

Discharge
Discharge Injunction
Willful Violation
11 U.S.C. § 524

Bradley Weston Taggart, Case No. 09-39216-rld7

12/16/2014 RLD

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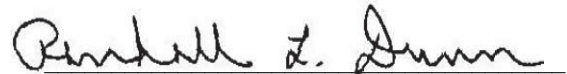
After Chapter 7 debtor received his discharge, co-members of an LLC in which debtor also had a member interest resumed state court litigation to expel the debtor from the LLC. After the state court entered the judgment for expulsion, the LLC, through the co-members, sought and obtained a supplemental judgment awarding it attorneys fees against the debtor incurred in the post petition proceedings.

The debtor then reopened his bankruptcy case and filed a motion for contempt against the members and their attorney. The state court previously had determined that the debtor had returned to the fray within the meaning of Boeing North American, Inc. v. Ybarra (In re Ybarra), 424 F.3d 1018 (9th Cir. 2005), such that the § 524 discharge injunction was not implicated. The bankruptcy court adopted the state court's determination and the debtor appealed. The District Court reversed.

Following further proceedings on remand, the bankruptcy court, analyzing the facts under the two-prong test set forth in Zilog, Inc. v. Corning (In re Zilog, Inc.), 450 F.3d 966, 1007 (9th Cir. 2006), determined that the co-members and their attorney had willfully violated the discharge injunction. First, the co-members and the attorney knew of the existence of the discharge and therefore of the discharge injunction. Their subjective belief that the discharge injunction did not apply to proceedings to obtain the supplemental judgment was not relevant. Second, they intended the actions which violated the discharge injunction.

P14-7(12)

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
Bradley Weston Taggart,) No. 09-39216-rld7
Debtor.) MEMORANDUM OPINION

Factual Summary¹

Bradley Weston Taggart ("Mr. Taggart") filed a Chapter 7² petition on the eve of trial in litigation in Washington County, Oregon

¹ This factual summary is brief. A detailed recitation of the underlying facts can be found in (1) this court's Memorandum Opinion entered December 9, 2011 (#64 on the docket), (2) the Opinion and Order entered August 7, 2012 on Mr. Taggart's appeal to the United States District Court for the District of Oregon (#105 on the docket), and (3) a decision of the Oregon Court of Appeals with respect to an appeal of the supplemental judgment entered postpetition in the Litigation (see Sherwood Park Business Center, LLC v. Taggart, -- P.3d --, 2014 WL6693829 (Or. App.)(November 26, 2014)).

² 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 Circuit Court ("Litigation") through which Sherwood Park Business Center,
2 LLC ("SPBC")³ asserted claims against Mr. Taggart for breach of fiduciary
3 duty, expulsion, breach of contract, attorneys fees and declaratory
4 relief. The claims arose from (1) Mr. Taggart's conduct as the managing
5 member of SPBC, in which he held a 25% member interest, and (2) the
6 validity of Mr. Taggart's attempted transfer of that member interest.
7 The filing of the petition stayed the Litigation.

8 Mr. Taggart's chapter 7 discharge was entered February 23,
9 2010. Thereafter, the other SPBC members, Terry W Emmert ("Mr. Emmert")
10 and Keith Jehnke ("Mr. Jehnke"), represented by attorney Stuart M. Brown
11 ("Mr. Brown")⁴ (collectively, "Respondents"), resumed the Litigation for
12 the purpose of expelling Mr. Taggart from the SPBC. Mr. Taggart moved
13 both to quash his scheduled deposition and to dismiss the Litigation on
14 the basis of the bankruptcy discharge. However, the state court

16 ³ In his Trial Brief on Remand, Mr. Taggart makes an assertion
17 that directly calls into question whether I am disinterested in this
18 matter: "The Operating Agreement was prepared by the Landye, Bennett
19 firm. The form of the Operating Agreement may even have been crafted or
20 used by this Court."

21 Landye, Bennett is the law firm at which I was managing partner
22 before my appointment to the bench on February 1, 1998. For the record,
23 SPBC's operating agreement reflects that SPBC was organized October 12,
24 1999. See Exhibit 1, at p. 18. Whether the Landye, Bennett firm may
25 have continued to use a form to which I may have contributed my work
26 product as an attorney does not mean that I prepared the SPBC operating
agreement. Regardless, I am not called upon to interpret the operating
agreement in these proceedings. All I am asked to decide is to review
the knowledge and actions of the Respondents after February 23, 2010.

⁴ Mr. Brown is now deceased. Shelley A. Lorenzon, the executor
of Mr. Brown's estate, is the successor party for Mr. Brown's position.
For clarity I will continue to refer to the actions taken and positions
asserted as those of Mr. Brown.

1 determined that Mr. Taggart was an essential party to resolving the SPBC
2 member expulsion claim and allowed the Litigation to proceed with the
3 proviso that no money judgment would be entered against Mr. Taggart.

4 Ultimately, the state court entered its "General Judgment" in
5 favor of SPBC which deemed Mr. Taggart's attempted transfer of his member
6 interest null and void. As relevant to the matter before me, the General
7 Judgment expelled Mr. Taggart as a member of SPBC effective January 1,
8 2008, based upon his wrongful conduct under the operating agreement. The
9 General Judgment awarded Mr. Emmert and Mr. Jehnke the right to purchase
10 Mr. Taggart's member interest on the following terms:

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

17 Respondents then initiated proceedings in the Litigation to
18 recover postpetition attorney fees against Mr. Taggart to be used as an
19 offset against the purchase price of his member interest. An attorney
20 fee award was sought both by SPBC based on litigating the expulsion claim
21 and separately by Mr. Emmert and Mr. Jehnke based on litigating the
22 transfer of Mr. Taggart's member interest. SPBC sought a fee award
23 against Mr. Taggart personally. Mr. Emmert and Mr. Jehnke sought an
24 award against the alleged purchaser of Mr. Taggart's member interest.
25 Mr. Taggart again asserted that his bankruptcy discharge precluded the
26 imposition of such fees against him. Citing the Ninth Circuit's decision
in Boeing North American, Inc. v. Ybarra (In re Ybarra), 424 F.3d 1018
(9th Cir. 2005), the state court determined that Mr. Taggart had

1 voluntarily returned to the fray, with the result that bankruptcy
2 discharge did not preclude an award of postpetition attorney fees against
3 him in favor on SPBC. The state court then entered its "Supplemental
4 Judgment," which awarded SPBC \$45,404.30 in attorney fees and costs from
5 Mr. Taggart. The state court determined that Mr. Emmert and Mr. Jehnke
6 were not entitled to a fee award against the alleged purchaser of Mr.
7 Taggart's member interest.

8 In response to entry of the Supplemental Judgment, Mr. Taggart
9 filed in this court his Motion to Hold Stuart M. Brown, Terry W. Emmert
10 and Keith Jehnke in Contempt for Violating Discharge Injunction Under 11
11 U.S.C. § 524 ("Contempt Motion").⁵ I denied the Contempt Motion
12 following an evidentiary hearing held November 14, 2011 ("2011 Hearing"),
13 on the basis that the state court had correctly determined that Mr.
14 Taggart had voluntarily returned to the fray such that Ybarra precluded a
15 finding that the discharge injunction had been violated.

16 On Mr. Taggart's appeal, the United States District Court for
17 the District of Oregon reversed based on its conclusion after de novo
18 review that Mr. Taggart had not voluntarily returned to the fray
19 postpetition within the meaning of Ybarra. The Respondents' appeal to
20 the Ninth Circuit was dismissed as interlocutory. The Contempt Motion
21 therefore is before me once again on remand.

22 Following further briefing and oral argument held November 7,
23 2014 ("2014 Hearing"), I took determination of the Contempt Motion under

24
25 ⁵ An alleged violation of the discharge injunction is pursued, as
26 in this case, by a motion invoking the contempt remedies allowed for in
§ 105(a). See Walls v. Wells Fargo Bank, N.A., 276 F.3d 502, 509-10 (9th
Cir. 2002).

1 advisement.⁶

2 In deciding this matter, I have considered carefully the
3 testimony presented at the 2011 Hearing on the Contempt Motion, the
4 exhibits admitted at the 2011 Hearing, the supplemental exhibits filed in
5 advance of the 2014 Hearing, and the arguments presented, both in legal
6 memoranda and orally. I further have taken judicial notice of the docket
7 and documents filed in Mr. Taggart's chapter 7 case for the purpose of
8 confirming and ascertaining facts not reasonably in dispute. Federal
9 Rule of Evidence 201; In re Butts, 350 B.R. 12, 14 n.1 (Bankr. E.D. Pa
10 2006). In addition, I have reviewed relevant legal authorities both as
11 cited to me by the parties and as located through my own research.

12 In light of that consideration and review, this Memorandum
13 Opinion sets forth the court's findings of fact and conclusions of law
14 under Civil Rule 52(a), applicable with respect to this contested matter
15 under Rules 7052 and 9014.⁷

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18 _____
19 ⁶ The current proceedings have been limited to issues regarding
20 liability only. If I decide the Contempt Motion in favor of Mr. Taggart,
21 further proceedings will be scheduled with respect to Mr. Taggart's
damages claims.

22 ⁷ This matter, like the underlying Litigation, has been
23 contentious at every step of the way. Accordingly, I expect to be
24 appealed no matter how I decide. As an aid to the parties in their
25 further contests, I note that the standard for review of decisions on
26 motions for contempt in the Ninth Circuit is abuse of discretion. "We
review the decision to impose contempt for abuse of discretion, and
underlying factual findings for clear error." Knupfer v. Lindblade (In
re Dyer), 322 F.3d 1178, 1991 (9th Cir. 2003), citing FTC v. Affordable
Media, 179 F.3d 1228, 1239 (9th Cir. 1999).

1 Jurisdiction

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

4 Discussion

5 As in my prior Memorandum Opinion, the ultimate question before
6 me is whether, in seeking the Supplemental Judgment, the Respondents
7 violated the discharge injunction provided for in § 524(a)(2).⁸

8 An alleged contemnor’s violation of the discharge injunction
9 must be “willful” in order to be subject to sanctions for violating the
10 discharge injunction. Under Ninth Circuit law, I apply a two-part test
11 to determine whether the alleged violation was willful. I must find
12 first, that the alleged contemnor knew that the discharge injunction
13 applied, and second, that the alleged contemnor intended the actions that
14 violated the discharge injunction. See Zilog, Inc. v. Corning (In re
15 Zilog, Inc.), 450 F.3d 996, 1007 (9th Cir. 2006); Hardy v. United States
16 (In re Hardy), 97 F.3d 1384, 1390 (9th Cir. 1996). The burden of proof
17 for the moving party is clear and convincing evidence. See In re Zilog,
18 Inc., 450 F.3d at 1007; Renwick v. Bennett (In re Bennett), 298 F.3d
19 1059, 1069 (9th Cir. 2002) (“The moving party has the burden of showing
20 by clear and convincing evidence that the contemnors violated a specific
21 and definite order of the court.”).

22 / / /

23
24 ⁸ Section 524(a)(2) provides that, “A discharge in a case under
25 this title - (2) operates as an injunction against the commencement or
26 collect, recover or offset any such debt as a personal liability of the
debtor, whether or not discharge of such debt is waived”

1 1. Did the Respondents Know the Discharge Injunction "Applied"?

2 Respondents contend that the first part of the Zilog test
3 requires that I find that they knew that Mr. Taggart's discharge
4 "applied" to the proceedings which resulted in the Supplemental Judgment.
5 They suggest the phrasing precludes a finding of willfulness because they
6 held a good faith belief that the discharge injunction did not apply in
7 the Supplemental Judgment proceedings. In effect, I am asked to decide
8 whether a good faith belief that the discharge injunction does not apply
9 to proceedings vitiates the Respondents' knowledge that the discharge
10 injunction was in existence. I hold that it does not. My reasons
11 follow.

12 In Zilog, the Ninth Circuit states:

13 A party who knowingly violates the discharge injunction can be
14 held in contempt under section 105(a) of the bankruptcy code.
15 [See In re Bennett, 298 F.3d 1059, 1069 (9th Cir. 2002)] . . .
16 In Bennett, . . . [w]e cited with approval the standard adopted
17 by the Eleventh Circuit for violation of the discharge
18 injunction: "[T]he movant must prove that the creditor (1) knew
19 the discharge injunction was applicable and (2) intended the
20 actions which violated the injunction." Bennett, 298 F.3d at
21 1069 (citing Hardy v. United States (In re Hardy), 97 F.3d
22 1384, 1390 (11th Cir. 1996)).

19 Since the Ninth Circuit expressly adopted the Eleventh
20 Circuit's willfulness test as set forth in Hardy, I reviewed the language
21 in Hardy as the source for the test. In Hardy, the Eleventh Circuit
22 extended its previously established test for determining whether a
23 violation of the automatic stay was willful.

24 In [Jove Engineering, Inc. v. Internal Revenue Service, 92 F.3d
25 1539 (11th Cir. 1996)], this court adopted a two-pronged test
26 to determine willfulness in violating the automatic stay
provision of § 362. Under this test the court will find the
defendant in contempt if it: "(1) knew that the automatic stay

1 was invoked and (2) intended the actions which violated the
2 stay." Jove, 92 F.3d at 1555 [emphasis added]. This test is
3 likewise applicable to determining willfulness for violations
4 of the discharge injunction of § 524.

4 Hardy, 97 F.3d at 1390.

5 Whether the Respondents knew the discharge was "invoked" is a
6 simple fact-based inquiry. It does not allow for the subjective belief,
7 good faith or otherwise, regarding whether, as a legal matter, the
8 discharge applied to the proceedings. This premise is reinforced in the
9 case law. "In determining whether the contemnor violated the stay, the
10 focus 'is not on the subjective beliefs or intent of the contemnors in
11 complying with the order, but whether in fact their conduct complied with
12 the order at issue.'" In re Dyer, 322 F.3d at 1191 (quoting Hardy, 97
13 F.3d at 1390).⁹

14 Hardy, as adopted by the Ninth Circuit, in effect imposes a
15 strict liability standard as the first element of the willfulness test:
16 "If the court on remand finds, as plaintiff claims, that IRS received
17 notice of Mr. Hardy's discharge in bankruptcy, and was thus aware of the
18 discharge injunction, Mr. Hardy will then have to prove only that the IRS
19 intended the actions which violate the stay." Hardy, 97 F.3d at 1390.

21 ⁹ Because courts have equated the willfulness test for automatic
22 stay violations with that for discharge injunction violations, case law
23 discussing automatic stay violations is instructive. The Ninth Circuit
24 BAP has held that in automatic stay violation cases a finding of
25 willfulness merely requires that the creditor know of the automatic stay
26 and that the actions that violate the stay be intentional. No specific
 intent is required; a good faith belief that the stay is not being
 violated "is not relevant to whether the act was 'willful' or whether
 compensation must be awarded." Morris v. Peralta (In re Peralta), 317 BR
 381, 389 (9th Cir. BAP 2004).

1 In Lone Star Security & Video, Inc. v. Gurrola (In re Gurrola),
2 328 B.R. 158, 175 (9th Cir. BAP 2005), the Panel highlighted the sanctity
3 of the discharge injunction, stating that once entered, it was "good
4 against the world." Respondents had a duty to obey the discharge
5 injunction. Only lack of notice of the discharge may serve as a defense
6 to contempt sanctions. Id.

7 To the extent Respondents suggest that the state court's ruling
8 that Ybarra applied to render the Supplemental Judgment proceedings
9 outside the scope of the discharge injunction insulates them from a
10 willfulness finding, I disagree. As I stated in my prior Memorandum
11 Opinion, the state court had "jurisdiction to construe the bankruptcy
12 discharge correctly, but not incorrectly." Pavelich v. McCormick,
13 Barstow, Sheppard, Wayte & Carruth, LLP (In re Pavelich), 229 B.R. 777,
14 784 (9th Cir. BAP 1999). See Huse v. Huse-Sporsen, A.S. (In re Birting
15 Fisheries, Inc.), 300 B.R. 489, 500 (9th Cir. BAP 2003). The District
16 Court determined that the state court construed the scope of Mr.
17 Taggart's discharge incorrectly. Neither is my prior determination that
18 the state court correctly determined Ybarra's impact on the Supplemental
19 Judgment proceedings helpful to Respondents where it was reversed on
20 appeal.

21 At the November 2011 Hearing, Mr. Brown testified that after
22 discussion with his co-counsel, he would seek attorney fees postpetition

23 ... for fees from the date the notice of discharge was filed.
24 I think that was February 23rd of . . . 2010.
25 ... Technically we could have gone back to [the petition date]
26 . . . but as a practical matter it didn't make any sense. You
 know, we're not going to get attorney fees from Mr. Taggart in
 any event except for the offset.

1 Tr. Of November 2011 Hearing at 83:25-84:9 [Exhibit T]. Thus, it is not
2 disputed that Respondents had actual knowledge that Mr. Taggart's
3 bankruptcy discharge had been entered at the time they sought the
4 Supplemental Judgment. As such, they are charged with knowledge of the
5 discharge injunction.

6 Respondents point out that the Supplemental Judgment was
7 awarded only in favor of SPBC. Mr. Brown asserted that because he did
8 not represent SPBC, he could not be held accountable for the actions that
9 resulted in a fee award in favor of SPBC.

10 However, the record reflects that it was Mr. Brown who prepared
11 and submitted the Supplemental Judgment which resulted in the award of
12 fees in favor of SPBC and against Mr. Taggart. See Exhibit 27. When
13 questioned about how he came to submit the judgment on behalf of SPBC,
14 Mr. Brown testified:

15 [I]n filing the petition for the judgment, the motion to enter
16 the judgment, and the petition for fees, we [Mr. Brown and
17 SPBC's attorney of record] had a discussion, and the discussion
18 was whether both attorneys needed to file their own or whether
19 one could do it and the other one join. And we decided to go
20 the latter way to save money.

21 October 12, 2001 Deposition of Mr. Brown at 16:22-17:3 [Exhibit S].

22 Mr. Emmert and Mr. Jehnke also assert that they cannot be held
23 accountable personally for any action resulting in the Supplemental
24 Judgment, either because the award was in favor of SPBC or because they
25 relied on the advice of their counsel. Mr. Brown testified that he had
26 advised Mr. Emmert and Mr. Jehnke that if a court determined that
Mr. Taggart had not returned to the fray, the discharge injunction would
preclude a recovery of attorneys fees. Id. at 18:3-19:1. Thus,

1 Mr. Emmert and Mr. Jehnke were on notice that seeking fees from
2 Mr. Taggart might implicate the discharge injunction.

3 I find that Mr. Taggart has established the first element of
4 the willfulness test by clear and convincing evidence.

5 2. Respondents Intended the Actions Which Violated the Injunction.

6 By initiating and pursuing proceedings to obtain the
7 Supplemental Judgment, the Respondents violated the discharge injunction.
8 There is no dispute in the record that they intended those actions. As
9 previously stated, Mr. Brown testified he prepared and submitted the
10 Supplemental Judgment. Because Mr. Brown would not have proceeded
11 without approval from his clients, and because the record does not
12 reflect that Mr. Emmert and Mr. Jehnke have at any time asserted they did
13 not instruct Mr. Brown to proceed to seek attorney fees against
14 Mr. Taggart, they also intended the actions that led to the entry of the
15 Supplemental Judgment. I therefore find that Mr. Taggart has established
16 the second element of the willfulness test by clear and convincing
17 evidence.

18 3. Consequences From the Violation of the Discharge Injunction.

19 Three consequences flow from the above findings.

20 First, the Supplemental Judgment is void, having been entered
21 in violation of the discharge injunction. See § 524(a)(1).¹⁰

22 Second, having proven both elements of the willfulness test,
23 Mr. Taggart is entitled to entry of an order holding the Respondents in
24 contempt of for violating his discharge injunction.

25
26 ¹⁰ The Oregon Court of Appeals reversed the entry of the Supplemental Judgment on appeal.

1 Third, Mr. Taggart is entitled to an evidentiary hearing to
2 determine the appropriate amount of sanctions damages this court should
3 impose against Respondents.

4 Conclusion

5 Based on the foregoing findings of fact and conclusions of law,
6 I will enter an order holding Respondents in contempt. Further
7 proceedings are appropriate to determine the amount of sanctions damages
8 warranted under the circumstances.

9 ###

10 cc: John Berman
11 James Ray Streinz
12 Hollis K. McMilan