

FEB 18 2014

ORDERED PUBLISHED

SUSAN M. SPRAUL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

6	In re:)	BAP No.	NV-13-1034-TaJuKi
7	CHARTRI DAECHARKHOM,)	Bk. No.	2:11-bk-13396-LED
8	Debtor.)	Adv. No.	2:11-ap-01152-LED
9	_____)		
10	CHARTRI DAECHARKHOM,)		
11	Appellant,)		
12	v.)	O P I N I O N	
13	WAUGH REAL ESTATE HOLDINGS,)		
14	LLC,)		
15	Appellee.)		
16	_____)		

Argued and Submitted on January 24, 2014
at Las Vegas, Nevada

Filed - February 18, 2014

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

Honorable Thad J. Collins,* Bankruptcy Judge, Presiding

Appearances: Christopher Burke argued for appellant Chartri
Daecharkhom; Kathryn Holbert of the Law Office of
Brian D. Shapiro, LLC argued for appellee Waugh
Real Estate Holdings, LLC.

Before: TAYLOR, JURY, and KIRSCHER, Bankruptcy Judges.

* United States Bankruptcy Judge for the Northern District
of Iowa, sitting by designation.

1 TAYLOR, Bankruptcy Judge:

2
3 Chartri Daecharkhom (the "Debtor") appeals from the
4 bankruptcy court's order awarding less than the full amount of
5 his requested attorney's fees and costs under § 523(d).¹ The
6 bankruptcy court determined that creditor Waugh Real Estate
7 Holdings, LLC ("Waugh") was not substantially justified in
8 pursuing a § 523(a)(2) nondischargeability action on a consumer
9 debt and that the requested fees and costs were reasonable. It
10 then awarded reduced fees and costs based on a determination
11 that special circumstances justified reduction.

12 We hold that a special circumstances determination within
13 the meaning of § 523(d) requires a complete disallowance of fees
14 and costs. We also conclude on this record that special
15 circumstances justifying fee disallowance did not exist. Thus,
16 we REVERSE and REMAND.

17 **FACTS**²

18 Waugh filed an adversary complaint against the Debtor and
19 sought a nondischargeability determination under § 523(a)(2).
20 The allegedly nondischargeable debt arose in the context of a
21 consumer mortgage loan. The bankruptcy court entered a judgment
22 after trial in favor of the Debtor. Afterward, the Debtor moved
23

24 ¹ Unless otherwise indicated, all chapter and section
25 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.

26 ² Many of the relevant background facts in this case are
27 set forth in the bankruptcy court's opinion granting judgment
28 for the Debtor. See Waugh Real Estate Holdings, LLC v. Daecharkhom (In re Daecharkhom), 481 B.R. 641 (Bankr. D. Nev. 2012).

1 for an award of fees and costs under § 523(d), contending that
2 Waugh's nondischargeability action was not substantially
3 justified within the meaning of the same statutory provision; in
4 particular, he sought \$8,441.50 in fees and \$14.80 in costs.

5 The bankruptcy court heard the matter and orally granted
6 the Debtor's motion. There was considerable argument about
7 substantial justification, but the bankruptcy court focused,
8 among other things, on Waugh's failure to advance any evidence
9 at trial of the original lender's reliance on the Debtor's
10 allegedly fraudulent statements. It ultimately found that Waugh
11 proceeded without substantial justification, so it then examined
12 the fee request. The bankruptcy court expressed discomfort with
13 a full fee award, but concluded, after review, that the
14 requested fees and costs were reasonable. Notwithstanding these
15 conclusions, the bankruptcy court then awarded reduced fees of
16 \$4,500. In doing so, the bankruptcy court announced that it
17 "pick[ed] the number out of the air a little bit" and that its
18 decision was informed by the "special circumstances" exception
19 of § 523(d). Hr'g Tr. (Dec. 11, 2012) at 20:24-25; 21:1-3. It
20 then entered an order confirming its oral ruling. It never
21 identified the alleged special circumstances.

22 The Debtor appeals from the award order.

23 JURISDICTION

24 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
25 §§ 1334 and 157(b)(2)(A) and (I). We have jurisdiction under 28
26 U.S.C. § 158.

27 ISSUE

28 Did the bankruptcy court abuse its discretion in awarding

1 less than the full amount of the Debtor's requested fees and
2 costs under § 523(d)?

3 **STANDARD OF REVIEW**

4 We review an award of fees and costs under § 523(d) for an
5 abuse of discretion. Heritage Pac. Fin., LLC v. Montano (In re
6 Montano), 501 B.R. 96, 104 (9th Cir. BAP 2013). A review of an
7 abuse of discretion determination involves a two-pronged test;
8 first, we determine de novo whether the bankruptcy court
9 identified the correct legal rule for application. See United
10 States v. Hinkson, 585 F.3d 1247, 1261-62 (9th Cir. 2009) (en
11 banc). If not, then the bankruptcy court necessarily abused its
12 discretion. See id. at 1262. Otherwise, we next review whether
13 the bankruptcy court's application of the correct legal rule was
14 clearly erroneous; we will affirm unless its findings were
15 illogical, implausible, or without support in inferences that
16 may be drawn from the facts in the record. See id.

17 **DISCUSSION**

18 Section 523(d) allows a debtor who successfully defended a
19 § 523(a)(2) objection to discharge of a consumer claim an
20 opportunity for fee recovery where the creditor's pursuit of the
21 litigation was not substantially justified. Congress created
22 this potential for fee shifting in recognition of the fact that
23 consumer debtors often lack the financial wherewithal to defend
24 against even meritless claims and, as a result, may settle even
25 if the claim is frivolous or brought in bad faith.³

26
27 ³ See H.R. Rep. 95-595, at 365 (1977), reprinted in 1978
28 U.S.C.C.A.N. 5963, 6321 ("The purpose of the provision is to
(continued...)

1 Section 523(d), thus, provides:

2 If a creditor requests a determination of
3 dischargeability of a consumer debt under [§ 523(a)(2)],
4 and such debt is discharged, the court shall grant
5 judgment in favor of the debtor for the costs of, and a
6 reasonable attorney's fee for, the proceeding if the
7 court finds that the position of the creditor was not
8 substantially justified, except that the court shall not
9 award such costs and fees if special circumstances would
10 make the award unjust.

11 Under this provision, a debtor carries the initial burden to
12 establish three particular elements and, if met, the burden
13 shifts to the creditor to prove that its actions were
14 "substantially justified." In re Montano, 501 B.R. at 114
15 (describing the three elements).

16 On appeal, there is no dispute that the determination of
17 discharge involved a consumer debt or that the Debtor prevailed
18 and the debt was discharged. In awarding fees and costs under
19 § 523(d), the bankruptcy court also determined that Waugh was
20 not substantially justified in pursuing its nondischargeability
21 claim. Neither party challenges that aspect of the bankruptcy
22 court's ruling and, thus, we do not review the substantially

23 ³(...continued)

24 discourage creditors from initiating false financial statement
25 exception to discharge actions in the hopes of obtaining a
26 settlement from an honest debtor anxious to save attorney's
27 fees. Such practices impair the debtor's fresh start.");
28 S. Rep. No. 95-989, at 6 (1978), reprinted in 1978 U.S.C.C.A.N.
5787, 5792. ("[We have] received considerable testimony that
creditors have used these exceptions to threaten debtors into
settlements which the debtors agree to in order to save
attorneys' fees [We] oppose[] this practice and
[include] a provision that . . . where the court finds that the
objection to discharge . . . was frivolous, or not brought in
good faith, the court may award attorneys' fees and costs to the
debtor.").

1 justified determination on appeal.

2 Notwithstanding the determination that a
3 nondischargeability proceeding is not substantially justified, a
4 creditor can defend against fee recovery if it establishes
5 special circumstances that make the award unjust. Courts
6 interpret this exception "with reference to traditional
7 equitable principles." First Card v. Hunt (In re Hunt), 238
8 F.3d 1098, 1104 (9th Cir. 2001) (citing Matter of Hingson, 954
9 F.2d 428, 430 (7th Cir. 1992)). As this Panel previously noted,
10 "traditional equitable principles" frequently refers to
11 "circumstances suggesting unfair dealing or an abuse of the
12 legal process." See Kilbey v. Nawrocki (In re Nawrocki), No.
13 AZ-09-1221, 2010 WL 6259978, at *8 n.11 (9th Cir. BAP Mar. 3,
14 2010); see also Stine v. Flynn (In re Stine), 254 B.R. 244, 252
15 (9th Cir. BAP 2000), aff'd, 19 F. App'x 626 (9th Cir. 2001)
16 (neither inaccuracies in a debtor's bankruptcy petition and
17 schedules nor counsel's pro bono representation of debtor
18 constitute special circumstances); Commercial Fed. Bank v.
19 Pappan (In re Pappan), 334 B.R. 678, 684 (10th Cir. BAP 2005)
20 (special circumstances did not exist based on creditor's
21 employment of debtor or debtors' borrowing history with the
22 creditor). In this context, it would correctly include a
23 situation where a debtor's improper action or inaction made it
24 impossible or unduly difficult for a creditor to identify the
25 deficiencies that rendered its case meritless.

26 The bankruptcy court did not expressly identify the rule of
27 law it used in determining whether special circumstances
28 existed. It also failed to identify the exact special

1 circumstances on which it ultimately relied. Our review of the
2 record, however, establishes that the bankruptcy court did not
3 apply general equitable principles and did not find debtor
4 misconduct sufficient to justify complete fee disallowance.

5 The plain language of § 523(d) and case law construing the
6 statutory provision, albeit sparse, make clear that if the
7 bankruptcy court determines that special circumstances within
8 the meaning of § 523(d) exist, an award of fees and costs is
9 statutorily unavailable. See 11 U.S.C. § 523(d) (“[T]he court
10 **shall not** award such costs and fees if special circumstances
11 would make the award unjust.”) (emphasis added); Matter of
12 Hingson, 954 F.2d at 429-30 (special circumstances authorizes
13 the denial of fees and costs under § 523(d)); In re Hunt, 238
14 F.3d at 1104 (same). It, thus, follows that the inverse is also
15 true: if special circumstances do not justify total fee
16 disallowance, they do not justify any fee reduction. In sum,
17 and contrary to Waugh’s position, under § 523(d) a fee award and
18 the special circumstances exception are mutually exclusive
19 determinations.

20 The record shows that at the hearing, the bankruptcy court
21 focused on two alleged special circumstances: the Debtor’s
22 failure to schedule Waugh and issues related to the Debtor’s
23 deposition. Then, in rendering its oral ruling, the bankruptcy
24 court stated that special circumstances informed its decision to
25 award fees and costs in the amount of \$4,500. The bankruptcy
26 court failed to make any express findings, so we do not know
27 what special circumstances allegedly justified its ruling. We
28 agree, however, with the implicit determination that the two

1 factors argued as special circumstances by Waugh were not
2 sufficient to justify complete fee disallowance.

3 Waugh first complains that it was not scheduled as a
4 creditor. The Debtor explains and the record reflects, however,
5 that he properly scheduled the debt and identified Waugh's
6 predecessor-in-interest as a secured creditor. And Waugh had
7 notice of the bankruptcy case sufficient to file a timely
8 nondischargeability complaint. Even if we agree that Waugh lost
9 the opportunity to attend the § 341(a) meeting through no fault
10 of its own, the evidence is not clear that this was the Debtor's
11 fault or that examination of the Debtor at the § 341(a) meeting
12 (or otherwise) would have assisted Waugh in recognizing that it
13 had no evidence of reliance by the original lender as to the
14 Debtor's allegedly false statements.

15 Similarly, the fact that Debtor requested a translator
16 shortly before a scheduled deposition does not evidence the type
17 of special circumstances that justify complete fee disallowance
18 on this record. At trial, the bankruptcy court stopped the
19 proceeding to allow the Debtor to obtain the assistance of a
20 translator. The Debtor's language difficulties were not
21 feigned. And, in any event, Waugh unilaterally decided not to
22 conduct the deposition when it had to pay for a translator.
23 There is no evidence in the record that the Debtor refused to
24 attend or cooperate if translation allowing him to create an
25 accurate record was available. And, again, the Debtor's
26 testimony would not help Waugh in filling the gaping hole in its
27 case; the Debtor could not provide evidence of the internal
28 workings of the original lender and its reliance on his

