

for Shirley M. Shaw (Debtor). Those fees were sought pursuant to 11 U.S.C. § 523(d). The court ruled that the Debtor's sworn testimony at a meeting of creditors held pursuant to 11 U.S.C. § 341 represented special circumstances such as to relieve America First Credit Union (Credit Union) from the imposition of the punitive provisions of 11 U.S.C. § 523(d).

After trial, but prior to the issuance of the Order referenced above, the Debtor filed a motion for summary judgment seeking attorney's fees under the doctrine set forth in *In re Martin*, 761 F.2d 1163 (6th Cir. 1985). She asserted a statutory right under Utah law arising from the underlying contract between the parties. The Credit Union objected on procedural and substantive grounds. The Debtor then filed a request for ruling on an uncalendared motion as allowed by Local Rule 5(i).¹ The fees sought by affidavit total \$1,672.00. The court elects to deal with the substance of the motion.

ISSUE

The Debtor argues that she possesses a state statutory right premised in the underlying contract to attorney's fees outside the parameters of 11 U.S.C. § 523(d).² The Debtor relies on a rationale set forth in *Martin*. *Martin* held that a creditor is entitled to recover attorney's fees in bankruptcy claims if the creditor has a contractual right to them under state law. *Martin*, 761 F.2d at 1168. Relying on Utah Code Ann. § 78-27-56.5

¹ Rules of Practice of the United States Bankruptcy Court for the District of Utah.

² All future references are to Title 11 of the United States Code unless otherwise noted.

(1987), the Debtor contends that if a contractual right to fees exists in the Credit Union, a reciprocal right must also exist in the Debtor.

The Credit Union argues that the *Martin* rationale pertained to creditors and should not be extended to include debtors. The Credit Union contends that this is especially true if a creditor's action was found to be "substantially justified" under section 523(d). The Credit Union concludes that *Martin* is distinguishable from the case at hand because *Martin* involved a creditor who successfully obtained attorney's fees under the provisions of its contract, in spite of an argument that section 523 does not specifically allow such fees.

DISCUSSION

Can the Debtor have a contractual right to attorney's fees in bankruptcy independent of section 523(d) of the Code?

In determining whether the Debtor is entitled to attorney's fees under the contract, it is sufficient to determine whether the Credit Union has a contractual right to attorney's fees. If the Credit Union has such a right, the court must then determine whether, under state law, the Debtor has a reciprocal right to attorney's fees.

A contractual obligation to pay attorney's fees presents no obstacle to enforcement in bankruptcy³. Therefore, a state law contractual right to attorney's fees can be decided and enforced by a bankruptcy court. In the court's view, *Martin* indicates

³ *Security Mortgage Co. v. Powers*, 278 U.S. 149, 153-54 (1928).

that a contractual right to fees can be asserted by a creditor independent of any authority given by section 523. Under this view, the prevailing debtor's right to attorney's fees under section 523(d) is retained, while preserving the creditors' rights under the contract.⁴

Does the Debtor have a contractual right to attorney's fees under the contract?

Having determined that the Credit Union has a contractual right to attorney's fees outside of section 523, the court must ascertain whether the Debtor has a reciprocal right under the parties' contract.⁵ The relevant Utah Code section states,

A court may award costs and attorney's fees to either party that prevails in a civil action based upon any promissory note, written contract, or other writing executed after April 28, 1986, when the provisions of the promissory note, written contract, or other writing allow at least one party to recover attorney's fees.

Utah Code Ann. § 78-27-56.5. Section 78-27-56.5 permits the court to award attorney's fees to the prevailing party if a contract allows at least one party to recover attorney's fees. *Carr v. Enoch Smith Co.*, 781 P.2d 1292, 1296 n.5 (Utah App. 1989).

⁴ The court presumes that the Credit Union gave value, in the form of a contract term, in exchange for the attorney's fee provision. A creditor so situated is entitled to a greater portion of the debtor's estate because it gave more at the time of the loan. Therefore, creditors are entitled to recover attorney's fees in bankruptcy claims if they have a contractual right to the fees under state law. *United Merchants & Mfrs., Inc. v. Equitable Life Assurance Soc'y (In re United Merchants & Mfrs. Inc.)*, 674 F.2d 134, 137 (2nd Cir. 1982).

⁵ In litigation not based upon a contract or statutory right, this federal court would follow the "American rule" as set forth in *Summit Valley Indus. v. Carpenters*, 456 U.S. 717, 721 (1982). The claim in this case however, is based upon both a contract and a statutory right. It is well established in Utah that parties bear their attorney's fees in the absence of a statutory or contractual provision to the contrary. *Cobabe v. Crawford*, 780 P.2d 834, 836 (Utah App. 1989).

Generally, the purpose of a statute providing for an award of attorney's fees in an action on the contract is to transform the unilateral right to fees into a reciprocal right to attorney's fees. *See Carr*, 781 P.2d at 1296 n.5. Such a statute provides mutuality of remedy and prevents the oppressive use of one-sided attorney's fees provisions. *Reynolds Metals Co. v. Alperson*, 599 P.2d 83, 85 (1979). In order to address whether the Debtor has a reciprocal right to attorney's fees, the court must determine whether the Credit Union has a contractual right to attorney's fees since the applicability of section 78-27-56.5 is predicated on the existence of such a right.

A contractual right to attorney's fees must be interpreted under state law. *Security Mortgage Co. v. Powers*, 278 U.S. 149, 154 (1928). If attorney's fees are provided for under an enforceable contractual provision, the award must be consistent with the provision. *Dixie State Bank v. Bracken*, 764 P.2d 985, 988 (Utah 1988). "The cardinal rule in construing any contract must be to give effect to the intentions of the parties." *Atlas Corp. v. Clovis Nat'l Bank*, 737 P.2d 225, 229 (Utah 1987). These intentions are best determined by looking within the four corners of the written agreement if the agreement is complete and unambiguous. *Ron Case Roofing & Asphalt Paving, Inc. v. Blomquist*, 773 P.2d 1382, 1385 (Utah 1989).

The court's reading of the contract in the present case leads it to conclude that the provision for attorney's fees is plain and unambiguous and prompts no inquiry outside the four corners of the document. The provision for attorney's fees is found in

a section entitled "Taking Possession of the Collateral" contained in the Security Agreement. The pertinent provision in the contract states the following:

When you [the borrower] are in default, the credit union can take possession of the collateral. . . . The costs the credit union incurs in taking possession of and selling the collateral (including costs of holding and preparing the collateral for sale and reasonable attorney fees) will be added to the loan.

The default of the Debtor and an action against the collateral are conditions precedent to the Credit Union's right to attorney's fees. The Credit Union is only entitled to fees and costs incurred in taking possession of and selling the collateral. Fees incurred in the Credit Union's nondischargeability action against the Debtor cannot be considered a cost incurred in taking possession of or selling the collateral because this was an unsecured loan.⁶ Thus, upon these facts, the Credit Union would not be entitled to attorney's fees under the contract for having filed a nondischargeability action against the Debtor. Consequently, the Debtor has no reciprocal right to attorney's fees because such right is predicated upon the Credit Union's right to attorney's fees.

CONCLUSION

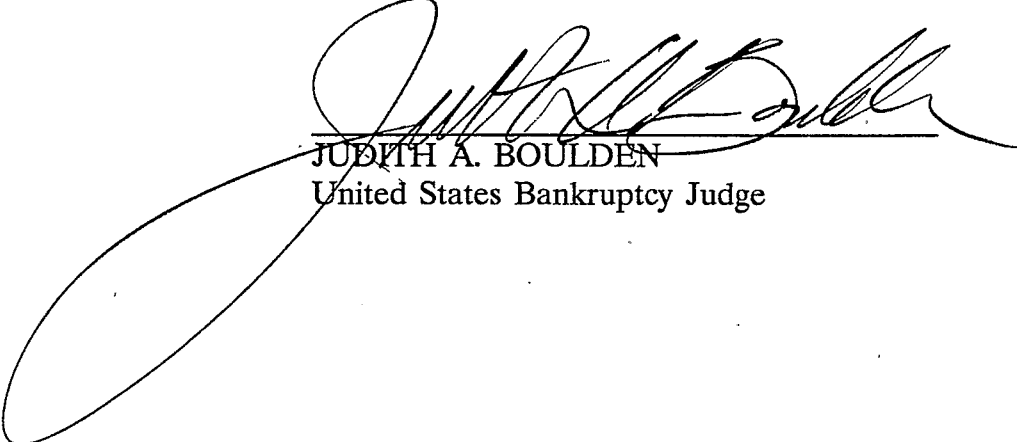
The court concludes that the Credit Union has a right to attorney's fees only if the Credit Union attempts to recover or to sell collateral pledged under the security

⁶ Though listed as unsecured in the Debtor's schedules, the loan may have been partially secured by the Debtor's shares. No assertion has been made by the Credit Union to that effect. If the loan were partially secured, the result would be the same. The dischargeability action does not relate to the collateral, but instead seeks a nondischargeable money judgment.

agreement. Because the Credit Union has not taken possession of or sold any such collateral, the Credit Union is not entitled to attorney's fees under the contract. Since the Credit Union is not entitled to attorney's fees, the Debtor has no reciprocal right under the state statute. Therefore, it is hereby

ORDERED, that the Debtor's motion for summary judgment is hereby denied.

DATED this 21st day of September, 1990.



JUDITH A. BOULDEN
United States Bankruptcy Judge