

UNITED STATES BANKRUPTCY COURT

DISTRICT OF SOUTH DAKOTA

ROOM 211

FEDERAL BUILDING AND U.S. POST OFFICE

225 SOUTH PIERRE STREET

PIERRE, SOUTH DAKOTA 57501-2463

IRVIN N. HOYT
BANKRUPTCY JUDGE

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July 10, 1989

David L. Claggett, Esq.
Post Office Box 945
Spearfish, South Dakota 57783

Randall L. Macy, Esq.
Post Office Box 726
Belie Fourche, South Dakota 57717

Re: Douglas Gordon Ruhnaw
Chapter 7 85-50195
Adversary 88-5022

Dear Counsel:

After reviewing the affidavit for attorney's fees submitted by Mr. Claggett and the response thereto by Mr. Macy, I have decided that an award of attorney's fees is inappropriate.

11 U.S.C. 523(d) provides:

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.

(emphasis added)

Consumer debt is defined in the Code as "debt incurred by an individual primarily for a personal, family, or household purpose[.]" 11 U.S.C. §101(7). Here, the debtor did make a showing that the debt which he sought to discharge was a consumer debt. The debtor must successfully carry this burden in order to be entitled to costs and attorney's fees under -§523(d). See In re Austin, 73

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B.R. 937 (Bkrtcy. W.D.La. 1987). The evidence presented at the hearing leads the Court to conclude that the debt which Mr. Ruhnow incurred with the Bank was intended to satisfy past debts to other creditors stemming from his former business, the Music Mine. Such a debt does not qualify as a consumer debt under §101(7) of the Code. See In re Ethridge, 80 B.R. 581 (Bkrtcy. M.D.Ga. 1987). See also In re Bernstein, 71 B.R. 259 (Bkrtcy. S.D.Fl. 1987), In re Byrd, 66 B.R. 261 (Bkrtcy. N.D.M5. 1986), and In re Panaia, 65 B.R. 865 (Bkrtcy. D.Ma. 1986).

Based on the foregoing, this Court concludes that an award of attorney's fees would be inappropriate pursuant to 11 U.S.C. 523(d). This letter memorandum constitutes the Court's findings and conclusions pursuant to Bankruptcy Rule 7052. The Court will issue an order in conformance herewith.

Very truly yours,

Irvin N. Hoyt
Chief Bankruptcy Judge

INH/sh

CC: Bankruptcy Clerk

