

The below described is **SIGNED**.

Dated: March 19, 2007

Glen E Clark

GLEN E. CLARK
U.S. Bankruptcy Judge



IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH

In re)	
)	
Susan Ferre Stauffer)	Bankruptcy Case No. 04C-22407
)	
Debtor,)	Chapter 13
)	
_____)	
)	
American General Finance of Utah, Inc.)	Adversary Proceeding No. 04-02573
)	
Plaintiff,)	
)	
vs.)	ORDER DENYING DEBTOR'S
)	MOTION FOR FEES AND COSTS
)	PURSUANT TO 11 U.S.C. § 523(d)
Susan Stauffer aka Susan Ferre)	
)	
Defendant,)	
)	

The Debtor's motion to dismiss adversary proceeding with prejudice and motion for fees and costs under § 523(d) came before the Court on the 17th day of January 2007. Kenneth R. Ivory appeared on behalf of the Plaintiff, American General Finance of Utah, Inc. ("American General"), and Paul James Toscano appeared on behalf of Susan Stauffer (the "Debtor").

Facts

1. On February 17, 2004, the Debtor filed Chapter 7 bankruptcy, Case No. 04-22407.
2. On June 2, 2004, American General filed Adversary Proceeding No. 04-2573 seeking to except the American General debt from discharge under 11 U.S.C. § 523(a)(6).
3. Paragraph #3 of the complaint filed by American General states that “This action is brought pursuant to 11 U.S.C. section 523(a)(6).”
4. Paragraph 31 of the complaint filed by American General states that “The acts or omissions of Defendant were a result of willful and malicious conduct, or conduct that manifested a knowing and reckless indifference toward, and disregard of, the rights of Plaintiff.”
5. American General has never amended the complaint in its adversary proceeding to seek an exception to Debtor’s discharge under any other subsection of § 523(a).
6. Since the filing of American General’s adversary proceeding on June 2, 2004, the parties to the Adversary Proceeding have engaged in various disputes involving this Adversary Proceeding as well as disputes involving how American General’s claim will be treated in Debtor’s Chapter 13 bankruptcy proceeding.
7. On October 6, 2006, the Debtor filed a motion to dismiss American General’s Adversary Proceeding seeking dismissal of the complaint with prejudice.
8. On October 18, 2006, the Court denied, without prejudice, Debtor’s motion to dismiss, and invited the Debtor to renew the motion pending the outcome of the Debtor’s Chapter 13 bankruptcy proceeding.

9. On December 14, 2006, the Debtor renewed the motion to dismiss with prejudice and set the matter for hearing on January 17, 2007.
10. The Debtor's renewed motion to dismiss includes a motion for fees and costs under § 523(d).
11. Debtor's renewed motion to dismiss is supported by a declaration of Paul Toscano itemizing fees and costs totaling \$15,925.00 for which Debtor seeks reimbursement under § 523(d).
12. American General responded to the renewed motion to dismiss indicating that it had no objection to dismissal of the Adversary Proceeding with prejudice. American General objected to Debtor's motion seeking fees and costs pursuant to § 523(d).
13. At the hearing of January 17, 2007, the Court granted Debtor's motion to dismiss with prejudice and took the motion for fees and costs under advisement.

Discussion

American General's adversary proceeding was commenced under § 523(a)(6). American General's complaint was never amended to seek an exception to Debtor's discharge under any other subsection of § 523(a). Debtor's motion for assessment of fees and costs is brought under § 523(d).

Section 523(d) reads as follows:

(d) If a creditor requests a determination of dischargeability of a consumer debt under subsection (a)(2) of this section, and such debt is discharged, the court shall grant judgment in favor of the debtor for the costs of, and a reasonable attorney's fee for, the proceeding if the court finds that the position of the creditor was not substantially justified, except that the court shall not award such costs and fees if special circumstances would make the award unjust.

11 U.S.C. § 523(d).

Section 523(d) references only determinations of dischargeability brought under § 523(a)(2), and does not mention determinations of dischargeability brought under § 523(a)(6). When faced with this type of statutory interpretative question, application of the maxim *expressio unius est exclusio alterius* is appropriate. The maxim *expressio unius est exclusio alterius* is a canon of statutory construction which holds that to include one thing in a statute implies the exclusion of the other. See In re Vaughan, 311 B.R. 573 (10th Cir. BAP 2004). Because Congress limited the scope of § 523(d) to determinations brought under § 523(a)(2), the fees and costs incurred by a debtor when defending a determination of dischargeability brought under § 523(a)(6) are not allowable under § 523(d).

Based upon the above, it is hereby;

ORDERED that Debtor's motion for fees and costs under § 523(d) is DENIED.

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