

BACKGROUND²

On October 10, 2019, Andria Nicole Robinson (“Debtor”) filed a voluntary Chapter 7 petition commencing the above-captioned bankruptcy proceeding. (ECF No. 1). On the same date, a notice of bankruptcy and meeting of creditors was issued (ECF No. 5), which scheduled a deadline of January 13, 2020, for creditors to file objections to the Debtor’s Chapter 7 discharge or objections to the dischargeability of any debt.

On January 8, 2020, Jessie Robinson (“Plaintiff”) commenced the above-captioned adversary proceeding by filing a complaint (“Complaint”) against the Debtor. (AECF No. 1). Plaintiff, who is the Debtor’s paternal grandmother, sought a determination that the balance of a \$10,000 personal loan to the Debtor was excepted from the Chapter 7 discharge under Section 523(a)(2)(A).

On August 5, 2020, Debtor filed an answer to the Complaint (“Answer”). (AECF No. 29).

On May 24, 2021, an Order Regarding Pretrial and Trial Matters was entered setting a pre-trial conference for August 12, 2021, and a one-day trial for August 24, 2021. (AECF No. 58).

On August 24, 2021, a trial was conducted at which both the Plaintiff and the Debtor presented direct testimony by declaration and were subject to cross-examination. After closing arguments were presented by counsel, the matter was taken under submission.

On September 13, 2021, a Memorandum Decision After Trial was entered (“Trial Decision”). (AECF No. 78). Based on that decision, a separate judgment was entered in favor of the Debtor. (AECF No. 80). No appeal was taken, and the separate judgment is final (“Final Judgment”).

² Pursuant to FRE 201(b), the court takes judicial notice of all materials appearing on the docket in the above-captioned adversary proceeding and the above-captioned Bankruptcy Case. See U.S. v. Wilson, 631 F.2d 118, 119 (9th Cir. 1980); see also Bank of Am., N.A. v. CD-04, Inc. (In re Owner Mgmt. Serv., LLC Trustee Corps.), 530 B.R. 711, 717 (Bankr. C.D. Cal. 2015) (“The Court may consider the records in this case, the underlying bankruptcy case and public records.”).

1 On September 28, 2021, the court entered its Disposition and Closing of Adversary Case.
2 (AECF No. 88).

3 On November 22, 2021, Debtor filed an ex parte motion to reopen the instant Adversary
4 Proceeding. (AECF No. 100).

5 On November 29, 2021, an order was entered reopening the Adversary Proceeding.
6 (AECF No. 101).

7 On November 29, 2021, Debtor filed the instant Motion along with a declaration of Ethan
8 Featherstone. (AECF No. 102). The Motion was noticed to be heard on January 5, 2022.
9 (AECF No. 103).

10 On December 10, 2021, Plaintiff filed her opposition (“Opposition”). (AECF No. 106).

11 On January 4, 2022, Plaintiff filed a document entitled “Offer of Judgment.” (AECF No.
12 107).

13 DISCUSSION

14 By the instant Motion, Debtor seeks to recover the total amount of \$26,290 in attorney’s
15 fees, paralegal fees, and costs pursuant to FRCP 68. The Offer of Judgment is dated and
16 apparently was served on September 11, 2020, i.e., approximately 37 days after Debtor filed her
17 Answer and approximately 346 days before the commencement of trial. Apparently, the Plaintiff
18 did not respond to the Offer of Judgment. Accompanying the Motion are copies of the billing
19 statements of Debtor’s counsel representing that the total amount sought was incurred from the
20 date of the Offer of Judgment through the completion of the trial.

21 Having lost at trial and suffering entry of the Final Judgment against her, Plaintiff
22 opposes any recovery under FRCP 68 on a variety of grounds, including that her counsel charged
23 only \$1,500 compared to the \$26,290 total amount sought by the Debtor.

24 Both the Debtor and the Plaintiff are misguided. The professional fees incurred by
25 Debtor’s counsel appear to be reasonable and necessary.³ The same is true of the fees actually
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27 ³ Even the Plaintiff describes Debtor’s counsel as “competent and well-versed in
28 bankruptcy practice and procedure.” See Opposition at 5:1-2.

1 charged, and possibly all of the fees billed but not charged, by Plaintiff's counsel.⁴ But
 2 regardless of the reasonableness of the fees sought by the Debtor, they are not recoverable under
 3 FRCP 68 for one reason: the Debtor won.

4 There is no question that the Offer of Judgment was timely because the Debtor conveyed
 5 it to the Plaintiff more than 14 days before trial. See FED.R.CIV.P. 68(a). There is no question
 6 that the Plaintiff did not accept the offer and it was considered withdrawn. Id. at 68(c).⁵ There is
 7 no question that the Debtor, as defendant, made the offer to the Plaintiff, and that the Final
 8 Judgment was entered in favor of the Debtor.⁶ In such circumstances, FRCP 68 simply does not
 9 apply. See Delta Air Lines, Inc. v. August, 450 U.S. 345, 354 (1981).⁷ See generally 12
 10 FEDERAL PRACTICE AND PROCEDURE: CIVIL, supra, § 3006 ("The rule is entirely inapplicable,
 11 however, if the defendant, rather than the plaintiff, obtains judgment."). See, e.g., Pauluk v.
 12 Clark County Health Dist., 2020 WL 2773524, at *4 (D. Nev. May 27, 2020)(FRCP 68 would
 13 not apply when judgment is entered in favor of defendant-offeror); Merry v. Sandoval, 2019 WL
 14 6332159, at *2 (D. Nev. Nov. 8, 2019)(request under FRCP 68 denied where defendant-offerors

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 16 ⁴ Plaintiff's counsel represents that she provided more than \$25,000 in legal services to
 17 the Plaintiff and even paid certain legal expenses that were awarded to the Debtor early in the
 case. See Opposition at 5:1-6 & n.3.

18 ⁵ See 12 Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, FEDERAL
 19 PRACTICE AND PROCEDURE: CIVIL § 3006 (3rd ed. 2021) ("Unless the plaintiff accepts a Rule 68
 20 offer within fourteen days, it is deemed rejected and plaintiff will suffer the adverse
 consequences prescribed by the rule unless it obtains a more favorable judgment.").

21 ⁶ Plaintiff sought entry of a bankruptcy court judgment declaring the Debtor's pre-
 22 bankruptcy obligation in the amount of \$9,800 to be nondischargeable under Section 523(a)(2).
 23 See Complaint at 6:11-12. There is no question that a bankruptcy court has authority to
 24 determine the dischargeability of a debt and to enter a judgment for the amount. See Sasson v.
 25 Sokoloff (In re Sasson), 424 F.3d 864, 873-74 (9th Cir. 2005). Had this court determined
 liability in favor of the Plaintiff but awarded less than the Debtor's \$1,000 Offer of Judgment, an
 award of attorney's fees to the Debtor would have been permitted under FRCP 68. Arguably, the
 results achieved by Debtor's counsel were just too good.

26 ⁷ FRCP 68 is designed to encourage good faith settlement offers between parties.
 27 Submitting a "lowball" offer that has no hope of being accepted does nothing to discourage the
 28 plaintiff from going to trial. In those circumstances, there is no reason to reward the prevailing
 defendant for making such an offer by shifting the legal fees and expenses. 450 U.S. at 352-56.

1 had obtained summary judgment in their favor on all claims); Miller v. C.H. Robinson
2 Worldwide, Inc., 2019 WL 1903389, at *3 (D. Nev. Apr. 26, 2019) (request under FRCP 68
3 denied where defendant-offeror obtained judgment on the pleadings). Because the sole basis for
4 the instant Motion does not apply, Debtor's request cannot be granted.

5 Even if FRCP 68 somehow applied, it is questionable whether the Offer of Judgment was
6 properly made. Even a cursory review of the document reflects that the Debtor actually offered
7 to enter a judgment in her own favor rather than in favor of the Plaintiff. See Offer of Judgment
8 at 1:22-24 ("...Defendant ANDRIA ROBINSON, hereby offers to take judgment against
9 Defendant ANDRIA ROBINSON in the sum of \$1,000 (One Thousand Dollars), inclusive of
10 costs, attorney's fees and pre-judgment interest herein incurred." (emphasis added)).

11 Ambiguities in an offer of judgment under FRCP 68 must be construed against the drafter. See
12 Erdman v. Cochise County, Arizona, 926 F.2d 877, 880 (9th Cir.1991). Given the language used
13 by the Debtor, there appears to have been nothing for which the Plaintiff could respond. On this
14 record, it therefore appears that the Debtor failed to even provide an effective offer within the
15 meaning of FRCP 68.

16 Finally, under Section 523(d), a creditor that loses a dischargeability objection under
17 Section 523(a)(2), must pay the debtor's costs and reasonable attorney's fees "if the court finds
18 that the position of the creditor was not substantially justified..." In the Trial Decision, the court
19 concluded that the Plaintiff had failed to meet her burden of proof at trial on the elements
20 required under Section 523(a)(2). While the court questioned the wisdom of ever pursuing the
21 Complaint, the court did not conclude after trial and does not conclude now that the Plaintiff's
22 position was not substantially justified from a legal standpoint. Thus, even if the Debtor ever
23 sought to recover her costs and reasonable attorney's fees under Section 523(d), such a request
24 would be denied.⁸

25 **IT IS THEREFORE ORDERED** that Defendant's Motion for Attorney's Fees After
26 Offer of Judgment Under Fed.R.Bank.P. 7068 and Fed.R.Civ.P. 68, Adversary Docket No. 102,

27 ⁸ Compare Trial Decision at 10 n.13 (discussing "American Rule" generally requiring
28 litigants to bear their own attorney's fees and inapplicability of Section 523(d) to a creditor's
request for attorney's fees).

1 be, and the same hereby is, **DENIED**.

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3 Copies sent via CM/ECF ELECTRONIC FILING

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