

FILED

AUG 28 2006

U.S. BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA**

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10 In re:) Chapter 11
11)
12 JOHN RICHARD STEPHENS and) No. 0-05-bk-01680-JMM
13 SANDRA J. STEPHENS,)
14 _____ Debtors.) Adversary No. 0-06-AP-00002-JMM
15) **MEMORANDUM DECISION RE:**
16 CORONA COLLEGE HEIGHTS) **MOTION FOR SUMMARY JUDGMENT**
17 ORANGE & LEMON ASSOCIATION,)
18 EXPORT SELECT, LLC, AND KODIAK)
19 PRODUCE & STORAGE, INC.,) (Opinion to Post)
20 _____ Plaintiffs,)
21 vs.)
22 JOHN RICHARD STEPHENS and)
23 SANDRA J. STEPHENS,)
24 _____ Defendants.)

21 The Plaintiffs have asked this court to grant summary judgment on their behalf. For
22 the reasons outlined below, the court finds oral argument to be unnecessary, and rules as follows:

- 23 1. Corona College Heights Orange & Lemon Association's ("CCH")
24 motion is GRANTED;
25 2. Export Select, LLC's ("ESL") motion is GRANTED;
26 3. Kodiak Produce & Storage, Inc.'s ("Kodiak") motion is DENIED;

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1 U.S. District Judge Stephen M. McNamee then, on July 14, 2005, accepted that
2 stipulation as containing undisputed facts, and adopted them as the court's findings of fact. Order
3 of July 14, 2005.

4 Judgment was then entered, on the same day, against all defendants in that civil
5 action, including the Defendants herein, as follows:

- | | | | |
|----|----------------|---|--|
| 6 | <u>For CCH</u> | • | \$38,957.50 damages |
| 7 | | • | 7,190.50 attorneys' fees (applicable to both
CCH and ESL) |
| 8 | | • | 5,424.63 finance charges |
| 9 | <u>For ESL</u> | • | \$44,102.83 damages |
| 10 | | • | 4,660.41 finance charges |

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12 The court then ordered that interest was due on any unpaid sums at the simple interest rate of 18%
13 per annum until all sums were fully paid.

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15 **(3) Defendants' Defenses**

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17 The Defendants, in their response, challenge the aforesaid judgment and stipulated
18 facts on the merits. In Sandra Stephens' case, she also argues that she had no active role in the
19 businesses which injured the Plaintiffs. However, the Defendants are raising these defenses too late,
20 and in direct contradiction to their previous stipulation. Thus, they are judicially estopped from so
21 doing. *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782-83 (9th Cir. 2001). To now allow
22 the Defendants to change their story from that to which they previously agreed, and require the
23 Plaintiffs to start again, is for them to play too "fast and loose" with the court. *Id.* at 782. Their
24 District Court stipulation is binding upon them. *Sec Crown Life Insurance Co. v. Springpark*
25 *Associates (Matter of Springpark Associates)*, 623 F.2d 1377, 1380 (9th Cir. 1980).

26 Therefore, the District Court judgment of July 14, 2005, is declared to be non-
27 dischargeable pursuant to 11 U.S.C. § 523(a)(4).
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(4) Attorneys' Fees

As for Plaintiffs' claim for attorneys' fees in this non-dischargeability action, while Plaintiffs have pointed to federal cases allowing fees and costs in a PACA lawsuit, this court notes that those fees and costs have already been awarded in the District Court action, which this court has now found to be non-dischargeable obligations.

However, the Plaintiffs have not provided the court with any authority as to their claim for fees under the bankruptcy statute, 11 U.S.C. § 523(a)(4). In the United States, the "American Rule" is that, unless otherwise provided by contract or statute, each party is to bear their own attorneys fees. *See Alyeska Pipeline Serv. Co. v. Wilderness Society*, 421 U.S. 240, 257-58 (1975).

Fees for the non-dischargeability proceeding shall not be awarded. Taxable costs, however, shall be. An affidavit or bills of costs of appropriate taxable costs for the bankruptcy action shall be filed within 20 days.

(5) Kodiak's Motion

Unlike CCH and ESL, Kodiak holds no prior judgment or stipulation. The affidavits of the parties reveal conflicting interpretations of undeveloped facts. Thus, this court must hear all the evidence and judge the credibility of all witnesses. Accordingly, Kodiak's motion for summary judgment shall be DENIED, and a trial shall commence thereon on September 11, 2006, at 11 a.m.

DATED: August 28, 2006.



JAMES M. MARLAR
UNITED STATES BANKRUPTCY JUDGE

1 COPIES served as indicated below this 28th
2 day of August, 2006, upon:

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