FILED
U.S. Bankruptcy Appellate Panel
of the Tenth Circuit
February 25, 2013
Blaine F. Bates
Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE NICHOLAS RAYMOND INNERBICHLER, Debtor.	BAP No. NM-12-032 BAP No. NM-12-038
ADAMAR OF NEW JERSEY, INC., Plaintiff – Appellant – Cross-Appellee, v. NICHOLAS RAYMOND INNERBICHLER, Defendant – Appellee – Cross-Appellant.	Bankr. No. 09-12437 Adv. No. 09-01126 Chapter 7 OPINION*

Appeal from the United States Bankruptcy Court
for the District of New Mexico

Before MICHAEL, ROMERO, and TALLMAN[1], Bankruptcy Judges.

TALLMAN, Bankruptcy Judge.

After examining the briefs and appellate record, the Court has determined unanimously that oral argument would not materially assist in the determination of this appeal. Fed. R. Bankr. P. 8012. The case is therefore ordered submitted

* This unpublished opinion may be cited for its persuasive value, but is not precedential, except under the doctrines of law of the case, claim preclusion, and issue preclusion. 10th Cir. BAP L.R. 8018-6.

[1] Honorable Howard R. Tallman, United States Bankruptcy Judge, United States Bankruptcy Court for the District of Colorado, sitting by designation.

without oral argument.

Adamar of New Jersey, Inc. ("Adamar"), a company that owns the Tropicana casino in Atlantic City, New Jersey, appeals the bankruptcy court's order finding that a gambling debt incurred by Nicholas Raymond Innerbichler ("Debtor") was dischargeable. In its findings of fact and conclusions of law ("FFCL") entered after a two-day trial,[2] the bankruptcy court held that Adamar had failed to prove that Debtor's debt was obtained by fraud under 11 U.S.C. § 523(a)(2)(A).[3] The bankruptcy court entered judgment for Debtor on April 13, 2012,[4] and Adamar timely appealed. Debtor cross-appealed, arguing that the bankruptcy court erred in failing to award him fees under § 523(d). Finding no error by the bankruptcy court, we AFFIRM.

I. BACKGROUND FACTS

Debtor had been gambling in Atlantic City casinos, including the Tropicana, since at least 1992.[5] In 2003 he sold his business, TAMSCO, for $68 million, and received approximately half of that amount as a 49% owner of the business.[6] In August 2003, Debtor filled out a credit application with Adamar in which he listed his income as $250,000 per year and his assets at $30 million.[7] Adamar reviewed his credit at that time, and again in January and July of 2004.[8]

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[2] *Findings of Fact and Conclusions of Law Entered After Trial on the Merits, in* Appellant's App. at 820.

[3] Unless otherwise noted, all statutory references are to Title 11 of the United States Code.

[4] *Judgment for Defendant, in* Appellant's App. at 828.

[5] *Transcript of Trial Proceedings held on April 27, 2011 ("Transcript of 4/27/11")* at 32, *in* Appellant's App. at 134.

[6] *Id.* at 29-30, *in* Appellant's App. at 133-34.

[7] *Id.* at 112-13, 126, *in* Appellant's App. at 154, 158.

[8] *Id.* at 112-13, *in* Appellant's App. at 154.

Prior to January 2005, he had always paid his debts to Adamar. Between January 21 and January 23, 2005, Debtor signed markers[9] with Adamar for a total amount of $550,000.[10] The markers bore the legend, "I represent that I have received cash for the above amount and that said amount is on deposit in said bank or trust company in my name. It is clear from all claims and is subject to this check." When Adamar subsequently presented the markers to Debtor's bank for payment in March 2005, it learned that Debtor had stopped payment on them. Adamar obtained a judgment for $399,936.99 against Debtor in New Jersey state court in July 2006.[11]

Debtor paid Adamar $160,000 in partial satisfaction of the judgment before filing for Chapter 11 bankruptcy in June 2009. Shortly thereafter, Adamar filed its complaint under § 523(a)(2)(A), objecting to discharge of the debt that remained outstanding. Debtor's case was converted to one under Chapter 7 on January 6, 2011. After a trial on the merits in April 2011, the bankruptcy court held that the gambling debt was dischargeable, but did not award Debtor costs and reasonable attorney's fees for the proceeding as permitted under § 523(d). Both parties appealed the bankruptcy court's decision to this Court.

II. APPELLATE JURISDICTION

This Court has jurisdiction to hear timely filed appeals from "final judgments, orders, and decrees" of bankruptcy courts within the Tenth Circuit, unless one of the parties elects to have the district court hear the appeal. 28 U.S.C. § 158(a)(1), (b)(1), and (c)(1); Fed. R. Bankr. P. 8002; 10th Cir. BAP L.R.

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[9] Markers are lines of credit extended by a casino to a gambler and, in New Jersey, are governed by N.J. Stat. Ann. § 5:12-101(c)(3) (West 2012). Under that statute, a gambler has 45 days to pay markers before they are considered in default.

[10] Appellant's App. at 31-33.

[11] *Judgment of Default*, *in* Appellant's App. at 41.

8001-3. Neither party elected to have this appeal heard by the United States District Court for the District of New Mexico. The parties have therefore consented to appellate review by this Court.

A decision is considered final "if it 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996) (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)). A judgment dismissing a § 523 complaint with prejudice is final for purposes of appeal. *Dimeff v. Good (In re Good)*, 281 B.R. 689, 694-95 (10th Cir. BAP 2002).

III. STANDARD OF REVIEW

The bankruptcy court's findings of fact are reviewed for clear error, and its legal conclusions are reviewed *de novo*. *Miller v. Bill and Carolyn Ltd. P'ship (In re Baldwin)*, 593 F.3d 1155, 1159 (10th Cir. 2010). *De novo* review requires an independent determination of the issues, giving no special weight to the bankruptcy court's decision. *Salve Regina Coll. v. Russell*, 499 U.S. 225, 238 (1991). A factual finding is "clearly erroneous" when "'it is without factual support in the record, or if the appellate court, after reviewing all the evidence, is left with the definite and firm conviction that a mistake has been made.'" *Las Vegas Ice & Cold Storage Co. v. Far W. Bank*, 893 F.2d 1182, 1185 (10th Cir. 1990) (quoting *LeMaire ex rel. LeMaire v. United States*, 826 F.2d 949, 953 (10th Cir. 1987)).

The bankruptcy court's determination concerning fees under § 523(d) is reviewed for abuse of discretion. *Commercial Fed. Bank v. Pappan (In re Pappan)*, 334 B.R. 678, 682-83 (10th Cir. BAP 2005). Under the abuse of discretion standard, a trial court's decision will not be disturbed unless the appellate court has a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances. *Moothart v. Bell*, 21 F.3d 1499, 1504 (10th Cir. 1994). A trial

court abuses its discretion when it makes "'an arbitrary, capricious, whimsical, or manifestly unreasonable judgement.'" *FDIC v. Oldenburg*, 34 F.3d 1529, 1555 (10th Cir. 1994) (quoting *United States v. Hernandez-Herrera*, 952 F.2d 342, 343 (10th Cir. 1991)).

IV. ANALYSIS

A. Denial of § 523(a)(2)(A) claim

Adamar brought its complaint against Debtor under § 523(a)(2)(A).[12] That section provides as follows:

> (a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt—
>
> . . .
>
> (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—
>
> (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition[.]

In order to establish a non-dischargeable claim under this subsection, a creditor must prove the following elements by a preponderance of the evidence: "The debtor made a false representation; the debtor made the representation with the intent to deceive the creditor; the creditor relied on the representation; the creditor's reliance was reasonable;[13] and the debtor's representation caused the creditor to sustain a loss." *Fowler Bros. v. Young (In re Young)*, 91 F.3d 1367, 1373 (10th Cir. 1996).

Ultimately, in this case, the bankruptcy court determined that Adamar had not met the first prong of § 523(a)(2)(A):

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[12] *Complaint Under Section 523(a)(2) Objecting to Discharge ("Complaint")* at 1, *in* Appellant's App at 28.

[13] The Supreme Court has clarified that the proper standard is "justifiable reliance" rather than "reasonable reliance." *Field v. Mans*, 516 U.S. 59, 74-75 (1995).

> First of all, there has to be a . . . false statement uttered with the intention or at least recklessness with respect to the truthfulness of it and with the intention to deceive that's . . . relied on. . . . And so the very starting one is that there was basically [a] signing off on these markers with the intention . . . not to pay them at the time that Mr. Innerbichler signed them[.][14]

The bankruptcy court, after reviewing all the testimony and evidence, determined that Adamar had failed to prove that Debtor intended not to pay the debt at the time it was incurred: "it is absolutely clear to me . . . that when [Debtor] signed those markers . . . he intended to pay those obligations. And . . . from my perspective, he almost certainly had the assets to do it in January of 2005 and . . . I'm absolutely convinced that whether he had the assets or not, he firmly believed he had the assets to make those payments."[15]

At trial, the bankruptcy court heard testimony from Debtor and from the casino controller at the Tropicana. The court determined that both witnesses were "totally credible."[16] The court found that Debtor's undisputed testimony was that he had, or reasonably believed he had, the funds to pay the markers at the time he incurred the debt, and that he intended to pay the debt.[17] The court also relied on the fact that Debtor's bank account was part of a sweep arrangement or a "zero balance" account. In other words, as checks would come in, the bank would transfer enough money from Debtor's brokerage investment account to pay the checks. If the bank account had a positive balance at the end of the day, the bank would transfer the money back to the brokerage account.[18] Debtor's testimony and supporting evidence showed that he had deposited $2.4 million into the

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[14] *Transcript of Trial Proceedings Held on April 28, 2011 ("Transcript of 4/28/11")* at 28-29, *ll.* 20-25, 5-8, *in* Appellant's App. at 232-33.

[15] *Id.* at 26, *ll.* 3-10, *in* Appellant's App. at 230.

[16] *FFCL* at 3, *in* Appellant's App. at 822.

[17] *Transcript of 4/28/11* at 26, *in* Appellant's App. at 230.

[18] *Id.* at 26-28, *in* Appellant's App. at 230-32.

brokerage account in January 2005, and that on the morning of January 21, 2005, he had $1 million in the brokerage account.[19]

On appeal, Adamar argues that the bankruptcy court erred when it found that Debtor did not make an intentionally false representation when he signed the markers. Specifically, Adamar contends that the court's error was "in failing to find that Adamar had established a prima facie case of fraud by showing that the combined funds in [Debtor's] accounts for which documentation had been provided were insufficient to cover the markers."[20] In support of its argument, Adamar primarily relies on *Marina District Development Co. v. Ridge (In re Ridge)*, No. 09-1351, 2010 WL 3447669 (Bankr. E.D. Va. Aug. 24, 2010) and *Boardwalk Regency Corp. v. Ridge (In re Ridge)*, No. 09-1354, 2010 WL 3632818 (Bankr. E.D. Va. Sept. 9, 2010).[21] For the reasons discussed below, we are not persuaded that the bankruptcy court committed reversible error.

The *Ridge* cases involved a debtor who gambled at the Borgata and Caesars casinos in Atlantic City. At the Borgata, the debtor filled out a credit application and was granted a $250,000 credit line, even though his application reflected that he had approximately $5,000 in his bank account and a $200,000 line of credit at other casinos. *Marina Dist. Dev. Co. v. Ridge,* 2010 WL 3447669 at *1 (the "Borgata case"). At Caesars, the debtor's credit application also reflected that he owned a business that generated $280,000 of income per year and owned a house

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19 *FFCL* at 5, *in* Appellant's App. at 824.

20 Brief of Appellant at 13.

21 Adamar also relies on *Trump Plaza Assocs. v. Poskanzer (In re Poskanzer)*, 143 B.R. 991 (Bankr. D.N.J. 1992), which several courts have declined to follow. *See, e.g., Adamar of N.J., Inc. v. August (In re August)*, 448 B.R. 331 (Bankr. E.D. Pa. 2011); *Mandalay Resort Group v. Miller (In re Miller)*, 310 B.R. 185 (Bankr. C.D. Cal. 2004). In any event, the *Poskanzer* case is factually distinguishable because the debts were incurred on the "eve" of bankruptcy, and the debtor admitted he knew at the time he obtained credit from the casinos that his bank account's assets were grossly inadequate. *In re Poskanzer*, 143 B.R. at 999.

worth $500,000. Caesars also granted the debtor a $250,000 credit line. *Boardwalk Regency Corp. v. Ridge,* 2010 WL 3632818 at *1 (the "Caesars case"). At both casinos, the debtor signed markers identical to the ones at issue in this case. At the time of signing, he had about $30,000 in his bank accounts. He failed to honor the markers, and the casinos objected to the discharge of debtor's gambling debts upon his filing for bankruptcy.

In the Borgata case, the court found the following: 1) the markers were statements regarding the debtor's financial condition, and as such, the test used to determine dischargeability was § 523(a)(2)(B); 2) the statements were materially false because it was undisputed that debtor had about $30,000 in his bank accounts when he signed the markers; 3) the issue was not whether the debtor intended to make the markers good, but whether he had the funds on deposit to make the markers good; 4) because he did not have the funds on deposit, he had the intent to deceive; but 5) Borgata did not reasonably rely on the statements to extend credit to debtor. *Marina District Development Co.* at *3-5. The court reasoned, "the representation that a customer had a particular amount on deposit on the date a marker is signed would provide no assurance that the same funds would be available 45 days later. Much can obviously happen in 45 days, and fraud requires a misrepresentation as to an existing fact and not a future occurrence." *Id.* at *4. Thus, the court held that Borgata had not proven all the elements of § 523(a)(2)(B).

In the Caesars case, the bankruptcy court followed the same analysis in holding the debt dischargeable under §523(a)(2)(B). But the court also stated,

> Even if § 523(a)(2)(A) applied on the theory that the debtor knew he had no ability to pay the debt at the time he contracted it and never had any intention of paying it, the evidence at the trial was simply not sufficient to support such an assertion. While the debtor's apparent hope of paying his losses at one casino with winnings from another seems objectively something of a long shot, and while in the long run the odds necessarily favor the house against the gambler, some finite percentage of gamblers do win substantial sums of money.

Boardwalk Regency Corp. v. Ridge, 2010 WL 3632818 at *4 n.2. Thus, the *Ridge* cases actually undermine Adamar's argument.

In its brief, Adamar concedes that under Tenth Circuit law, the legend on the markers was *not* a statement respecting the debtor's financial condition, citing *Cadwell v. Joelson (In re Joelson)*, 427 F.3d 700 (10th Cir. 2005). Further, Adamar agrees that the bankruptcy court was correct when it ruled the case should be analyzed under § 523(a)(2)(A) rather than § 523(a)(2)(B).[22] The analysis in the *Ridge* cases hinges on the markers being a statement of financial condition under § 523(a)(2)(B), and in fact, the bankruptcy court in the Caesars case expressly stated there would not have been a sufficient case under § 523(a)(2)(A). Additionally, in both cases the court ultimately determined that the casinos had not reasonably relied on the markers to extend credit.

Adamar attempts to side-step this crucial distinction by arguing that the standard for reasonable reliance in the Tenth Circuit differs from that of the Fourth Circuit applicable in the *Ridge* cases. Adamar cites *Colorado East Bank & Trust v. McCarthy (In re McCarthy)*, 421 B.R. 550 (Bankr. D. Colo. 2009), for the proposition that a creditor need only show partial reliance on the debtor's representations. That case, however, was also decided under § 523(a)(2)(B). Further, Adamar admits that even under the "partial" reliance standard, there still must be "actual" reliance."[23]

A recent Pennsylvania bankruptcy court case involving Adamar is far more instructive. In *Adamar of New Jersey, Inc. v. August (In re August)*, 448 B.R. 331 (Bankr. E.D. Pa. 2011), Adamar objected to dischargeability of a casino debt on almost identical facts. Importantly, the bankruptcy court analyzed Adamar's

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22 Appellant's Brief at 18.

23 *Id.* at 21.

claims under both § 523(a)(2)(A), which requires justifiable reliance, and § 523(a)(2)(B), which requires reasonable reliance. *In re August*, 448 B.R. at 350. Adamar asserted that the statement on the markers was both a false representation under § 523(a)(2)(A) and a materially false written statement of the debtor's financial condition under § 523(a)(2)(B). *Id.* at 352. The court found that the debtor had no intent to deceive under either section, and also determined that Adamar did not *actually, justifiably, or reasonably* rely on the markers. *Id.* "Whether asserting that a false representation or false pretenses were made and warrant relief under section 523(a)(2)(A), a showing of justifiable reliance and causation of loss must be made." *Id.* at 350. The court held:

> I agree with the debtor's position that Adamar failed to meet its burden of proving that it actually relied upon the preprinted language on those markers when extending credit to Ms. August in February 2009. In other words, Adamar did not demonstrate that, when reinstating . . . and then increasing the debtor's credit line . . . it either justifiably relied or reasonably relied upon Ms. August's signed statements that . . . she had funds in her bank account at least equal to the amount of her outstanding markers.

Id. at 352.

The debtor in *August* had a long "play and pay" history with Adamar; that is, she had repaid large sums of money to the casino over the years. *Id.* at 340. The court found that the casino relied more on that history than on any representation made by the debtor at the time she signed the markers. *Id.* at 352-53. Thus, Adamar could not show that it actually, justifiably, or reasonably relied on the debtor's statement at the time she signed the markers that funds were actually in her bank account. Likewise, in this case, Debtor had a long "play and pay" history with Adamar.[24] Therefore, even if the bankruptcy court had determined that Debtor intended to deceive Adamar, under the *August* court's analysis, Adamar could not show reliance under either § 523(a)(2)(A) or

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[24] *FFCL* at 6, *in* Appellant's App. at 825.

§ 523(a)(2)(B). After thoroughly reviewing the record and applicable case law, we conclude that the bankruptcy court made no error in its determination that the debt to Adamar was dischargeable under § 523(a)(2)(A).

B. Cross appeal under § 523(d)

In the cross appeal, Debtor contends that the bankruptcy court erred in determining he was not entitled to costs and fees under § 523(d). That section provides as follows:

> If a creditor requests a determination of dischargeability of a consumer debt[25] 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.

Debtor contends that the burden was on Adamar to show it was substantially justified in bringing its complaint, and Adamar failed to do so. Following the trial, the bankruptcy court announced that it was prepared to rule in favor of Debtor, but that Adamar should submit its closing argument in writing and the court would consider it. After Adamar submitted its written closing, the court issued an order requiring Debtor to brief the issue of attorney fees under § 523(d), and set a deadline for Adamar to respond. However, Adamar did not file any response to Debtor's brief on attorney's fees. The court then held that Debtor was not entitled to attorney fees.[26]

Debtor contends that "[i]t would make no sense to assign the debtor, having just prevailed against the creditor's complaint, the task of demonstrating a lack of substantial justification for the action," citing *Bridgewater Credit Union v. McCarthy (In re McCarthy)*, 243 B.R. 203, 208 n.5 (1st Cir. BAP 2000).

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[25] A gambling debt is a consumer debt. *Turning Stone Casino v. Vianese (In re Vianese)*, 195 B.R. 572, 576 (Bankr. N.D.N.Y. 1995).

[26] *FFCL* at 6, *in* Appellant's App. at 825.

Further, Debtor argues that the bankruptcy court erred because, "[w]hen . . . the trier of fact gives no reasons for his discretionary determination, appellate review is exceedingly difficult unless the ground and merit of the determination are clear." *Id.* at 211 (internal quotation marks omitted).

The bankruptcy court stated the following in its FFCL:

> 10. Based on a review of the record in this case, and the arguments and testimony presented at trial, the Court finds that Plaintiff had substantial justification in filing this adversary proceeding. Of particular note was the difficulty of obtaining information and records from Defendant and the unavailability of certain information either because Defendant did not have the records or the records had to be created (e.g., some twenty income tax returns for the Debtor and various entities had to be prepared). Discovery was started before filing and continued throughout the case.[27]

On appeal, Debtor argues that the court committed clear error in determining that "[d]iscovery was started before filing."[28] Debtor, citing to the dockets of both the underlying bankruptcy and the adversary proceeding, asserts that Adamar did not conduct discovery until eight months after filing its adversary proceeding.[29] Again citing *In re McCarthy*, Debtor notes that "[b]ankruptcy procedures provide creditors with 'ample opportunity' to investigate the merits of § 523(a)(2) claims before commencing an adversary proceeding." *Id.* at 209 n.6.

In response, Adamar points out that here, there was a state court default judgment against Debtor, which distinguishes this case from *McCarthy*. Also, Debtor's testimony during his Rule 2004 examination was substantial justification for bringing the proceeding. The question of substantial justification is a totality of the circumstances test, but certain factors are considered: whether the creditor attended the 341 meeting or conducted an examination under 2004, as well as the extent of pre-trial investigation. *Bank of Am. v. Miller (In re Miller),* 250 B.R.

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27 *Id.*

28 Appellee – Cross-Appellant Nicholas Raymond Innerbichler's Brief at 13.

29 *Id.*

294, 296 (Bankr. E.D. Ky. 2000). Adamar notes that it conducted two 2004 examinations of Debtor, subpoenaed each bank Debtor stated he had an account with, was required to file several motions to require discovery and discovered several inconsistent statements in the Debtor's testimony and records. Adamar also argues that when Debtor stopped payment on checks, it had substantial justification for bringing the § 523(a)(2) action.

This Court has held that, to determine whether substantial justification exists for bringing a complaint for purposes of § 523(d), a court should consider whether the plaintiff has shown "a reasonable basis for the facts asserted; a reasonable basis in the law for the legal theory proposed; and support for the legal theory by the facts alleged." *Commercial Fed. Bank v. Pappan (In re Pappan)*, 334 B.R. 678, 683 (10th Cir. BAP 2005) (quoting *Harris v. R.R. Ret. Bd.*, 990 F.2d 519, 520-21 (10th Cir. 1993)). Bankruptcy courts in this circuit also have noted: "The determination of substantial justification is largely one of fact which requires proof of elements such as what the party did prior to making the complaint to investigate and substantiate the allegations, and what proof it has to establish the elements essential for it to prevail[.]" *Bank of N.Y. v. Le (In re Le)*, 222 B.R. 366, 369 (Bankr. W.D. Okla. 1998). *See also Citizens Nat'l Bank v. Burns (In re Burns)*, 77 B.R. 822, 823-24 (D. Colo. 1987), *aff'd*, 894 F.2d 361 (10th Cir. 1990) (acknowledging that many courts find it necessary to find that no significant element of the creditor's claim has been established before awarding fees under § 523(d)) (citations omitted). In *First Card v. Leonard (In re Leonard)*, 158 B.R. 839 (Bankr. D. Colo. 1993), the court awarded fees to the debtor, but in that case, no discovery was undertaken prior to filing the complaint *or prior to going to trial*. That is not the case here.

This Court has closely reviewed the briefs that both parties submitted on the fees issue, and notes that Adamar did devote a portion of its closing argument

brief to the § 523(d) issue.[30] Then, Debtor filed its brief on the §523(d) issue.[31] The fact that Adamar did not then file a reply is not dispositive, as it was not required to do so and may have concluded that its initial argument on the issue was sufficient. While the bankruptcy court only devoted a short portion of its FFCL to the fees issue, it did put forth some reasoning and reached a conclusion, again distinguishing this case from *McCarthy*, upon which Debtor heavily relies.[32]

Additionally, the bankruptcy court had the perspective of viewing the entire case from start to finish, and knew the discovery issues that had been involved. Whether Adamar conducted discovery prior to commencing the complaint seems to be an issue disputed by the parties, and the court was in the best position to determine that issue. In any event, the bankruptcy court's conclusion on the issue does not rise to an abuse of discretion. *See In re Pappan*, 334 B.R. at 682 ("[I]t is well-established that a 'bankruptcy court's determination [under § 523(d)] of whether the position of a creditor is 'substantially justified' or whether 'special circumstances' exist is . . . reviewed for abuse of discretion.' Under this standard, 'a trial court's decision will not be disturbed unless the appellate court has a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances.'") (footnotes omitted). This Court cannot ascribe clear error here or that the bankruptcy court exceeded the bounds of permissible choice based on the record

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30 *Adamar's Closing Argument* at 7-8, *in* Appellant's App. at 771-72.

31 *Defendant's Brief in Support of Award of Attorney Fees to Defendant Pursuant to 11 USC § 523(d)*, *in* Appellant's App. at 797.

32 In that case, the court addressed the issue in its entirety as follows: "I'm going to deny that because I don't think you've met the test of [§ 523](d). It wasn't altogether clear that they were doing something that would bring in fees. Motion for summary judgment is granted without more. Motion for fees is denied." *McCarthy* at 211 (emphasis omitted).

before us.

As a final matter, because we affirm the bankruptcy court in all respects, we determine that Adamar's October 18, 2012, motion to strike portions of Debtor's reply brief is moot and shall be DENIED.

V. CONCLUSION

For the reasons stated herein, the bankruptcy court's judgment in favor of Debtor on Adamar's claim under § 523(a)(2)(A), as well as its determination of fees under § 523(d), is AFFIRMED.