

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF WISCONSIN

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In re

TIMOTHY B. BRAHM,

Debtor.

Case No. 96-22890-MDM

CHAPTER 7

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KEVIN HIBL,

Plaintiff,

v.

Adversary No. 96-2506

TIMOTHY B. BRAHM,

Defendant.

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MEMORANDUM DECISION

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I. INTRODUCTION

On January 27, 1997, a trial was held before this court on the plaintiff's complaint for exception to discharge of the debtor's debt to the plaintiff for \$7,000. The plaintiff made this loan to the debtor to enable him to purchase his present home when sale proceeds of his old home were inadequate. The plaintiff was the realtor handling both sales. The plaintiff alleged that the debtor misrepresented the amount of the mortgage on his old home, which was higher than the plaintiff said the debtor told him, and this misrepresentation induced him to make the loan to save two real estate sales. The debtor testified he gave the plaintiff an estimate very close to the correct amount. The plaintiff argued that he justifiably relied on the misrepresented mortgage amount, and he believed the debtor would realize \$7,000 on the sale of his old home.

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After listing his house, the plaintiff found the debtor a new home, available for purchase on a land contract. The debtor was financially strapped and was unable to pay expenses, taxes and assessments on the old home, and he could not get commercially available credit. The closings were scheduled a week apart. The closing on the new home was first, and the purchase required \$7,000 in cash. Thus, the plaintiff stated he was induced to loan the debtor \$7,000 for the first closing, believing he would be paid on the second closing.

The debtor received considerably less than \$7,000 when his house was sold and could not pay the plaintiff. Subsequently, this bankruptcy case was filed, and the plaintiff brought this adversary proceeding. At the trial, the court found it had jurisdiction under 11 U.S.C. § 1334(b); this is a core proceeding under 11 U.S.C. § 157(b)(2)(I); the plaintiff had not met his burden of proof by a preponderance of the evidence; the debtor's representations concerning the amount of the mortgage, if not true, were unintentionally mistaken; the plaintiff could have verified the amount of the mortgage (as his office did in preparing the closing statement) but did not; his reliance on an incorrect estimate, which the plaintiff acknowledged was only an estimate, was not justifiable under the circumstances; and the debt was discharged. An Order finding the debt dischargeable was entered February 6, 1997.

The debtor also moved for reasonable attorney fees under 11 U.S.C. § 523(d) because the plaintiff's bringing the action was not substantially justified. This debt was a "consumer debt," as defined by 11 U.S.C. § 101(8), as it was incurred by the debtor for a personal, family or household purpose. Counsel for the debtor submitted a statement for \$2,277. For the reasons stated in this decision, the debtor's motion is granted, and the debtor is awarded \$1,800 in attorney fees.

Additional facts will be set forth in the body of this decision.

## II. DISCUSSION

The standard for "substantially justified" under 11 U.S.C. § 523(d) is one of reasonableness. The United States Supreme Court held that the term means justified in substance or in the main, not justified to a high degree; the action must be justified to a degree that could satisfy a reasonable person and must have a reasonable basis in law and fact. *Pierce v. Underwood*, 487 U.S. 552, 565, 108 S.Ct. 2541, 2550 (1988). As long as there is a reasonable basis in law and fact, a position will be found to be substantially justified, even if it is wrong. *EEOC v. O&G Spring & Wire Forms Specialty Co.*, 38 F.3d 872, 883 (7<sup>th</sup> Cir. 1994), *cert. denied*, 115 S.Ct. 1270 (1995). The action need not be frivolous to warrant the award. *In re Shurbier*, 134 B.R. 922, 928 (Bankr. W.D. Mo. 1991). Furthermore, the creditor need not have acted in bad faith or with ill will. *In re Harvey*, 172 B.R. 314, 317 (B.A.P. 9<sup>th</sup> Cir. 1994).

The plaintiff stated that the debtor told him the outstanding mortgage on the old home was \$70,000 - 72,000. This was the alleged misrepresentation that led to his loss. The debtor testified that he told the plaintiff the correct mortgage balance of around \$78,000 at their second meeting in July of 1995 when the listing contract was signed, and the plaintiff disputes only the amount, not the timing. In other words, the plaintiff believes there is a direct causal link between the debtor's deliberate misrepresentation in July of 1995, and his loaning the debtor the money in September, 1995.

In order to prevail in an action under 11 U.S.C. § 523(a)(2)(A), the plaintiff had the burden to prove that the debtor knew his representation regarding the amount of the mortgage balance was false, or he recklessly disregarded the truth; he intended that the creditor rely on his misrepresentation; and the creditor justifiably relied on it when induced to part with the money.

*Field v. Mans*, 116 S.Ct. 437 (1995); *Matter of Mayer*, 51 F.3d 670, 673 (7<sup>th</sup> Cir. 1995). Therefore, when the debtor supposedly stated the mortgage was only \$70, 000 - 72,000, he would have had to have known and to have intended the following:

1. The debtor could accurately calculate his equity in the old house — including the future selling price, a prediction as to the amount of the real estate tax allocation (date unknown), cost of title report, and transfer fees — so he would know he really had no significant equity in the house and needed to lie to the plaintiff;

2. His old house would be sold about the same time he would buy a new house, even though he had not yet told the plaintiff he wanted a new house when the alleged misrepresentation occurred;

3. The plaintiff would find the debtor a new house which could close before the sale of the old house closed, so the debtor would need cash from the plaintiff to close;

4. The sellers of the new house would accept a land contract;

5. The down payment on the new house would be no more than about \$6,000 - 7,000, which was the difference in equity between the real mortgage balance and the misrepresented mortgage balance, or alternatively, the amount needed for the down payment would be no more than \$7,000 more than the cash received from the old house; and

6. The plaintiff would have enough cash to loan the debtor to complete both closings, which the debtor would be legally obligated to perform or else incur substantial damages to the other parties, and the plaintiff would have the willingness to make the loan.

. How could anyone believe or intend that lying about the amount of his mortgage would cause a realtor to loan him money? The more plausible cause for the loan was the fact that

assisting the debtor saved the plaintiff a total of \$8,878 in total commissions. To find that a calculated misrepresentation by the debtor was the event that caused the plaintiff to make the loan was too great a leap for the court to make, and it should have been too great a leap for the plaintiff to make. With all of the intervening and unknowable events between the alleged misrepresentation (which the court believes was a mistake or misunderstanding) and the loan, no reasonable person could discern a connection. This court finds that the plaintiff was not "substantially justified" in bringing this action.

Section 523(d) requires that if the court finds the creditor was not substantially justified in bringing the adversary proceeding and the 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. . ." In other words, the award of the debtor's attorney's fee is mandatory. The attorney for the debtor has submitted a statement for \$2,277. While the court does not dispute the time expended, the court believes the cost to the debtor was a bit high, and heavy on research into what was essentially a fact determination. Therefore, the court awards the debtor \$1,800 in attorney fees under 11 U.S.C. § 523(d). An order consistent with this decision will be entered.

Dated at Milwaukee, Wisconsin, April 15, 1997.

BY THE COURT:

\_\_\_\_\_/s/\_\_\_\_\_  
Margaret Dee McGarity  
United States Bankruptcy Judge