UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re

James G. Ball, aka Jim Ball Trucking,
dba Jim Ball Trucking — Case No. 08-10148 K

Debtor

Chittenden Trust Company, dba Chittenden Bank

Plaintiff

-vs- — AP No. 08-1087 K

James G. Ball

Defendant

Peter A. Muth, Esq.
Hodgson Russ
The Guaranty Building, Suite 100
140 Pearl Street
Buffalo, NY 14202-4040

Attorney for Plaintiff

John M. Aversa, Esq.
625 Sixth Street
Niagara Falls, NY 14301

Attorney for Debtor/Defendant

The Defendant, having prevailed at trial, has sought attorneys fees and costs of the proceeding, asserting that the position of the Creditor/Plaintiff was "not substantially justified" in proceeding with the matter. The motion is denied.

The Court has read the Examination Before Trial of James Ball taken on September 12, 2008, and agrees with the Plaintiff that it could reasonably have concluded that the Debtor made a knowingly false financial application in connection with the loan in question. The affidavit of trial counsel Peter Muth, dated January 15, 2010, explains that "at the last minute, plaintiff became unable to send a witness to the trial to testify as to [the lender's] assessment of the defendant's credit application, and therefore the reasonableness of the Plaintiff's reliance on [the lender's] vetting of the Defendant's application." And Mr. Muth, consequently, explains, that "the sole focus at trial was ultimately the § 523(a)(6) cause of action, although there was brief testimony about the inaccuracy of the information in the Defendant's credit application to illustrate the Defendant's low regard for the strictures of written contracts."

The Court concludes that the Plaintiff was justified in proceeding on the § 523(a)(2) cause of action up until the point it realized that it could not provide at trial a key witness, at which point the Plaintiff did not proceed with that cause of action at trial. Consequently, no award may be made under 11 U.S.C. § 523(d).

To the extent, if any, that the Defendant seeks an award of attorneys fees and costs with regard to the § 523(a)(6) cause of action, such an award would have to rely on cases in abrogation of the "American Rule," which, as stated in Black's Law Dictionary, 9th Edition, provides "the general policy that all litigants, even the prevailing one, must bear their own

attorneys fees . . . subject to bad faith and other statutory and contractual exceptions." From the Debtor's Examination Before Trial there can be no doubt that the Debtor acted in breach of his contractual responsibilities with regard to the lender's collateral, having dismantled the collateral, etc., without notification to the lender or obtaining the lender's permission. Given the conflicting evidence of the initial lender's appraisal of the collateral, as compared with the Debtor's testimony of the condition of the collateral when he received it, the Plaintiff was justified in proceeding to trial with regard to the Debtor's credibility on this issue, as well as the question of whether the Debtor's conduct toward the collateral constituted a "wilful and malicious injury" to the Plaintiff's collateral. Thus, there is no basis for abrogation of the American Rule in this case.

The parties will bear their own costs and expenses.

The Clerk shall enter final judgment of dismissal, with the parties to bear their own costs and expenses.

SO ORDERED.

Dated: Buffalo, New York
February 1, 2010

/s/ Michael J. Kaplan

U.S.B.J.