

Motion for Contempt
Violation of Discharge Injunction
11 U.S.C. §524(a)(2)

In re Taggart, Case No. 09-39216-rld7

12/9/2011 RLD

Unpublished

Prior to the bankruptcy filing, the debtor owned a 25% member interest in Sherwood Park Business Center, LLC ("SPBC"), which was formed to build and operate a two-building business park in Sherwood, Oregon. The debtor later transferred his 25% member interest in SPBC to BT of Sherwood, LLC ("BT"), which he had formed. He then transferred his entire member interest in BT to his attorney, who had represented him in the formation of BT and the transfer of his member interest in SPBC to BT.

SPBC initiated a state court action against the debtor, his attorney and BT, asserting various claims, including breach of fiduciary duty and breach of contract. The debtor filed an answer to the state court action, asserting affirmative defenses and a counterclaim for attorney's fees against SPBC and two members of SPBC ("SPBC members"). Before trial in the state court action was to begin, the debtor filed his chapter 7 bankruptcy petition.

The debtor did not schedule an interest in either SPBC or BT, though he scheduled a potential attorney fee award on his counterclaim in the state court action. After the chapter 7 trustee filed a no asset report, the debtor received his discharge. The state court action was stayed while the debtor's bankruptcy case was pending.

After the debtor received his discharge, the state court action was revived. The debtor filed a motion for a protective order ("protective order motion") requesting that a subpoena seeking to depose him be quashed. The debtor also sought attorney's fees on behalf of BT and himself in the protective order motion. The state court action went to trial.

Before trial, the debtor moved to dismiss himself as a party from the state court action. The state court denied the debtor's motion to dismiss. Following trial, the state court found in favor of SPBC. The state court dismissed the debtor's counterclaim with prejudice. After a hearing, the state court entered judgment against the debtor. The debtor appealed the judgment.

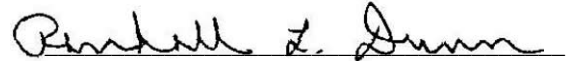
A petition for costs and attorney's fees ("attorney's fees petition") was filed on behalf of SPBC and the SPBC members. The attorney's fees petition sought attorney's fees and costs incurred

in the state court action for the period following the debtor's bankruptcy discharge. The state court awarded attorney's fees in favor of SPBC as an offset.

The debtor meanwhile filed a motion for contempt ("contempt motion") against the SPBC members and their attorney for an alleged violation of the discharge injunction under 11 U.S.C. § 524(a)(2) in seeking the judgment and in filing the attorney's fees petition. Following an evidentiary hearing, the bankruptcy court denied the debtor's contempt motion. In making its ruling, the bankruptcy court noted that it was unclear what standard of review applied to the state court's fact findings. The bankruptcy court thus made its determination under both the "clearly erroneous" standard of review and the "de novo" standard of review.

With respect to the "clearly erroneous" standard of review, the bankruptcy court concluded that the state court did not clearly err in finding that the SPBC members did not violate the debtor's discharge injunction in seeking an offsetting award of postpetition attorney's fees against the debtor in the state court action. The bankruptcy court determined that the state court applied the appropriate legal standard as set forth in Boeing North American, Inc. v. Ybarra (In re Ybarra), 424 F.3d 1018 (9th Cir. 2005) when the state court found that the debtor never abandoned his counterclaim for attorney's fees in the state court action. With respect to the "de novo" standard of review, the bankruptcy court found that the debtor's collective actions demonstrated that he reengaged in the state court action postpetition in light of the standards set forth in Ybarra.

Below is an Opinion of the Court.



RANDALL L. DUNN
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF OREGON

In Re:)	Bankruptcy Case
)	No. 09-39216-rld7
BRADLEY WESTON TAGGART,)	
)	MEMORANDUM OPINION
Debtor.)	

On November 14, 2011, I received evidence and heard testimony and argument at the hearing ("Hearing") on debtor Bradley Weston Taggart's ("Mr. Taggart") Motion to Hold Stuart M. Brown, Terry W. Emmert and Keith Jehnke in Contempt for Violating Discharge Injunction under 11 USC § 524 ("Contempt Motion").¹ Hereafter, Messrs. Brown, Emmert and Jehnke will be referred to collectively as the "Respondents" and individually as "Mr. Brown," "Mr. Emmert" and "Mr. Jehnke," as appropriate. The Hearing was limited to issues as to liability. If I decide the Contempt Motion in favor of Mr. Taggart, a further evidentiary hearing will be scheduled to receive evidence and hear testimony as to

¹ Unless otherwise indicated, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and all "Rule" references are to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037. The Federal Rules of Civil Procedure are referred to as "Civil Rules."

1 Mr. Taggart's damages. At the conclusion of the Hearing, I took the
2 matter under advisement.

3 In deciding this matter, I have considered carefully the
4 testimony presented and the exhibits admitted at the Hearing, as well as
5 arguments presented, both in legal memoranda and orally. I further have
6 taken judicial notice of the docket and documents filed in Mr. Taggart's
7 main chapter 7 case, Case No. 09-39216-rld7 ("Main Case"), for the
8 purpose of confirming and ascertaining facts not reasonably in dispute.
9 Federal Rule of Evidence 201; In re Butts, 350 B.R. 12, 14 n.1 (Bankr.
10 E.D. Pa. 2006). In addition, I have reviewed relevant legal authorities,
11 both as cited to me by the parties and as located through my own
12 research.

13 In light of that consideration and review, this Memorandum
14 Opinion sets forth the court's findings of fact and conclusions of law
15 under Civil Rule 52(a), applicable with respect to this contested matter
16 under Rules 7052 and 9014.

17 Factual Background

18 Unfortunately, the proceedings in this court culminating in the
19 Hearing represent no more than one pitched battle in the longstanding
20 disputes among the parties and their counsel. It is neither the
21 beginning, nor I fear, the end. I will refer to the underlying
22 grievances among them only as necessary to set the stage for the filing
23 of the Contempt Motion and its aftermath.

24 Mr. Taggart was a general contractor, who operated through a
25 corporation, Builders, Inc. Mr. Taggart developed several business
26 parks, anchored by tenants who also were owners. Sherwood Park Business

1 Center, LLC ("SPBC") was formed to build and operate a two-building
2 business park in Sherwood, Oregon. Its Operating Agreement reflects that
3 it was organized on or about October 12, 1999. See Exhibit 1, at p. 18.
4 Initially, SPBC was owned by four members, each with a 25% member
5 interest: Mr. Taggart, Mr. Jehnke, Mr. John Hoffard and Mr. Anthony
6 Benthin. See id. at p. 19. Mr. Taggart was designated as the Manager.
7 See id. at p. 3. Apparently, at some point, Mr. Emmert succeeded to the
8 member interest of Mr. Benthin in SPBC.

9 In 2004, Mr. Emmert acquired a 50% ownership interest in
10 Builders, Inc. Thereafter, relations between Mr. Taggart and Mr. Emmert
11 became contentious, and Mr. Taggart ultimately encouraged three creditors
12 to file an involuntary bankruptcy petition against Builders, Inc., which
13 had become insolvent while the SPBC buildings were being constructed.
14 "When SPBC paid approximately \$33,000 to Builders, Inc. to be used as a
15 deposit for a steel building, Builders, Inc. used the funds for payroll
16 instead." Taggart Trial Brief ("Taggart Trial Brief"), Main Case Docket
17 No. 50, at p. 2. That conduct ultimately resulted in Mr. Taggart being
18 replaced as the SPBC Manager by Mr. Jehnke. Id.

19 Mr. Taggart's financial condition subsequently deteriorated
20 further. On July 23, 2007, Mr. Taggart formed BT of Sherwood, LLC ("BT")
21 and transferred his 25% member interest in SPBC to BT. Mr. Taggart was
22 represented by attorney John M. Berman ("Mr. Berman") with respect to the
23 formation of BT and the transfer of Mr. Taggart's member interest in SPBC
24 to BT. Mr. Berman informed counsel for SPBC that the transfer had been
25 made. See Exhibit 2. SPBC's counsel responded that Mr. Taggart had no
26 right to make such a transfer. See Exhibit 3. Mr. Taggart later

1 transferred his entire member interest in BT to Mr. Berman in exchange
2 for payments totaling \$200,000. See Taggart Trial Brief, at pp.3-4; and
3 Exhibit 5.

4 On or about September 24, 2008, SPBC filed a complaint
5 ("Complaint") against Mr. Taggart, BT and Mr. Berman in the Washington
6 County, Oregon Circuit Court ("Circuit Court"), asserting claims for
7 breach of fiduciary duty, expulsion, breach of contract, attorney's fees
8 and declaratory relief (the "Circuit Court Lawsuit"). See Exhibit A. On
9 or about February 24, 2009, SPBC filed a First Amended Complaint
10 ("Amended Complaint") in the Circuit Court Lawsuit, asserting essentially
11 the same claims with elaborating allegations. See Exhibit B.

12 On October 28, 2009, Mr. Taggart filed an answer ("Answer") to
13 the Amended Complaint, asserting affirmative defenses of failure to state
14 a claim upon which relief could be granted and claim preclusion and
15 stating a counterclaim for attorney's fees against SPBC, Mr. Jehnke and
16 Mr. Emmert. See Exhibit C.

17 In the meantime, Mr. Taggart's financial condition was not
18 improving. He wanted to be done with SPBC, he wanted to be free of his
19 connections with Mr. Jehnke and Mr. Emmert, and he had no money to fund
20 participation in the Circuit Court Lawsuit. On November 4, 2009, the day
21 that the trial in the Circuit Court Lawsuit was to begin, Mr. Taggart
22 filed for protection under chapter 7 of the Bankruptcy Code. See Main
23 Case Docket No. 1. In his Schedule B list of personal property assets,
24 Mr. Taggart did not include any interest in either SPBC or BT, but he did
25 include a potential attorney fee award on his counterclaim in the Circuit
26 Court Lawsuit. See Exhibit D, at p. 2; Main Case Docket No. 1, Schedule

1 B. The trustee in Mr. Taggart's chapter 7 case filed a report of no
2 assets available for distribution, and Mr. Taggart received his discharge
3 by order entered on February 23, 2010. See Main Case Docket Nos. 14 and
4 15. Apparently, all action in the Circuit Court Lawsuit was stayed while
5 Mr. Taggart's bankruptcy case was pending.

6 After Mr. Taggart received his discharge, the Circuit Court
7 Lawsuit was revived. In behalf of Mr. Jehnke and Mr. Emmert, Mr. Brown
8 subpoenaed Mr. Taggart for a deposition on April 9, 2010. See Exhibit
9 10. Mr. Berman, in behalf of Mr. Taggart, filed a motion for a
10 protective order requesting that the subpoena be quashed, supported by
11 the declaration of Mr. Taggart. See Exhibit E. Mr. Taggart argued that
12 he already had been subjected to an 8-hour videotaped deposition in the
13 Circuit Court Lawsuit, and requiring him to submit to a further
14 deposition in the same case was "harassing, annoying and oppressive."
15 Id. at p. 2. In the motion for protective order, Mr. Berman requested
16 attorney's fees in behalf of BT and Mr. Taggart. Id. at p. 3. The
17 Hearing record is unclear as to the ultimate disposition of the motion
18 for a protective order: Mr. Taggart testified that the Circuit Court
19 never ruled on the motion. Mr. Brown testified that it was his
20 understanding that the Circuit Court denied the motion. In any event,
21 Mr. Taggart appeared at the deposition and was deposed by an attorney for
22 Mr. Emmert other than Mr. Brown.

23 The rescheduled trial ("Trial") in the Circuit Court Lawsuit
24 was set to begin on May 18, 2010. On May 17, 2010, Mr. Berman filed a
25 Motion to Dismiss and corresponding order to dismiss Mr. Taggart from the
26 Circuit Court Lawsuit in behalf of Mr. Taggart. See Exhibit 12. Neither

1 the Motion to Dismiss nor the accompanying order referenced Mr. Taggart's
2 counterclaim for attorney's fees and costs.

3 The Motion to Dismiss was argued on the first day of the Trial.
4 While counsel for Mr. Jehnke and Mr. Emmert agreed that they would not be
5 seeking monetary relief against Mr. Taggart, Mr. Brown argued that Mr.
6 Taggart was a necessary party with respect to the expulsion claim. The
7 Circuit Court ruled that no money judgment would be entered against Mr.
8 Taggart but otherwise denied the Motion to Dismiss. See Exhibit 13,
9 which includes the portion of the Trial transcript relating to the Motion
10 to Dismiss. No other portion of the Trial transcript was submitted in
11 evidence at the Hearing. Mr. Brown testified that Mr. Berman orally
12 renewed the Motion to Dismiss in behalf of Mr. Taggart at the end of the
13 Trial, and the renewed motion was denied. Mr. Taggart apparently did not
14 appear or testify at the Trial.

15 Following the Trial, the Circuit Court generally found in favor
16 of SPBC, and Mr. Brown drafted the Findings of Fact and Conclusions of
17 Law ("Findings and Conclusions") that the Circuit Court signed. See
18 Exhibit H. All counterclaims of Mr. Taggart and BT in the Circuit Court
19 Lawsuit were dismissed with prejudice. See id. at p. 9. The Findings
20 and Conclusions were entered on July 29, 2010.

21 After a delay of a number of months, Mr. Brown prepared and
22 submitted a form of judgment in the Circuit Court Lawsuit to which Mr.
23 Berman objected. The objections to the form of judgment ("Objection to
24 Judgment") were filed by Mr. Berman as "attorney for Defendants BT of
25 Sherwood LLC and John Berman." See Exhibit J, particularly at p. 7. Mr.
26 Taggart testified that Mr. Berman prepared the Objection to Judgment, in

1 part, for him. The Objection to Judgment contains the following, that I
2 quote at length:

3 The reason that no General Judgment has been submitted
4 is because as a matter of federal law no attorney fees
5 or costs, pre- or post-bankruptcy, can be assessed
6 against Mr. Taggart. Thus, the payment to him for the
7 25% interest [in SPBC] must be without any such
8 offsets, as explained infra.

9 Mr. Brown, who submitted this form of General
10 Judgment, is fully aware that he is asking the Court
11 to participate in a violation of federal law.
12 Moreover, he has been told that any attempt to seek
13 such fees or costs will result in a legal proceeding
14 against the responsible parties in the Bankruptcy
15 Court for violation of Mr. Taggart's discharge. It is
16 up to this Court to decide how it wishes to respond
17 when an attorney asks it to violate federal law
18 without even advising this Court that it is being
19 asked to do so.

20 . . . 21 DETAILS OF OBJECTIONS TO JUDGMENT

22 A. The proposed judgment states as follows, with
23 the objectionable parts italicized, at page 3 lines 3-
24 6[:]

25 "The purchase price shall be the fair market
26 value of [SPBC] multiplied by Taggart's 25% membership
27 interest, *less any unpaid post-bankruptcy petition
28 attorney fees, costs and prevailing party fees which
29 might be assessed against Taggart pursuant to ORCP 68
30 and ORS Chapter 20 and any necessary proceedings in
31 bankruptcy court or this court.*"

32 As you may recall, Mr. Taggart concluded that he
33 had assigned his interest and received fair value. He
34 considered himself to have no interest in this
35 proceeding and asked at the commencement of the trial
36 to be dismissed. He did not appear at trial or
37 participate in any manner.

38 Under these facts it is a violation of federal
39 law for anyone to attempt to obtain any award of
40 attorney fees against him. Mr. Taggart has received a
41 discharge in bankruptcy, and that discharge includes
42 any liability arising from a continuation of this
43 proceeding.

44 SPBC insists that he continues to be the owner of
45 the 25% interest, even though Mr. Taggart made no such
46 claim and did not engage in the litigation. SPBC and
47 Messrs. Jehnke and Emmert cannot force the
48 continuation of this litigation on Taggart, and then
49 assert a claim for attorney fees and costs against

1 him.

2 That was the express holding in In re Ybarra, 424
3 F.[.]3d 1018 (2005), a copy of which is attached to
4 this brief. It held that where a litigant actively
5 asserts claims in litigation post-petition, only then
6 can he be assessed post-petition attorney fees,
7 overruling In re Ybarra, 295 BR 609 (USBAP, 2002),
8 which held that even then attorney fees could not be
9 awarded.

10 As explained in the Ninth Circuit's decision, and
11 there are numerous other cases that have so held in
12 other jurisdictions, when one is discharged in
13 bankruptcy from liability, including liability
14 associated with prepetition litigation, the fact that
15 the litigation continues without any involvement by
16 the discharged debtor means that no attorney fees or
17 costs on account of those claims can be asserted
18 against the discharged debtor. His right to a fresh
19 start is preeminent.

20 The relevant fact is whether the discharged
21 debtor asserted claims in this case post-petition. He
22 did not. Here Taggart did not do so, but actively
23 sought to be dismissed from the case.

24 In addition, the reference to deducting from the
25 payment to be made to Taggart any fees or costs in
26 this or the Bankruptcy Court is improper, not only for
the above reasons, but also because it suggests that
this court has some authority to assess attorney fees
incurred in some unspecified later bankruptcy court
proceeding, or some other proceeding in this court,
and to deduct them from what Taggart is owed, for
which there is absolutely no basis. Rather, Messrs.
Jehnke and Emmert have no legal basis for their
claims. They just don't want to pay for what they say
they want to buy. This is not an option.

The italicized portion of the judgment quote[d]
above violates federal law and must be stricken.

20 Id. at pp. 1-4.

21 The Objection to Judgment further states:

22 The payments must be paid to seller. There is no
23 provision in the Operating Agreement for any escrow
24 account. Messrs. Jehnke and Emmert want to be the
25 owners of the 25% that Mr. Taggart had owned. They
26 have to pay for it, and they have to pay Mr. Taggart
for it. Otherwise, Mr. Taggart would be entitled to
the rights of an owner, which Messrs. Emmert and
Jehnke have said terminated on January 1, 2008.

1 Id. at p. 6.

2 On May 2, 2011, the Circuit Court held a hearing ("Judgment
3 Hearing") on the form of judgment to be entered in the Circuit Court
4 Lawsuit. Mr. Taggart appeared at the Judgment Hearing, purportedly
5 representing himself. See Exhibit K, at p.1. Mr. Berman also appeared,
6 representing himself and BT, but he stated to the Circuit Court that Mr.
7 Taggart "consents to what I am proposing." Id. Much of the argument
8 focused on when interest would begin to run on the value of Mr. Taggart's
9 SPBC membership interest to be sold and how proceeds to Mr. Taggart from
10 such sale would be distributed. See Exhibit K, at pp.2-14. When Mr.
11 Taggart was called upon to address the Circuit Court, he stated the
12 following:

13 MR. TAGGART: Only - the only thing I'd like to say,
14 Your Honor, is that if - if the date is in 2008, then
15 they do - I feel they owe interest on that date. If
16 it's not, then I -I deserved the - the tax benefit
17 from that period of time. They can't have their cake
18 and eat it too, in my opinion, so -

19 THE COURT: Very well.

20 MR. TAGGART: Fair is fair. Regarding the bankruptcy,
21 my bankruptcy was discharged before you made your
22 decision. There have been considerable payments made
23 on the taxes already. We don't know what's the totals
24 of those right now. My feeling is that any money that
25 comes out of this should go into either an escrow
26 account or Mr. Berman's trust account until we
determine exactly what that number is. They're
hopefully not going to be receiving a hundred percent
of the proceeds, so -

27 Id. at p. 16.

28 The General Judgment ("Judgment") in the Circuit Court Lawsuit
29 was entered on May 26, 2011. See Exhibit L. The Judgment contained the
30 following specific provisions with respect to Mr. Taggart:

31 (1) Brad Taggart's attempted transfer of his

1 membership interest in [SPBC] to [BT] violated the
2 Operating Agreement and Oregon law. The transfer is
hereby deemed null and void.

3 (2) Brad Taggart engaged in wrongful conduct as a
4 member of [SPBC]. Brad Taggart is hereby expelled
5 from [SPBC] effective January 1, 2008.

6 (3) Counterclaim Defendants Emmert and Jehnke have
7 timely elected to purchase Taggart's 25% membership
8 interest. Pursuant to Section 12.5 of the Operating
9 Agreement, the other remaining members of [SPBC],
10 Keith Jehnke and Terry W. Emmert, are entitled to
11 purchase Brad Taggart's 25% membership interest in
[SPBC] as follows:

12 The purchase price shall be the fair market value
13 of the Company as of the date of entry of Judgment
14 multiplied by Taggart's 25% membership interest, less
15 any unpaid post-bankruptcy petition attorney fees,
16 costs and prevailing party fees which might be
17 assessed against Taggart pursuant to ORCP 68 and ORS
Chapter 20 and any necessary proceedings in bankruptcy
court or this court.

18 The fair market value shall be determined by a
19 third-party appraiser acceptable to Jehnke, Emmert and
20 Taggart. Within 90 days of the valuation, Jehnke and
21 Emmert shall pay twenty percent of the purchase price
22 as a downpayment, and the balance shall be paid in 60
23 substantially equal, consecutive monthly payments,
24 including principal and interest. Interest shall
25 accrue from the date of closing at the prime rate
26 quoted by Wells Fargo Bank at Portland, Oregon on the
date that this Judgment is entered. Emmert and Jehnke
may prepay some or all of the outstanding balance at
any time without penalty or additional interest.

Judgment, Exhibit L, at pp. 1-2.

Both Mr. Taggart and BT appealed the Judgment. Mr. Taggart testified that he is representing himself in the appeal, but he acknowledged that Mr. Berman assisted him in preparing the Notice of Appeal. See Exhibit O.

Thereafter, Mr. Brown filed a petition for costs and attorney's fees ("Petition") in behalf of SPBC, Mr. Jehnke and Mr. Emmert in the Circuit Court Lawsuit. See Exhibit M. The Petition reflected the understanding that any liability of Mr. Taggart for fees "would be

1 limited to fees incurred after he filed for bankruptcy on November 4,
2 2009 . . . ,” citing Boeing North American, Inc. v. Ybarra (In re
3 Ybarra), 424 F.3d 1018 (9th Cir. 2005). Id. at p. 4. At oral argument
4 on the Petition, Mr. Brown clarified that fees and costs were sought from
5 Mr. Taggart only for the period following the date of his discharge,
6 February 23, 2010. See Exhibit R at p. 3 (p. 11 of the hearing
7 transcript). Mr. Taggart filed objections to the Petition pro se,
8 supported by a Hearing Memorandum prepared by Mr. Berman as Mr. Taggart’s
9 attorney. See Exhibit 19. Mr. Brown filed a Reply Memorandum in behalf
10 of SPBC, Mr. Jehnke and Mr. Emmert. See Exhibit P. Mr. Berman called
11 and examined Mr. Taggart as a witness at the hearing on the Petition.
12 See Exhibit R, at pp. 5-6 (pp. 17-21 of the hearing transcript). At the
13 conclusion of the hearing on the Petition, the Circuit Court took the
14 matter under advisement.

15 On August 11, 2011, the Circuit Court issued a letter opinion
16 (“Letter Opinion”) addressing the Petition. See Exhibit Q. The Letter
17 Opinion states the following with respect to Mr. Taggart:

18 The court notes that In re Ybarra, 424 F[.]3d 1018
19 (9th Cir. 2005) holds that the trial court has power
20 to award post-petition attorney fees against a debtor
21 who continues to pursue litigation post-petition that
22 had been begun pre-petition. This is consistent with
23 the federal case law the court reviewed.
24 Taggart filed an answer that was file stamped October
25 28, 2009. The answer contained a counterclaim for
26 attorney fees based on Section 13.6 of the Operating
Agreement. The answer also sought to have plaintiff’s
claim to be dismissed against him. This was
consistent with the oral Motion to Dismiss raised at
the time of trial. Taggart never abandoned his
counterclaim for attorney fees. Rather he continued
to pursue his position post-petition that the
plaintiff’s claim against him be dismissed which, if
successful, would have led to Taggart having a

1 contractual right to obtain attorney fees.
2 The court awards attorney fees in favor of BT of
3 Sherwood [sic-actually, SPBC] in the amount sought at
4 oral argument. My notes are difficult to decipher but
5 I believe that amount was \$44,691.50. (It may be
6 accurately \$44,611.50 as the ten column is the one I
7 am having trouble reading.) Costs and disbursements
8 sought as well as the standard prevailing party fee
9 are also appropriate.

10 [SPBC] is the prevailing party with respect to Brad
11 Taggart (as noted above)

12 Exhibit Q, at pp. 1-2.

13 In the meantime, on July 13, 2011, Mr. Taggart had filed the
14 Contempt Motion, as supplemented by allegations on August 15, 2011. See
15 Main Case Docket Nos. 24 and 31-32. Following the filing of opposition
16 papers and preliminary proceedings, as noted above, the Contempt Motion
17 proceeded to the evidentiary Hearing on November 14, 2011. See Main Case
18 Docket No. 63. At the Hearing, Mr. Taggart testified that his deal with
19 Mr. Berman is if he receives anything for the value of the contested
20 membership interest in SPBC, the proceeds will be split half to him to
21 pay tax obligations and half to Mr. Berman.

22 Jurisdiction

23 I have jurisdiction to decide the Contempt Motion under 28
24 U.S.C. §§ 1334, 157(b)(1) and 157(b)(2)(I) and (O).

25 Discussion

26 The question before me is whether the Respondents violated the
discharge injunction provided for in § 524(a)(2) by continuing to
prosecute the Circuit Court Lawsuit against Mr. Taggart to the point of
requesting an offsetting award of attorney's fees and costs against him
after he received his discharge in his chapter 7 bankruptcy case.

1 Section 524(a)(2) provides that, "A discharge in a case under this title
2 - (2) operates as an injunction against the commencement or continuation
3 of an action, the employment of process, or an act, to collect, recover
4 or offset any such debt as a personal liability of the debtor, whether or
5 not discharge of such debt is waived"

6 Procedurally, an alleged violation of the discharge injunction
7 is pursued, as in this case, by a motion invoking the contempt remedies
8 allowed for in § 105(a). See Walls v. Wells Fargo Bank, N.A., 276 F.3d
9 502, 509-10 (9th Cir. 2002). In order to be subject to sanctions for
10 violating the discharge injunction, a party's violation must be
11 "willful." The Ninth Circuit has adopted a two-part test to determine
12 whether the willfulness standard has been met: 1) Did the alleged
13 offending party know that the discharge injunction applied; and 2) did
14 such party intend the actions that violated the discharge injunction?
15 See Zilog, Inc. v. Corning (In re Zilog, Inc.), 450 F.3d 996, 1007 (9th
16 Cir. 2006); Hardy v. United States (In re Hardy), 97 F.3d 1384, 1390 (9th
17 Cir. 1996). The burden of proof for the moving party is clear and
18 convincing evidence. See In re Zilog, Inc., 450 F.3d at 1007; Renwick
19 v. Bennett (In re Bennett), 298 F.3d 1059, 1069 (9th Cir. 2002) ("The
20 moving party has the burden of showing by clear and convincing evidence
21 that the contemnors violated a specific and definite order of the
22 court.").

23 Where litigation is commenced prepetition and is recommenced
24 postpetition or postdischarge, the Ninth Circuit has set forth the
25 standards to determine whether the continued prosecution of such
26 litigation violates the discharge injunction of § 524(a)(2) in Boeing

1 North American, Inc. v. Ybarra (In re Ybarra), 424 F.3d 1018 (9th Cir.
2 2005). The ultimate question is whether the discharged debtor has
3 voluntarily "returned to the fray" in the renewed litigation. Siegel v.
4 Federal Home Loan Mortg. Corp., 143 F.3d 525, 533-34 (9th Cir. 1998).

5 In re Ybarra is the saga of a die-hard litigant who paid the
6 ultimate price for her belief in her claims. Ms. Ybarra sued her former
7 employer, Rockwell International Corporation ("Rockwell"), originally in
8 1988. In her Fifth Amended Complaint, filed in April 1991, Ms. Ybarra
9 asserted two causes of action against Rockwell: 1) employment
10 discrimination in violation of California Government Code § 12940; and 2)
11 violation of the covenant of good faith and fair dealing. In re Ybarra,
12 424 F.3d at 1020. On December 10, 1991, Ms. Ybarra filed a chapter 11
13 bankruptcy petition, but she did not disclose her claims against Rockwell
14 in her schedules. Id. Rockwell first learned of Ms. Ybarra's bankruptcy
15 case in 1993 and moved to convert the case to chapter 7. Id. Rockwell's
16 motion was granted, and the case was converted in June 1993. Id.

17 Rockwell negotiated a \$17,500 settlement of Ms. Ybarra's claims
18 with the chapter 7 trustee, to which Ms. Ybarra objected. Id. However,
19 the bankruptcy court approved the settlement over Ms. Ybarra's objections
20 on November 12, 1993. Id. Thereafter, the state court granted the
21 trustee's and Rockwell's motion to dismiss Ms. Ybarra's lawsuit. Id.

22 In the meantime, Ms. Ybarra had amended her schedule of exempt
23 property to add her lawsuit against Rockwell. Rockwell objected to her
24 amended exemption claim, and the bankruptcy court sustained Rockwell's
25 objection. Id. That decision was reversed by the Bankruptcy Appellate
26 Panel, which was affirmed by the Ninth Circuit. On remand, the

1 bankruptcy court upheld Ms. Ybarra's exemption claim and gave her the
2 option of accepting the \$17,500 settlement amount from Rockwell or
3 proceeding with her lawsuit against Rockwell in state court. Id. She
4 chose to proceed with her lawsuit.

5 Thereafter, Ms. Ybarra persuaded the state court to set aside
6 its dismissal order, and the case proceeded on Rockwell's motion for
7 summary judgment. Id. Summary judgment ultimately was granted in
8 Rockwell's favor. Rockwell then moved for an award of fees and costs
9 under California law and was awarded \$456,884.03 against Ms. Ybarra. Id.
10 at 1020-21.

11 Ms. Ybarra previously had received her discharge in bankruptcy
12 in May 1998. Rockwell filed a motion in the bankruptcy court for leave
13 to enforce the state court's award of fees and costs. The bankruptcy
14 court granted Rockwell's motion to the extent of \$159,030.78, the total
15 amount of fees and costs incurred by Rockwell after Ms. Ybarra filed her
16 bankruptcy petition. Id. at 1021. Ms. Ybarra appealed to the Bankruptcy
17 Appellate Panel, which reversed, "holding that the entire fee and cost
18 award was discharged in [Ms.] Ybarra's bankruptcy." Id.

19 On further appeal, the Ninth Circuit reversed the Bankruptcy
20 Appellate Panel, citing Siegel, for its holding that "post-petition
21 attorney fee awards are not discharged where post-petition, the debtor
22 voluntarily 'pursue[d] a whole new course of litigation,' commenced
23 litigation, or 'return[ed] to the fray' voluntarily." Id. at 1024
24 (quoting Siegel, 143 F.3d at 533-34).

25 Whether attorney fees and costs incurred through the
26 continued prosecution of litigation initiated pre-
petition may be discharged depends on whether the

1 debtor has taken affirmative post-petition action to
2 litigate a prepetition claim and has thereby risked
the liability of these litigation expenses.

3 In re Ybarra, 424 F.3d at 1026.

4 Both Mr. Taggart and the Respondents have cited In re Ybarra to
5 me and to the Circuit Court as setting forth the relevant legal standard
6 to consider whether the Respondents violated the discharge injunction of
7 § 524(a)(2) in seeking a judgment against Mr. Taggart in the Circuit
8 Court Litigation, including an award of attorney's fees and costs. Based
9 on the record before it, and specifically noting the application of In re
10 Ybarra, the Circuit Court determined that an award of post-petition
11 attorney's fees against Mr. Taggart was not barred by the discharge
12 injunction, citing primarily Mr. Taggart's never having abandoned his
13 counterclaim for attorney's fees in the Circuit Court Litigation. See
14 Letter Opinion, Exhibit Q, at pp. 1-2.

15 Injunctions issuing from the core jurisdictional authority of
16 the bankruptcy court are not subject to collateral attack in other
17 courts. Gruntz v. County of Los Angeles (In re Gruntz), 202 F.3d 1074,
18 1082 (9th Cir. en Banc 2000) (citing Celotex Corp. v. Edwards, 514 U.S.
19 300, 313 (1995)). The discharge injunction of § 524(a)(2) is such an
20 injunction.

21 However, the Ninth Circuit further has held that a state court
22 is not divested of jurisdiction "to determine the applicability of a
23 discharge order when discharge in bankruptcy is raised as a defense to a
24 state cause of action filed in a state court" McGhan v. Rutz (In
25 re McGhan), 288 F.3d 1172, 1180 (9th Cir. 2022). Accordingly, a state
26 court, such as the Circuit Court in this case, has concurrent

1 jurisdiction with this court to interpret the bankruptcy court's
2 discharge orders, but it has no authority to modify them. See In re
3 McGhan, 288 F.3d at 1179-80.

4 In Gruntz, where the automatic stay injunction of § 362 was
5 considered, the Ninth Circuit stated that, "even assuming that the states
6 had concurrent jurisdiction, their judgment would have to defer to the
7 plenary power vested in the federal courts over bankruptcy proceedings."
8 In re Gruntz, 202 F.3d at 1083. The Ninth Circuit applied the same
9 principle to alleged violations of the discharge injunction of § 524 in
10 In re McGhan. Accordingly, neither issue preclusion nor the Supreme
11 Court's Rooker-Feldman doctrine preclude my review of the Circuit Court's
12 findings and conclusions with respect to the scope and application of the
13 discharge injunction regarding the Respondents' pursuit of the Judgment
14 and an award of attorney's fees and costs against Mr. Taggart in the
15 continued Circuit Court Litigation. See In re McGhan. 288 F.3d at 1181;
16 In re Gruntz, 202 F.3d at 1083-84. "In short, the state court has
17 jurisdiction to construe the bankruptcy discharge correctly, but not
18 incorrectly." Pavelich v. McCormick, Barstow, Sheppard, Wayte & Carruth,
19 LLP (In re Pavelich), 229 B.R. 777, 784 (9th Cir. BAP 1999). See Huse v.
20 Huse-Sporssem, A.S. (In re Birting Fisheries, Inc.), 300 B.R. 489, 500
21 (9th Cir. BAP 2003).

22 What the foregoing authorities do not make clear is, in
23 circumstances where the state court has applied the correct legal
24 authority in interpreting this court's discharge order, what standard of
25 review applies to the state court's fact findings. Ordinarily, the
26 standard for review of a trial court's fact findings is "clear error."

1 SEC v. Coldicutt, 258 F.3d 939, 941 (9th Cir. 2001); Clear Channel
2 Outdoor, Inc. v. Knupfer (In re PW, LLC), 391 B.R. 25, 32 (9th Cir. BAP
3 2008). There are important reasons behind that standard.

4 The rationale for deference to the original finder of
5 fact is not limited to the superiority of the trial
6 judge's position to make determinations of credibility
7 [although that superiority of position is important in
8 itself]. The trial judge's major role is the
9 determination of fact, and with experience in
10 fulfilling that role comes expertise. Duplication of
11 the trial judge's efforts in the court of appeals
12 would very likely contribute only negligibly to the
13 accuracy of fact determination at a huge cost in
14 diversion of judicial resources. . . . As the court
15 has stated in a different context, the trial on the
16 merits should be "the 'main event' . . . rather than a
17 'tryout on the road.'" Wainwright v. Sykes, 433 U.S.
18 72, 90 . . . (1977). For these reasons, review of
19 factual findings under the clearly-erroneous standard
20 - with its deference to the trier of fact - is the
21 rule, not the exception.

22 Anderson v. City of Bessemer City, 470 U.S. 564, 574-75 (1985) (emphasis
23 in original).

24 "A finding is 'clearly erroneous' when although there is
25 evidence to support it, the reviewing court on the entire evidence is
26 left with the definite and firm conviction that a mistake has been
committed." United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948).
"This standard plainly does not entitle a reviewing court to reverse the
finding of the trier of fact simply because it is convinced that it would
have decided the case differently." Anderson v. City of Bessemer City,
470 U.S. at 573.

27 In this case, after citing In re Ybarra, the Circuit Court
28 found that it was appropriate to award postpetition attorney's fees
29 against Mr. Taggart as an offset to the purchase price for his member

1 interest in SPBC because Mr. Taggart had never abandoned his own
2 counterclaim for attorney's fees in the Circuit Court Litigation. See
3 Letter Opinion, Exhibit Q, at pp. 1-2. At oral argument on the Petition,
4 Mr. Brown reminded the Circuit Court that Mr. Taggart had moved for a
5 protective order in the Circuit Court Litigation postdischarge; that he
6 had filed a motion to dismiss postdischarge, without moving for dismissal
7 of his counterclaim for attorney's fees; and that he had claimed the
8 potential award of attorney's fees in the Circuit Court Litigation as an
9 asset in his bankruptcy. See Exhibit R, at p. 3 (pp. 9-11 of the hearing
10 transcript). In addition, the Circuit Court presided at the Trial and
11 thus had the opportunity first-hand to consider whether Mr. Taggart's
12 interests were represented at the Trial. I do not have a complete
13 transcript of the Trial to review. See Exhibit 13.

14 In these circumstances, I cannot conclude that the Circuit
15 Court clearly erred in determining that the Respondents did not violate
16 Mr. Taggart's discharge injunction under § 524(a)(2) in seeking a
17 judgment and an award of offsetting, postpetition attorney's fees in the
18 Circuit Court Litigation.

19 If the standard of review is de novo, my task is more
20 complicated, but I ultimately likewise conclude that it is not
21 appropriate to disturb the Circuit Court's findings and conclusions and
22 further determine that Mr. Taggart's Contempt Motion should be denied for
23 the following reasons.

24 Deciding the Contempt Motion presents mixed questions of law
25 and fact. Review of "mixed questions" of law and fact requires
26 consideration of legal principles and the exercise of judgment about the

1 values underlying those legal principles. Consequently, review is de
2 novo. Wolkowitz v. Beverly (In re Beverly), 374 B.R. 221, 230 (9th Cir.
3 BAP 2007) (citing Murray v. Bammer (In re Bammer), 131 F.3d 788, 791-92
4 (9th Cir. 1997). In re Beverly and In re Bammer involved determinations
5 regarding, respectively, a debtor's entitlement to a general discharge
6 and to the dischargeability of a particular debt. This case involves yet
7 another determination to be made with respect to the bankruptcy
8 discharge: the application of the injunction arising upon its entry.
9 Accordingly, generally, a determination made pursuant to § 524(a)(2) also
10 is a mixed question of law and fact subject to de novo review.

11 De novo review requires that I consider a matter anew,
12 independent of any prior decision, as if it had not been heard before.
13 United States v. Silverman, 861 F.2d 571, 576 (9th Cir. 1988); B-Real,
14 LLC v. Chaussee (In re Chaussee), 399 B.R. 225, 229 (9th Cir. BAP 2008).

15 Setting aside the Judgment and the Letter Opinion of the
16 Circuit Court, the record reflects the following as to Mr. Taggart's
17 participation in the Circuit Court Lawsuit postdischarge:

18 When Mr. Brown subpoenaed Mr. Taggart for a second deposition
19 in the Circuit Court Lawsuit, Mr. Taggart had Mr. Berman file a motion
20 for a protective order, requesting that the subpoena be quashed and
21 further requesting attorney's fees. One day before the Trial, Mr. Berman
22 filed a motion to dismiss Mr. Taggart from the Circuit Court Lawsuit in
23 Mr. Taggart's behalf, without offering to dismiss Mr. Taggart's
24 counterclaim for attorney's fees. That motion was argued on the first
25 day of Trial, with Mr. Brown arguing that Mr. Taggart was a necessary
26 party with regard to SPBC's expulsion claim. While recognizing that no

1 money judgment would be entered against Mr. Taggart in light of his
2 bankruptcy discharge, the Circuit Court denied the motion to dismiss, and
3 the Trial proceeded. Mr. Berman renewed his motion to dismiss in behalf
4 of Mr. Taggart orally at the end of the Trial. Mr. Taggart did not
5 appear or testify at the Trial.

6 Following the Trial, Mr. Berman filed the Objection to Judgment
7 as "attorney for BT of Sherwood LLC and John Berman," but Mr. Taggart
8 testified that Mr. Berman prepared the Objection to Judgment, in part,
9 for him. A substantial portion of the Objection to Judgment, raises and
10 argues objections in behalf of Mr. Taggart. At the Judgment Hearing, Mr.
11 Berman told the Circuit Court that Mr. Taggart consented to what Mr.
12 Berman was arguing, and again, much of Mr. Berman's argument focused on
13 Mr. Taggart's issues. Mr. Taggart also appeared at the Judgment Hearing
14 and argued before the Circuit Court. After the Judgment was entered, Mr.
15 Taggart appealed it. He testified that he was representing himself in
16 the appeal, but Mr. Berman had helped him in preparing his Notice of
17 Appeal.

18 At the Hearing, Mr. Taggart testified that the Circuit Court
19 Lawsuit had precipitated his personal bankruptcy filing. He also
20 testified that when he filed for bankruptcy protection, he wanted to be
21 finished with SPBC, he wanted to be freed from his connections with Mr.
22 Jehnke and Mr. Emmert, and he had no money to fund further participation
23 in the Circuit Court Lawsuit. In his bankruptcy schedules, he did not
24 schedule any interest in SPBC or BT, but he did include a potential
25 attorney's fee award on his counterclaim in the Circuit Court Lawsuit as
26 an asset.

1 The foregoing presents a very mixed record. Individually, I am
2 not sure that any of the actions of Mr. Taggart on his own or through Mr.
3 Berman as outlined above would establish that Mr. Taggart renewed active
4 participation in the Circuit Court Lawsuit postdischarge. However,
5 collectively, particularly from the point where the Circuit Court
6 determined that Mr. Taggart's attempted transfer of his member interest
7 in SPBC was ineffective and that he could be expelled from SPBC, I find
8 on de novo review that Mr. Taggart reengaged in the Circuit Court
9 Lawsuit, effectively "reentering the fray" for In re Ybarra purposes. As
10 noted above, the burden of proof to prevail on a motion for contempt is
11 clear and convincing evidence, and I further find that Mr. Taggart has
12 not met that burden.

13 Conclusion

14 To recapitulate: 1) In light of the Circuit Court's application
15 of the correct legal standard, citing In re Ybarra, if I review the
16 Circuit Court's fact findings for clear error, I conclude that the
17 Circuit Court did not clearly err in determining that it was appropriate
18 to grant an offsetting award of postpetition attorney's fees against Mr.
19 Taggart in the Circuit Court Lawsuit. 2) If my review is de novo, I
20 find, based on the record before me, that at some point postdischarge,
21 Mr. Taggart reengaged in the Circuit Court Lawsuit, and he did not meet
22 his burden of proof to establish by clear and convincing evidence that
23 the Respondents willfully violated the discharge injunction provided for
24 in § 524(a)(2).

25 Based on the foregoing findings of fact and conclusions of law,
26 I will deny Mr. Taggart's Contempt Motion. Mr. Smith or Mr. Streinz

1 should prepare and submit an order denying the Contempt Motion within ten
2 (10) days following the date of entry of this Memorandum Opinion.

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5 cc: Damon J. Petticord
6 James Ray Streinz
7 John Berman
8 Tyler Smith
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