

JUL 22 2008

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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No.	AZ-07-1166-MoDC
)		
LESLIE S. LEVITT and EDITH T. LEVITT,)	Bk. No.	03-15992
)		
Debtors.)	Adv. No.	03-01084
)		
LESLIE S. LEVITT; EDITH T. LEVITT,)		
)		
Appellants,)		
)		
v.)	MEMORANDUM ¹	
)		
C.T. COOK; DAVCO ENTERPRISES, INC.,)		
)		
Appellees.)		

Argued by Video Conference
and Submitted on June 20, 2008

Filed - July 22, 2008

Appeal from the United States Bankruptcy Court
for the District of Arizona

Honorable Redfield T. Baum, Sr., Chief Bankruptcy Judge, Presiding

Before: MONTALI, DUNN and CARROLL,² Bankruptcy Judges.

¹This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

²Hon. Peter H. Carroll, U.S. Bankruptcy Judge for the Central District of California, sitting by designation.

1 After a trial, the bankruptcy court entered a judgment
2 determining that debts arising from the presentation of checks
3 not supported by sufficient funds and from misrepresentations as
4 to the ownership of collateral were nondischargeable under 11
5 U.S.C. § 523(a)(2)(A).³ In addition, the court awarded the
6 creditors their attorneys' fees relating to the prosecution of
7 the nondischargeability action. We AFFIRM the
8 nondischargeability judgment but REVERSE and REMAND the award of
9 attorneys' fees.

10 I. FACTS

11 On September 9, 2003, Leslie S. Levitt ("Levitt") and Edith
12 T. Levitt⁴ (collectively, "Debtors") filed their voluntary
13 chapter 7 bankruptcy petition. Debtors conducted business under
14 the name of Genesis Motors of North America ("Genesis").

15 Doing business as Genesis, Levitt would purchase vehicles
16 (usually at auction) for resale. To obtain financing, Levitt
17 entered into a floor plan financing arrangement with appellees
18 C.T. Cook ("Cook") and Davco Enterprises, Inc. d/b/a Davco Motors
19

20 ³Unless otherwise indicated, all chapter, section and rule
21 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and
22 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037, as
23 enacted and promulgated prior to the effective date of The
24 Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,
25 Pub. L. 109-8, 119 Stat. 23.

26 ⁴The appealed judgment was entered against the debtor wife,
27 although neither the evidence nor the allegations indicate that
28 she participated in the events giving rise to the judgment. At
oral argument before this panel, counsel for the judgment
creditors/appellees acknowledged that only the separate property
of the debtor husband and the community property of both debtors
would be used to satisfy the judgment; the appellees will not
attempt to seize or recover the debtor wife's separate property.

1 and Davco Leasing ("Davco") (collectively, "Creditor"). To
2 secure repayment of advances made by Creditor, Levitt/Genesis
3 would deliver to Creditor "open title" to the vehicle. Before or
4 upon selling the vehicle to a third party, Levitt/Genesis would
5 repay to Creditor the amounts advanced plus interest plus
6 inspection fees. These payments were generally made by check.
7 Upon receiving the payment, Creditor would return the open title
8 of the vehicle to Levitt/Genesis.⁵

9 In December 2001, Genesis/Levitt tendered two checks to
10 Creditor which were returned for insufficient funds (the "NSF
11 Checks"): Check No. 7512 (dated December 19, 2001, in the amount
12 of \$12,147.00) and Check No. 7568 (dated December 14, 2001, in
13 the amount of \$22,429.00).⁶ Upon receiving the NSF Checks,
14

15 ⁵"Floor plan financing" is a common arrangement for car
16 dealers, but it is usually evidenced by a note and a security
17 agreement. See Mannheim Auto. Fin. Servs., Inc. v. Park (In re
18 Park), 314 B.R. 378, 381-82 (Bankr. N.D. Ill. 2004) (describing
19 floor plan financing); Keys Jeep Eagle, Inc. v. Chrysler Corp.,
20 897 F. Supp. 1437, 1440-41 (S.D. Fla. 1995) (same). Here,
21 however, the record does not contain a security agreement
22 executed by the parties. Instead, the only writing memorializing
23 the terms of the arrangement between Genesis/Levitt and Creditor
24 is a promissory note dated October 4, 2001. Above the note is a
25 typewritten notation stating that Levitt and Genesis "will put
26 cars and trucks on floor and pay cars off during term of this
27 note[.] All cars paid off will be credited from note[.] Cars put
28 on floor shall be for purchase amount[.] No repairs or
transportation shall be advanced[.]" The side of the note states
that "[t]his note is secured by autos and titles."

25 ⁶Levitt contended that he previously had provided two signed
26 blank checks to Creditor and that Creditor completed and
27 deposited the checks without notifying Debtors. At trial,
28 however, Levitt acknowledged that the notations on the NSF Checks
regarding vehicle titles being released were made by him.
Creditor testified that he did not receive blank checks from
Levitt/Genesis.

1 Creditor released the titles to certain vehicles.⁷ Levitt
2 contended that Creditor presented the NSF Checks prematurely and
3 should have waited for Levitt to tell him when funds would be in
4 the account to cover those checks. He also asserted, but did not
5 present corroborating evidence, that he delivered other vehicles
6 to Creditor to satisfy the debt arising from the NSF checks.⁸

7 In April 2002, Creditor loaned Debtors \$14,500.00 and
8 received title to a 2001 Chevrolet Venture Van, Serial No.
9 1GNDX03EX10149456 (the "Van"). Creditor discovered thereafter
10 that the vehicle identification number provided by Levitt/Genesis
11 did not match the van actually received by Levitt/Genesis (and
12 subsequently given or loaned to a third party). In other words,
13 the title was worthless. Levitt testified that he had the
14 responsibility to verify the vehicle identification number and
15 that he did not perform due diligence. He nonetheless contended
16 that he did not intend to defraud Creditor.

17 In December 2003, Creditor filed a complaint to determine
18 dischargeability of debt under section 523(a)(2)(A), requesting
19 the bankruptcy court to except from discharge the debt arising
20 from the NSF Checks and the debt for which the incorrect
21

22 ⁷The record does not reflect when Creditor presented the NSF
23 Checks to the bank for payment. The record does show that as of
24 the date of the first check (December 14, 2001) through the end
25 of December 2001, the balance of the account was never sufficient
to pay that check.

26 ⁸When Creditor sued Levitt/Genesis in state court, Levitt
27 contended that he had satisfied the obligations arising from the
NSF Checks with a certified check. He later recanted that
28 contention, and asserted that he satisfied the debt by turning
over automobiles to Creditor.

1 collateral (the Van title) was pledged. Creditor also alleged
2 that Debtors had pledged but not delivered titles to six other
3 vehicles, and sought a judgment that the underlying debts were
4 thus nondischargeable.⁹

5 Following trial, the bankruptcy court entered its minute
6 entry/order setting forth its findings and conclusions. The
7 court held nondischargeable the debts arising from the NSF Checks
8 and from the delivery of bad title to the Van, and instructed
9 Creditor to submit an appropriate judgment.

10 Debtors filed a motion to amend findings or to make
11 additional findings. At a hearing on this motion, the court
12 explained further its holding that the Van title debt was
13 nondischargeable: Levitt had misrepresented that he had title to
14 the collateral when he should have known, as a car dealer and by
15 simply checking the windshield of the Van, that the Van's vehicle
16 identification number was incorrect and title was thus invalid.

17 On April 18, 2007, the court entered a minute order ("April
18 Ruling") indicating that it would conditionally deny the
19 motion but grant Debtors additional time to produce titles or
20 other credible evidence that they had paid the debt underlying
21 the NSF Checks. "Speaking bluntly and as previously commented
22 upon by the court, [Debtors'] oral statements alone will not be
23 credited as proof of payment. If such evidence is not presented
24 to the court by May 19, 2007, the motion is denied."

25
26 ⁹At the conclusion of a two-day trial, the court held that
27 Creditor had not met his burden of proof as to the claims of non-
28 delivery of titles to the six automobiles. It took under
advisement the Van claim and the NSF Checks claim.

1 Debtors filed a notice of appeal within ten days of the
2 April 18 Ruling, even though no judgment had been entered and
3 even though the deadline for presenting additional evidence (May
4 19, 2007) had not yet expired. After filing that notice of
5 appeal, Debtors filed two sets of supplemental exhibits in
6 response to the April 18 Ruling. The court entered a minute
7 order on November 29, 2007, holding that Debtors had not
8 established that they had transferred vehicles to Creditor to
9 satisfy the NSF Checks debt.

10 On December 17, 2007, Creditor filed an application and
11 affidavit requesting attorneys' fees and costs; Debtors opposed
12 the application. On March 18, 2008, the bankruptcy court entered
13 a final judgment excepting the principal sum of \$46,076.00 from
14 discharge and awarding \$18,000 in attorneys' fees and \$1,333.20
15 in costs against Debtors. Debtors' premature notice of appeal is
16 deemed timely pursuant to Rule 8002(a).

17 **II. ISSUES**

18 1. Did the bankruptcy court err in holding that the debt
19 arising from the tender of the NSF Checks was nondischargeable
20 under section 523(a)(2)(A)?

21 2. Did the bankruptcy court err in holding that the debt
22 arising from the failure to deliver good title to the Van was
23 nondischargeable under section 523(a)(2)(A)?

24 3. Did the bankruptcy court err in awarding attorneys'
25 fees to Creditor?

26 **III. STANDARD OF REVIEW**

27 We review a bankruptcy court's findings of fact, whether
28 based on oral or documentary evidence, for clear error, and give

1 due regard to the opportunity of the bankruptcy court to judge
2 the credibility of the witnesses. Fed. R. Bankr. P. 8013; Wells
3 Fargo Bank v. Beltran (In re Beltran), 182 B.R. 820, 823 (9th
4 Cir. BAP 1995). A bankruptcy court's finding as to a debtor's
5 intent is a question of fact which is similarly subject to the
6 clearly erroneous standard. Id.

7 A factual finding "is clearly erroneous if the appellate
8 court, after reviewing the record, has a firm and definite
9 conviction that a mistake has been committed." Wall St. Plaza,
10 LLC v. JSJF Corp. (In re JSJF Corp.), 344 B.R. 94, 99 (9th Cir.
11 BAP 2006), aff'd, 2008 WL 2019590 (9th Cir. 2008); Anderson v.
12 Bessemer City, 470 U.S. 564, 573 (1985). We do not substitute
13 our judgment for that of the bankruptcy court in reviewing
14 findings of fact, but will inquire only whether the Debtors have
15 rebutted a "presumption of correctness by demonstrating that
16 contrary findings are warranted when the evidence is taken as a
17 whole and considered in a light most favorable to the
18 appellee.[]" Smith v. James Irvine Found., 402 F.2d 772, 774
19 (9th Cir. 1968).

20 If two views of the evidence are possible, the trial judge's
21 choice between them cannot be clearly erroneous. Anderson, 470
22 U.S. at 573-575; Hansen v. Moore (In re Hansen), 368 B.R. 868,
23 874-75 (9th Cir. BAP 2007). We give findings of fact based on
24 credibility particular deference. Hansen, 368 B.R. at 874-75.

25 We review a bankruptcy court's conclusions of law de novo.
26 Fireman's Fund Ins. Co. v. Grover (In re Woodson Co.), 813 F.2d
27 266, 270 (9th Cir. 1987).

1 We review a bankruptcy court's determination on attorneys'
2 fees for abuse of discretion or erroneous application of the law.
3 Bertola v. N. Wisc. Produce Co., Inc. (In re Bertola), 317 B.R.
4 95, 99 (9th Cir. BAP 2004). To the extent the issue is whether
5 Arizona law allows the award of attorneys' fees, we review de
6 novo. Bertola, 317 B.R. at 99.

7 IV. JURISDICTION

8 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
9 §§ 1334 and 157(b) (2) (I) and we have jurisdiction under 28 U.S.C.
10 § 158.

11 V. DISCUSSION

12 A. Elements of a Section 523(a) (2) (A) Claim

13 Section 523(a) (2) (A) excepts from discharge any debt for
14 money, property, services, or an extension, renewal, or
15 refinancing of credit, to the extent obtained by false pretenses,
16 a false representation, or actual fraud. 11 U.S.C.

17 § 523(a) (2) (A). In order to establish that a debt is
18 nondischargeable under section 523(a) (2) (A), a creditor must
19 establish five elements by a preponderance of the evidence:

20 (1) misrepresentation, fraudulent omission or deceptive
21 conduct by the debtor; (2) knowledge of the falsity or
22 deceptiveness of his statement or conduct; (3) an
23 intent to deceive; (4) justifiable reliance by the
24 creditor on the debtor's statement or conduct; and (5)
25 damage to the creditor proximately caused by its
26 reliance on the debtor's statement or conduct.

24 Turtle Rock Meadows Homeowners Ass'n v. Slyman (In re Slyman),
25 234 F.3d 1081, 1085 (9th Cir. 2000); Ghomeshi v. Sabban (In re
26 Sabban), 384 B.R. 1, 5 (9th Cir. BAP 2008).

27 Because direct evidence of an intent to deceive is rarely
28 available, intent may be "inferred and established from the

1 surrounding circumstances." Alexander & Alexander of Wash., Inc.
2 v. Hultquist (In re Hultquist), 101 B.R. 180, 183 (9th Cir. BAP
3 1989).

4 The Ninth Circuit has held "reckless disregard for the truth
5 of a representation satisfies the element that the debtor has
6 made an intentionally false representation in obtaining credit."
7 Anastas v. Am. Sav. Bank, 94 F.3d 1280, 1286 (9th Cir. 1996),
8 quoted in Advanta Nat'l Bank v. Kong (In re Kong), 239 B.R. 815,
9 826-27 (9th Cir. BAP 1999); see also Household Credit Servs.,
10 Inc. v. Ettell (In re Ettell), 188 F.3d 1141, 1145 n.4 (9th Cir.
11 1999) ("reckless conduct could be sufficient to establish
12 fraudulent intent") (citing Anastas, 94 F.3d at 1286); Houtman v.
13 Mann (In re Houtman), 568 F.2d 651, 656 (9th Cir. 1978)¹⁰
14 ("`[R]eckless indifference to the actual facts, without examining
15 the available source of knowledge which lay at hand, and with no
16 reasonable ground to believe that it was in fact correct' [is]
17 sufficient to establish the knowledge element[.]"); Gertsch v.
18 Johnson & Johnson Fin. Corp. (In re Gertsch), 237 B.R. 160,
19 167-68 (9th Cir. BAP 1999) (recognizing that "intent to deceive
20 can be inferred from the totality of circumstances, including
21 reckless disregard for the truth").

22 Fraudulent misrepresentation is established where the
23 maker of a statement chooses to assert it as a fact
24 even though he is conscious that he has neither
25 knowledge nor belief in its existence and recognizes
26 that there is a chance, more or less great, that the
27 fact may not be as it is represented. This is often
28 expressed by saying that fraud is proved if it is shown

27 ¹⁰Houtman also held that collateral estoppel did not apply
28 in section 523 proceedings. The Supreme Court overruled that
particular holding in Grogan v. Garner, 498 U.S. 279, 284 (1991).

1 that a false representation has been made without
2 belief in its truth or recklessly, careless of whether
3 it is true or false.

3 Kong, 239 B.R. at 826-27 (internal quotations and citations
4 omitted) (emphasis added).

5 B. The NSF Checks

6 Debtors contend on appeal that the bankruptcy court erred in
7 finding two of the elements for recovery under section 523(a)(2)
8 existed here: (1) misrepresentation, fraudulent omission or
9 deceptive conduct by Debtors and (2) an intent to deceive by
10 Debtors. More specifically, Debtors argue that the court erred
11 in finding that they acted with fraudulent intent when they
12 tendered the NSF checks. They also argue that executing and
13 issuing a check is not a representation that the check is good.
14 We disagree.

15 While the tendering of a check on insufficient funds is not
16 conclusive evidence of fraud or an intent to defraud, the
17 tendering does constitute a representation that the bank will
18 honor the check upon presentment. Bear Stearns & Co. v.
19 Kurdooghlian (In re Kurdooghlian), 30 B.R. 500, 502 (9th Cir. BAP
20 1983) ("Tendering the checks was an implicit representation the
21 checks were good."). While other courts have criticized
22 Kurdooghlian as being inconsistent with the Supreme Court's
23 decision in Williams v. U.S., 458 U.S. 279, 284-85 (1982),¹¹

25 ¹¹In Williams, the Supreme Court had to decide whether the
26 issuance of insufficiently funded checks was proscribed by a
27 criminal statute penalizing false statements in connection with
28 farm loans. Holding that a check "is not a factual assertion at
all, and therefore cannot be characterized as 'true' or 'false,'" the court held that the criminal statute did not apply to bad
(continued...)

1 Kurdoghlian is still the law of this panel. Absent a change in
2 the law, we are bound by our precedent.¹² Gaughan v. The Edward

3 _____
4 ¹¹(...continued)
5 checks:

6 In any event, whatever the general understanding of a
7 check's function, "false statement" is not a term that,
8 in common usage, is often applied to characterize "bad
9 checks." And, when interpreting a criminal statute that
10 does not explicitly reach the conduct in question, we
11 are reluctant to base an expansive reading on
12 inferences drawn from subjective and variable
13 "understandings."

14 Williams, 458 U.S. at 286. While Williams was decided prior to
15 Kurdoghlian, the Kurdoghlian panel did not cite or discuss it.
16 Perhaps the Kurdoghlian panel felt Williams was distinguishable
17 as it involved a criminal statute that proscribed "false
18 statements," unlike section 523(a)(2)(A), which applies to
19 conduct ("false pretenses") as well as to statements. In any
20 event, the Ninth Circuit has held that conduct may give rise to
21 an implied representation for the purposes of section
22 523(a)(2)(A). Am. Express Travel Related Servs. Co. Inc. v.
23 Hashemi (In re Hashemi), 104 F.3d 1122, 1126 (9th Cir. 1997)
24 ("Each time a 'card holder uses his credit card, he makes a
25 representation that he intends to repay. . . . When the card
26 holder uses the card without an intent to repay, he has made a
27 fraudulent representation to the card issuer.'" (quoting Anastas,
28 94 F.3d at 1285).

29 ¹²In Mandalay Resort Group v. Miller (In re Miller), 310
30 B.R. 185, 195 (Bankr. C.D. Cal. 2004), a bankruptcy court held
31 that Kurdoghlian "is no longer good law" because the Uniform
32 Commercial Code ("U.C.C.") was modified in 1990 with respect to
33 obligations under dishonored checks:

34 Prior to 1990, UCC § 3-413(2) provided: "[t]he drawer
35 engages that upon dishonor of the draft . . . he will
36 pay the amount of the draft to the holder" (emphasis
37 added). The "engages" language could be interpreted to
38 imply a representation that would be false when made if
the drawer delivered a bad check that the drawer did
not intend to pay. . . . However, this "engages"
language was deleted in the 1990 revisions to Article
3. The UCC now provides only that, if an unaccepted

(continued...)

1 Dittlog Revocable Trust (In re Costas), 346 B.R. 198, 201 (9th
2 Cir. BAP 2006); Ball v. Payco-General Am. Credits, Inc. (In re
3 Ball), 185 B.R. 595, 597 (9th Cir. BAP 1995).

4 Having determined that the tendering of the NSF Checks by
5 Levitt/Genesis constituted a representation that the bank would
6 honor them upon presentation, we must decide whether the
7 bankruptcy court erred in holding that Levitt/Genesis knew that
8 the representation was false and acted with intent to deceive.
9 As previously noted, “reckless disregard for the truth of a
10 representation satisfies the element that the debtor has made an
11 intentionally false representation in obtaining credit.” Kong,
12 239 B.R. at 826 (quoting Anastas, 94 F.3d at 1286). Here,
13 Debtors obtained the titles from Creditor by tendering the
14 checks. Levitt testified that he did not necessarily know how
15 much was in the account when he wrote checks on it. The account
16 did not have sufficient funds to cover the checks. Levitt’s

18 ¹²(...continued)

19 check is dishonored by the bank, the drawer is obliged
20 to pay it according to its terms at the time it was
21 issued. The obligation now is simply statutory and
involves no representation, promise or engagement at
all.

22 Miller, 310 B.R. at 195 (emphasis in original). We disagree.
23 The Kurdoghlian panel did not rely on the U.C.C. in holding that
24 the issuance of a check constituted an implied representation
25 that sufficient funds exist for its payment. The change in the
26 U.C.C.’s language is thus irrelevant. Moreover, as discussed in
27 the prior footnote, the Ninth Circuit has held that conduct (such
28 as using a credit card) can constitute an implied representation.
As the U.C.C. now provides, the issuer of a dishonored check must
pay the check according to its terms at the time it was issued.
Given this language, the issuance is a representation that funds
will be paid. Kurdoghlian has not been overruled.

1 contentions varied: he initially contended that he signed checks
2 in blank and that Creditor completed them and deposited them
3 without telling Levitt. He then admitted he wrote the notations
4 on the checks about the vehicle titles being released by
5 Creditor. He asserted in state court that he repaid the amount
6 of the NSF Checks by certified check, then recanted. He stated
7 that he turned over vehicles to satisfy the debt, but did not
8 provide sufficient proof. The court, as trier of fact,
9 determined that Levitt's testimony was not credible.

10 The court inferred an intent to deceive from the surrounding
11 circumstances. Levitt tendered the checks to obtain titles even
12 when he admittedly was not certain about the sufficiency of funds
13 in the account. Because no single objective factor is
14 dispositive, assessment of intent is left to the fact-finder.
15 The intent to defraud a creditor is thus a finding of fact, and
16 we see no clear error in the court's finding. Rubin v. West (In
17 re Rubin), 875 F.2d 755, 759 (9th Cir. 1989). We therefore
18 affirm.

19 C. The Van Title

20 On appeal, Debtors contend that the bankruptcy court erred
21 in finding that they had acted with intent to deceive with
22 respect to the Van title, and therefore urge us to reverse.
23 Levitt testified that someone else had deceived him about the
24 validity of the title and that he did not know that the title was
25 invalid when he gave it to Creditor; he argues that therefore he
26 did not act with intent to deceive.

27 The bankruptcy court disagreed, noting that although Debtor
28 admittedly had the responsibility to check the vehicle

1 identification number and in fact examined the Van, he did not
2 compare the vehicle's number to that on the title. Rather, he
3 presented the title as good in order to obtain an advance of
4 \$14,500.00, even though he should have known and could have
5 simply ascertained that the title was not good. He chose to
6 present the title as valid without taking even the minimum steps
7 to ascertain whether it was valid or not. The court believed
8 Levitt's cavalier disregard to the accuracy of his
9 representations constituted intent to defraud.

10 We find no clear error in the court's holding. The evidence
11 supports a finding that Levitt acted with reckless disregard as
12 to the truth or falsity of his representation that title to the
13 Van was good. Under Kong, this reckless indifference to the
14 actual facts was sufficient to establish knowledge and intent for
15 the purposes of section 523(a)(2)(A). Kong, 239 B.R. at 826-27.
16 We therefore affirm.

17 D. Attorneys' Fees

18 Citing Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec.,
19 __ U.S. __, 127 S.Ct. 1199 (2007), Creditor sought and recovered
20 attorneys' fees incurred in prosecuting the section 523 action.
21 While we agree that Travelers and our decision in Centre Ins. Co.
22 v. SNTL Corp. (In re SNTL Corp.), 380 B.R. 204, 223 (9th Cir. BAP
23 2007), support the proposition that an unsecured creditor may
24 assert a postpetition claim against the estate if governing
25 contracts and state law permit such fees, these cases apply to
26 claims against the estate and not to nondischargeable claims
27 against a debtor. Instead, Cohen v. de la Cruz, 523 U.S. 213
28 (1998), governs.

1 In Cohen, the Supreme Court held that the discharge
2 exception set forth in section 523(a)(2)(A) applies to all
3 liability arising on account of the fraudulent conduct, including
4 attorneys' fees and costs. Cohen, 523 U.S. at 223. That said,
5 to recover attorney fees under Cohen, the creditor must be able
6 to recover the fees outside of the bankruptcy court under state
7 or federal law. Bertola, 317 B.R. at 99-100. Here, Creditor
8 relies on two Arizona statutes: A.R.S. § 12-341.01 (allowing
9 prevailing party to recover reasonable attorneys' fees in a
10 "contested action arising out of a contract") and A.R.S. § 12-671
11 (allowing a creditor to receive reasonable attorneys' fees "on
12 the basis of time and effort expended" to recover money from a
13 debtor who, with intent to defraud, tenders a check drawn on
14 insufficient funds).

15 Creditor has not sufficiently demonstrated that the section
16 523(a)(2)(A) claim "arises out of a contract" for the purposes of
17 A.R.S. § 12-341.01. As we noted in Bertola, the Arizona statute
18 requires more than just the existence of a contract. Bertola,
19 317 B.R. at 100, citing Marcus v. Fox, 150 Ariz. 333, 335, 723
20 P.2d 682, 684 (1986) ("attorney's fees are not appropriate based
21 on the mere existence of a contract somewhere in the
22 [litigation]"). "To the contrary, the contract must be a
23 substantive predicate to an action." Bertola, 317 B.R. at 100-
24 101, citing Sparks v. Republic Nat'l Life Ins., 132 Ariz. 529,
25 543, 647 P.2d 1127, 1141 (1982). If the contract does not
26 provide the underlying basis for the action, recovery of damages
27 under A.R.S. § 12-341.01(A) is improper. Bertola, 317 B.R. at
28 100-101.

1 In Sparks, the Arizona Supreme Court held that a
2 misrepresentation cause of action did not arise out of the
3 contract, as it could have been brought absent a breach of a
4 contract. Sparks, 647 P.2d at 1142. Here, as in Bertola, the
5 nondischargeability claims are predicated on fraud and
6 misrepresentation. They are not dependent on the existence of a
7 contract and, as such, do not fall within the scope of A.R.S.
8 § 12-341.01. As in Bertola, Creditor's claim for attorneys' fees
9 cannot be based on that statute.

10 In contrast, A.R.S. § 12-671 does allow Creditor to recover
11 reasonable attorneys fees "on the basis of time and effort
12 expended" in pursuing relief against a debtor who has tendered,
13 with intent to defraud, a check drawn on an account with
14 insufficient funds. Creditor, however, has not demonstrated what
15 portion of the attorneys' fees is attributable to collection of
16 the amounts owed because of the NSF checks. Absent a reasonable
17 apportionment of the fees, Creditor cannot recover the fees. We
18 therefore reverse and remand for such a determination.

19 VI. CONCLUSION

20 For the foregoing reasons, we AFFIRM the bankruptcy court's
21 determination that the NSF Check and Van title debts were
22 nondischargeable, but we REVERSE and REMAND the award of
23 attorneys' fees.

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