

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI**

IN RE: MARION C. JOHNSON

CASE NO. 11-01229-KMS

DEBTOR

CHAPTER 13

COUNTRY CREDIT, LLC

PLAINTIFF

V.

ADV. NO. 11-00084-KMS

MARION C. JOHNSON

DEFENDANT

ORDER GRANTING DEFENDANT’S REQUEST FOR ATTORNEY’S FEES

This matter came before the Court for hearing on April 19, 2012, (the “Hearing”) on the Motion for Attorney Fees and Costs (the “Motion”) (Adv. Dkt. No. 15) filed by J. Thomas Ash (“Ash”) on behalf of defendant Marion C. Johnson (“Johnson”) and the Response (Adv. Dkt. No. 17) filed by Country Credit, LLC (“Country Credit”). At the Hearing, Clinton Ashley Atkinson (“Atkinson”) represented Country Credit and Ash represented Johnson. In accordance with the reasons set forth at the Hearing and on the record, the Court finds that the Motion is **GRANTED** with modification.¹

I. JURISDICTION

The Court has jurisdiction of the parties to and the subject matter of this adversary proceeding pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157 (b)(2)(I).

¹ Pursuant to Federal Rule of Civil Procedure 52, made applicable to this Adversary by Federal Rule of Bankruptcy Procedure 7052, the following constitutes the findings of fact and conclusions of law of the Court.

II. FINDINGS OF FACT

Country Credit initiated this adversary proceeding on July 15, 2011, seeking a declaration that the debt owed to it by Johnson is nondischargeable for allegedly failing to disclose an outstanding tax obligation, a mortgage payment, and a payday debt on her loan application (the “Adversary”). The relevant facts and circumstances of the Adversary are fully addressed in this Court’s Memorandum Opinion entered on March 19, 2012 (the “Opinion”). (Adv. Dkt. No. 13). As discussed in the Opinion, Johnson failed to disclose an outstanding tax obligation on the application for the loan at issue. However, the Court held that Country Credit failed to reasonably rely on this misrepresentation because the undisputed evidence established that: (1) Johnson had disclosed the obligation in her prior dealings with the creditor; and (2) the renewal loan was approved and made prior to Johnson’s review and signature.

III. CONCLUSIONS OF LAW

Pursuant to 11 U.S.C. § 523(d),² if the court rules against the creditor on the creditor’s request for a determination as to the dischargeability of a consumer debt under § 523(a)(2) and there are no special circumstances that would make such award unjust, “the court shall 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.” 11 U.S.C. § 523(d); *Carthage Bank v. Kirkland*, 121 B.R. 496, 499 (S.D. Miss. 1990) (“by its

² Section 523(d) states in its entirety

If a creditor requests a determination of dischargeability of a consumer debt under subsection (a)(2) of this section, and such debt is discharged, the court shall 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 shall not award such costs and fees if special circumstances would make the award unjust.

11 U.S.C. § 523(d).

express terms, section 523(d) mandates an award of attorney’s fees to a prevailing debtor unless the court determines the facts of the case to fall within the exceptions to that provision”); *Eric D. Fein, P.C. & Assoc. v. Young (In re Young)*, Adv. No. 09-4054, 2010 WL 795113, at *1 (Bankr. E.D. Tex. Mar. 8, 2010); *FIA Card Servs., N.A. v. Knoche (In re Shahidulla)*, 465 B.R. 511, 513 (Bankr. D. Minn. 2012). The purpose of this provision is to discourage creditors from bringing objectively weak nondischargeability actions in hopes of inducing a settlement from a debtor anxious to avoid paying attorney’s fees to defend the action. Collier on Bankruptcy P 523.08[8] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.); see *In re Shahidulla*, 465 B.R. at 513 (“Congress added this cost-shifting provision to ‘reduce the pressure on the honest individual debtor to settle this type of nondischargeability claim for the sole purpose of avoiding attorney’s fees and costs of litigation.’”) (internal citations omitted). An award of attorney’s fees under § 523(d) is within the court’s sound discretion. *In re Young*, 2010 WL 795113, at *2.

The Court finds, and the parties do not dispute, that Country Credit initiated the nondischargeability action under § 523(a)(2), the loan at issue concerns a consumer debt,³ and the debt was held to be dischargeable.⁴ Country Credit abandoned the issue of whether there are any circumstances that would make an award of fees and costs unjust by failing to address the element in its Response and at the Hearing.⁵ Thus, the Court finds no evidence that would necessitate a denial of an award as unjust.

The only disputed element is whether Country Credit’s position in the Adversary was substantially justified. In its Motion, Country Credit asserted that it filed the Complaint after

³ “The term ‘consumer debt’ means debt incurred by an individual primarily for a personal, family, or household purpose.” 11 U.S.C. § 101(8). Johnson maintained at trial that she obtained the loan to pay personal bills.

⁴ See Opinion, Adv. Dkt. No. 13.

⁵ At the Hearing, counsel for Country Credit merely stated that its position was substantially justified.

reviewing the “loan application signed by [Johnson] and review[ing] the [proof of claims] filed by the Internal Revenue Service” and that these documents taken together provide a basis in law and fact such that the Complaint was substantially justified. Country Credit further asserted that the issue was a “close question that needed a trial and considerable testimony in order to be decided.”⁶ At the Hearing, Atkinson maintained that Country Credit’s position was substantially justified; although, he did not advance any additional explanation or justification to support its position.

As the Court noted at the Hearing, the lack of investigation on the part of Country Credit indicates that it did not have a reasonable basis for the facts and allegations it asserted in the Complaint. *See In re Shahidulla*, 465 B.R. at 514 (complaint did not have reasonable basis in fact because at the onset, plaintiff did little to no legal or factual research). Country Credit made no attempt to obtain information regarding when the home loan modification was entered into or whether Johnson had an outstanding payday loan before filing the Adversary. The record does not reflect that Country Credit conducted an examination of the debtor under a Federal Rule of Bankruptcy Procedure 2004 before filing the Adversary. *See In re Shahidulla*, 465 B.R. at 514. Further, Regina, the Country Credit employee who dealt directly with Johnson and to whom Johnson disclosed her outstanding tax obligations, was noticeably absent from trial. In essence, Country Credit appeared at trial without any evidence to support its causes of action. Thus, the Court finds that an award of attorney’s fees and costs pursuant to § 523(d) is warranted in this case.

⁶ In its Motion, Country Credit argued that “if this were a case without substantial justification, the debtor would have filed and prevailed at summary judgment and a trial would not have been necessary.” However, the Court does not find this argument relevant as to Country Credit’s burden to prove substantial justification.

In its Motion and at the Hearing, Country Credit requested a reduction in the amount of Ash's fees and costs to take into account that Ash appeared in Gulfport and Hattiesburg for hearings and/or trials on the same day in two unrelated cases. The Court finds that the costs and the hourly rate were reasonable; however, the time submitted for the pre-trial conference shall be reduced by from 3.5 hours to 2.0 hours, the time submitted for travel to Gulfport shall be reduced from 6.6 hours to 3.3 hours and the mileage expense shall be reduced by half to account for travel time and expenses for an unrelated case. Thus, an award of attorney's fees and costs in the amount of \$4,103.00⁷ is granted.

IV. CONCLUSION

For the foregoing reasons, the Court concludes that Country Credit was not substantially justified in bringing and pursuing the Adversary. The Court further concludes that there are no special circumstances that would make an award of costs and attorney's fees unjust. Thus, the Motion is GRANTED with modification of the amount of the award consistent with this Order.

THEREFORE IT IS ORDERED that, within 14 days of the entry of this Order, Country Credit shall reimburse Johnson and Ash the sum of \$4,103.00 for costs and attorney's fees incurred in connection with the Adversary pursuant to 11 U.S.C. § 523(d).

A separate final judgment will be entered in accordance with Federal Rule of Bankruptcy Procedure 7058.

SO ORDERED.

⁷ Costs and fees include: Johnson's costs of \$110.25 (time off from work) and \$190.30 (travel expense) and attorney's costs and fees of \$3,802.45 (12.2 hours at \$300) and \$142.45 (259 miles at \$0.55) for a total of \$4,103.00.