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TIMOTHY R. WALBRIDGE, CLERK
U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

IN RE:

ORBY LEE CHILDERS and
CYNTHIA JEAN CHILDERS,

Debtors.

Case No. 98-05244-M
Chapter 7

THE EXCHANGE NATIONAL BANK
OF JEFFERSON CITY, MISSOURI,

Plaintiff,

v.

CYNTHIA JEAN CHILDERS,

Defendant.

Adv. No. 99-0055-M

JOURNAL ENTRY OF JUDGMENT

THIS MATTER comes before the Court on the Motion for Default Judgment (the "Motion") filed herein by Plaintiff, The Exchange National Bank of Jefferson City, Missouri ("Exchange Bank"). The Court, having reviewed the pleadings on file herein, and having heard statements of counsel, makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. This Court has jurisdiction over the subject matter hereof and the parties hereto. Venue of this action properly lies in this District.
2. A Complaint was filed by Exchange Bank against Defendant Cynthia Jean Childers (the "Defendant"), on March 11, 1999.
3. On March 12, 1999, Exchange Bank served Defendant with Summons and a copy of

5

the Complaint, and on March 16, 1999, returned the Summons to the Court.

4. To date, the Defendant has not filed an answer or otherwise plead to the Complaint, and, therefore, pursuant to Fed. R. Bankr. P. 7055 and Fed. R. Civ. P. 55(a), the Defendant is in Default.

5. Each of the material allegations set forth in Exchange Bank's Complaint is deemed admitted by the Defendant.

6. Exchange Bank is entitled to judgment by default pursuant to Fed. R. Bankr. P. 7055 and Fed. R. Civ. P. 55(b)(1) against the Defendant.

CONCLUSIONS OF LAW

Exchange Bank is entitled to (a) judgment, pursuant to 11 U.S.C. § 523, determining the Defendant's indebtedness to it to be excepted from any discharge otherwise granted to Defendant in this bankruptcy case; and (b) judgment in its favor and against the Defendant in the amount of \$4,104.82, plus interest on such sum through April 30, 1999 in the amount of \$1,013.47, plus interest from and after May 1, 1999, at the rate of \$1.49 per day until such sums are fully paid.

Plaintiff has also requested an award of attorney's fees in the amount of \$1,500.00. Under § 523(d) of the Bankruptcy Code,¹ debtors may be entitled to recover attorneys' fees if they are successful in a dischargeability proceeding. However, nothing in "§ 523 . . . expressly state[s] that creditors successful in dischargeability proceedings are entitled to recover attorney's fees." *Transouth Financial Corp. of Florida v. Johnson*, 931 F.2d 1505, 1507 (11th Cir. 1991)(ultimately awarding attorney's fees under a contract theory). This Court does not believe that § 523(d)

¹Unless otherwise noted, all statutory references are to sections of the United States Bankruptcy Code, 11 U.S.C. § 101 *et. seq.* (West 1999).

provides an avenue for recovery of attorneys' fees by a creditor who successfully litigates a dischargeability action.

Two lines of cases have developed in considering if and when creditors are allowed to receive award of attorneys' fees in bankruptcy proceedings. One line of cases has held that attorneys' fees may be awarded to creditors if a contractual right to the same exists under state law. *In re Martin*, 761 F.2d 1163 (6th Cir. 1984); *Transouth Financial Corp. of Florida v. Johnson*, 931 F.2d 1505 (11th Cir. 1991). The other line of cases has held that a prevailing creditor is not entitled to attorneys' fees, even if successfully litigating a dischargeability proceeding. *In re McDonald*, 177 B.R. 212, 218 (Bankr. E.D. Pa. 1994) (citing *In re Fobian*, 951 F.2d 1149 (9th Cir. 1991) *cert. denied. sub. nom. Western Farm Credit Bank v. Fobian*, 505 U.S. 1220, 112 S.Ct. 3031, 120 L.Ed.2d 902 (1992)); *see also Alyeska Pipeline Service Co. v. Wilderness Soc'y*, 421 U.S. 240, 259 n. 31, 95 S.Ct. 1612, 1622 n. 31, 44 L.Ed.2d 141 (1975) (award of attorney's fees in federal litigation reversed as contrary to the "American Rule").

The Court finds the second line of cases more persuasive. "Attorney's fees may be recovered in actions based on federal bankruptcy statutes only when the statute so provides, regardless of whether there is a contract providing for attorney's fees." *Id.* Section 523(d) only provides for attorneys' fees for a debtor who successfully litigates a dischargeability proceeding. There is no provision for attorneys' fees for a creditor who successfully litigates a nondischargeability proceeding. The legislative history regarding § 523 Congress' intent in this area:

In order to balance the scales more fairly in this area, H.R. 8200 adopts a compromise. . . . The Creditor is protected from dishonest debtors by the continuance of the exception to discharge. The bill does not award the creditor attorney's fees if the creditor prevails. Though such a balance might seem fair at first blush, such a provision would restore the balance back in favor of the creditor

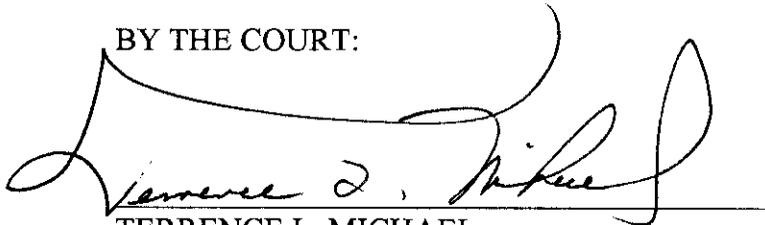
by inducing debtors to settle no matter what the merits of their cases. In addition, the creditor is generally better able to bear the costs of the litigation than a bankrupt debtor, and it is likely that a creditor's attorneys fees would be substantially higher than a debtor's, putting an additional disincentive on the debtor to litigate.

H.R. Rep. No. 595, 95th Cong., 1st Sess. 131 (1977), reprinted in 1978 Cong. U.S.C.C.A.N. 5963, 6092; *see also In re McDonald*, 177 B.R. at 219. Therefore, the Court finds that Exchange Bank, as the creditor in this dischargeability proceeding, is not entitled to attorneys' fees.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiff, The Exchange Bank of Jefferson City, Missouri is granted judgment against Defendant Cynthia Jean Childers, in the amount of \$5,118.29, together with post-judgment interest in the amount of \$1.49 per day until such sums are fully paid.

Dated this 7th day of May, 1999.

BY THE COURT:

A handwritten signature in black ink, appearing to read "Terrence L. Michael", written over a horizontal line.

TERRENCE L. MICHAEL
UNITED STATES BANKRUPTCY JUDGE

cc: Thomas A. Creekmore
Cynthia Jean Childers

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