

UNITED STATES BANKRUPTCY COURT

DISTRICT OF SOUTH DAKOTA

ROOM 211

FEDERAL BUILDING AND U.S. POST OFFICE

225 SOUTH PIERRE STREET

PIERRE, SOUTH DAKOTA 57501-2483

IRVIN N. HOYT
BANKRUPTCY JUDGE

TELEPHONE (605) 224-0560
FAX (605) 224-9020

March 5, 1999

James P. Hurley, Esq.
Counsel for Plaintiff
Post Office Box 2670
Rapid City, South Dakota 57709

Gustav K. Johnson, Esq.
Counsel for Defendant-Debtor
P.O. Box 522
Rapid City, South Dakota 57709

Subject: *West River Surgery, P.C. v. William J. Burney*
(*In re Burney*), Adversary Proceeding No. 98-5012;
Chapter 7; Bankr. No. 98-50158

Dear Counsel:

The matter before the Court is Defendant's First Motion for Award of Attorney's Fees and Related Costs, an affidavit of Debtor's counsel, and supporting brief filed December 17, 1999 and Plaintiff's response filed March 3, 1999. This is core proceeding under 28 U.S.C. § 157(b)(2). This Memorandum of Decision and accompanying Order shall constitute the Court's findings and conclusions under F.R.Bankr.P. 7052. As set forth below, the Court concludes that requested fees and costs should be awarded to Defendant-Debtor under 11 U.S.C. § 523(d).

SUMMARY OF FACTS. Plaintiff commenced an adversary proceeding under 11 U.S.C. § 523(a)(2)(A) seeking a determination that certain medical bills incurred by Debtor should be declared non dischargeable. After Debtor answered, the parties stipulated to a dismissal of the action. Defendant-Debtor reserved the right to request attorneys' fees under § 523(d). Following submission of Defendant-Debtor's request for fees and Plaintiff's response, a telephonic hearing was held March 4, 1999 so that the parties could supplement the record regarding their stipulation for dismissal. Plaintiff stated that it had agreed to the dismissal of its complaint because it could not prevail on one element under § 523(a)(2)(A).

36

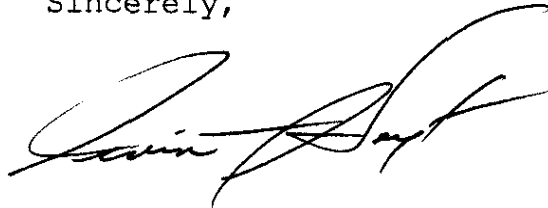
Re: West River Surgery v. Burney
March 5, 1999
Page 2

APPLICABLE LAW. Section 523(d) provides that a defendant-debtor may request reasonable attorneys' fees and costs when a creditor is unsuccessful in a non dischargeability action regarding a consumer debt under § 523(a)(2), the creditor's position was "not substantially justified," and no special circumstances exist that would make an award of fees and costs unjust. The debtor has the burden to establish the first three elements of § 523(d): (1) the creditor requested a determination of the dischargeability of a debt; (2) the debt was a consumer debt; and (3) the debt was discharged. *F.C.C. National Bank v. Dobbins*, 151 B.R. 509, 511 (Bankr. W.D. Mo. 1992) (cites therein). The plaintiff-creditor must then go forward and show that the complaint was substantially justified. *Id.* In other words, the creditor must show that the complaint had a reasonable or good faith basis in fact and law. *Id.* at 512 (cites therein); *In re Grayson*, 199 B.R. 397, 400 (Bankr. W.D. Mo. 1996).

DISCUSSION. The record establishes that the first three elements of § 523(d) are present. However, Plaintiff cannot show that its complaint had a reasonable basis in fact. If that were true, Plaintiff would not have found, after it filed a complaint, that it could not prevail on one element of § 523(a)(2)(A). Therefore, attorneys' fees and costs are appropriate under § 523(d).

The fees and costs submitted by Attorney Johnson are reasonable. An appropriate order will be entered.

Sincerely,



Irvin N. Hoyt
Bankruptcy Judge

INH:sh

CC: adversary file (docket original; serve copies on counsel)

I hereby certify that a copy of this document
was mailed, hand delivered, or faxed this date
to the parties on the attached service list.

MAR 05 1999

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court, District of South Dakota
By 

NOTICE OF ENTRY
Under F.R.Bankr.P. 9022(a)
Entered

MAR 05 1999

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota

Case: 98-05012 Form id: 122 Ntc Date: 03/05/1999 Off: 3 Page : 1
Total notices mailed: 2

Aty Hurley, James P. PO Box 2670, Rapid City, SD 57709
Aty Johnson, Gustav K. PO Box 522, Rapid City, SD 57709