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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WASHINGTON

In Re:)
CAMPION, MICHAEL C.,)
Debtor(s).)
_____)
MICHAEL C. CAMPION,)
Plaintiff(s),)
vs.)
ASSOCIATED CREDIT SERVICES, INC.,)
a Washington corporation,)
Defendant(s).)

No. 99-03598-W13
Adv. No. A00-00229-W13

MEMORANDUM DECISION RE:
PLAINTIFF'S MOTION FOR AWARD
OF ATTORNEY'S FEES BASED ON
JUDGMENT FOR PLAINTIFF

THIS MATTER came on for hearing before the Honorable Patricia C. Williams on August 23, 2001 upon Plaintiff's Motion for Award of Attorney's Fees Based on Judgment for Plaintiff. Plaintiff was represented by Timothy Durkop; Defendant was represented by Gregory Lockwood; and David Solberg, the Secretary/Treasurer and Owner of defendant Associated Credit Services was also present. The court heard argument of counsel and was fully advised in the premises. The court now enters its Memorandum Decision.

Bankruptcy Rule 7068 adopts Fed. R. Civ. P. 68 in adversary proceedings. Fed. R. Civ. P. 68 allows a party to submit an offer to

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MEMORANDUM DECISION RE: . . . - 1

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BANKRUPTCY COURT
EASTERN DISTRICT OF WASHINGTON

1 allow judgment to be taken against it. If the offer is accepted, a
2 final judgment consistent with the offer is entered. If the offer is
3 not accepted and the final judgment after resolution on the merits is
4 less favorable than the offer, the offering party is not liable for
5 costs and attorney fees incurred after it made the offer. If the final
6 judgment after resolution on the merits is more favorable than the
7 offer, the offering party is liable for costs and attorney fees.

8 Plaintiff debtor commenced this adversary action alleging that the
9 defendant violated the automatic stay. In July, the defendant, pursuant
10 to Bankruptcy Rule 7068 made an offer of judgment. On July 23, 2001,
11 the plaintiff accepted the offer. On August 3, 2001, the plaintiff
12 filed an Acceptance of Offer of Judgment and a Motion for Award of
13 Attorney Fees Based on Judgment for Plaintiff. The defendant objected
14 to the Motion on the basis that the Acceptance of Offer of Judgment
15 precluded such request.

16 The Offer of Judgment states that defendant

17 . . . submits an Offer of Judgment pursuant to FRCiv.P 68 in
18 the amount of \$251.00 (Two hundred and fifty-one dollars -
19 0/00). This offer is based upon plaintiffs answers to
interrogatories and represents full recovery of plaintiff's
claim. . . .

20 Defendant intended this offer to fully satisfy all the claims that the
21 plaintiff held under 11 U.S.C. § 362(h) which would include compensatory
22 damages, costs and attorney fees. Consequently, the defendant argues
23 that plaintiff cannot now request an award of attorney fees.
24 Alternatively, defendant argues that as each party held a mistaken
25 belief as to the effect of the offer and the effect of its acceptance,
26 the offer and the acceptance should be rescinded or revoked. Plaintiff
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1 understood the offer to exclude attorney fees, in other words, an offer
2 to pay \$251 as compensatory damages with plaintiff's statutory right to
3 reasonable attorney fees unaffected. Plaintiff argues that the court
4 should determine the amount of reasonable attorney fees and costs
5 incurred by the plaintiff and enter final judgment for the sum of \$251
6 plus the attorney fees.

7 Cases interpreting Fed. R. Civ. P. 68 have held that even though
8 the offer of judgment does not refer to costs, as the rule itself refers
9 to entry of a judgment for money "with cost then accrued", an offer of
10 judgment necessarily requires the payment of costs. *Holland v. Roeser*,
11 37 F.3d 501 (9th Cir. 1994). The question of whether attorney fees are
12 included in "costs" must be answered by the underlying statute giving
13 rise to the cause of action. If the underlying statute distinguishes
14 between costs and attorney fees, the offer of judgment will necessarily
15 include an offer to pay costs but not necessarily attorney fees.
16 *Marek v. Chesny*, 473 U.S. 1, 105 S. Ct. 3012, 87 L. Ed. 2d 1 (1985).

17 The underlying statute in this case is 11 U.S.C. § 362(h) which
18 distinguishes between costs and attorney fees as each is listed as a
19 separate element of damages. Application of the above cases
20 interpreting Fed. R. Civ. P. 68 lead to the conclusion that the
21 defendant's Offer of Judgment necessarily included an offer to pay
22 plaintiff's costs. As to attorney fees, further analysis is necessary.

23 The parties agreed to a consent decree in *Muckleshoot Tribe v.*
24 *Puget Sound Power & Light Co.*, 875 F.2d 695 (9th Cir. 1989). The consent
25 decree was silent as to costs and attorney fees. A dispute then arose
26 between the parties regarding the plaintiff's right to seek attorney
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1 fees under 11 U.S.C. § 1983 of the Civil Rights Act. The court held
2 that the burden was on the offering party to demonstrate "by clear
3 language in the release" that attorney fees had been waived.

4 Also analyzing an action arising under 11 U.S.C. § 1983 of the
5 Civil Rights Act, *Erdman v. Cochise County*, 926 F.2d 877 (9th Cir. 1991),
6 resolved a dispute similar to the one now presented by these parties.
7 In *Erdman*, the defendant made an offer of judgment "for the sum of
8 \$7,500 with costs now accrued." The defendant intended to include
9 attorney fees in the offer, i.e., that \$7,500 would be the full recovery
10 on all claims. The plaintiff accepted the offer and construed it to
11 mean a payment of \$7,500 to the plaintiff with a later award of fees
12 after the court determined reasonableness.

13 Typically, a settlement agreement is analyzed in the same
14 manner as any contract, i.e., any ambiguities are construed
15 against the drafter. Where necessary, district courts are
16 authorized to look to extrinsic evidence to clarify
17 ambiguities as to the intended meaning of material terms.
18 *Callie*, 829 F.2d at 890-91. Rule 68 offers, however, differ
19 from contracts with respect to attorney fees. We have held
20 that any waiver or limitation of attorney fees in settlements
21 of § 1983 cases must be clear and unambiguous. *Muckleshoot*
22 *Tribe v. Puget Sound Power & Light Co.*, 875 F.2d 695, 698 (9th
23 Cir. 1989).

24 We hold that as the terms of the accepted offer here did not
25 clearly exclude an additional attorney fee award as required
26 by *Muckleshoot*, the City is bound by the letter of its
27 agreement and must pay Erdman's reasonable attorney fees in
28 addition to the amount contained in its offer.

29 *Erdman v. Cochise County*, 926 F.2d at 880-881 (9th Cir. 1991).

30 *Erdman* essentially holds that for an offer of judgment to include
31 attorney fees in the amount offered, the offer must clearly and
32 unambiguously state attorney fees are included. Stated negatively, if
33 the offer of judgment does not clearly and unambiguously state that

1 attorney fees are included, they are excluded. When attorney fees are
2 not specifically and clearly included in the offer, the accepting party
3 may file a Motion for an Award of Attorney Fees if the underlying
4 statute gives the plaintiff the right to recover fees.

5 The clearest statement of the rule is found in *Nusom v. Comh*
6 *Woodburn, Inc.*, 122 F.3d 830 (9th Cir. 1997) which was an action under
7 the Truth-in-Lending Act. The offer of judgment in that case was
8 ". . . for \$15,000 together with costs accrued to the date of this
9 offer." The holding appears at page 835:

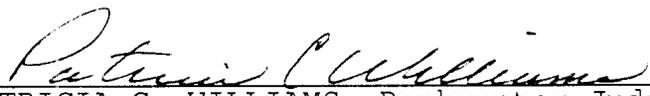
10 We hold only that a Rule 68 offer for judgment in a specific
11 sum together with costs, which is silent as to attorney fees,
12 does not preclude the plaintiff from seeking fees when the
underlying statute does not make attorney fees a part of
costs.

13 As to defendant's argument that recession or revocation of the
14 offer and acceptance is appropriate, *Erdman* recognizes that courts
15 typically look to extrinsic evidence to clarify ambiguous terms of
16 contracts, including offers of judgment. However, the analysis
17 regarding attorney fee provisions in offers of judgment differs. An
18 offer under Fed. R. Civ. P. 68 which attempts to preclude an accepting
19 party from obtaining its statutory right to attorney fees must clearly
20 and unambiguously set forth the preclusion of attorney fees. Any
21 ambiguity results in attorney fees being excluded from the offer. There
22 is no need for extrinsic evidence of intent as if an ambiguity exists,
23 the fees are not included in the offer. Although recession and
24 revocation may be available remedies when an ambiguity results in each
25 party having a mistaken belief as to the effect of the agreement, they
26 are inappropriate under the logic of *Erdman* and *Nusom*. Those cases

1 mandate a particular effect when an ambiguity exists. Absent a clear
2 and unambiguous inclusion of attorney fees in the offer, they are
3 excluded and the later award of fees is not precluded. See also, *Sea*
4 *Coast Foods, Inc. v. Lu-Mar Lobster and Shrimp, Inc.*, 260 F.3d 1054,
5 2001 W.L. 897384 (9th Cir. 2001) wherein the court stated ". . . where
6 a Rule 68 offer makes no reference to attorneys' fees whatsoever, they
7 are not automatically precluded. Rather, the matter of fees remains an
8 open question." *Sea Coast Foods, Inc.*, 260 F.3d at 1059. Therefore,
9 plaintiff is not precluded from filing its Motion for Award of
10 Attorney's Fees and said motion will be set for hearing to determine the
11 reasonable amount of fees.

12 The Clerk of Court is directed to file this Memorandum Decision and
13 provide copies to counsel.

14 DATED this 21st day of September, 2001.

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17 PATRICIA C. WILLIAMS, Bankruptcy Judge
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