispositive.

Certainly, if this Court had adopted, as some courts have, a rule that Debtor's intent to repay at the time charges were made is based on an objective standard, First Card might have prevailed, assuming that one may construe the execution of a credit card charge slip to include an implied representation of ability to pay. However, I have adopted the rule that 523(a)(2) requires a showing that at the time the Debtor executed the credit card slip her promise to pay was actually, subjectively false, since that is the only express representation made by a debtor in a credit card transaction. Given the elements of proof which First Card had at trial and that the law in this area has not been well settled, I conclude that reasonable people could differ as to the appropriateness of the action in this case. Under the standard enunciated by the Supreme Court in the

Underwood decision, therefore, no attorney's fees should be awarded.

After consideration of the foregoing, it is the judgment of this Court that Fabie is not entitled to an award of attorney's fees in this case. In the alternative, I find that the special circumstances which existed prior to the December 19, 1997, Order, in that I had not yet ruled on a similar issue and the Circuit Court of Appeals has not spoken, also warrant an exception to an award of attorney's fees.

ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that Defendant Fabie's Motion for Attorney's Fees and Expenses be denied.



Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 21st day of May, 1998.