UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

BKY 4-90-1182

MICHAEL E. WEINAND
and PATRICIA A. WEINAND,

Debtors.

CHEVY CHASE FEDERAL SAVINGS
BANK,

Plaintiff, ADV 4-90-210

-v.-

MICHAEL E. WEINAND
and PATRICIA A. WEINAND,

MEMORANDUM ORDER GRANTING
JUDGMENT FOR COSTS AND FEES

Defendants.

At Minneapolis, Minnesota, January 7, 1991.

The above-entitled matter came before the undersigned on Defendants' request for entry of judgment against the Plaintiff for the Defendants' costs and reasonable attorney's fees under 11 U.S.C. Section 523(d). This Court has jurisdiction over the parties to and the subject matter of this proceeding pursuant to 28 U.S.C Sections 157 and 1334, and Local Rule 103. Moreover, this Court may hear and finally adjudicate this request because its subject matter renders such adjudication a "core" proceeding pursuant to 28 U.S.C. Section 157(b)(2)(I). This Memorandum Order shall constitute the Court's findings of fact and conclusions of law.(FN1)

(FN1) The Court bases its findings of fact and conclusions of law upon the pleadings, affidavits and memoranda filed by the parties, as well as the argument of counsel presented and the testimony and exhibits received during the trial.

Plaintiff commenced this adversary proceeding to determine the dischargeability of Defendants' credit card debt under 11 U.S.C. Sections 523(a)(2)(A) and (B). Trial was held on December 3, 1990. Following presentation of Plaintiff's case-in-chief, I granted Defendants' motion to dismiss Plaintiff's claim under 11 U.S.C. Section 523(a)(2)(A). At the close of Defendants' case, I granted judgment in favor of the Defendants on Plaintiff's claim under 11 U.S.C. Section 523(a)(2)(B), and I read my findings of fact and conclusions of law supporting such judgment into the record.

I then addressed the issue of Defendants' request for costs and reasonable attorney's fees. I indicated that I had tentatively concluded that Plaintiff was without substantial justification on its claim under subsection (A). I also tentatively concluded that Plaintiff might have been substantially justification on its claim under subsection (B) at some time, but that it clearly was without substantial justification on said claim by the time of trial. I

required Defendants' counsel to submit an affidavit regarding costs and attorney's fees and requested the parties to submit memoranda regarding allocation of expenses between the substantially justified, if any, and non-substantially justified parts of Plaintiff's case. The parties have now submitted their memoranda and affidavit, and I have carefully considered them.

Three elements must be present in order for an award of costs and attorney's fees to be proper under 11 U.S.C. Section 523(d): 1) a request by a creditor for determination of dischargeability; 2) a consumer debt; and 3) the discharge of the consumer debt. Chevy Chase Fed. Sav. Bank v. Kullgren (In re Kullgren), 109 B.R. 949, 953 (Bktcy. C.D. Cal. 1990). Once these three elements are present, it becomes the creditor's burden to show that its case, or some part thereof, was substantially justified. Chrysler First Fin. Serv. Corp. v. Rhodes (In re Rhodes), 93 B.R. 622, 624 (Bktcy. S.D. Ill. 1988).

Plaintiff does not dispute the existence of the three elements. Instead, Plaintiff's memoranda proffers four bases for finding that its case was substantially justified: 1) Defendants made a substantial number and amount of charges within 60 days of filing for bankruptcy; 2) Defendants lacked sufficient income to pay their charges and repay their cash advances; 3) Defendants' annual income in 1989 was significantly less than the figure reported on their credit card application as their "annual salary"; and 4) Plaintiff filed its complaint in good faith and without intent to engage in frivolous litigation.

When I dismissed Plaintiff's claim under 11 U.S.C. Section 523(a)(2)(A), I concluded that the facts regarding the number, amount and timing of Defendants' charges and cash advances were not legally sufficient to constitute a prima facie case for a judgment of nondischargeability. Plaintiff's claim under said section was completely without merit.

Furthermore, when I granted Defendants judgment on Plaintiff's claim under 11 U.S.C. Section 523(a)(2)(B), I concluded that Defendants' testimony as to their understanding, or the lack thereof, of the types of income which could be included legitimately in "annual salary" precluded a finding based on clear and convincing evidence that the Defendants intended to deceive the Plaintiff. Plaintiff asserts it had a good-faith basis for pleading section 523(a)(2)(B) when it filed its complaint, but the uncontroverted affidavit of Defendants' counsel belies that assertion. Defendants' previous counsel, who at that time was serving as Plaintiff's counsel in adversary proceedings in other bankruptcy cases, informed the Plaintiff of Defendants' reasonable explanation for the apparent income discrepancy prior to the filing of the complaint. Within a week after the filing of the complaint, Defendants' present counsel recommunicated the Defendants' reasonable explanation to the Plaintiff. Plaintiff was not substantially justified in pursuing its claim under section 523(a)(2)(B) after being made aware of facts that would effectively preclude it from proving intent to deceive by clear and convincing evidence:

> A creditor is not justified in continuing to pursue a case once it learns that its position is not justified, even if the suit was originally filed in good faith.

> Such a reading of the statute would all but emasculate the purpose of section 523(d). Creditors could always contend they thought they had a good case when they filed. Thus, the consumer debtor would be forced to settle rather than fight it out. No, we think better [sic] the construction of 523(d) is that when 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 attorneys' fees and costs.

Manufacturers Hanover Trust Co. v. Hudgins, 72 B.R. 214, 221 (N.D. Ill. 1987).(FN2)

Moreover, Plaintiff has failed to indicate any special circumstances that would make an award of the Defendants' expenses unjust. On the contrary, such an award is particularly warranted in this proceeding, since I warned Plaintiff's counsel at the scheduling conference and repeatedly thereafter that I considered the facts of the instant case to be substantially similar to a recent case in which Judge O'Brien had decided to grant judgment for expenses against this same Plaintiff. See Chevy Chase Fed. Sav. Bank v. Dvorak (In re Dvorak), ADV 3-89-311 (Bktcy. D. Minn. Aug. 2, 1990).

Finally, I have concluded that the fees requested in the affidavit of Defendants' attorney are reasonable.

ACCORDINGLY, IT IS HEREBY ORDERED that Defendants shall have judgment against the Plaintiff in the amount of $1,875.25 pursuant to 11 U.S.C. Section 523(d).

Nancy C. Dreher
United States Bankruptcy Judge

(FN2) Even if Plaintiff were entitled to disbelieve the representations of counsel and insist upon deposing the Defendants, such a deposition would have clearly revealed that the Plaintiff's case lacked merit, and Plaintiff would then have been required to dismiss the case to avoid sanction. In addition, if Plaintiff's pursuit of its claim under section 523(a)(2)(B) had been substantially justified up to some point in the proceeding, Plaintiff failed to provide this Court with a basis for separating expenses incurred while Plaintiff's position was substantially justified from those incurred after it ceased to be so.