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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

In Re: LANA MARIE BARR, fdba
TV Facts, NE, Inc.,

Debtor,

CHECK CENTRAL OF OREGON, INC.,

Plaintiff,

v.

LANA MARIE BARR, fdba TV Facts,
NE, Inc.,

Defendant.

) Bankruptcy Case No.
382-03319

) Adversary Proceeding No.
82-0208

) Civil No. 84-591-FR

) OPINION AND ORDER

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Attorneys for Debtor/Defendant

FRYE, Judge:

INTRODUCTION

1
2 Lana Marie Barr (Debtor) appeals from the Findings and
3 Conclusions entered by the Honorable Donal D. Sullivan,
4 Bankruptcy Judge.

5 Plaintiff-appellee Check Central of Oregon, Inc.
6 (Creditor) brought a complaint in bankruptcy to determine the
7 dischargeability of a debt under 11 U.S.C. § 523(a)(2)(A). This
8 section makes nondischargeable debts "for obtaining money,
9 property, services, or an extension, renewal, or refinance of
10 credit by . . . false pretenses, a false representation, or
11 actual fraud. . . ." Debtor counterclaimed, alleging that
12 Creditor had violated the provisions of the Fair Debt Collection
13 Practices Act (FDCPA), 15 U.S.C. §§ 1692 et seq. The debt at
14 issue -- \$155.81 -- represents the total amount of four of
15 debtor's checks which were returned to several creditors for
16 insufficient funds and later assigned to Creditor for collection.
17 The bankruptcy court first held that Debtor had acted with intent
18 to deceive when she wrote the checks, and that the \$155.81 debt
19 was nondischargeable. This finding is not challenged by Debtor.
20 The bankruptcy court next awarded Creditor \$400 in statutory
21 attorney's fees under ORS 20.090, and held this amount to be non-
22 dischargeable in bankruptcy. On Debtor's counterclaim the court
23 found that Creditor had violated the FDCPA in one respect claimed
24 by Debtor, although it found no violation under Debtor's second
25 theory (discussed in II. below). The bankruptcy court awarded
26 Debtor \$100 damages for the FDCPA violation, as well as \$400 in

1 attorney's fees, under 15 U.S.C. § 1692k. This ruling is also
2 not challenged in this appeal. The bankruptcy court then offset
3 the awards, and entered a judgment holding that \$55.10 of
4 Creditor's claim against Debtor is nondischargeable in
5 bankruptcy. Debtor in the present appeal challenges two of the
6 bankruptcy court's rulings.

7 I.

8 Debtor first contends that the bankruptcy court erred in
9 assessing \$400 in attorney's fees against her and making the \$400
10 a nondischargeable debt under 11 U.S.C. § 523(a)(2)(A). The
11 bankruptcy court assessed the fees against Debtor under ORS 20.090,
12 which provides:

13 (1) Except as otherwise provided in subsection (2)
14 of this section, in any action against the maker of any
15 check, draft or order for the payment of money which has
16 been dishonored for lack of funds or credit to pay the
17 same or because payment has been stopped, the court
18 shall allow a reasonable attorney fee at trial and on
19 appeal to the prevailing party, in addition to
20 disbursements.

21 (2) If the plaintiff prevails in an action
22 described in subsection (1) of this section, the court
23 shall not allow a reasonable attorney fee to the plain-
24 tiff as provided in subsection (1) of this section
25 unless the court finds that the plaintiff made written
26 demand of the defendant for the payment of such claim
27 not less than 10 days before the date of the commen-
28 cement of the action and that the defendant failed to
29 tender to the plaintiff, prior to the commencement of
30 the action, an amount of money not less than the damages
31 awarded to the plaintiff.

32 Although acknowledging that the issue of dischargeability "is
33 solely a question of federal law," the bankruptcy court stated
34 that questions of liability and damages are "matters of state
35 law."

1 law." Under ORS 20.090, "attorney's fees are a special rule of
2 damages or penalty where liability is incurred for writing a
3 check on insufficient funds." Therefore, the bankruptcy court
4 concluded that the \$400 in attorney's fees was simply an addi-
5 tional element of damages which "should be unaffected once the
6 debt is determined to be nondischargeable in bankruptcy."
7 Findings and Conclusions at 3.

8 The bankruptcy court's conclusion cannot stand in light
9 of In re Fulwiler, 624 F.2d 908 (9th Cir. 1980). Although not
10 precisely on point, the analysis in Fulwiler supports the conclu-
11 sion that the attorney's fee award is not proper. In Fulwiler, a
12 creditor brought an action against a debtor under section
13 17(a)(2) of the old Bankruptcy Act (the predecessor to section
14 523(a)(2) of the present Code), alleging that the debtor had pro-
15 cured a \$26,000 loan by fraud and seeking to make the debt non-
16 dischargeable. The debtor prevailed in this proceeding and then
17 sought attorney's fees against the creditor, relying on an
18 attorney's fees provision in the loan contract and ORS 20.096.
19 ORS 20.096 provides that "[i]n any action or suit on a contract"
20 containing an attorney's fee provision, the prevailing party in
21 the action shall be entitled to attorney's fees. The debtor
22 claimed that the creditor's nondischargeability action was an
23 action on the contract, and that, as prevailing party in that
24 action, the debtor was entitled to attorney's fees. The Ninth
25 Circuit disagreed. It held that section 17(a)(2) "created a
26 purely federal cause of action designed to implement the

1 policies" of federal bankruptcy law, and as such was not an
2 action to which ORS 20.096 applied. Id. at 910. Similarly,
3 although the present "Complaint to Determine Dischargeability of
4 Debt" falls literally within the language of ORS 20.090 ("any
5 action against the maker of any check . . . which has been disho-
6 nored for lack of funds") as did the creditor's action in
7 Fulwiler with respect to ORS 20.096, the court believes that ORS
8 20.090, like ORS 20.096, does not apply to the "purely federal
9 cause of action" granted by section 523(a)(2)(A) upon which the
10 present complaint is based. Fulwiler indicates that the awarding
11 of attorney's fees in a nondischargeability proceeding is a
12 matter of federal law, and that absent some specific federal sta-
13 tutory authorization (such as section 523(d) of the Bankruptcy
14 Code) or bad faith, attorney's fees are not available in section
15 523(a)(2) actions. Although there is caselaw to the contrary, see
16 In re Crosslin, 14 Bankr. 656 (Bankr. M.D. Tenn. 1981), the pre-
17 sent holding appears to represent the majority view. See In re
18 Crouse, 27 Bankr. 284 (Bankr. E.D. Mo. 1983); In re Woods, 25
19 Bankr. 16 (Bankr. D. Ore. 1982)¹; In re The Record Company,
20 Bankr. L. Rep. (CCH) ¶67,746 at 78,394 (Bankr. S.D. Ind. 1980)
21 ("It is a well established principle of bankruptcy that damages
22 granted on nondischargeability complaints for obtaining money by
23 false pretenses are limited to funds actually obtained by the
24 representation. Consequential damages are not included, nor are

25
26 ¹ However, it is unclear from this opinion the basis upon which
the creditor made his argument for attorney's fees.

1 punative damages.").

2 This result -- that ORS 20.090 does not apply to a pro-
3 ceeding to determine nondischargeability under section 523(a)(2)
4 -- best harmonizes the structure of the two statutory sections.
5 The language of section 523(a)(2) requires that the non-
6 dischargeable debt be "for obtaining money, property, [or]
7 services" by "false pretenses, a false representation, or actual
8 fraud. . . ." This language has been interpreted to require that
9 the money, property, or services related to the debt have been
10 obtained by the debtor himself and by the debtor's false repre-
11 sentations or fraud. See 3 L. King, Collier on Bankruptcy
12 ¶523.08[1] (15th ed. 1984). In the present case, the \$400 debt
13 for attorney's fees did not result from services obtained by the
14 debtor, nor were the services given in reliance upon any fraud or
15 misrepresentation by the debtor. Whether certain elements of
16 damages which might arise as a result of a creditor's reliance
17 upon a debtor's misrepresentations are nondischargeable may in
18 some cases depend in part on whether the elements are recoverable
19 under state law, as noted by the court below. But section
20 523(a)(2)(A)'s requirement of reliance always remains as a limi-
21 tation on which debts are subject to nondischargeability. See
22 Collier, supra, ¶523.08[4]. Although in one sense the attorney's
23 fees debt was "caused" by the debtor's writing the NSF checks,
24 clearly the creditor was not relying on any fraudulent represen-
25 tation of the debtor in authorizing the services underlying the
26 attorney's fee debt. Therefore, the attorney's fee award is not

1 collection notice sent to the debtor read as follows:

2 If you notify this office in writing in 30 days from
3 receiving this notice, this office will obtain verifica-
4 tion of the debt or obtain a copy of the judgment
against you and mail you a copy of such judgment or
verification.

5 Debtor contends that this language is misleading because the word
6 "judgment" occurs in it, which might tend to make a debtor
7 believe that a judgment had already been rendered against him.
8 However, the notice clearly states that the collection agency
9 will in the alternative either "obtain verification of the debt or
10 obtain a copy of the judgment against you and mail you a copy of
11 such judgment or verification." Use of the word "or" makes the
12 sentence not misleading. Moreover, as noted by the bankruptcy
13 court, the language mirrors the requirements of the FDCPA
14 itself, 15 U.S.C. §1692g(a)(4):

15 Within five days after the initial communication
16 with a consumer in connection with the collection of any
17 debt, a debt collector shall, unless the following
information is contained in the initial communication or
the consumer has paid the debt, send the consumer a
written notice containing--

18 * * *


19 a statement that if the consumer notifies the debt
20 collector in writing within the thirty-day period that
21 the debt, or any portion thereof, is disputed, the debt
22 collector will obtain verification of the debt or a copy
of a judgment against the consumer and a copy of such
23 verification or judgment will be mailed to the consumer
by the debt collector;

24 Finally, the one decision addressing the issue found similar
25 language not to violate the FDCPA. See Blackwell v. Professional
26 Business Services of Georgia, 526 F. Supp. 535, 539 (N.D. Ga.

1 1981). The decision of the bankruptcy court on this point is
2 affirmed.

3 IT IS THEREFORE ORDERED that the Findings and
4 Conclusions of the bankruptcy court are reversed in part and
5 affirmed in part, and the case remanded to that court for further
6 proceedings in light of this opinion.

7 DATED this 16 day of July, 1984.

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10 Helen J. Frye

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