

If You Sue a Debtor in Bankruptcy Court, Can You Collect Attorney's Fees Too?

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Scenario: A creditor loans money to a debtor and the parties sign a contract whereby the debtor agrees to repay the creditor over a period of time. The contract also states that if the debtor fails to pay the creditor, and the creditor brings an action against the debtor for the default, then the debtor will be liable for the creditor's attorney's fees. However, the debtor does not make any payments to the creditor and files for bankruptcy. The bankruptcy court determines that the debt owed to the creditor is not discharged in the bankruptcy. Can the creditor then collect from the debtor the attorney's fees it incurred bringing an action against the debtor for the debtor's failure to pay?

According to the Bankruptcy Code, if a debtor prevails in a bankruptcy proceeding and the debtor's debt is discharged, the debtor may recover attorney's fees. *See*, 11 U.S.C. § 523(d). However, the Bankruptcy Code does not expressly state that creditors who are successful in dischargeability proceedings are entitled to recover attorney's fees from debtors. Therefore, it is necessary to turn to case law for our answer.

Generally speaking, the prevailing party in a bankruptcy proceeding, as in other federal litigation, may not collect attorney's fees from the other party unless it is set forth in a federal statute or in a contract between the parties. *In re Martinez*, 416 F.3d 1286, 1288 (11th Cir. 2005). In our scenario, there is a contract between the parties but there is not a federal statute stating that a creditor who succeeds in a dischargeability proceeding may recover attorney's fees from a debtor.

A creditor may be entitled to attorney's fees pursuant to a state statute if state law governs the substantive issues raised in the bankruptcy proceeding, rather than federal bankruptcy law. *See*, *In re Baroff*, 105 F.3d 439, 441 (9th Cir. 1997); *see also In re DeRoche*, 434 F.3d 1188, 1191 (9th Cir. 2006). For instance, the Ninth Circuit held in *In re Baroff*, 105 F.3d at 442-3, that since the bankruptcy court applied California contract law in granting summary judgment, the court should have applied California law in determining whether to award attorney fees under the contract between the parties. *See also In re Johnson*, 756 F.2d 738, 740-1 (9th Cir. 1985). Nevertheless, if the cause of action in a bankruptcy proceeding is purely federal, such as determining the dischargeability of a debt, then the court will not rely upon state law in considering whether to award the prevailing party attorney's fees. *See*, *In re Sheridan*, 105 F.3d 1164, 1167 (7th Cir. 1997).

Despite the Bankruptcy Code's omission of a statute entitling a creditor to recover attorney's fees from a debtor in a bankruptcy case, the Eleventh Circuit has stated that "a creditor successful in a dischargeability proceeding may recover attorney's fees when such fees are provided for by an enforceable contract between the creditor and debtor." *Transouth Fin. Corp. of Fla. v. Johnson*, 931 F.2d 1505, 1509 (11th Cir. 1991). Thus, in our scenario, the creditor would be entitled to recover attorney's fees it incurred bringing an action against the debtor for the debtor's failure to make its repayments to the creditor because the parties entered into a contract, which provided for this relief.

In conclusion, the Bankruptcy Code sets forth a federal statute providing that if a debtor prevails in a dischargeability proceeding, then the debtor may recover attorney's fees. The Bankruptcy Code does not provide a similar statute for successful creditors. Nevertheless, a successful creditor may be able to collect attorney's fees from a debtor if there is a state statute that provides for such relief and state law governs the substantive issues of the bankruptcy proceeding or if there is an enforceable contract between the parties.

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