United States Bankruptcy Court
Western District of Wisconsin

Cite as: [Unpublished]

Security Bank & Trust, Plaintiff, v.
Deloris L. Bierman, Defendant
(In re Deloris[(1)] L. Bierman, Debtor)
Bankruptcy Case No. 91-33131-7, Adv. Case No. 91-3239-7

United States Bankruptcy Court
W.D. Wisconsin

May 21, 1992

Roy L. Prange, Jr., and Valerie L. Bailey-Rihn, Quarles & Brady, Madison, WI, for plaintiff.
Sandra M. Baner, UAW-GM Legal Services, Janesville, WI, for defendant.

Robert D. Martin, United States Bankruptcy Judge.

MEMORANDUM DECISION

On September 23, 1991 the debtor, Deloris L. Bierman, filed her petition under chapter 7 of the Bankruptcy Code. Throughout her bankruptcy proceeding, the debtor's legal representation has been provided to her free-of-charge as a participant of UAW Legal Services Plan, a prepaid legal service. On December 9, 1991 Security Bank and Trust ("Bank") filed this adversary proceeding seeking a determination that the debtor's credit card debt to the Bank in the amount of $2,618.62 is nondischargeable pursuant to 11 USC § 523(a)(2). At the conclusion of an April 1, 1992 trial I dismissed the Bank's complaint. The complaint was not substantially justified by the evidence. I also denied the request of the debtor's attorney, Sandra M. Baner ("Baner"), for an award of costs and attorney's fees pursuant to 11 USC § 523(d), but granted her twenty days' leave to submit legal authority in support of her position that a fee award is appropriate even in circumstances in which the debtor has incurred no legal expenses. Baner's well presented brief indicates that she seeks an award of $1,930.00 for 19.3 hours of representation at a billing rate of $100.00 per hour. The reasonableness of the amount claimed is not at issue.

When enacted as part of the 1978 Bankruptcy Code, 11 USC § 523(d) provided:

> 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 against such creditor and in favor of the debtor for the costs of, and a reasonable attorney's fee for, the proceeding to determine dischargeability, unless such granting of judgment would be clearly inequitable.

The purpose of then-Section 523(d) was "to discourage creditors from initiating proceedings to obtaining a false financial statement exception to discharge in the hope of obtaining a settlement from an honest debtor anxious to save

attorney's fees. Such practices impair the debtor's fresh start and are contrary to the spirit of the bankruptcy laws." S Rept No 95-989, to accompany S 2266, 95th Cong, 2d Sess 80 (1978); see also H Rept No 95-595 to accompany HR 8200, 95th Cong, 1st Sess 365 (1977).

In 1984, Section 523(d) was amended to provide:

> 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.(2)

Judge Robert Ginsberg describes the effect of the 1984 amendment as follows:

> The 1984 amendments made a significant change in the standards to be applied in determining when a debtor is to be awarded costs and attorney's fees for a successful defense to an objection to dischargeability based on alleged fraud or an allegedly false financial statement. Instead of awarding fees to the debtor in all such cases except when it would be "clearly inequitable," the court is only to award costs and fees to the debtor for a successful defense if the objection "was not substantially justified." Even if the objection was not substantially justified, no award is to be made if such an award would be unjust based on special circumstances surrounding the objection. Thus, in cases begun on or after October 9, 1984, the risk to a creditor in filing an objection to dischargeability based on fraud or a false financial statement is significantly reduced. In fact, awards of costs and fees to the successful debtor will likely be very rare.

Robert E. Ginsberg, 1 Bankruptcy: Text, Statutes, Rules § 11.06[c] at 901-02 (Prentice Hall Law & Business, 2d ed 1990).

"The language of [current] section 523(d) is drawn from the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A) (see S.Rep. No. 65, 98th Cong., 1st Sess. 9-10 (1983)), which governs claims for attorney's fees by litigants against the federal government." Matter of Hingson, 954 F2d 428, 429 (7th Cir 1992). See also In re Burns, 894 F2d 361, 362 n 2 (10th Cir 1990). In Senate Report Number 65, the Senate Committee stated:

> The Committee, after due consideration, has concluded that amendment of this provision [Section 523(d)] 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).

The Equal Access to Justice Act (EAJA), at 28 USC § 2412(d)(1)(A), provides:

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in

addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

The purpose of the EAJA is:

(1) to diminish the deterrent effect of seeking review of, or defending against, governmental action by providing in specified situations an award of attorney fees, expert witness fees, and other costs against the United States; and

(2) to insure the applicability in actions by or against the United States of the common law and statutory exceptions to the "American rule" respecting the award of attorney fees.

Section 202(c) of Pub L 96-481 [the EAJA], set out as a note to 5 USC § 504. See also H R Rep No 1418, 96th Cong, 2d Sess 5-6 (1980), reprinted in 1980 US Code Cong & Ad News 4953, 4984.

In the present case, I am unwilling to find that the complaint of the Bank was substantially justified. The issue which concerns us is whether a debtor having no "out of pocket" expenses may recover an amount equal to what her costs and fees might have been if actually incurred.

Baner contends that representation by a prepaid legal service plan is not a "special circumstance" which would make a fee award "unjust" under Section 523(d). In numerous cases construing the EAJA, courts have awarded fees under circumstances in which the defendants therein were represented at low-or-no cost by a legal aid entity. See, e.g., Cornella v Schweiker, 728 F2d 978 (8th Cir 1984); Howard v Heckler, 581 F Supp 1231 (SD Ohio 1984); Watkins v Harris, 566 F Supp 493 (ED Pa 1983); Chee v Schweiker, 563 F Supp 1362 (D Ariz 1983); Hornal v Schweiker, 551 F Supp 612 (MD Tenn 1982). In so doing, the courts generally relied on the following EAJA legislative history:

In general, consistent with the above limitations, the computation of attorney fees should be based on prevailing market rates without reference to the fee arrangements between the attorney and client. The fact that attorneys may be providing services at salaries or hourly rates below the standard commercial rates which attorneys might normally receive for services rendered is not relevant to the computation of compensation under the Act. In short, the award of fees is to be determined according to general professional standards.

HR Rep No 1418, 96th Cong, 2d Sess 15 (1980), reprinted in 1980 US Code Cong & Ad News 4994.

In reliance on the above legislative history, the Eighth Circuit Court of Appeals concluded that "[o]nce the actual fee arrangements between the attorney and client are excluded from computation of the award, there is no logical distinction which can be drawn between cases in which fees have been incurred and those in which they have not." Cornella v Schweiker, 728 F2d at 986 (citation omitted). However, the Court's conclusion was subsequently qualified by its decision in S.E.C. v Comserv Corp., 908 F2d 1407 (8th Cir 1990).

In S.E.C. v Comserv Corp., the Eighth Circuit considered whether Johnson, a

corporate officer, was entitled to attorney's fees and expenses under the EAJA where the officer's employer was obligated by contract with the officer to pay for the officer's legal fees and expenses incurred in connection with an SEC investigation. The court examined cases construing the EAJA or similar statutes in circumstances in which one or more of the prevailing parties did not pay out-of-pocket legal expenses, and stated:

Neither the client in 122 Acres [856 F2d 56 (8th Cir 1988), who had retained an attorney under a contingency fee contract which provided that he would bear no expense for attorney's fees in the event that there was no recovery], nor Johnson in the instant case required the assistance of a federal fee-shifting statute to overcome the deterrent of attorneys' fees. Both were protected by private agreement . . . from the burden of attorneys' fees. To allow either to shift his fees under a statute intended to remove the deterrent effect of fees is pointless.

S.E.C. v Comserv Corp., 908 F2d at 1415.

The Court then distinguished Cornella v Schweiker, stating:

We acknowledge there is an exception to the requirement that a legal liability for attorneys' fees must be incurred in order to be eligible for an EAJA award. In Cornella v Schweiker, 728 F.2d 978, 987 (8th Cir.1984), we held that parties who were represented by pro bono counsel are not barred from receiving an EAJA award, even though they had not actually been assessed attorneys' fees. In so holding, we relied in part on legislative history, which suggests that awards to pro bono organizations were contemplated by Congress. We held that where a pro bono attorney "forgives" a fee to a client unable to afford legal expenses, that client is eligible for an EAJA award on the basis of that arrangement with the attorney. Other courts have reached a similar result.

122 Acres and Cornella can be harmonized once the EAJA's purpose to remove the deterrent effect of attorneys' fees is understood. The client in 122 Acres had eliminated any deterrent effect of fees by means of his contract with his attorney. Fees ceased to exercise a deterrent effect on his litigation decisions. Nor is it apparent that the incidence of litigation by those deserving representation would be increased. By contrast, in Cornella we observed that "[i]f attorneys' fees to pro bono organizations are not allowed . . ., it would more than likely discourage involvement by these organizations in [cases against the government], effectively reducing access to the judiciary . . . ." Thus, by assisting in the financing of the pro bono representation effort, EAJA unquestionably contributes to removing the deterrent effect of fees for those pro bono-dependent clients and thereby increases the incidence of deserving representation. Thus, neither 122 Acres, when its reasoning is applied to EAJA, nor Cornella is at odds with intent of Congress to reduce or eliminate the deterrent effect of fees.

S.E.C. v Comserv Corp., 908 F2d at 1415 (citations omitted; emphasis in original).

The Court concluded that "EAJA awards should be available where the burden of attorneys' fees would have deterred the litigation challenging the government's actions, but not where no such deterrence exists." S.E.C. v Comserv Corp., 908 F2d at 1415-16. The corporate officer was held to be ineligible to receive an EAJA award both because he "did not incur legal liability for attorneys' fees and because the fee-deterrent-removal purpose of EAJA

would not be served by an award of fees to an individual whose fees are fully paid by a noneligible organization." S.E.C. v Comserv Corp., 908 F2d at 1416 (emphasis in original).

Like the corporate officer in S.E.C. v Comserv Corp., the debtor herein has suffered no actual pecuniary loss due to any liability for payment of the attorneys fees, and is not represented by a pro bono organization. She had no incentive to settle the dischargeability action in an effort to save herself additional fee expenses, and the case indeed proceeded through trial.

The reasoning of the Eighth Circuit with respect to EAJA fee awards is equally persuasive with respect to fee awards under Section 523(d), which incorporates the EAJA standard. In non-pro bono cases, Section 523(d) fee awards should be available where the burden of attorney's fees might have deterred a debtor's defending against a creditor's dischargeability action, but not where no possibility of such deterrence exists. Denial of fees under the latter circumstance will neither increase nor decrease the incidence of deserving pro bono representation. The purpose of Section 523(d) is not served by an award of fees to an individual whose fees are fully paid by non-pro bono entity. Absence of the desired deterrence in these cases is a "special circumstance" which renders "unjust" an award of fees under section 523(d). Furthermore, were fees to be awarded under these circumstances, a debtor would receive a windfall in the amount of the costs and fees awarded. She would receive the funds without having paid out-of-pocket costs for the legal representation. Baner contends that "[a]ttorney's fees should be awarded to Defendant's counsel in the amount of $1,930.00." However, Section 523(d) does not authorize the bankruptcy court to enter a fee award in favor of debtor's counsel; the court is authorized to enter a fee award only in favor of the debtor. Thus, even were this court to determine that a fee award of $1,930.00 is just under Section 523(d), the award would be entered on behalf of the debtor and not on behalf of Baner.

In short, the purpose of Section 523(d) is not to deter the bringing of all dischargeability proceedings under Section 523(a)(2), but only to discourage bringing those in which the costs of representation will unfairly compel or encourage the debtor to avoid a determination of liability. Where, as in this case, the debtor is represented by a non-pro bono entity, has paid no legal expenses, and has defended the litigation through a trial on the merits, the purposes of Section 523(d) are not served and a motion for an award of debtor's attorney's fees must be denied. It will be so ordered.

END NOTES:

1. This spelling of the debtor's first name has been adopted in the belief that it is correct, despite various pleadings and filed papers using other spellings. If we are incorrect, we apologize to the debtor.

2. In In re Shurbier, 134 BR 922, 927 (Bankr WD Mo 1991), the court stated:

Five elements must be satisfied in order for a debtor to prevail on a motion for attorney fees under § 523(d): (1) the creditor must bring a dischargeability complaint under § 523(a)(2); (2) the complaint must concern a consumer debt; (3) the debt must be found to be dischargeable; (4) the court must find that the creditor's complaint was not substantially justified; and (5) there must be no "special circumstances" which would make an award of attorney fees unjust.

Only the fifth of these five elements is at issue herein.