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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA
SACRAMENTO DIVISION

In re:)	
)	
NANETTE/ERIK DELP,)	Case No. 05-31414-B-7
)	
Debtors.)	
)	
_____)	
)	
ROBERT BOYLES, ET AL.,)	
)	
Plaintiffs)	Adv. No. 06-2015-B
)	
vs.)	
)	
NANETTE DELP, ET AL.,)	Docket Control No. N/A
)	
Defendants.)	Date: October 24, 2006
)	
_____)	Time: 9:30 a.m.

On or after the calendar set forth above, the court issued the following ruling. The official record of the ruling is appended to the minutes of the hearing.

Because the ruling constitutes a "reasoned explanation" of the court's decision under the E-Government Act of 2002 (the "Act"), a copy of the ruling is hereby posted on the court's Internet site, www.caeb.uscourts.gov, in a text-searchable format, as required by the Act. However, this posting does not constitute the official record, which is always the ruling appended to the minutes of the hearing.

DISPOSITION AFTER ORAL ARGUMENT

This matter was calendared pursuant to the court's October 2, 2006 order. In that order, the court required plaintiffs to address several cases related to the request for attorney's fees in the amended complaint and motion for default judgment.

1 The motion is granted in part and denied in part to the extent
2 set forth herein. The court finds that plaintiffs have in their
3 complaint sufficiently pled five causes of action against the debtors:
4 (1) Nondischargeability pursuant to 11 U.S.C. § 523(a)(2)(A); (2)
5 Nondischargeability pursuant to 11 U.S.C. § 523(a)(4); (3)
6 Nondischargeability pursuant to 11 U.S.C. § 523(a)(6); (4) Breach of
7 Contract; and (5) Negligence. The allegations contained therein are
8 deemed established for purposes of this adversary proceeding. Alan
9 Neuman Productions, Inc., v. Albright, 862 F.2d 1388 (9th Cir. 1988).
10 In the evidence submitted with the motion for default judgment,
11 plaintiffs have established damages in the amount of \$46,000.00. The
12 court further finds that this case warrants an award of pre-judgment
13 interest in the amount of \$3,742.20. Costs of \$250.00 for the
14 adversary filing fee are awarded. Plaintiffs are entitled to judgment
15 in the total amount of \$49,892.20. Plaintiffs are also entitled to
16 post-judgment interest at the Federal Judgment Rate as provided in 28
17 U.S.C. § 1961(a).

18 Plaintiffs request for attorney's fees is denied. This court
19 follows what is referred to as the American Rule meaning that
20 attorney's fees are not generally available for suits in Federal
21 Court. Generally, "[a]ttorney's fees may be awarded to an unsecured
22 creditor in a bankruptcy proceeding only to the extent that state law
23 governs the substantive issues and authorizes the court to award
24 fees." Thrifty Oil Co. v. Bank of America, NT&SA, 322 F.3d 1039, 1040-
25 41 (9th Cir. 2003). There is an exception to that rule. Attorney's
26 fees may be available to the prevailing party in actions under 11
27 U.S.C. § 523(a)(2) for more than just that portion relating to
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1 litigation on the contract.

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3 [A]fter Cohen [v. de la Cruz, 523 U.S. 213, 118 S.Ct.
4 1212, 140 L.Ed.2d 341 (1998)], the determinative question
5 in cases under § 523(a)(2) is whether the successful
6 plaintiff could recover attorney's fees in a
7 non-bankruptcy court. The Ninth Circuit's holdings in
8 [Ford v. Baroff (In re Baroff), 105 F.3d 439 (9th
9 Cir.1997)] and [American Express Travel Related Servs.
10 Co. Inc. v. Hashemi (In re Hashemi), 104 F.3d 1122 (9th
11 Cir.1997)] were premised on the view that, under
12 California law, fees in a fraud action for damages could
13 not be recovered via a contractual fee agreement. These
14 holdings were arguably undercut by Santisas v. Goodin, 17
15 Cal.4th 599, 608, 71 Cal.Rptr.2d 830, 836, 951 P.2d 399
16 (1998), in which the Supreme Court of California
17 concluded that, depending on the wording of the fee
18 provision, there may be a contractual right to recover
19 attorney's fees in litigating tort claims.

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21 AT&T Universal Card Services Corp. v. Pham (In re Pham), 250 B.R. 93,
22 99 (9th Cir. BAP 2000).

23 The written contract between the plaintiffs and defendant is
24 submitted with the exhibits to this motion. See Dkt. No. 53, pages 99
25 - 107. Nowhere in that contract is there an attorney's fees
26 provision. Therefore, plaintiffs must show some statutory right to
27 attorney's fees to prevail. They have attempted to set forth several
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1 state law and federal law bases for their request. None is ultimately
2 successful.

3 Under Federal authority, Plaintiffs' first argument references
4 Federal Rules of Civil Procedure 16(f), 26(g) and 37 applicable in
5 this court via Federal Rules of Bankruptcy Procedure 7016, 7026, and
6 7037. None of these have any applicability in this default situation.
7 No scheduling order or pre-trial order appears on the court's docket.
8 Instead, the court directed plaintiffs to seek defendants' defaults
9 and to file a motion for a default judgment. Sanctions under Rule
10 16(f), let alone attorney's fees disguised as sanctions, are
11 inappropriate where no such scheduling order was violated and where
12 defendant's nonappearance at the status conferences in this case is
13 because they have opted not to participate in this litigation at all.
14 Sanctions under Rules 26(g) and 37 are inappropriate because no
15 discovery is alleged to have occurred. These are not general
16 sanctioning provisions. They are targeted at specific bad behavior
17 none of which is present here.

18 Plaintiffs' second argument is that this court should award
19 attorney's fees under the inherent power of the court embodied in 28
20 U.S.C. § 1927. That section is inapplicable to this case. By its
21 terms, it applies only to attorneys. No attorney appeared for debtors
22 in this adversary proceeding. In addition, the section is directed to
23 conduct that unreasonably multiplies the proceedings unreasonably and
24 vexatiously. No such conduct is present here where the debtors never
25 answered the initial or amended complaints.

26 Plaintiffs set forth two state law theories under which they
27 argue they are entitled to attorney's fees. Their first argument is
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1 that attorney's fees are available and should be awarded as exemplary
2 damages under California Civil Code Section 3934(a). They cite Cal-
3 Micro, Inc. v. Cantrell (In re Cantrell), 329 F.3d 1119 (9th Cir. 2003)
4 in support of this theory. Cantrell contains no such holding. The
5 only mention of Section 3294(a) is contained in a discussion of
6 whether a state court default judgment which included \$10,000 in
7 punitive damages would qualify for *res judicata* treatment in a
8 subsequent non-dischargeability proceeding. Of particular note is
9 that no part of the punitive damages award was for attorney's fees.
10 That was a separate part of the judgment. "On April 12, 1996, the
11 state court granted Cal-Micro default judgment against Cantrell for
12 \$1,271,985 in compensatory damages, \$10,000 in punitive damages,
13 \$4,670 in attorney's fees, and \$463.75 in costs and post- judgment
14 interest." Id. at 1122.

15 An award of attorney's fees as exemplary damages under Civil Code
16 Section 3934(a) appears to be improper. "The general rule is that
17 attorneys' fees are not a proper item of recovery from the adverse
18 party, either as costs, damages or otherwise, unless there is express
19 statutory authority or contractual liability therefor [citations]."
20 Haines v. Parra, 193 Cal.App.3d 1553, 239 Cal.Rptr. 178 (Cal. Ct. App.
21 1987) citing Russell v. United Pacific Ins. Co., 214 Cal.App.2d 78, 29
22 Cal.Rptr. 346 (Cal Ct. App. 1963). Awards of attorney's fees and
23 punitive damages serve different purposes. "Punitive damages are
24 imposed to deter future misconduct by the defendant." Griffin v.
25 Felton (In re Felton), 197 B.R. 881, 891 (N.D. Cal. 1996) citing Adams
26 v. Murakami, 54 Cal.3d 105, 110, 284 Cal.Rptr. 318, 320, 813 P.2d
27 1348, 1349-50 (Cal. 1991). Attorney's fees are compensatory in
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1 nature. The court was unable to find any authority permitting what
2 plaintiffs wish to do here.

3 Plaintiffs' second state law theory for fees is found in
4 California Civil Code Section 1794. "Any buyer of consumer goods who
5 is damaged by a failure to comply with any obligation under this
6 chapter or under an implied or express warranty or service contract
7 may bring an action for the recovery of damages and other legal and
8 equitable relief." Cal. Civ. Code. § 1794(a) (West 1998 & Supp. 2006).
9 The fee provision is Section 1794(d). "If the buyer prevails in an
10 action under this section, the buyer shall be allowed by the court to
11 recover as part of the judgment a sum equal to the aggregate amount of
12 costs and expenses, including attorney's fees based on actual time
13 expended, determined by the court to have been reasonably incurred by
14 the buyer in connection with the commencement and prosecution of such
15 action." Cal. Civ. Code. § 1791(d) (West 1998 & Supp. 2006).

16 Plaintiffs misconstrue the term "service contract" in the
17 statute. Section 1794 is part of Title 1.7: Consumer Warranties.
18 Section 1791 contains a series of definitions applicable to that
19 Title. "'Service contract' means a contract in writing to perform,
20 for an additional cost, over a fixed period of time or for a specified
21 duration, services relating to the maintenance, replacement or repair
22 of a consumer product, except that this term does not include a policy
23 of automobile insurance, as defined in Section 116 of the Insurance
24 Code." Cal. Civ. Code. § 1791(o) (West 1998 & Supp. 2006). The
25 contract at issue in this case was for defendant to provide surrogacy
26 services for plaintiffs. There is no maintenance, replacement or
27 repair of a consumer product involved. The statute is simply not
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1 applicable here.

2 Even if plaintiffs had a viable theory under which attorney's
3 fees could be awarded, the court has no evidence from which to make
4 such an award. In the October 2, 2006 order, the court ordered
5 plaintiffs to file copies of the billing records referenced in the
6 Declaration of Terry R. Hunt (Dkt. No. 55) because they had been
7 omitted. The only document provided is attached as exhibit A to the
8 supplemental memorandum (Dkt. No. 60). This one page statement is
9 nothing more than a summary of the invoices by counsel and payments
10 made by defendants to counsel. The court ordered submission of
11 counsel's billing records not a summary. To the extent that the court
12 can award attorney's fees, such an award must be reasonable. An
13 examination of counsel's records is necessary to determine whether a
14 reasonable amount of time was spent on the various tasks related to
15 this adversary proceeding. The court is unable to make such a finding
16 on the record before it.

17 The court will issue a minute order granting the motion in part
18 and denying it in part as against defendant Nanette Lynn Delp. The
19 court will also issue a separate judgment by default.

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