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11 U.S.C. § 523(a) (2) (A)
ORS 20.096
Attorneys Fees

Advanta National Bank, USA v.
Meneley (In re Meneley)

Adv. #97-3479
Main Case #397-35087-rld7

6/9/98

RLD

Unpublished

Bank requested reconsideration of denial of its attorneys fees asserting that the Supreme Court recently recognized a right to recover, among other things, attorneys fees as a "debt" in an action brought under 11 U.S.C. § 523(a) (2) (A). Cohen v. De la Cruz, 118 S.Ct. 1212 (1998). The court denied the motion for reconsideration, finding that the sole basis for claiming attorneys fees in this case was the Bank's contractual provision enforceable pursuant to ORS 20.096. Because the issues tried related to fraud for purposes of § 523(a) (2) (A) rather than any contract cause of action, the contractual provision was unavailing to the Bank. The court determined that American Express Travel Related Services Company Inc. v. Hashemi (In re Hashemi), 104 F.3d 1122, 1126-27 (9th Cir. 1997) was not inconsistent with Cohen and remained the controlling authority in cases such as this where there is no statutory authorization to award attorneys fees to the Bank as the prevailing party on its fraud claim under § 523(a) (2) (A).

P98-2(3)

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re:)	Bankruptcy Case
)	No. 397-35087-rld7
RODNEY D. MENELEY)	
and BREEON B. MENELEY,)	Adversary Proceeding
)	No. 97-3479
Debtors.)	
_____)	
ADVANTA NATIONAL BANK, USA,)	MEMORANDUM OPINION
)	
Plaintiff,)	
)	
v.)	
)	
RODNEY D. MENELEY,)	
)	
Defendant.)	
_____)	

20 Following a trial on the complaint in this adversary
21 proceeding, I issued a letter opinion finding that debtor Rodney
22 Meneley's debt to Advanta National Bank, USA (the "Bank") was
23 nondischargeable. Letter Opinion, dated April 28, 1998. Relying on
24 American Express Travel Related Services Company Inc. v. Hashemi (In
25 re Hashemi), 104 F.3d 1122, 1126-27 (9th Cir. 1997), I denied the
26 Bank's request for attorneys fees pursuant to its Cardholder

1 Agreement because I did not need to determine the enforceability of
2 the Cardholder Agreement in order to determine dischargeability
3 under 11 U.S.C. § 523(a)(2)(A). The Bank timely moved for
4 reconsideration of the denial of its attorneys fees, asserting that
5 Cohen v. De la Cruz, 118 S.Ct. 1212 (1998), decided by the United
6 States Supreme Court on March 24, 1998, recognized a right to
7 recover attorneys fees for the prosecution of a fraud action under
8 § 523(a)(2)(A).

9 I have reviewed the memoranda of the parties filed in
10 connection with the motion for reconsideration. I find the Cohen
11 decision distinguishable from the facts before me. In Cohen, the
12 creditor was entitled to recover treble damages and attorneys fees
13 as a "debt" pursuant to the provisions of the New Jersey Consumer
14 Fraud Act. The Supreme Court did not find any right to an award of
15 attorneys fees under § 523(a)(2)(A) itself.

16 In the instant case, the Bank is relying on a contract
17 provision, enforceable pursuant to ORS 20.096, authorizing an award
18 of attorneys fees in connection with collecting amounts due under
19 the Cardholder Agreement. Because Mr. Meneley did not contest the
20 allegation that he had breached his Cardholder Agreement with the
21 Bank, the issues that were tried before me were those relating
22 solely to Mr. Meneley's alleged fraud for purposes of
23 § 523(a)(2)(A), rather than to any contract causes of action. In
24 these circumstances, I am bound by the Ninth Circuit's decision in
25 Hashemi, which is not inconsistent with Cohen, to the effect that
26 there is no statutory authorization to award attorneys fees to the

1 Bank as the prevailing party on its fraud cause of action under
2 § 523(a)(2)(A). Accordingly, I must deny the Bank's motion for
3 reconsideration.

4 The foregoing constitutes my findings of fact and conclusions
5 of law in accordance with Fed. R. Bankr. P. 7052. I will enter a
6 separate order denying the Bank's motion.

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10 RANDALL L. DUNN
Bankruptcy Judge

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12 cc: Thomas K. Wolf
13 Dale F. Evans
14 John W. Lundeen
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