United States Bankruptcy Court
Western District of Wisconsin

Cite as: [Unpublished]

Green Tree Financial Corp., Plaintiff, v.
Harry Bednarczyk, Defendant
(In re Harry Bednarczyk, Debtor)
Bankruptcy Case No. 95-31218-7; Adv. Case No. 95-3126-7

United States Bankruptcy Court
W.D. Wisconsin

July 2, 1996

Jay B. Stoker, Minneapolis, MN, for plaintiff.
Sandra M. Baner, Janesville, WI, for defendant.

Robert D. Martin, United States Bankruptcy Judge.

MEMORANDUM DECISION

Harry Bednarczyk filed for bankruptcy on April 21, 1995, five months after purchasing a mobile home through Green Tree Financial Corporation ("Green Tree"). He took delivery of the mobile home just days before mustering into a four-year hitch in the Navy. When he first approached Green Tree, Bednarczyk was a truck driver earning approximately $3,000 per month. He did not inform Green Tree of his intention to enter the Navy or of the effect his enlistment would have on his income. In the Navy, he expected to receive approximately $1,000 per month plus a housing allowance (an allowance that, it turns out, Bednarczyk did not receive during the period relevant to this dispute). Shortly after Bednarczyk filed his bankruptcy, Green Tree sought a determination of nondischargeability under 11 U.S.C. § 523(a)(2)(A) and (B) and a money judgment against Bednarczyk for approximately $36,000. Green Tree avered that Bednarczyk's failure to inform Green Tree of his intended job change during negotiations and various representations on written documents constituted material misrepresentations of Bednarczyk's financial status.

After a trial held February 22, 1996, at which Bednarczyk and loan officers for Green Tree testified, I dismissed Green Tree's complaint after noting, "This is a difficult case," (Trial Transcript at 2), explaining:

I don't think there's any reasonable doubt that Green Tree relied on . . . all the representations, whether affirmative or omission [sic], that took place in this case in extending the credit. They believed that the employment was important, and there was nothing under the standard that's been created by Field v. Mans that would have indicated that they should have looked further so that the reliance was justifiable.

Id. I found that Green Tree's reliance in the information proffered by Bednarczyk was reasonable and that it had met the burden of proving that the misrepresentations were material. Nevertheless, Green Tree's claim failed under both parts of 11 U.S.C. §

523(a)(2) because Bednarczyk's written and oral representations were not "false when made," id. at 3. Furthermore, Bednarczyk's testimony that he believed he could make the scheduled payments even after his drop in income was credible. Id. at 3-4.

After my favorable ruling, debtor's counsel, Sandra Baner, moved for payment of $3,581.65 in fees and costs pursuant to section 523(d), which states:

If a creditor requests a determination of dischargeability of a *consumer debt* under 11 U.S.C. Sec. 523(a)(2), and such debt is discharged, the court must 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 must not award such costs and fees if *special circumstances* would make the award unjust. (emphasis added)

Attorney Baner suggested that Green Tree's suit was a retaliation against Bednarczyk who, at some point during this dispute--it may have been just prior to his filing for bankruptcy--had apparently filed a suit in state court against Green Tree. (Baner did not state the grounds of that suit, and no evidence of it was presented during the trial.) Reserving any comment on whether the suit itself was "substantially justified," I asked that the parties brief a threshold question: Whether the subject of the action was a "consumer debt" under 11 U.S.C. § 523(d), noting that the Wisconsin Consumer Act ("WCA"), Wis.Stat. § 421-427, specifically excludes debts for more than $25,000. Wis.Stat. § 421.202 ("Exclusions"). (1)

The essence of my question to the attorneys at the end of the Bednarczyk trial was whether "consumer debt" is defined by federal or state law. The Code is fairly specific in identifying a consumer debt as "a debt incurred by an individual primarily for a personal, family, or household purpose[.]" 11 U.S.C. § 101(8). As Green Tree points out in its brief, bankruptcy courts sometimes look to state law to define terms in section 101. For example, this court has looked to Wisconsin law to interpret "community claim." 11 U.S.C. § 101(7)(formerly section 101(6)). See Matter of Grimm, 82 B.R. 989, 992 (Bkrtcy. W.D. Wis. 1988)(Martin, C.J.); In re Sweitzer, 111 B.R. 792, 793 (Bkrtcy. W.D. Wis. 1990)(Martin, C.J.). Both Grimm and Sweitzer involved marital property law, an area that is appropriately, or at least typically, controlled by state law. More to the point, however, "community claim" is derived from, and only applies to, bankruptcy actions involving claims from states that have community property laws. See 1 *Norton Bankruptcy Law & Practice 2d* § 9.6 (1994).

Green Tree asserts that bankruptcy courts have turned to cases decided under various consumer protection laws to define a "consumer debt" under section 523(d), citing In re Burns, 894 F.2d 361 (10th Cir. 1990), and In re Whitelock, 122 B.R. 582 (Bkrtcy. D. Utah 1990). Green Tree's assertion is not quite accurate. What these cases say is that Congress *derived* the definition of consumer debt from consumer protection laws. See Burns, 894 F.2d at 363; Whitelock, 122 B.R. at 587. None of the cases cited by Green Tree, or found independently by this court, look to a specific state's laws for a definition of "consumer debt" under the Code. (2) See, e.g., Zolg v. Kelly (In re Kelly), 841 F.2d 908 (9th Cir. 1988); Matter of Booth, 858 F.2d 1051 (5th Cir. 1988); In re Nolan, 140 B.R. 797 (Bkrtcy. D. Colo. 1992); In re Johnson, 115 B.R. 159 (Bkrtcy. S.D. Ill. 1990); McDaniel v. Nationwide, 85 B.R. 69 (Bkrtcy. N.D. Ill. 1988). The Ninth Circuit's decision in Kelly has become the leading case discussing the source and scope of section 523(d). Kelly never addresses Arizona law on the issue. Under Kelly, it would appear that, for the purposes of section 523(d), the Code's definition would abrogate a state law definition at least for a determination, such as the one at issue here, to be made under some provision of the Code. It would certainly be a strange reading of Kelly and the decisions that rely on Kelly to conclude that a home mortgage is a consumer debt

under the Code, and for purposes of section 523(d), *unless* state law declares otherwise.

That question need not be reached, however, because the WCA does not exclude Bednarczyk's mortgage from the definition of a "claim," the WCA analog of the Code's "debt." A "claim" is "*any* obligation or alleged obligation arising from a consumer transaction." Wis.Stat. § 427.103(1)(emphasis added). A "consumer transaction" includes "consumer credit transaction," which is a "consumer transaction between a merchant and a customer in which *real or personal property*, services, or money is acquired on credit[.]" Wis.Stat. § 421.301(10)(emphasis added). A "customer" is "a person other than an organization [ ] who seeks or acquires *real or personal property, . . .* for *personal, family, household, or agricultural purposes*." Wis.Stat. § 421.301(17)(emphasis added). The WCA's language echoes that of section 101(8)--"a debt incurred by an individual primarily for a personal, family, or household purpose"--but, if anything, is more inclusive (e.g., it includes agricultural purposes, which arguably are business purposes under the Code). The dollar cap itself cannot be read to exclude consumer credit transactions worth more than $25,000 from this definition of "claim" (and thus from "consumer debt"). It only excludes consumer credit transactions of that size from the protections of the WCA. The plain language of the exclusion suggests that, under Wisconsin law, a "consumer credit transaction" has *no* dollar cap. If it did, there would be no reason to exclude those "[c]onsumer credit transactions in which the amount financed exceeds $25,000," because those transactions would not be included in the first place.

Since Bednarczyk's debt is a consumer debt for which Green Tree sought and lost a determination of nondischargeability, the question is whether Green Tree's suit was "substantially justified." To meet the substantially justified standard, Green Tree's complaint must have had a reasonable basis in law and fact. FCC Nat. Bank v. Dobbins, 151 B.R. 509, 512 (W.D. Mo. 1992). Green Tree's claim must not have been just reasonable *in toto*, but must have been based on sufficient facts to support each element of its claims. In re Friend, 156 B.R. 257, 262 (Bkrtcy. W.D. Mo. 1992). "A creditor is not justified in continuing to pursue a case once it learns that its position is not substantially justified, even if the suit was originally filed in good faith. . . . [W]hen a creditor learns that it will not be able to prove its case, but continues to pursue the case, it falls within the statute, and thus must pay the debtor's attorney fees and costs." Manufacturers Hanover Trust Co. v. Hudgins, 72 B.R. 214, 221 (N.D. Ill. 1984).

The evidence and testimony presented at trial distilled the question, under both parts of section 523(a)(2), to that of Bednarczyk's intent. Intent is the element of fraud or misrepresentation that is typically demonstrated by circumstantial evidence presented at trial, where the debtor's explanations are made to the court and his demeanor can be assessed by the trier of fact. See, e.g., In re Williams, 85 B.R. 494 (Bkrtcy. N.D. Ill. 1988)(listing criteria often used by the court in assessing intent); In re Mayer, 51 F.3d 670 (7th Cir. 1995)("intent . . . may logically be inferred from a false representation which the debtor knows or should know will induce another to make a loan."). Here, there was some evidence that, in the absence of Bednarczyk's testimony, may have allowed Green Tree to prevail. Bednarczyk did enter into negotiations to purchase a mobile home costing nearly $36,000 on credit (financing $33,000 of it), while at the same time, and without informing Green Tree, putting into motion his plan to quit his truck-driving job and join the Navy at a substantially reduced income. This court found that Green Tree's reliance on Bednarczyk's written and oral representations was reasonable and that the misrepresentations themselves would have been material to Green Tree's loan decision. Since the matter turned solely on Bednarczyk's intent--specifically, his belief in his ability to make payments and his intent in not telling Green Tree of his plans--and this court found that his intentions were not fraudulent in part because of his testimony before this court, Green Tree was substantially justified in

bringing this case to trial. Therefore, the claim for costs and attorney's fees under 11 U.S.C. § 523(d) must be denied. It may be so ordered.

END NOTES:

1. Excluded from the protections of the Wisconsin Consumer Act are "(6) Consumer credit transactions in which the amount financed exceeds $25,000 or other consumer transactions in which the cash price exceeds $25,000[.]."

2. For that matter, none of the three bankruptcy treatises reviewed--*Martin & Ginsberg on Bankruptcy*, *Norton Bankruptcy Law and Practice 2d*, and *Collier on Bankruptcy*--discuss the issue.