

**United States Bankruptcy Court
District of New Mexico**

Document Verification

Case Title: Robert Garcia, et al. v. Terry Sykes, et al.
Case Number: 99-01024
Nature of Suit:
Judge Code: S
Reference Number: 99-01024 - S

Document Information		
Number:	54	
Description:	Judgment Def's Counter claim against Plf under section 523(d) is dismissed with prejudice. RE: [9-1] Claims Answer by Terry Sykes, Donna Sykes, Erin Garcia, Robert Garcia, [9-2] Counterclaim Claim by Terry Sykes, Donna Sykes, Erin Garcia, Robert Garcia	
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Comments:	Judgment Dismissing Defendant's Counterclaim under Section 523(d)	

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:

TERRY SYKES
Debtor.

No. 7-98-17432 SA

ROBERT GARCIA ,
Plaintiff,

v.

Adv. No. 99-1024 S

TERRY SYKES,
Defendant.

**JUDGMENT DISMISSING DEFENDANT'S
COUNTERCLAIM UNDER SECTION 523(d)**

This matter is before the Court on Defendant's Counterclaim for Costs and Attorney's Fees under Section 523(d). Defendant is represented by his attorney Ron Holmes. Plaintiff is represented by his attorney Gary Lakin.

This adversary came on for trial on February 16, 2000 on Plaintiff's complaint under 523(a)(2) to declare a debt nondischargeable. At the close of Plaintiff's case the Court granted defendant's motion to dismiss. The Court entered an Order on February 17, 2000 dismissing the complaint and reserving jurisdiction over the section 523(d) counterclaim. The parties have submitted briefs, and the Court now issues this Memorandum Opinion as its findings of fact and conclusions of law on the 523(d) claim.

The starting point for analysis is the statute itself. Section 523(d) provides:

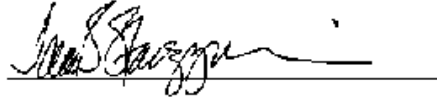
If a creditor requests a determination of dischargeability of a consumer debt under subsection (a)(2) of this section, and such debt is discharged, the court shall grant judgment in favor of the debtor for the costs of, and a reasonable attorney's fee for, the proceeding if the court finds that the position 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.

The term "consumer debt" is defined in section 101(8) as a "debt incurred by an individual primarily for a personal, family, or household purpose." The Court of Appeals for the Tenth Circuit has stated that "a credit transaction is not a consumer debt when it is incurred with a profit motive." Citizens National Bank v. Burns (In re Burns), 894 F.2d 361, 363 (10th Cir. 1990). The Bankruptcy Appellate Panel for the Tenth Circuit ruled that "Section 101(8) requires that the court consider the purpose for which the debt was incurred." Stewart v. United States Trustee (In re Stewart), 215 B.R. 456, 465 (10th Cir. B.A.P. 1997). The primary purpose for which the debt was incurred is determinative of the issue. Id. See also In re Traub, 140 B.R. 286, 288 (Bankr. D. N.M. 1992)(Court must look to purpose of debt; debt incurred for business ventures or profit-seeking activities is not consumer debt.)

The debt that was the subject of plaintiff's complaint was an alleged fraud and breach of a covenant not to compete related to a sale of defendant's business to plaintiff. Defendant claims that the proceeds of the sale of the business were used to move

to Arkansas and purchase a home there. This, according to defendant, demonstrates that the debt was incurred for the purpose of acquiring a residence, which is a personal, family, and household purpose. The Court disagrees. Defendant's interpretation would stretch the meaning of consumer debt; arguably any debt, even a purely business venture, would then become a consumer debt because a debtor could claim he or she intended to use any profits for personal purposes. When defendant sold his business his purpose was not incurring a consumer debt; he was exchanging one asset for another, the business for money. How he used this money is not highly relevant to plaintiff's claim against him. The relevant inquiry is, what was defendant's purpose in incurring the debt. The evidence was clear that his purpose was to sell the business at a profit. Compare In re Traub, 140 B.R. at 289 (taxes related to debtor's business were not consumer debts.) See also Internal Revenue Service v. Westberry (In re Westberry), 2000 WL 726971 at 1 (6th Cir. June 6, 2000) rev'g 219 B.R. 572 (Bankr. M.D. Tn. 1998)(Federal income taxes and self-employment taxes are not consumer debts.) The Court finds, therefore, that the debt in this case is not a consumer debt.

IT IS ORDERED, ADJUDGED, and DECREED that Defendant's Counterclaim against Plaintiff under section 523(d) is dismissed with prejudice.



Honorable James S. Starzynski
United States Bankruptcy Judge

I hereby certify that, on the date file stamped above, a true and correct copy of the foregoing was either electronically transmitted, faxed, mailed, or delivered to the listed counsel and parties.

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