attorney fees
dischargeability

Multco Employees Credit Union v. Martin Adv. No. 91-3307

In re Martin BAP No. OR-91-2106-AsJR
BK No. 391-32263-S7

8/20/92 BAP aff'g DDS Unpublished

The BAP held that the bankruptcy court did not abuse its discretion in declining to award attorney fees to the successful plaintiff in a non dischargeability suit. Although the underlying credit card charge was not dischargeable, the debt for attorney fees was dischargeable because it was premised on a federal, rather than state, cause of action.

P92-17(7)

**** No. 92-3667 Ninth Circuit aff'g BAP 6/13/94
unpublished

The Court of Appeals affirmed the BAP and bankruptcy court's decisions denying the creditor's application for attorney fees. The creditor could not recover fees under the contract because Congress has spoken explicitly to the role of fees in sestting the balance of power in nondischargeability proceedings.

The Ninth Circuit declined the creditor's request that it reconsider the holding of In re Fulwiler and its progeny despite the contrary decision of three other circuits.

FILED

JUN 13 1994

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

U.S. BANKRUPTCY COURT
DISTRICT OF OREGON
FILED

JUL 25 1994

TERENCE H. DUNN, CLERK
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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: JOSEPH W. MARTIN; LEILA JOANNE MARTIN, Debtors.	
MULTCO EMPLOYEEES CREDIT UNION, Appellant, v. JOSEPH W. MARTIN; LEILA JOANNE MARTIN Appellees,	No. 92-3667 BAP No. OR-91-2106-ASjR **MEMORANDUM*** 91-3307

Appeal from the Ninth Circuit
Bankruptcy Appellate Panel
Russell, Jones, and Ashland, Judges, Presiding

Submitted January 5, 1994**
Portland, Oregon

Before: POOLE and TROTT, Circuit Judges, and KING,*** District Judge.

Creditor Multco Employees Credit Union ("Multco") appeals the decision of the Bankruptcy Appellate Panel. The Bankruptcy Appellate Panel had affirmed the bankruptcy court's

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** Pursuant to Ninth Circuit Rule 34-4, the panel unanimously finds this case suitable for disposition without oral argument.

*** Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.

decision to deny Multco's application for attorneys' fees after prevailing in an 11 U.S.C. § 523 non-dischargeability action against Joseph W. Martin and Leila J. Martin. We have jurisdiction under 28 U.S.C. § 158(d) and Federal Rule of Appellate Procedure 6. We affirm the Bankruptcy Appellate Panel's denial of attorneys' fees.

The Bankruptcy Appellate Panel and the Bankruptcy Court ruled as a matter of law that Multco was not entitled to payment of its attorney's fees. We review conclusions of law de novo.

In In re Fulwiler, 624 F.2d 908 (9th Cir. 1980), we held that in the absence of a finding that a creditor brought a non-dischargeability proceeding in bad faith, vexatiously or with the intent to harass the debtor, there was no basis to award attorneys' fees to the debtor. Our analysis rested on the predecessor to § 523(a)(2), Section 17, and we noted:

> We conclude that Section 17(a)(2) created a purely federal cause of action designed to implement the policies of the former Bankruptcy Act. Though elements of proof associated with both tort and contract actions may have been present in many non-dischargeability proceedings, Section 17 fell into neither classification.
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> . . .
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> [T]he award of attorneys' fees in a bankruptcy proceeding should rest upon a firmer foundation than the semantical characterization of a particular proceeding.

Section 523(d) now provides for the mandatory award of attorney fees to successful debtor litigants. Congress did not provide for the award of fees for a successful creditor litigant in a Section 523 proceeding in order to avoid upsetting the balance of power between the parties in the bankruptcy process.

See H. R. Rep. No. 595, 95th Cong., 1st Sess. 365 (1977); S. Rep. No. 989, 95th Cong., 2d Sess. 80 (1978) U.S. Code Cong. & Admin. News, pp. 5787, 5865, 5963, 6320.

We have since favorably recognized the validity of In re Fulwiler, and reaffirmed its rationale. In re Fobian, 951 F.2d 1149 (9th Cir. 1991), cert. denied, 112 S. Ct. 3031, 120 L. Ed. 2d 902 (1992); In re Johnson, 756 F.2d 738 (9th Cir.), cert. denied, 474 U.S. 828 (1985); Collingwood Grain v. Coast Trading Co. (In re Coast Trading Co.), 744 F.2d 686 693 (9th Cir. 1984). See also In re Itule, 114 B.R. 206 (9th Cir. BAP 1990).

Appellant argues that attorneys' fees are recoverable to a prevailing party in a Section 523 nondischargeability proceeding as they are in any federal cause of action where an underlying contract so provides. Appellant relies upon F.D. Rich Co., Inc. v. Industrial Lumber Co., Inc., 417 U.S. 116 (1974) and Grogan v. Gardner, 498 U.S. 279 (1991). F.D. Rich upholds the so-called "American Rule" for attorneys' fees in federal causes of action, i.e., absent a statute or enforceable contract providing for the award of attorneys' fees such fees are not recoverable. Grogan applies the same evidentiary standard used in other federal causes of action to § 523 nondischargeability proceedings. Appellant combines the negative implication of F.D. Rich and the evidentiary standardization in Grogan to argue by implication that Multco's contract for attorneys' fees should be enforceable. We are not persuaded. Where Congress has spoken explicitly to the role of attorneys fees in setting the appropriate balance of power in nondischargeability proceedings between debtors and creditors we

are not at liberty to upset that balance. See H. R. Rep. No. 595, 95th Cong., 1st Session at 131-32 (1977) ("The bill does not award the creditor attorney's fees if the creditor prevails. . . . [S]uch a provision would restore the balance back in favor of the creditor by inducing debtors to settle no matter what the merits of their cases.").

Appellant also urges us to reconsider In re Fulwiler and its progeny in light of cases holding to the contrary in other circuits. See, e.g., Matter of Jordan, (5th Cir. 1991); In re Martin, 761 F.2d 1163 (6th Cir. 1985); Transouth Financial Corp. of Florida v. Johnson, 931 F.2d 1505 (11th Cir. 1991). We are not at liberty to do so.

For the foregoing reasons, the decision of the Bankruptcy Appellate Panel is **AFFIRMED**.

A TRUE COPY
ATTEST
JUL 05 1994
Clerk of Court
by: [signature]
Deputy Clerk

attorney fees
dischargeability

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NOT FOR PUBLICATION

U.S. BANKRUPTCY COURT
DISTRICT OF OREGON
FILED
AUG 20 1992
TERENCE H. DUNN, CLERK
BY _____ DEPUTY

FILED
AUG 20 1992
NANCY B. DICKERSON, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re JOSEPH W. MARTIN and LEILA JOANNE MARTIN, Debtors.	BAP No. OR-91-2106-AsJR BK. No. 391-32263-S7 Adv. No. 91-3307
MULTCO EMPLOYEES CREDIT UNION, Appellant, v. JOSEPH W. MARTIN and LEILA JOANNE MARTIN, Appellees.	**MEMORANDUM**

Argued and Submitted on
July 24, 1992 at Portland, Oregon

Filed - AUG 20 1992

Appeal from the United States Bankruptcy Court
for the District of Oregon

Honorable Donal D. Sullivan, Bankruptcy Judge, Presiding

Before: ASHLAND, JONES, and RUSSELL, Bankruptcy Judges.

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Creditor Multco Employees Credit Union appeals a judgment of the bankruptcy court granting summary judgment on a dischargeability complaint but failing to award attorney fees to Multco as the prevailing party in the action. We affirm.

STATEMENT OF THE FACTS

In 1988 Joseph and Leila Martin obtained a Visa credit card through Multco Employees Credit Union. The default terms of the Visa card agreement provided in paragraph 17:

> You will be in default under this agreement if any of the following occur: (A) Any minimum Monthly Payment is not made when due; (B) Someone tries to levy, execute upon, or attach any of your deposit accounts with us; (C) You become insolvent, bankrupt, or die; (D) You violate any part of this agreement or any other agreement with us; (E) If we reasonably deem ourselves insecure on your account. We will notify you in writing of any such action as soon as practical if it occurs. Upon default, we may declare the entire unpaid balance immediately due and payable, and you agree to pay that amount. <u>You will pay any amount that we pay to someone else to help enforce this agreement. This includes our attorneys' fees</u>, whether or not there is a lawsuit, including attorneys' fees for bankruptcy proceedings, appeals, and any other postjudgment collection services, if applicable, together with such additional fees as may be directed by the court and any fees on appeal. You also will pay court costs.

EX.6, pages 33 (a) & (b) (emphasis added).

The Martins used their Visa card on April 2 and 4, 1991 to pay for the services of their attorney in the preparation of a Chapter 7 bankruptcy petition. The total amount charged to their Visa card for this purpose was $775.

On April 5, 1991, the Martins filed the Chapter 7 petition.

On June 28, 1991, Multco filed a dischargeability complaint under Bankruptcy Code § 523(a)(2)(A) and (C), alleging that the Visa credit card charges paying for attorney fees for the filing of their bankruptcy petition was a nondischargeable debt.

In August, 1991 Multco filed a motion for summary judgment on the complaint. The debtors answered and filed a cross summary judgment motion. The debtors did not appear at the hearing on motions and the court granted summary judgment in favor of Multco in the amount of $775. The court denied Multco's request for attorney fees, although the terms of the Visa agreement provided for payment of attorney fees.

The court entered its judgment on September 18, 1991 and Multco filed a notice of appeal on September 30, 1991. The appeal is timely in accordance with Federal Rule of Bankruptcy Procedure 8002(a).

STATEMENT OF THE ISSUE

Whether the bankruptcy court abused its discretion in not awarding attorney fees to Multco as the prevailing party on its dischargeability action when the underlying agreement between the parties provided for payment of attorney fees incurred in enforcement of the agreement.

STANDARD OF REVIEW

Whether to award attorney fees and the amount of fees to be awarded are reviewed for an abuse of the bankruptcy court's

discretion. Perry v. O'Donnell, 759 F.2d 702, 704 (9th Cir. 1985).

DISCUSSION

Multco argues that it is entitled to attorney fees for bringing the dischargeability action against the debtors based upon the agreement executed between the parties calling for payment of attorney fees incurred in the enforcement of the agreement. In re Itule, 114 B.R. 206 (9th Cir. BAP 1990), is inapposite to appellant's position. In Itule, the panel concluded that postpetition attorney fees incurred in bringing a dischargeability action were not recoverable. Itule, 114 B.R. at 213. The panel relied on In re Fulwiler, 624 F.2d 908 (9th Cir. 1980) (an Act case), which concluded that the creditor in that case was not entitled to attorney fees for bringing the dischargeability complaint although the underlying contract between the parties provided for payment of attorney fees. The court reasoned that § 17(a) of the Bankruptcy Act was a federal cause of action and not one based upon the contract. Fulwiler, 624 F.2d at 910.

The panel in Itule confirmed the applicability of Fulwiler to the Bankruptcy Code, adopted the approach therein, and held that the creditor was not entitled to recover its attorney fees in the dischargeability action. The panel stated, the "complaint was premised on a federal cause of action, i.e., the determination that the debt owed was nondischargeable." Itule, 114 B.R. at 213. The panel distinguished prepetition state court attorney fees and postpetition attorney fees incurred in litigation of the dischargeability complaint; the latter being dischargeable in

bankruptcy. Itule, 114 B.R. at 213, quoting, In re Levinson, 58 B.R. 831, 838 (Bankr. N.D. Ill. 1986), aff'd., Klingman v. Levinson, 66 B.R. 548 (N.D. Ill. 1986).

Here, the bankruptcy court relied on Itule to deny attorney fees to Multco. Multco argues that the bankruptcy court's reliance is improper in light of the recent Supreme Court case Grogan v. Gardner, ___ U.S. ___, 111 S. Ct. 654 (1991).

Grogan held that the preponderance of the evidence standard of proof applies to § 523(a) dischargeability exceptions. In its discussion the Court drew a distinction between the standards of proof required to establish the validity of a claim against the estate and to avoid the discharge of an already established claim. The Court noted, "[t]he validity of a creditor's claim is determined by rules of state law. Since 1970, however, the issue of nondischargeability has been a matter of federal law governed by the terms of the Bankruptcy Code." Grogan, 111 S. Ct. at 657-8 (citations omitted).

Multco applies this language in Grogan to the present case and states,

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> The ruling by the Supreme Court in Grogan v. Gardner, id., calls into question the rulings in In Re Fulwiler, 624 F.2d 908 (9th Cir. 1980), and In Re Itule, 114 Bankr 206 (9th Cir. BAP 1990) that both the issues of the nondischargeability of a claim and the validity and amount of that claim are governed by 11 USC § 523 only. Under Grogan v. Gardner, id., a court must look elsewhere to determine the validity and amount of the claim. Where a contract exists between the two parties, the court must look to the contract provisions, including the provisions which provide for an award of attorney's fees, to determine the amount of nondischargeable debt.

Appellant's Opening Brief p. 6.

We disagree with Multco. The substantive issues involved in the competing summary judgment motions before the bankruptcy court were matters of federal bankruptcy law and not state law issues on the validity of the claim. We, therefore, do not interpret Grogan to require the bankruptcy court to award attorney fees to a prevailing creditor in the dischargeability action, even though the underlying agreement provided for the payment of attorney fees.

In fact, Grogan supports Itule and Fulwiler, in that Grogan confirms the principle that nondischargeability is a matter of federal law governed by the terms of the Bankruptcy Code. See, Grogan, 111 S. Ct. at 658. When federal law governs the issues in a bankruptcy proceeding, a state law award of attorney fees is inappropriate. In re Johnson, 756 F.2d 738, 740-1 (9th Cir. 1985) cert. denied, Johnson v. Righetti, 474 U.S. 828 (1985); see also, In re Ashley, 903 F.2d 599, 605 n.7 (9th Cir. 1990) (a bankruptcy court may apply state law in awarding attorney fees when state law governs the underlying claim in bankruptcy).

Multco further argues that attorney fees are included in the

term "debt" and § 523(a)(2)(A) does not discharge a debtor from a "debt" for services, etc. obtained by false pretenses, false representation, or actual fraud. 11 U.S.C. § 523(a)(2)(A). Although attorney fees constitute a debt as defined in § 101(a)(12), it does not follow that such a debt is therefore nondischargeable under § 523(a)(2)(A). Consistent with the cases cited above, the debt for attorney fees is dischargeable because it was premised on a federal cause of action.

CONCLUSION

The bankruptcy court did not abuse its discretion in declining to award attorney fees to Multco pursuant to the terms of the agreement. We affirm.

OFFICE OF THE CLERK
United States Bankruptcy Appellate Panel
of the Ninth Circuit

NOTICE OF ENTRY OF JUDGMENT

A separate Judgment was entered in this case on AUG 20 1992.

Motions for Rehearing

A motion for rehearing may be filed within 10 days after entry of the judgment. (Bankruptcy Rule 8015).

The motion shall be submitted on 8½ by 11 inch paper, shall not exceed 15 pages in length, and shall comply with rules governing service and signature. An original and three copies shall be filed.

A motion for rehearing may toll the time for filing a notice of appeal to the Court of Appeals. See Bankruptcy Rule 8015.

Bill of Costs

Bankruptcy Rule 8014 provides that costs on appeal shall be taxed by the Clerk of the Bankruptcy Court. Cost bills should be filed with the Clerk of the Bankruptcy Court from which the appeal was taken. Also see, Federal Rules of Appellate Procedure 39.

Issuance of the Mandate

The mandate, a certified copy of the judgment addressed to the Clerk of the Bankruptcy Court from which the appeal was taken, will be issued 21 days after entry of the judgment unless otherwise ordered by the Panel. A timely motion for rehearing will stay issuance of the mandate until 7 days after disposition of the motion, unless otherwise ordered. See Bankruptcy Rule 8017 and Federal Rules of Appellate Procedure 41.

Appeal to Court of Appeals

An appeal to the Ninth Circuit Court of Appeals is initiated by filing a notice of appeal with the Clerk of this Panel. The Notice of Appeal should be accompanied by payment of the $100 filing fee. Checks may be made payable to the U.S. Court of Appeals For The Ninth Circuit. See Federal Rules of Appellate Procedure 4 and the corresponding Rules of the United States Court of Appeals for the Ninth Circuit for specific time requirements.