

11 USC 523(a)(6)
Dischargeability
Willful and Malicious
Non-compete Contract
Covenant not to compete
Non-solicitation
Intentional Interference with
Economic Relations

Home Instead Senior Care of Oregon v. Treon, Adv. No. 07-03159
In Re Jamie Lynn Treon, Case No. 07-31112-elp7

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ELP

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Plaintiff filed this adversary proceeding to determine the dischargeability of its claim against debtor pursuant to 11 USC § 523(a)(6). The issue in this case is whether debtor's alleged breach of non-solicitation and non-compete provisions in two employment contracts resulted in a nondischargeable debt.

Breach of contract damages are only excepted from discharge under § 523(a)(6) if (1) the debtor's conduct was tortious and (2) the debtor caused willful and malicious injury. In re Jercich, 238 F.3d 1202, 1205 (9th Cir. 2001). The court discussed and concluded that the first prong of this test requires a plaintiff to prove that the debtor committed an intentional tort (*i.e.* tort-like conduct is insufficient). Applying Oregon law, the court found that the plaintiff did not present sufficient evidence to prove that debtor committed the tort of intentional interference with economic relations. Under the second prong, the debtor's conduct did not cause either willful or malicious injury to the plaintiff. Thus, the debt owed to the plaintiff, if any, was dischargeable and plaintiff's complaint was dismissed.

Both parties requested attorney fees pursuant to a fee provision in the employment contract. The court held that neither party was entitled to attorney fees.

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9 UNITED STATES BANKRUPTCY COURT
10 FOR THE DISTRICT OF OREGON

11 In Re:) Bankruptcy Case
12 JAMIE LYNN TREON,) No. 07-31112-elp7
13 Debtor.)
14 _____) Adversary No. 07-03159
15 A.K.D., INC., dba HOME INSTEAD)
16 SENIOR CARE OF OREGON) MEMORANDUM OPINION
17 v. Plaintiff,)
18 JAMIE LYNN TREON,)
19 Defendant.)

19 Plaintiff, Home Instead Senior Care of Oregon (Home Instead), filed
20 this adversary proceeding to have its claim against defendant-debtor,
21 Jamie Treon, declared nondischargeable and reduced to judgment. The
22 claim arises from alleged breaches of employment agreements containing
23 non-compete and non-solicitation provisions. For the reasons discussed
24 below, I conclude that, when debtor went to work for one of Home
25 Instead's former clients one month after she stopped working for Home
26 Instead, she did not willfully and maliciously injure Home Instead.

1 Thus, Home Instead's claim that the debt debtor owes it is
2 nondischargeable under 11 U.S.C. § 523(a)(6)¹ will be dismissed.

3 FACTS

4 Home Instead, which runs a service that provides primarily non-
5 medical in-home care to seniors, employed debtor as a caregiver from
6 about June 14, 2005, until she resigned on April 28, 2006. As a
7 condition of her employment, debtor signed two contracts with Home Instead
8 - a "Caregiver Confidentiality, Non-Solicitation and Non-Compete
9 Agreement" (Non-Compete Agreement) and an "Employment Agreement." Those
10 agreements together prohibited debtor from soliciting, diverting, taking
11 away, or attempting to solicit, divert, or take away, any of Home
12 Instead's current or prospective clients and from working for any of Home
13 Instead's clients for three months after termination of employment.

14 While employed by Home Instead, debtor provided services primarily
15 for Richard Mayfield and Donald and Phyllis Hinman (the Hinmans).

16 During one of her last visits with Mayfield, debtor informed him and
17 Susan Lewis (who was Mayfield's medical decision maker and power of
18 attorney) that she was resigning from Home Instead. Debtor testified
19 that, after she told Mayfield and Lewis that she was leaving Home
20 Instead, Lewis suggested that debtor continue working for Mayfield as a
21 private caregiver after she quit. Lewis testified that debtor was the
22 one who made the suggestion. I believe Lewis's version and find that
23 debtor was the one who made the suggestion, based on Lewis's demeanor and
24 the fact that Lewis has no stake in this proceeding.

25
26 ¹ Unless otherwise indicated, all chapter and section references
are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.

1 As a result of the conversation with debtor, Lewis contacted Home
2 Instead on or about April 26, 2006, to cancel Mayfield's service
3 contract. That day Matt Van Sooy, a Home Instead employee, contacted
4 Lewis and warned her that it would be a breach of Mayfield's service
5 contract if she independently hired debtor.² A few hours after that
6 conversation, Lewis reinstated Mayfield's contract with Home Instead.
7 There was no break in the services Home Instead provided to Mayfield.

8 As for the Hinmans, debtor denies making a similar proposal to
9 provide post-termination services to the Hinmans. Home Instead did not
10 provide any direct evidence that debtor solicited the Hinmans as clients,
11 but wants me to infer that she did based on the fact that debtor did
12 solicit Mayfield and that, on April 26, 2006, the Hinmans also called
13 Home Instead to cancel their contract. Kelly Davison, Home Instead's co-
14 owner, and Jeannette Barlow, Home Instead's registered nurse, went to the
15 Hinmans' home and informed Hinman of the restrictions in his contract
16 with respect to hiring former Home Instead employees. Matt Van Sooy also
17 called Rick Hinman (the Hinmans' son) to tell him about the contract
18 restrictions. On May 2, the Hinmans reinstated their contract.

19 Ali Davidson, another co-owner of Home Instead, was suspicious that
20 debtor was attempting to solicit Home Instead clients. When debtor
21 picked up her final paycheck, Ali Davidson warned debtor that she could

22
23 ² There was testimony that Home Instead clients sign a contract
24 agreeing that, if the client chooses to stop receiving services from Home
25 Instead, the client must wait for one year before independently hiring a
26 former employee of Home Instead. None of the written contracts between
Home Instead and its clients were introduced in evidence. Nor was there
any evidence that debtor was aware of this provision in the clients'
contracts with Home Instead.

1 not continue working for Home Instead clients under the terms of her Non-
2 Compete Contract and Employment Agreement. Debtor told Davidson that she
3 had intended to continue styling Mrs. Hinman's hair and was contemplating
4 having her husband mow the Hinmans' lawn. Davidson told debtor that she
5 could not provide those services, and was to have no contact with
6 Mayfield or the Hinmans.

7 In the weeks after she left Home Instead, debtor requested and
8 received copies of her Non-Compete and Employment Agreements. She sought
9 the advice of counsel to clarify her rights and obligations under the
10 contracts. After speaking with her lawyer, debtor understood that she
11 could not solicit, divert, or take away any of Home Instead's *current*
12 clients, but that she could work for *former* clients.

13 I find credible debtor's testimony regarding the legal advice she
14 received and her understanding of that advice. Debtor's testimony was
15 corroborated by Roxanne Farra, Home Instead's attorney in the state court
16 case it had filed against defendant prior to her bankruptcy. Farra
17 testified that debtor's counsel had filed a motion for summary judgment
18 in state court on the theory that debtor had not breached the contracts,
19 because the contract language did not extend to "former" clients of Home
20 Instead. Although the state court judge denied debtor's motion, the
21 theory used in the motion corroborates debtor's testimony regarding the
22 advice she received from counsel as to what the contracts required.

23 From April 28, 2006, her last day of work for Home Instead, to June
24 2, 2006, debtor had no working relationship with any current or former
25 Home Instead clients, nor did she attempt to or actually solicit, divert,
26 or take away any clients. During May, the Hinmans continued to receive

1 Kawaauhau v. Geiger, 523 U.S. 57, 61-62 (1998) (indicating that negligent
2 and reckless torts and intentional breaches of contract are outside the
3 scope of what was "plainly expressed" in § 523(a)(6)). "It is well
4 settled that a simple breach of contract is not the type of injury
5 addressed by § 523(a)(6)." In re Riso, 978 F.2d 1151, 1154 (9th Cir.
6 2001). An intentional breach of contract is excepted from discharge only
7 if it is "accompanied by tortious conduct which results in willful and
8 malicious injury." In re Jercich, 238 F.3d 1202, 1205 (9th Cir. 2001).

9 Under Jercich, the first question in determining whether a breach of
10 contract is excepted from discharge under § 523(a)(6) is whether debtor's
11 conduct was tortious. 238 F.3d at 1206. The second question is whether
12 the debtor's conduct resulted in willful and malicious injury to the Home
13 Instead. Both requirements must be met before a debt arising from
14 conduct that also constitutes breach of a contract will be
15 nondischargeable under § 523(a)(6). Id. at 1205,1206-1209 (analyzing
16 each element separately).

17 For the reasons discussed below, I find that debtor's conduct was
18 not tortious and did not give rise to a willful or malicious injury.
19 Thus, Home Instead's nondischargeability claim fails.

20 1. Tortious Conduct:

21 (a) Must Home Instead prove an intentional tort?

22 Home Instead argues that debtor's conduct constituted intentional
23 interference with economic relations, which is a tort. However, Home
24 Instead also argues that it need not prove that defendant's conduct
25 constituted a tort, but instead must prove only that debtor's conduct was
26 something akin to a tort or tort-like. I reject that argument.

1 The law is clear in the Ninth Circuit that a debt arising from a breach
2 of contract is nondischargeable under § 523(a)(6) only to the extent that
3 the breach of contract was accompanied by willful and malicious tortious
4 conduct. Riso, 978 F.2d at 1154; Jercich, 238 F.3d at 1205. See also In
5 re Hayes, 315 B.R. 579, 590 (Bankr. C.D. Cal. 2004). As the Ninth
6 Circuit recently said:

7 In 1998, . . . the Supreme Court clarified that the § 523(a)(6)
8 exception "is confined to debts 'based on what the law has for
9 generations called an intentional tort.'" Geiger, 523 U.S. at 60
(quoting Geiger v. Kawaauhau (In re Geiger), 113 F.3d 848, 852 (8th
Cir. 1997) (en banc)).

10 In re Ditto, 2007 WL 4355367 *3 (9th Cir. 2007).

11 Despite that clear statement of the law, Home Instead argues that a
12 breach of a non-compete contract results in a nondischargeable debt
13 regardless of whether tortious conduct is involved, relying on In re
14 Trammell, 172 B.R. 41 (Bankr. W.D. Ark. 1994), which was cited in
15 Jercich. In Trammell, the court made no finding regarding whether the
16 defendant's conduct was tortious. It merely concluded that, under the
17 facts of that case, the breach of a covenant not to compete was willful
18 and malicious. The Jercich court cited Trammell as an example of a case
19 in which an intentional breach of contract had resulted in willful and
20 malicious injury. It did not cite Trammell as a way of softening the
21 requirement that there be an intentional tort in order for damages for
22 breach of contract to be nondischargeable under § 523(a)(6). In any
23 event, the defendant's conduct in Trammell would have constituted
24 tortious conduct, and therefore Trammell is consistent with Jercich.

25 Plaintiff also relies on In re Ketaner, 149 B.R. 395 (Bankr. E.D.
26 Va. 1992). In that case, the defendant had sold his stock in a large

1 company for \$1,200,000, but remained the president and chief executive
2 officer. 149 B.R. at 396. After having a dispute with the company over
3 his annual bonus, the defendant decided to form his own company with the
4 goal of destroying his prior employer's business. Id. at 398. He
5 successfully enticed the plaintiff's staff to quit their jobs and come
6 and work for his new company. The defendant tortiously interfered with
7 the plaintiff's contractual and business relations, conspired to injure
8 the plaintiff in violation of Virginia's criminal code, breached his
9 fiduciary duty as an officer of the plaintiff's corporation, and breached
10 a non-compete agreement. Id. Thus Ketaner does not support plaintiff's
11 argument that any breach of a covenant not to compete, even on that is
12 not tortious, is sufficient to establish nondischargeability under §
13 523(a)(6).

14 (b) Was debtor's conduct tortious?

15 In determining whether debtor's conduct was tortious, the court must
16 apply Oregon state law, because the contracts and conduct at issue
17 occurred in Oregon. Jercich, 238 F.3d at 1206. To prove intentional
18 interference with economic relations, the tort plaintiff claims defendant
19 committed, the plaintiff must establish

20 (1) the existence of a valid business relationship or expectancy,
21 (2) intentional interference with that relationship, (3) by [the
22 defendant], (4) accomplished through improper means or for an
improper purpose, (5) a causal effect between the interference and
damage to economic relations, and (6) damages.

23 Uptown Heights Assoc. v. Seafirst Corp., 320 Or. 638, 651 (1995).

24 The heart of this nondischargeability claim is Home Instead's
25 assertion that defendant intentionally interfered with its economic
26

1 relations with the Hinmans.³ I conclude that Home Instead failed to
2 prove the elements of intentional interference with economic relations
3 with the Hinmans.

4 First, Home Instead failed to establish that it had a valid business
5 relationship with the Hinmans when debtor started working for them in
6 June 2006. Rick Hinman had canceled his parent's contract with Home
7 Instead on May 31, 2006. He then contacted debtor on June 1 and offered
8 her employment as an independent caregiver for his parents. Debtor
9 accepted his offer and started working for the Hinmans on June 2.
10 Because the Hinmans had terminated their business relationship with Home
11 Instead before the Hinmans approached debtor or debtor accepted
12 employment from Rick Hinman, there was no valid business relationship
13 between Home Instead and the Hinmans when debtor went to work for them.
14 As I said earlier, there is no evidence that debtor knew of the provision
15 in the contract between Home Instead and the Hinmans that prevented them

17 ³ A significant amount of trial time was spent discussing the
18 fact that Mayfield and the Hinmans gave notice that they were terminating
19 their use of Home Instead services contemporaneously with debtor's
20 leaving her employment at Home Instead. The evidence established that
21 debtor had sought to draw Mayfield away from Home Instead while he was
22 still a client of Home Instead, but Mayfield did not in fact terminate
23 his agreement with Home Instead, and debtor never provided private
24 caregiver services to him after she left her employment with Home
25 Instead. Therefore, there was in fact no interference with the Home
26 Instead contract with Mayfield, and no damages arising from debtor's
solicitation of Mayfield as a client. I agree with plaintiff that it is
reasonable to infer that defendant also solicited the Hinmans in April
just before she left her employment. That solicitation, however, did not
cause the Hinman's to terminate their services and thus did not damage
plaintiff. As discussed hereafter, I do not believe that debtor
solicited the Hinmans while they were still clients of Home Instead in
connection with subsequent employment by them a month later.

1 from hiring a private caregiver after they had terminated their agreement
2 with Home Instead.

3 Second, even if Home Instead had a business relationship with the
4 Hinmans, Home Instead did not prove that debtor interfered with that
5 relationship. Home Instead did not prove that debtor approached the
6 Hinmans, or suggested that they cancel their contract and hire her as an
7 independent caregiver in late May or early June 2006. Home Instead would
8 have me infer that debtor did solicit the Hinmans from the fact that
9 debtor solicited Mayfield while he was still a client of Home Instead,
10 and that both Mayfield and the Hinmans gave notice of termination to Home
11 Instead on the same date, April 26, 2006. While I agree that it is fair
12 to infer that debtor solicited the Hinmans in late April, the Hinmans
13 quickly rescinded their termination continued using Home Instead's
14 services for an additional month. I decline to infer that debtor further
15 solicited the Hinmans in early June from those facts. The Hinmans had
16 previously hired at least one other independent caregiver not employed by
17 Home Instead. This suggests that the Hinmans needed no encouragement
18 from debtor to cancel their contract with Home Instead and hire
19 independent caregivers.

20 Further, more than a month elapsed between the time debtor solicited
21 Mayfield and the date the Hinmans finally terminated their agreement with
22 Home Instead. They did not hire debtor immediately upon termination of
23 her employment with Home Instead; they approached debtor over a month
24 later. By that time, debtor had sought the advice of counsel. I believe
25 she was avoiding soliciting business from Home Instead's current clients,
26 based on counsel's advice that her contracts with Home Instead prohibited

1 her from doing so. She also questioned Rick Hinman to confirm that the
2 Hinmans were no longer using Home Instead's services before she agreed to
3 work for them. Thus, I conclude that, with respect to the employment
4 that began June 2, it was the Hinmans who contacted debtor and not the
5 other way around.

6 I also find that, if debtor interfered with the contract, that
7 interference was not intentional.

8 If the person whose actions interfere does not have the intent to
9 cause the result, his conduct does not subject him to liability.
10 However, even if he does not act for the purpose of interfering or
11 does not desire it but knows that the interference is substantially
12 certain to occur from his action and is a necessary consequence
13 thereof, his interference is intentional as contemplated by the
14 rule. Restatement (Second) of the Law of Torts § 766, comments (h)
15 and (j).

16 Straube v. Larson, 287 Or. 357, 360-61 (1979).

17 The evidence at trial did not prove that debtor's intent in
18 providing services to the Hinmans was to cause harm to Home Instead. Nor
19 could she had known that her actions were substantially certain to cause
20 harm to Home Instead, because the Hinmans had already terminated their
21 agreement with Home Instead when debtor agreed to work for them. Debtor
22 understood that there was no contract with which to interfere, and
23 therefore could not have thought that a necessary consequence of her
24 employment by the Hinmans would be harm to Home Instead.

25 Finally, Home Instead failed to prove that its damages are casually
26 connected to debtor's interference with its relationship with the
Hinmans. Home Instead introduced evidence of the damages it suffered as
a result of the Hinmans permanently canceling their contract. However,
it presented no evidence to show that the Hinmans would have likely

1 reinstated its contract with Home Instead had debtor rejected the
2 Hinmans' job offer. To the contrary, the Hinmans hired at least one
3 other private caregiver even before they permanently canceled their
4 contract with Home Instead. Additionally, when Rick Hinman canceled his
5 parents' contract, he informed Home Instead that his parents could no
6 longer afford their rates. This suggests that, regardless of debtor's
7 actions, the Hinmans likely would have discontinued using the services of
8 Home Instead. Home Instead did not present any evidence to the contrary.
9 I find that Home Instead did not demonstrate that any damages it suffered
10 were caused by debtor's alleged interference.

11 Because I conclude that Home Instead's proof fails on the first,
12 second, and fifth elements of the tort of intentional interference, I
13 need not consider whether the breach of a covenant not to compete could
14 be an improper means that would support a claim for intentional
15 interference with contract.

16 2. Willful and Malicious Injury:

17 Although my findings above are sufficient to support a decision in
18 favor of debtor, I will also analyze whether debtor caused willful and
19 malicious injury, because my conclusions provide an alternative basis for
20 my determination that debtor should prevail. A debt may be excepted from
21 discharge under § 526(a)(6) only to the extent that the injuries suffered
22 were caused by conduct that was both willful and malicious. Willfulness
23 and maliciousness are analyzed separately. In re Sicroff, 401 F.3d 1101,
24 1105 (9th Cir. 2005).

25 To be "considered willful, the debtor must commit an act akin to an
26 intentional tort under state law, and the debtor must intend the

1 consequences or injury resulting from that act rather than just the act
2 itself." Geiger, 523 U.S. at 61-62. In other words, the plaintiff must
3 prove "either that the debtor had a subjective motive to inflict the
4 injury or that the debtor believed that injury was substantially certain
5 to occur as a result of [her] conduct." Jercich, 238 F.3d at 1208
6 (emphasis in original). See also In re Su, 290 F.3d 1140, 1144 (9th Cir.
7 2002). In determining the defendant's state of mind, the court "may
8 consider circumstantial evidence that tends to establish what the debtor
9 must have actually known." Su, 290 F.3d at 1146 n.6; Sicroff, 401 F.3d
10 at 1106.

11 Home Instead argues that debtor was substantially certain that her
12 employment by the Hinmans would result in the termination of the business
13 relationship between the Hinmans and Home Instead and would thereby cause
14 economic injury to Home Instead. Home Instead's argument is predicated
15 on the assumption that, by accepting employment with the Hinmans, debtor
16 caused the Hinmans to terminate their contract with Home Instead. I find
17 this argument unconvincing because the assumption is wrong.

18 As I explained above, I believe the testimony that the Hinmans
19 terminated their Home Instead contract before they called debtor and
20 offered her employment. Furthermore, debtor was aware that she was bound
21 by the Non-Compete and Employment Agreements. She sought the advice of
22 an attorney to explain her rights and obligations under those contracts.
23 Debtor followed the advice of her attorney and did not solicit employment
24 from the Hinmans. Debtor accepted Rick Hinman's job offer after he had
25 terminated his parents' contract with Home Instead. Home Instead
26 presented no evidence showing that debtor's acceptance of employment had

1 any effect on the Hinmans' decision to cancel their contract. As
2 previously discussed, the Hinmans had already hired another independent
3 caregiver and were canceling their contract for financial reasons.
4 Debtor's conduct in causing injury to Home Instead, if any, was not
5 willful.

6 A malicious injury is caused by "(1) a wrongful act, (2) done
7 intentionally, (3) which necessarily causes injury, and (4) is done
8 without just cause or excuse.'" Jercich, 238 F.3d at 1209 (quoting In re
9 Bammer, 131 F.3d 788, 791 (9th Cir. 1997)). Home Instead argues that
10 debtor's breach of her contractual obligations wrongfully and
11 intentionally caused injury to Home Instead.

12 There are two problems with this argument. First, debtor did not
13 *intentionally* breach her contract. Debtor relied in good faith on her
14 attorney's advice that accepting employment from a former client was not
15 a breach of her contracts. See In re Adeeb, 787 F.2d 1339, 1343 (9th
16 Cir. 1986) (a debtor's intent to hinder or delay creditors may be
17 vitiated by good faith reliance on the advice of counsel). There is
18 nothing inherently wrongful about a person accepting employment offered
19 by a former client. The contracts debtor signed did not expressly state
20 that they prohibited employment by former clients. Debtor is not a
21 sophisticated business person. Her training is as a hairdresser. Her
22 earnings were not substantial - she earned a little over \$10 per hour
23 (\$250 for a 24 hour shift) working for the Hinmans. Under these
24 circumstances, it was reasonable for her to consult and follow the advice
25 of an attorney when her former employer threatened her.

26 Debtor's contractual restrictions lasted only three months after

1 termination of her employment, and more than one month had already
2 elapsed when Rick Hinman contacted debtor. Given the short remaining
3 duration of the restrictions, coupled with the fact that the debtor did
4 not solicit work from Home Instead clients once she understood her
5 obligations, I believe that debtor was trying to avoid violating her
6 contractual obligations as she understood them. I find that the debtor
7 lacked the intent necessary to maliciously injure Home Instead.

8 Second, I find that her conduct was not done "without excuse." In
9 and of itself, competition is not inherently wrongful. Only the breach
10 of the non-compete and non-solicitation provision can be considered
11 wrongful. I have found that debtor reasonably relied on her attorney's
12 interpretation that the contract language did not include "former
13 clients." Whether or not I ultimately disagreed with that attorney's
14 interpretation as to one of the contracts does not prevent debtor's
15 reliance on his advice from being in "good faith" and providing an
16 "excuse" for her conduct.

17 3. Attorney Fees:

18 Both parties sought attorney fees in this adversary proceeding,
19 relying on the attorney fee provision in the Non-Compete Agreement. The
20 Non-Compete Agreement provides:

21 If Employer shall *prevail* in a legal proceeding to remedy a breach
22 or threatened breach of this Agreement, Employer shall be entitled
23 to receive reasonable attorney's fees, expert witness fees, and out-
of-pocket costs incurred in connection with such proceeding, in
addition to any other relief it may be granted.

24 (emphasis added). ORS 20.096(1) effectively makes this provision
25 reciprocal. It provides:

26 In any action or suit in which a claim is made based on a contract,
where such contract specifically provides that attorney fees and

1 costs incurred to enforce the provisions of the contract shall be
2 awarded to one of the parties, the party that prevails on the claim,
3 whether that party is the party specified in the contract or not,
4 shall be entitled to reasonable attorney fees in addition to costs
5 and disbursements.

6 Home Instead is not entitled to recover attorney fees from debtor
7 because it did not prevail in this adversary proceeding. Debtor
8 prevailed on this § 523(a)(6) claim because Home Instead failed to prove
9 that she willfully and maliciously injured it. That does not mean,
10 however, that debtor is entitled to recover attorney fees.

11 The extent to which a debtor who prevails in dischargeability
12 litigation involving a contract that contains an attorney fee clause can
13 recover attorney fees is unresolved because of the recent decision in
14 Travelers Cas. & Surety Co. Of Am. v. Pac. Gas & Elec. Co., 127 S.Ct.
15 1199 (2007). In that case, the Supreme Court held that the Ninth Circuit
16 had erroneously disallowed a creditor's contractual attorney fee claim on
17 the basis that the legal work pertained strictly to federal bankruptcy
18 law. The Ninth Circuit had earlier held that in dischargeability
19 litigation, attorney fees could not be awarded for legal work related to
20 dischargeability, because that is a question of federal law, not an
21 action on the contract. But attorney fees could be awarded for legal
22 work related to contract issues, if the dischargeability litigation
23 involved enforceability of a contract that contained an attorney fee
24 provision. In re Hashemi, 104 F.3d 1122, 1126-1127 (9th Cir. 1997); In
25 re Baroff, 105 F.3d 439, 442 (9th Cir. 1997) (debtor awarded attorney
26 fees in dischargeability litigation, because debtor successfully defended
based on a settlement contract containing an attorney fee provision).

1 I need not resolve in this case the extent to which Travelers has
2 impacted recovery of attorney fees in dischargeability litigation,
3 because I find that debtor breached the Non-Compete Agreement. The Non-
4 Compete Agreement provided that debtor would not "solicit, divert or take
5 away, or attempt to divert, solicit or take away, the business or
6 patronage of any of the clients, customers or accounts, or prospective
7 clients, customers or accounts" of Home Instead during her employment and
8 for a "period of 3 months after termination." The contract covers
9 current and "prospective" "clients, customers or accounts." The term
10 "prospective" is extremely broad. It encompasses anyone who is a
11 potential client, customer or account. There is nothing in the text or
12 context that would exclude former clients. Someone may use professional
13 services on a sporadic basis. Thus, former clients are within the
14 universe of prospective clients. Because debtor breached her contract
15 with Home Instead by providing services to the Hinmans within three
16 months after she left her employment, she is not entitled to attorney
17 fees under the Non-Compete Agreement. She prevailed in this litigation
18 because the debt is dischargeable, not because she did not breach the
19 contract.

20 The Employment Agreement, which is a separate contract, does not
21 provide a right to attorney fees in the event enforcement or
22 interpretation is necessary. Thus, debtor cannot be awarded attorney
23 fees even if she did not breach the Employment Agreement.

24 CONCLUSION

25 Debtor's conduct was not tortious, and did not cause willful and
26 malicious injury to Home Instead. Consequently, the debt owed by debtor

1 to plaintiff, if any, is dischargeable. Both parties' requests for
2 attorney fees are denied.

3 ###

4 cc: Milly Whatley
5 Fred Kowolowski
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