NOT FOR PUBLICATION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.	**M E M O R A N D U M**[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

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

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[1]This 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.

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

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

I. FACTS

On September 9, 2003, Leslie S. Levitt ("Levitt") and Edith T. Levitt[4] (collectively, "Debtors") filed their voluntary chapter 7 bankruptcy petition. Debtors conducted business under the name of Genesis Motors of North America ("Genesis").

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

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

[4]The appealed judgment was entered against the debtor wife, although neither the evidence nor the allegations indicate that 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.

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

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

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[5]"Floor plan financing" is a common arrangement for car dealers, but it is usually evidenced by a note and a security agreement. See Mannheim Auto. Fin. Servs., Inc. v. Park (In re Park), 314 B.R. 378, 381-82 (Bankr. N.D. Ill. 2004) (describing floor plan financing); Keys Jeep Eagle, Inc. v. Chrysler Corp., 897 F. Supp. 1437, 1440-41 (S.D. Fla. 1995) (same). Here, however, the record does not contain a security agreement executed by the parties. Instead, the only writing memorializing the terms of the arrangement between Genesis/Levitt and Creditor is a promissory note dated October 4, 2001. Above the note is a typewritten notation stating that Levitt and Genesis "will put cars and trucks on floor and pay cars off during term of this note[.] All cars paid off will be credited from note[.] Cars put 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."

[6]Levitt contended that he previously had provided two signed blank checks to Creditor and that Creditor completed and deposited the checks without notifying Debtors. At trial, 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.

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

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

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

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

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

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

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

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

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

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

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

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

II. ISSUES

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

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

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

III. STANDARD OF REVIEW

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

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

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

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

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

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

IV. JURISDICTION

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

V. DISCUSSION

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

Section 523(a)(2)(A) excepts from discharge any debt for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by false pretenses, a false representation, or actual fraud. 11 U.S.C. § 523(a)(2)(A). In order to establish that a debt is nondischargeable under section 523(a)(2)(A), a creditor must establish five elements by a preponderance of the evidence:

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

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

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

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

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

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

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

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

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

B. The NSF Checks

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

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

[11]In Williams, the Supreme Court had to decide whether the issuance of insufficiently funded checks was proscribed by a criminal statute penalizing false statements in connection with 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

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

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[11](...continued)
checks:

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

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

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

> Prior to 1990, UCC § 3-413(2) provided: "[t]he drawer engages that upon dishonor of the draft . . . he will pay the amount of the draft to the holder" (emphasis added). The "engages" language could be interpreted to 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

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

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

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[12](...continued)
check is dishonored by the bank, the drawer is obliged to pay it according to its terms at the time it was issued. The obligation now is simply statutory and involves no representation, promise or engagement at all.

Miller, 310 B.R. at 195 (emphasis in original). We disagree. The Kurdoghlian panel did not rely on the U.C.C. in holding that the issuance of a check constituted an implied representation that sufficient funds exist for its payment. The change in the U.C.C.'s language is thus irrelevant. Moreover, as discussed in the prior footnote, the Ninth Circuit has held that conduct (such 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.

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

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

C. The Van Title

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

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

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

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

D. Attorneys' Fees

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

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

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

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

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

VI. CONCLUSION

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