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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

6	In re:)	BAP No.	SC-08-1112-MoJuKw
)		
7	KENNETH EADY,)	Bk. No.	03-04553
)		
8	Debtor.)	Adv. No.	07-90271
)		
9	_____)		
)		
10	KENNETH EADY,)		
)		
11	Appellant,)		
)		
12	v.)	MEMORANDUM ¹	
)		
13	BANKRUPTCY RECEIVABLES)		
	MANAGEMENT,)		
14)		
	Appellee.)		
15	_____)		

Argued and Submitted on September 18, 2008
at San Diego, California

Filed - November 18, 2008

Appeal from the United States Bankruptcy Court
for the Southern District of California

Honorable James W. Meyers, Bankruptcy Judge, Presiding

Before: MONTALI, JURY and KWAN,² Bankruptcy Judges.

¹ This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

² Hon. Robert N. Kwan, U.S. Bankruptcy Judge for the Central District of California, sitting by designation.

1 Debtor-Appellant, Kenneth Eady ("Eady"), appeals a summary
2 judgment entered in favor of Creditor-Appellee, Bankruptcy
3 Receivables Management. Because Creditor-Appellee did not
4 violate the discharge injunction of section 524,³ we AFFIRM the
5 bankruptcy court's decision granting summary judgment in its
6 favor and denying Eady's motion for summary judgment.

7 **I. FACTS**

8 On May 28, 1999, Eady was approved for a revolving charge
9 account with Daniel's Jewelers, the dba of Sherwood Management
10 Company ("Daniel's"). As part of its standard business practice,
11 Daniel's sends approved customers a credit card along with a
12 document entitled "Daniel's Jewelers Retail Installment Credit
13 Agreement" ("Credit Agreement"), which informs customers that
14 they grant Daniel's a purchase money security interest in all
15 goods purchased on the account. The initial credit application
16 signed by Eady also refers to this Credit Agreement. Eady does
17 not dispute getting the Credit Agreement, although he may not
18 have read it or fully understood the terms, but he does dispute
19 its sufficiency in creating a valid purchase money security
20 interest under California law.⁴

22 ³ Unless otherwise indicated, all chapter, section and rule
23 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and
24 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037, as
25 enacted and promulgated prior to the effective date of The
26 Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,
27 Pub. L. 109-8, 119 Stat. 23 ("BAPCPA").

28 ⁴ The bankruptcy court abstained from hearing this issue
since it was pending in state court. Eady's counsel apprised the
Panel at oral argument that the state court determined Daniel's
had a valid security interest, but its decision is currently on
appeal.

1 Over time, Eady purchased several pieces of jewelry on
2 credit with Daniel's. On October 25, 2000, Eady charged a 1.0
3 Carat Diamond Ladies Ring ("Ladies Ring") for \$1,999.95 plus tax
4 of \$155.00 (total \$2,154.95), the ring at issue in this case.
5 Between October 26, 2000 and May 9, 2001, Eady purchased a gold
6 charm ("Charm") for \$99.95 plus tax, and a 1.0 Carat Gents
7 Diamond Ring ("Gents Ring") for \$1,399.95 plus tax. The record
8 reflects that Eady's monthly payment of \$200.00 on May 30, 2001,
9 was his last. At the time of his final purchase sometime in
10 2001, Eady's account balance was \$2,572.71.

11 Eady filed for relief under Chapter 13 on May 12, 2003.
12 Thus, at the time of petition, Eady had been in default with
13 Daniel's for approximately two years. In his Schedule B, Eady
14 listed "Misc. Jewelry" with a value of \$1,500.00. On his
15 Schedule F, he listed Daniel's as a "Judgment" creditor with an
16 unsecured claim of \$3,327.00.

17 On September 18, 2003, Daniel's assigned Eady's account to
18 Creditor-Appellee, Bankruptcy Receivables Management ("BRM"), for
19 BRM to ascertain the location and/or disposition of the
20 collateral and settle and compromise Daniel's in rem rights.⁵
21 According to BRM, the collateral securing the unpaid balance on
22 Eady's account was the Ladies Ring, the Gents Ring, and Charm.

23 Eady's Chapter 13 plan was confirmed on September 25, 2003.
24 It did not provide for any payments to Daniel's.

27
28 ⁵ At this point, BRM was acting as a collection agent for Daniel's.

1 BRM filed a proof of claim on November 11, 2004, after the
2 deadline of September 17, 2003, and due to a "clerical error"
3 filed an amended proof of claim on December 21, 2004, changing
4 the value of collateral from \$2,000.00 to \$3,500.00. Eady
5 objected to Daniel's claim as untimely, and BRM eventually
6 withdrew its claim.⁶ On December 28, 2004, Daniel's assigned all
7 of its interest in the Ladies Ring to BRM.

8 Shortly thereafter, Eady claimed he was no longer in
9 possession of the Charm, so BRM agreed to waive its right of
10 possession to the Charm in exchange for the Gents and Ladies
11 Rings. Eady surrendered the Gents Ring sometime before March 31,
12 2005, but allegedly never surrendered the Ladies Ring.

13 After making all of his plan payments, Eady received a
14 discharge on August 31, 2005. Approximately nine months after
15 discharge, on May 26, 2006, BRM sent a "Post Discharge Property
16 Retention Agreement" ("PDPRA") directly to Eady, even though he
17 was represented by counsel. The PDPRA purportedly allowed Eady
18 to retain possession of the Ladies Ring in exchange for payments
19 of \$170.00 per month, at an annual interest rate of 10% (reduced
20 from the original 22.92%), and stated the "parties agree that the
21 current 'Fair Market Value' of the [Ladies Ring] is \$2,154.95,"
22 the "principal balance due." For its consideration, BRM agreed
23 to refrain from pursuing any recovery actions against Eady. The
24 letter also offered Eady the options of purchasing the Ladies
25 Ring for a "lump-sum cash settlement" or surrendering it. Eady

26
27 ⁶ In explaining why it withdrew its claim, BRM contends
28 that it reached a settlement with Eady who agreed to surrender
all collateral in full satisfaction of BRM's claim.

1 refused to sign the agreement. By its own admission, BRM knew of
2 Eady's discharge at the time it solicited the PDPRA.

3 When BRM got no response from Eady, on June 6, 2006, it sent
4 another letter informing Eady that its client, Daniel's, had a
5 perfected security interest in the Ladies Ring and, since Eady
6 did not "reaffirm the debt . . . or redeem the collateral for its
7 fair market value during [his] bankruptcy proceeding," Daniel's
8 was entitled to possess the ring and demanded its return. The
9 letter also told Eady that he "may be subject to a judgment
10 against [him] for the return of the collateral or its fair market
11 value." BRM alleges Eady did not respond to the second letter.
12 A subsequent letter followed on June 21, 2006, demanding that
13 Eady surrender the Ladies Ring since he failed to satisfy the
14 lien. Again, BRM alleges that Eady did not respond to the third
15 letter.

16 To the contrary, Eady claims that he offered to return the
17 Ladies Ring "on multiple occasions and each offer was rejected by
18 [BRM]," and "to date, [BRM] refuses to accept the [Ladies] Ring."

19 On October 17, 2006, BRM sued Eady⁷ in California Superior
20 Court ("State Court"). In its complaint, BRM requested either
21 possession and damages for wrongful detention of the collateral
22 after discharge, not for an amount greater than \$1,000.00, plus
23 costs of suit; or, alternatively, a money judgment for the value
24 of the collateral in the sum of \$2,154.95, plus damages for
25 wrongful detention after discharge not to exceed \$1,000.00, plus

26
27 ⁷ BRM's complaint also listed Mrs. Sharon Eady as a
28 defendant, but she was dismissed from the suit on August 24,
2007.

1 interest from the time of conversion, and costs of suit.
2 Sometime thereafter, Eady filed a "Notice of Stay" with the State
3 Court.⁸

4 On May 10, 2007, Eady filed a complaint in bankruptcy court,
5 alleging two claims: 1) that BRM willfully violated section
6 524(a)(2) - the discharge injunction - when it committed unlawful
7 conduct by commencing its lawsuit in State Court attempting to
8 collect a discharged debt; and 2) that BRM's PDPRA is really an
9 illegal reaffirmation agreement. In sum, regarding the first
10 claim, Eady's underlying argument was that since BRM had no valid
11 security interest, its action commenced in State Court was an
12 unlawful attempt at collecting a discharged debt. For the second
13 claim, Eady asserted that since the Ninth Circuit (and the BAP)
14 found the almost-identical PDPRA to be an illegal reaffirmation
15 agreement in Bankr. Receivables Mgmt. v. Lopez (In re Lopez), 345
16 F.3d 701 (9th Cir. 2003), the one sent to Eady was illegal as
17 well. Eady sought relief for Civil Contempt, Injunctive and
18

19 ⁸ The facts regarding BRM's State Court case are as
20 follows: BRM alleged that Eady failed to file an answer,
21 resulting in a default on October 9, 2007, and subsequent default
22 judgment on November 20, 2007, for the value of the collateral -
23 an unknown amount on this record. Eady filed a Motion to Set
24 Aside the Default Judgment on December 12, 2007, claiming that
25 service was improper and that he had filed his answer in
26 bankruptcy court, although he provided no conformed copy of this
27 alleged answer to the State Court. The State Court admonished
28 BRM for the improper service and for knowingly failing to notify
Eady's counsel prior to its Request for Entry of Default. It
granted Eady's Motion to Set Aside based upon surprise and
excusable neglect of his counsel. It also denied attorneys fees
to BRM because "[BRM] could have avoided this motion, and indeed,
the entire situation. Awarding fees to [BRM] under these
circumstances would be unjust."

1 Declaratory Relief, Coercive Fine, and Punitive Damages. BRM
2 filed its answer on June 11, 2007.

3 Eady moved for summary judgment on December 21, 2007. On
4 January 28, 2008, BRM filed its opposition to Eady's motion for
5 summary judgment and its own motion for summary judgment. BRM
6 argued that it has a valid security interest, that its in rem
7 rights were still intact after discharge, and therefore its
8 pursuit of the collateral in State Court and attempts to settle
9 with Eady did not constitute violations of section 524. To
10 support its valuation of the Ladies Ring, BRM offered the
11 declaration of its president, Bruce Jackman, who stated that at
12 all times after the October 25, 2000 purchase date, the ring had
13 a fair market value of \$2,154.95 or more.

14 The bankruptcy court heard both motions on February 14,
15 2008. In its oral ruling determining whether BRM's act of
16 soliciting the PDPRA from Eady violated the discharge injunction,
17 the court stated:

18 I think that my role here is on the violation of the
19 permanent injunction - the discharge order and I think on
20 this record I have to declare that I could not find that
21 the creditor or [sic] were acting - without good faith.
22 They had good faith belief. They had a good faith belief
23 they had a security interest. That being the case, I
won't find that it's a violation of the permanent
injunction and that's the ruling of the court. . . . I
do not think it has been determined that these types of
security arrangements are invalid or are not effective.

24 Transcript of Hearing on Plaintiff's Motion for Summary Judgment
at 72:5-16 (Feb. 14, 2008).

25 As to BRM's State Court action or attempted settlement
26 efforts with Eady, the court stated:

27

28

1 So, I think that the creditors⁹ here are acting in good
2 faith. I think that what they do on an obligation that
3 secured interest and collateral - there is some way out.
4 If the only option is for them to file a lawsuit, I don't
5 think that would be good policy for anyone. I think that
6 it's better that parties post-petition recognize the new
7 playing field and try to resolve it with what's in the
8 best interest of all the parties involved. So that's the
9 ruling of the court . . .

6 Id. at 72:18-73:2.

7 In its Order of March 5, 2008, the bankruptcy court ruled
8 that since BRM committed no contemptible conduct due to its good
9 faith and reasonable belief that its acts were not prohibited by
10 the discharge injunction, Eady's motion was denied and BRM's
11 motion was granted. The court's Judgment of April 9, 2008,
12 declared that it was abstaining from hearing the validity of
13 BRM's security interest since that issue is pending in State
14 Court and dismissed the adversary proceeding. Eady filed a
15 timely Notice of Appeal on April 18, 2008, pursuant to Rule
16 8002(a).

17 **II. ISSUE**

18 Did the bankruptcy court err when it denied Eady's motion
19 for summary judgment and granted BRM's motion for summary
20 judgment?

21 **III. JURISDICTION**

22 The bankruptcy court had jurisdiction under 28 U.S.C.
23 §§ 157(b)(2)(O) and 1334. Since the court disposed of all issues
24 raised when it granted BRM's motion for summary judgment and
25 abstained from hearing the validity of BRM's security interest,

26
27 ⁹ We assume the court used the plural "creditors" to
28 include both Daniel's, the assignor, and BRM, the assignee of all
claims against Eady.

1 resulting in dismissal of the adversary proceeding, the order is
2 final and we have jurisdiction under 28 U.S.C. § 158.¹⁰

3 **IV. STANDARD OF REVIEW**

4 We review summary judgment orders de novo. Tobin v. San
5 Souci Ltd. P'ship (In re Tobin), 258 B.R. 199, 202 (9th Cir. BAP
6 2001). Viewing the evidence in the light most favorable to the
7 non-moving party, we must determine "whether there are any
8 genuine issues of material fact and whether the trial court
9 correctly applied the relevant substantive law." Id. See New
10 Falls Corp v. Boyajian (In re Boyajian), 367 B.R. 138, 141 (9th
11 Cir. BAP 2007).

12 **V. DISCUSSION**

13 **A. Discharge Injunction, In Rem Rights, and Contempt.**

14 Although we agree with Eady that the bankruptcy court
15 utilized an incorrect standard of law when it applied a "good
16 faith" or "lack of bad faith" standard to determine whether BRM's
17 acts violated the discharge injunction and was therefore
18 contemptible conduct, this was harmless error.¹¹

21 ¹⁰ An order granting dismissal is final and appealable "if
22 it (1) is a full adjudication of the issues, and (2) clearly
23 evidences the judge's intention that it be the court's final act
24 in the matter." Nat'l Distribution Agency v. Nationwide Mut.
Ins. Co., 117 F.3d 432, 433 (9th Cir. 1997).

25 ¹¹ Fed. R. Civ. P. 61, incorporated by reference into Rule
9005, provides in relevant part:

26 "Unless justice requires otherwise, no error . . . by the
27 court . . . is ground for . . . vacating, modifying, or
28 otherwise disturbing a judgment or order."

1 Section 524 embodies the "fresh start" concept and provides
2 that a discharge "operates as an injunction against the
3 commencement or continuation of an action, the employment of
4 process, or an act, to collect, recover, or offset any
5 [discharged] debt as a personal liability of the debtor." Pre-
6 petition liens, however, survive bankruptcy and remain
7 enforceable unless they are avoidable under the Code. Johnson v.
8 Home State Bank, 501 U.S. 78, 84 (1991). Therefore, the
9 discharge only bars an in personam action against the debtor,
10 leaving intact an in rem action against the debtor to recover
11 property. Id.

12 A creditor who attempts to collect a pre-petition discharged
13 debt in violation of the discharge injunction is in contempt of
14 the bankruptcy court that issued the order of discharge. Cox v.
15 Zale Del. Inc., 239 F.3d 910, 915 (7th Cir. 2001); 4 Collier on
16 Bankruptcy ¶ 524.02[2][c] (15th rev. ed. 2008). In addition to
17 the bankruptcy court's inherent power to impose an order for
18 contempt only upon a showing of "bad faith," section 105 grants
19 statutory contempt powers and a creditor may be liable under
20 section 105 if it willfully violated the permanent injunction of
21 section 524. Renwick v. Bennett (In re Bennett), 298 F.3d 1059,
22 1069 (9th Cir. 2002); Walls v. Wells Fargo Bank, N.A., 276 F.3d
23 502, 509 (9th Cir. 2002); see Hardy v. U.S. (In re Hardy), 97
24 F.3d 1384, 1389-90 (11th Cir. 1996).

25 A debtor can bring a contempt claim under section 105 as a
26 remedy for a creditor's willful violation of the discharge
27 injunction, and relief may include an award of compensatory
28 damages and attorney's fees incurred as a result of a violation.

1 Walls, 276 F.3d at 507.

2 The party seeking contempt sanctions has the burden of
3 proving by clear and convincing evidence that the contemnors
4 violated a specific and definite order of the court. Bennett,
5 298 F.3d at 1069. The burden then shifts to the contemnors to
6 demonstrate why they were unable to comply. Id. " '[T]he movant
7 must prove that the creditor (1) knew the discharge injunction
8 was applicable and (2) intended the actions which violated the
9 injunction.' " Id. (citing Hardy, 97 F.3d at 1390). For the
10 second prong, the court employs an objective test and "the focus
11 of the [] inquiry . . . is not on the subjective beliefs or
12 intent of the alleged contemnors in complying with the order, but
13 whether in fact their conduct complied with the order at issue."
14 Bassett v. Am. Gen. Fin. (In re Bassett), 255 B.R. 747, 758 (9th
15 Cir. BAP 2000) (rev'd on other grounds, 285 F.3d 882 (9th Cir.
16 2002)); accord McComb v. Jacksonville Paper Co., 336 U.S. 187,
17 191 (1949) (because civil contempt serves a remedial purpose, it
18 matters not with what intent the defendant did the prohibited
19 act).

20 In its motion for summary judgment, BRM cited Diamontiny v.
21 Borg, which held that "[i]f a defendant's action 'appears to be
22 based on a good faith and reasonable interpretation of [the
23 court's order],' he should not be held in contempt." 918 F.2d
24 793, 797 (9th Cir. 1990). The bankruptcy court relied on this
25 "good faith" standard.

26 However, Diamontiny is distinguishable from this case.
27 Diamontiny was in the context of imposing contempt under the
28 court's inherent power, not a statutory power involving a

1 creditor under section 105, which applies a different standard.
2 In Knupfer v. Lindblade (In re Dyer), 322 F.3d 1178, 1191 (9th
3 Cir. 2003), the Ninth Circuit applied the same test for
4 violations of the automatic stay under section 362(h) to
5 violations of the discharge injunction under section 524, and
6 held that there can be no doubt the [discharge injunction]
7 qualifies as a specific and definite order, and the finding for
8 contempt under section 105 turns not on a finding of "bad faith"
9 or subjective intent, but rather on a finding of "wilfulness."
10 Moreover, belief by a creditor that its actions do not violate
11 the injunction does not preclude an award of damages against it
12 based upon its "willful" violation. Mitchell v. BankIllinois,
13 316 B.R. 891 (Bankr. S.D. Tex. 2004); see Henkel v. Lickman (In
14 re Lickman), 297 B.R. 162 (Bankr. M.D. Fla. 2003) (motivation or
15 belief of party charged with violation of the injunction is
16 irrelevant in assessing whether the violation was willful).

17 Consequently, Ninth Circuit case law is clear that for a
18 finding of contempt under section 105, the focus is not on
19 whether BRM subjectively and in good faith thought it had a valid
20 security interest when it attempted to recover the Ladies Ring or
21 its value, but rather on whether BRM's intended acts - soliciting
22 a PDPRA that could potentially be invalid, subsequent demand
23 letters, and State Court action - violate the discharge
24 injunction. In other words, BRM's subjective belief that it had
25 a valid security interest does not dispense with the issue of
26 whether the value of its alleged secured collateral, the Ladies
27 Ring, was actually \$2,154.95, the purchase price (plus sales tax)
28 six years prior.

1 Therefore, the bankruptcy court erred when it applied an
2 incorrect standard of law for contempt under section 105 by
3 focusing on BRM's good faith belief that it had a security
4 interest, rather than on the contents of the underlying PDPRA and
5 whether it violated the discharge injunction. However, because
6 BRM did not violate the discharge injunction, as we discuss
7 below, this error was harmless and does not alter our affirmance
8 of BRM's motion for summary judgment.¹²

9 **B. Soliciting The PDPRA From Eady Did Not Violate The Discharge**
10 **Injunction or Lopez Because It Did Not Attempt To Collect A**
11 **Previously Discharged Debt.**

12 Eady argues that the PDPRA, which is essentially identical
13 to the one found invalid in Lopez, unlawfully attempted to
14 collect from Eady a previously discharged debt. Further, in
15 light of Lopez, in which BRM was the defendant, BRM could not
16 claim ignorance of the discharge injunction, or that it still had
17 a good faith and reasonable belief that soliciting the PDPRA was
18 not a prohibited act. As a result, he asserts the court clearly
19 erred when it granted BRM summary judgment without considering
20 and addressing whether BRM's solicitation of the PDPRA was a
21 willful violation of the discharge injunction.¹³

22 ¹² Because the bankruptcy court's error did not affect
23 Eady's substantial rights, we may affirm on any grounds supported
24 by the record. Canino v. Bleau (In re Canino), 185 B.R. 584, 594
(9th Cir. BAP 1995).

25 ¹³ Eady also argues that under McClellan Fed. Credit Union
26 v. Parker (In re Parker), 139 F.3d 668 (9th Cir. 1998), BRM's
27 sole remedy was repossession when Eady failed to maintain
28 payments. Pre-BAPCPA, section 521 gave debtor's the option of
redeeming, reaffirming, or surrendering property securing a
consumer debt. In Parker, a pre-BAPCPA case, the Ninth Circuit
(continued...)

1 Eady's sweeping view of Lopez is incorrect, and we agree
2 with the bankruptcy court that Lopez did not hold all PDPRA's, no
3 matter what the terms, are in fact illegal and unenforceable
4 post-discharge agreements. Lopez was fact-specific; it held that
5 PDPRA's can be valid if a creditor is attempting to collect only
6 the value of the secured collateral, its in rem right, as opposed
7 to collecting the entire pre-petition balance of debtor's charge
8 account like in Lopez, some of which was in personam discharged
9 debt. However, if a PDPRA attempts to recover even one penny of
10 discharged debt it cannot qualify as a reaffirmation agreement
11 for the same reason in Lopez - it fails to comply with the
12 requirements of section 524(c).¹⁴

13
14
15 ¹³(...continued)
16 recognized a fourth option - "keep and pay." 139 F.3d 668, 673
17 (9th Cir. 1998) (as long as debtor keeps current under the
18 original agreement with secured creditor, debtor not required to
reaffirm or redeem, and creditor must accept payments or
repossess if debtor defaults).

19 Under Parker, Eady had no right to "keep and pay" the Ladies
20 Ring because he was in default on his Daniel's charge account for
almost two years prior to filing Chapter 13.

21 ¹⁴ Section 524(c), in relevant part, provides:

22 An agreement between a holder of a claim and the debtor,
23 the consideration for which, **in whole or in part**, is
24 based on a debt that is dischargeable . . . is
enforceable only to any extent enforceable under
applicable nonbankruptcy law . . . only if-

25 (1) such agreement was made before the granting of the
26 discharge under section . . . 1328 of this title; [and]

27

28 (3) such agreement has been filed with the court

(emphasis added).

1 BRM admits that it knew of Eady's discharge and that it
2 intended to send him the PDPRA. Therefore, the question is did
3 BRM's act of soliciting the PDPRA (and sending subsequent demand
4 letters) violate the discharge injunction? Obviously, that can
5 only be answered by analyzing the terms of the PDPRA.

6 Leaving aside the issue of consideration, which is
7 irrelevant for this analysis, and assuming that BRM has a valid
8 security interest, the validity of the PDPRA turns on what BRM
9 was trying to collect. If it was attempting to collect more than
10 the actual value of the Ladies Ring, then per the section 524
11 injunction and Lopez, that amounts to a willful attempt to
12 collect a discharged in personam debt and contempt is proper. If
13 the PDPRA was attempting to collect the actual value of the
14 Ladies Ring and nothing more, then it would not be a violation of
15 the discharge injunction because BRM was simply exercising an in
16 rem action to recover the value of its collateral. In re
17 Anderson, 348 B.R. 652, 655 (Bankr. D. Del. 2006) (where
18 creditor's action is limited to an in rem action, there can be no
19 violation of the discharge injunction).¹⁵ Finally, if the value
20 of the Ladies Ring was something less than \$2,154.95, a post-
21 discharge agreement attempting to collect any part of in personam
22 discharged debt outside the confines of section 524 is illegal,
23 violates the discharge injunction, and subjects BRM to contempt.

26 ¹⁵ Undoubtedly, if it turns out that BRM has no valid
27 security interest, then the act of soliciting the PDPRA and
28 sending demand letters violated the discharge injunction and
contempt sanctions are proper. See fn. 4.

1 Eady alleged in his complaint and argued in his appellate
2 brief that the Ladies Ring was worth something less than
3 \$2,154.95, especially considering five and one half years of wear
4 and tear. Admittedly, BRM offered no explanation in either the
5 PDPRA or its demand letters as to how it derived at a value of
6 \$2,154.95, or why "fair market value" was the proper valuation
7 standard under section 506.¹⁶ However, Eady never presented to
8 the bankruptcy court any admissible evidence in his summary
9 judgment motion, or in his response to BRM's summary judgment
10 motion, suggesting what that lesser value might be to put the
11 material fact of value in dispute. In other words, he did not
12 provide competent evidence to counter BRM's proof via Jackman's
13 declaration that the Ladies Ring was worth \$2,154.95. Therefore,
14 his attempts to raise the issue of value for the first time on
15 appeal will not be considered.¹⁷ Since Eady did not sufficiently
16 raise any genuine issue of material fact as to BRM's valuation of
17 the Ladies Ring, we must assume that \$2,154.95 was the proper
18 value.

21 ¹⁶ Although section 506(a) was revised by BAPCPA and
22 imposes a "replacement value" standard for personal property of
23 individuals in Chapter 7 or Chapter 13, this case arose pre-
24 BAPCPA and thus section 506(a) is not determinative. Courts pre-
BAPCPA vary on what valuation standard (replacement, liquidation,
forced-sale, etc.) under section 506(a) applies in these
circumstances.

25 ¹⁷ Generally, appellate courts do not consider arguments
26 "that are not 'properly raise[d]' in the trial courts." O'Rourke
27 v. Seaboard Sur. Co. (In re Fegert, Inc.), 887 F.2d 955, 957 (9th
28 Cir. 1989). See Scovis v. Henrichsen (In re Scovis), 249 F.3d
975, 984 (9th Cir. 2001) (court will not consider issue raised
for first time on appeal absent exceptional circumstances).

