NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	
SNYDER JAMES OH,	BAP No. NC-07-1325-MdKB
Debtor.	Bk. No. 03-54288-ASW
	Adv. No. 03-05342-ASW
CHRISTOPHER GLEN FLORES; GARY B. WESLEY,	
Appellants,	
v.	**MEMORANDUM**[*]
SNYDER JAMES OH,	
Appellee.	

Argued and Submitted on March 19, 2008
at Pasadena, California

Filed – April 16, 2008

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

Honorable Arthur S. Weissbrodt, Bankruptcy Judge, Presiding

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Before: MACDONALD,[**] KLEIN and BRANDT,[***] Bankruptcy Judges.

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[*]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.

[**]Hon. Donald MacDonald, IV, Chief Bankruptcy Judge for the District of Alaska, sitting by designation.

[***]Hon. Philip H. Brandt, Bankruptcy Judge for the Western District of Washington, sitting by designation.

A creditor and his attorney appeal the bankruptcy court's grant of summary judgment and a total of $16,659.35 in damages to the debtor. They contend the bankruptcy court committed reversible error by finding that they had violated the automatic stay and discharge injunction and awarding attorney's fees and costs to the debtor as damages. We AFFIRM.

FACTS

The debtor, Snyder James Oh, filed a chapter 13[1] petition on June 30, 2003, in which he received a chapter 13 discharge on January 14, 2005. At the time he filed, a state court civil action was pending against him. The action had been filed one year earlier, on June 20, 2002, by creditor Christopher Glen Flores ("Flores"). Flores alleged fraud and conversion, and sought damages in the principal sum of $50,000.00. When the debtor filed his petition, he listed Flores' state court attorney, Melvin Emerich, on his schedules and matrix. The debtor's bankruptcy attorney, David Boone, also filed a notice of bankruptcy filing, with a copy of the petition, in the state court action on July 8, 2003.

The debtor's chapter 13 plan was confirmed on August 29, 2003. Flores didn't file a proof of claim. Instead, on October 8, 2003, attorney Gary B. Wesley ("Wesley") filed an adversary

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[1] Unless otherwise indicated, all chapter, section, and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, prior to the effective dates of the provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), Pub. L. 109-8, 119 Stat. 23 (April 20, 2005)(generally effective October 17, 2005).

complaint on behalf of Flores in the debtor's bankruptcy case, seeking to except Flores' debt from discharge pursuant to § 523. At a telephonic status conference held January 15, 2004, the bankruptcy judge advised Wesley that the adversary proceeding was moot.[2] The judge explained, "It's a Chapter 13. It's a nondischargeability case. So there's really no nondischargeability case in a 13 like this." The court further informed Wesley that "if the 13 gets converted, you'll have another opportunity to file another nondischargeability complaint. So if it doesn't get converted and it gets dismissed, there will be no such thing as dischargeability." The judge also noted that Wesley hadn't properly served the debtor in the adversary case.

Wesley said he'd take another look at his position before he served the debtor with process. However, no further activity occurred in the adversary proceeding until April 9, 2004, when Boone filed a motion to dismiss on behalf of the debtor. The motion was granted April 12, 2004, and the proceeding was dismissed, without prejudice.

Wesley subsequently substituted into the state court action as attorney for Flores, on May 20, 2004. While the bankruptcy

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[2] The debtor's petition was filed before the enactment of BAPCPA. The chapter 13 discharge provisions in effect when he filed provided that a discharge after completion of plan payments would exclude debts "of the kind specified in paragraph (5), (8), or (9) of section 523(a)" from discharge upon a debtor's completion of plan payments. 11 U.S.C. § 1328(a) (Thomson/West 2003). Debts for fraud and conversion fall within subsections (2) and (6) of § 523(a). These debts were encompassed within a chapter 13 discharge entered after completion of plan payments.

was pending, the state court scheduled a status conference for May 20, 2004. When none of the parties attended this hearing, the state court scheduled an order to show cause regarding dismissal of the case. Flores and Wesley attended this hearing, and requested continuances of the status conference from July 8, 2004, to August 5, 2004, and then December 9, 2004. Boone filed a second notice of bankruptcy filing in the state court on December 20, 2004. This second notice was served only on the debtor's state court counsel, James Bravos.

After the debtor completed his plan payments, the trustee filed a notice of plan completion on January 12, 2005. The debtor's discharge was entered January 14, 2005. The discharge notice was served on Flores' former state court attorney, Melvin Emerich. The final decree was entered February 16, 2005, and the bankruptcy case was closed.

After the discharge was entered, Wesley sprung to action in Flores' state court case. On February 16, 2005, he served a notice of deposition on the debtor's state court attorney, James Bravos. When the debtor failed to appear at a March 4, 2005, deposition, Wesley filed a motion to compel his attendance. Wesley was aware of the debtor's discharge when he filed this motion on March 18, 2005. He attached a copy of the bankruptcy court's discharge order to a declaration he filed in support of the motion. His motion asserts that the debtor's chapter 13 bankruptcy "only cancelled 'nondischargeable' debts (not the causes of action herein for fraud and conversion)." His declaration in support stated that "the Bankruptcy Judge ruled that the adversary proceeding [he had filed] was unnecessary

because no such discharge could be obtained in the case. Accordingly, the adversary proceeding was dismissed without prejudice."

Wesley sought an order compelling the debtor's deposition, plus his attorney's fees and costs as a sanction. The state court granted the motion. It ordered the debtor to attend and testify at a deposition, and directed the debtor to pay Wesley monetary sanctions of $336.30.

On April 26, 2005, Wesley served a second deposition notice on the debtor's state court attorney, Bravos. Again, the debtor failed to attend the deposition. Wesley filed a motion for further sanctions on May 23, 2005, in which he requested that a "terminating" sanction of $50,000.00, the principal amount sought in Flores' complaint, be entered against the debtor. A hearing on this motion was scheduled for June 17, 2005.

The state court had also scheduled a case status review for June 9, 2005. The debtor's bankruptcy attorney, Boone, filed a third notice of stay in the state court action on June 7, 2005, which included a copy of the bankruptcy court's discharge order. Wesley was served with a copy. Wesley filed a declaration in response to this third notice, in which he stated:

> The [discharge] ORDER makes it clear that the bankruptcy proceeding ended, and [Boone's] suggestion that the nondischargeable debt (for fraud and conversion) in this case was discharged by the ORDER is false - as far as I understand and explained in my March 18 declaration. If, contrary to my belief, the debt was discharged, then Mr. Oh's attorney may so advise the Bankruptcy Court when judgment is entered herein against his client and, if true, the judgment would then be declared unenforceable.

Wesley also sent a letter to the bankruptcy judge, asking him to write to the Superior Court about the impact of chapter 13 discharges on state court civil actions.

An attorney from Boone's office made a special appearance at the June 9 status review. He informed the state court of the debtor's bankruptcy discharge and asked Wesley to dismiss the action. Wesley advised the court and counsel that he intended to proceed.

On June 16, 2005, one day before the hearing on Wesley's second motion for sanctions, Boone filed an adversary proceeding against Wesley, Flores, and state court judge James P. Kleinberg. The complaint prayed for the following relief:

> 1) a determination that any pre-petition claims of the defendants had been discharged;
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> 2) a determination that any actions, sanctions or orders taken against the debtor in the state court suit were void and in violation of either the stay imposed by § 362 or the discharge injunction imposed by § 524(a)(1);
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> 3) for an order enjoining defendants from pursuing any further collection activity against the debtor; and
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> 4) for the recovery of the debtor's actual damages, including costs and attorney's fees, as well as punitive damages.

An attorney from Boone's office attended the state court hearing on Wesley's second motion for sanctions on June 17, 2005. No dispositive ruling was made on the second motion. The state court action was subsequently removed to the bankruptcy court,

although there are few details regarding the removal action in the record.

Wesley appeared on behalf of himself and Flores in the debtor's adversary proceeding.[3] Three motions were quickly disposed of after the adversary proceeding was filed. The debtor's motion to consolidate the removed state court action was granted. Wesley's motion to dismiss the adversary proceeding and remand the state court action was denied. State court judge Kleinberg's motion to be dismissed from the action was granted, leaving only Flores and Wesley as defendants.

The parties filed cross motions for summary judgment on the debtor's adversary complaint. Both motions were heard on December 14, 2006. The bankruptcy court made detailed oral findings. It found that the pertinent facts were undisputed. It denied the defendants' motion, finding that there was no colorable basis for holding that Flores' debt had not been discharged in the debtor's chapter 13 case. As to the debtor's cross-motion, the bankruptcy court found that Flores' claim was a pre-petition debt, that it had been properly scheduled in the debtor's bankruptcy, and that proper notice of the bankruptcy had been given to Flores. It held that Flores' debt had been discharged.

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[3] Henceforth we will refer for convenience to both defendants as "Wesley" with respect to procedural matters and positions taken in the adversary proceeding; respecting conduct in the state court litigation, references to Wesley are to him alone, although, of course, he was acting on behalf of his client, Flores.

The bankruptcy court further found that any actions taken by the defendants in state court from June 30, 2003, when the chapter 13 petition was filed, until January 14, 2005, when discharge was entered, violated the automatic stay and were void. Similarly, it held that any actions taken by the defendants after discharge was entered on January 14, 2005, violated the discharge injunction. The bankruptcy court declined to enter an order enjoining the defendants from making any further collection efforts against the debtor, however, because such an order would be redundant to the discharge order already entered.

The bankruptcy court deferred ruling on the issue of damages, however. It had two concerns. First, it felt further facts needed to be provided regarding the defendants' requests for continuance of the state court action while the stay was in effect. If the continuances merely maintained the status quo in the state court, and no action on the part of the debtor was required, then the defendants' actions either did not violate the stay or were mere technical violations which didn't actually damage the debtor. The court felt the state court record which had been provided was too "abbreviated and cryptic" to make this evaluation, and suggested the debtor's state court attorney, Bravos, might submit a declaration on this issue.

The bankruptcy court also felt the record was insufficient to establish damages for violation of the discharge injunction. It noted that the party seeking such damages had to prove by clear and convincing evidence that the creditor knew the discharge injunction was applicable and intended the actions which violated the injunction. The court was also concerned that

the Ninth Circuit's recent decision, Zilog v. Corning (In re Zilog), 450 F.3d 996 (9th Cir. 2006), might require an evidentiary hearing on the issue of damages. The parties were given an opportunity to file supplemental briefing and a continued hearing on the issue of damages was set.

In his supplemental brief, the debtor waived his claim for punitive damages. He argued that Zilog was inapplicable to his situation because Wesley had actual notice of the discharge injunction no later than March 18, 2005, when he attached a copy of the discharge order to his first motion to compel deposition. A declaration from the debtor's state court attorney, Bravos, was submitted with the debtor's supplemental brief. Bravos' declaration and his fee itemization are both fairly cursory. He says the state court matter was "periodically set for status conferences" but doesn't allege that he attended any of these conferences. He also states that he was "refused telephonic appearances and [his] motions to be relieved as counsel were denied," and that "it was clear [he] would face monetary sanctions or [his] client's answer would be stricken" if he failed to appear. His fee itemization is very general, showing listings such as "review of file," "telephone conference," "correspondence," and "research" and "legal drafting." There is only one itemized entry for attending a hearing, and that is dated 8/5/04. Bravos billed 8 hours for "hearing, preparation, and travel time." on that date. His itemized costs list two filing fees ($36 each) and $238.20 for airline tickets.

The state court docket reflects that an OSC hearing was held on August 5, 2004, the date Bravos billed 8 hours for travel and

attendance at a court hearing. Bravos incurred airfare because his office is located in Southern California and the state court case was pending in the California Superior Court located in San Jose, California.

Wesley's supplemental brief noted the lack of detail in Bravos' declaration and fee itemization. Wesley argued that he hadn't violated the stay by attending state court status conferences because those hearings were set on the court's own motion. Wesley took issue with the debtor's assertion that he knew the discharge injunction encompassed Flores' debt. Wesley said he "did not interpret the vague discharge order to discharge the debt alleged in Mr. Flores' state court case." He also said that the bankruptcy judge's earlier comments, made at the January 15, 2004, status conference in the Flores adversary proceeding, had lead him to conclude "that a debt that is non-dischargeable would not be discharged in a Chapter 13 and that there was nothing to worry about - unless the case were 'converted' to a Chapter 7." He noted that he had previously written to the bankruptcy judge and requested an advisory letter for the state Superior Court on the issue of chapter 13 discharges, and that he had "openly communicated" his belief that Flores' debt hadn't been discharged to both the state court and bankruptcy court. Finally, he said there was no evidence that the debtor had incurred any damages, because there was no evidence that the debtor had paid any attorney's fees.

Continued oral argument on the debtor's motion for summary judgment was held on May 10, 2007. At the hearing, Wesley reiterated that the debtor hadn't suffered any damages because he

hadn't paid any fees, and suggested that the debtor's attorneys had incurred fees unnecessarily. Boone noted that Wesley had continued litigation during and after the bankruptcy, trying to obtain contempt sanctions and a judgment against the debtor, and convincing a state court judge that the bankruptcy didn't apply to Flores' civil action. He argued that Wesley's was "the most outrageous case of violation of the automatic stay" that he had seen in 30 years of practice, characterizing Wesley as the "energizer bunny" who just went on and on, in spite of the discharge. In response, Wesley contended Boone could have mitigated the harm by bringing these issues to the bankruptcy court's attention sooner. Wesley also stated that he'd never met the debtor's state court attorney, Bravos, or seen him in state court.

The bankruptcy court made detailed oral findings on the issue of damages on June 7, 2007. It first examined Bravos' declaration and fees. It found that the only fees which related to the defendants' violations of stay were incurred when Bravos flew to Northern California to attend the state court show cause hearing on August 5, 2004. Because the defendants had failed to stay the state court litigation, the debtor was required to have counsel attend that hearing. Bravos had billed $1,760.00, for 8 hours of time at $220 per hour, and incurred plane fare of $238.20, to attend this hearing. The court awarded these amounts, or a total of $1,998.20, as damages for the defendants' violation of the automatic stay.

The court found that an evidentiary hearing was not required before determining whether the defendants had violated the

discharge injunction. It noted that under Zilog, actual knowledge of the discharge injunction had to be shown before contempt damages could be awarded, and found that the defendants had actual knowledge of the discharge injunction no later than March 18, 2005, when Wesley attached a copy of the discharge order to a declaration he filed in state court. The court dismissed Wesley's argument that the discharge order was too general to serve as a basis for contempt because it didn't specifically discharge Flores' debt. The defendants' position didn't exonerate them from liability for contempt.

The court held that the defendants were liable to the debtor for the reasonable attorney's fees and costs incurred by Boone and Bravos after the discharge was entered. Boone's post-discharge fees totaled $20,406.00 and his costs were $70.65. The court deducted the sum of $6,184.50 from this total for Boone's fees pertaining to the motion to dismiss state court Judge Kleinberg from the adversary proceeding. It found that those fees were unrelated to the defendants' violation of the discharge injunction. The court awarded additional damages of $396.00 for fees Bravos had incurred post-discharge.

The court awarded total actual damages of $14,661.15 for violation of the discharge injunction. The total damage award, for both the stay violation and violation of the discharge injunction, was $16,659.35. An order granting the debtor's motion for summary judgment was entered August 16, 2007, which reads as follows:

> For reasons stated on the record, Defendants are liable to the Debtor for actual damages in the total amount of

> $1,998.20 for violation of the automatic stay, for fees incurred to Mr. Bravos in the amount of $1,760.00 and costs incurred to Mr. Bravos in the amount of $238.20; and actual damages in the amount of $14,661.15 for violation of the discharge injunction, representing fees and costs incurred to the Law Offices of David A. Boone in the amount of $14,265.15 and fees to Mr. Bravos in the amount of $396.00. Total actual damages in the amount of $16,659.35 are awarded Debtor for both violation of the automatic stay and violation of the discharge injunction.
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> Judgment is hereby entered in the amount of SIXTEEN THOUSAND AND SIX HUNDRED AND FIFTY NINE DOLLARS AND THIRTY FIVE CENTS ($16,659.35) in favor of Plaintiff and jointly and severally against Defendants CHRISTOPHER GLEN FLORES and GARY B. WESLEY.

Wesley and Flores filed a timely notice of appeal on August 27, 2007. An amended judgment was entered on November 14, 2007, to clarify that the debtor's request for punitive damages had been waived.

JURISDICTION

The bankruptcy court had jurisdiction under 28 U.S.C. § 1334 and § 157(b)(1) and (b)(2)(J). This panel has jurisdiction under 28 U.S.C. § 158(c).

ISSUES

1. Whether there are genuine issues of material fact which would preclude a grant of summary judgment as to the existence of stay violations under § 362 or violations of the discharge injunction under § 524(a).

2. Whether the bankruptcy court correctly applied controlling law in holding that the appellants violated the automatic stay of § 362 or the discharge injunction of § 524(a).

3. Whether the damages awarded the appellee for violation of the automatic stay and discharge injunction were appropriate under §§ 362(h) and 105(a) and the bankruptcy court's contempt powers.[4]

STANDARD OF REVIEW

"A grant of summary judgment is reviewed de novo." Carolco Television Inc. v. Nat'l Broadcasting Co. (In re De Laurentis Entertainment Group Inc.), 963 F.2d 1269, 1271 (9th Cir. 1992). Viewing the evidence in the light most favorable to the non-moving party, the appellate court must determine whether there are any genuine issues of material fact and whether the lower court correctly applied the law. Id. at 1271-72. Purported "findings of fact" made in a summary judgment context are reviewed de novo without deference because findings are not authorized in summary judgments. Zilog, 450 F.3d at 1002 ("'findings' that the bankruptcy court had no authority to make on a motion for summary judgment."). Because our review is de

[4] The Appellants phrase the issues somewhat differently. They contend the grant of summary judgment was reversible error because no private cause of action exists for violation of the stay. They again argue that the discharge order was too vague to serve as a basis for contempt, and that damages were not properly awarded because there was no evidence that the debtor actually paid Boone or Bravos for their services. These contentions will be dealt with in the discussion regarding the discharge injunction.

novo, this panel does not need to follow the bankruptcy court's reasoning in evaluating whether summary judgment was proper. Gertsch v. Johnson & Johnson Fin. Corp. (In re Gertsch), 237 B.R. 160, 166-67 (9th Cir. BAP 1999).

The factual determinations underlying an award of attorneys' fees are reviewed for clear error, and the legal premises used by the court to determine the award are reviewed de novo. Eskanos & Adler, P.C. v. Roman (In re Roman), 283 B.R. 1, 7 (9th Cir. BAP 2002), citing Ferland v. Conrad Credit Corp., 244 F.3d 1145, 1147-48 (9th Cir. 2001). If the bankruptcy court applied the proper legal principles and did not clearly err in any factual determination, the award of attorneys' fees is reviewed for an abuse of discretion. Ferland, 244 F.3d at 1148.

DISCUSSION

1. No Factual Issues Preclude Summary Judgment.

The bankruptcy court correctly found that there were no genuine issues of material fact which would preclude entry of summary judgment. Weighing the evidence in the light most favorable to Wesley, it cannot be disputed that he had actual knowledge of both the debtor's bankruptcy filing and the subsequent discharge order. Wesley clearly knew about the bankruptcy filing; he initiated an adversary proceeding in the debtor's chapter 13 case.

Wesley also had actual notice of the discharge injunction. Knowledge of an injunction is a question of fact which usually requires an evidentiary hearing. Zilog, 450 F.3d at 1007. But the bankruptcy court correctly concluded that an evidentiary

hearing was not required to establish Wesley's knowledge of the discharge injunction. Wesley appended a copy of the discharge order to a pleading he filed in the state court proceeding on March 18, 2005, and discussed his perceptions of the order in his brief. The discharge order gave Wesley written notice that the debtor had completed plan payments, had received a discharge under § 1328(a), and that "all creditors are prohibited from attempting to collect any debt that has been discharged in this case." There is no question that Wesley had actual notice of the discharge injunction.

Nor can it be disputed that there were several hearings in the state court action after Wesley had received notice of the debtor's bankruptcy and discharge. Numerous status conferences were held. A show cause hearing was held on August 5, 2004, while the stay was in effect. The debtor's state court attorney, Bravos, traveled from Southern California to attend this hearing. The state court proceedings continued in spite of the debtor's bankruptcy counsel having filed three notices of stay: the first on July 8, 2003, a second on December 20, 2004, and the final one, which included a copy of the discharge order, on June 7, 2005.

After Wesley had obtained a copy of the discharge order, he moved for sanctions against the debtor, twice, for failure to attend a deposition. He continued to maintain, in spite of the language in the discharge order, that Flores' debt was somehow excepted from the discharge injunction and that he could proceed with the state court suit. Notwithstanding the discharge order, Wesley suggested that the burden was on the debtor to get a

determination as to the discharge of Flores' debt, *after* the claim had been liquidated in state court. The debtor instead returned to the bankruptcy court before Wesley succeeded in taking the state court action to judgment, seeking declaratory relief and sanctions for Wesley's continued prosecution of the discharged claim.

These facts are material to the issues determined on summary judgment. They are clearly established by the record. There are no factual issues which would preclude a grant of summary judgment.

2. Wesley Violated the Automatic Stay of 11 U.S.C. § 362.

Under § 362(a), the filing of a bankruptcy petition "operates as a stay, applicable to all entities," of the commencement or continuation of pending judicial proceedings against the debtor. 11 U.S.C. § 362(a)(1). The automatic stay provided by § 362(a) "qualifies as a specific and definite court order." Knupfer v. Lindblade (In re Dyer), 322 F.3d 1178, 1191 (9th Cir. 2003).

Flores' state court civil action was automatically stayed by the debtor's bankruptcy filing, and remained so until the debtor's discharge was entered. 11 U.S.C. § 362(c)(2)(C). Wesley knew of the bankruptcy filing and was "charged with knowledge of the automatic stay." Dyer, 322 F.3d at 1191. A "willful" violation of the automatic stay can be shown because Wesley knew of the debtor's bankruptcy filing and intended to take the actions in the state court which violated the stay. Havelock v. Taxel (In re Pace), 67 F.3d 187, 191 (9th Cir. 1995),

citing Pinkstaff v. United States (In re Pinkstaff), 974 F.2d 113, 115 (9th Cir. 1992); see also Barnett v. Edwards (In re Edwards), 214 B.R. 613, 618-19 (9th Cir. BAP 1997). The bankruptcy court's holding that Wesley had violated the automatic stay was not reversible error. Further, any acts Wesley took in violation of the stay were void. Lone Star Security & Video, Inc. v. Gurrola (In re Gurrola), 328 B.R. 158, 171 (9th Cir. BAP 2005), citing 40235 Washington St. Corp. v. Lusardi, 329 F.3d 1076, 1080 (9th Cir. 2003); Schwartz v. United States (In re Schwartz), 954 F.2d 569, 572 (9th Cir. 1992).

3. Wesley Violated the Discharge Injunction of 11 U.S.C. § 524(a).

Like the automatic stay, the discharge injunction is imposed by statute, 11 U.S.C. § 524(a), and applies unambiguously to all entities. Gurrola, 328 B.R. at 170. Section 524(a) provides that a discharge:

> (1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section 727, 944, 1141, 1228, or 1328 of this title, whether or not discharge of such debt is waived;
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> (2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived. . . .

11 U.S.C. § 524(a). Wesley's post-discharge actions in state court, and the state court's order granting his motion for sanctions for the debtor's failure to attend a deposition,

violated the discharge injunction and are void. Gurrola, 328 B.R. at 171. The record supports the bankruptcy court's finding that there was no issue of material fact that Wesley had violated the discharge injunction. No reversible error was committed.

Wesley argues that the debtor cannot have relief on this count because there is no private cause of action for violation of a discharge injunction. He bases this argument on a misreading of Walls v. Wells Fargo Bank, N.A., 276 F.3d 502 (9th Cir. 2002). Walls involved a class action suit initiated in the United States District Court for the Eastern District of California for violation of the discharge injunction. The Ninth Circuit found that violations of the discharge injunction could not be brought as a class action in the district court. Rather, such violations were to be brought as contempt actions in individual bankruptcy cases. Id. at 506. Here, the debtor has initiated a contempt proceeding in the bankruptcy court which issued the discharge order. Civil contempt is the appropriate remedy for violations of the discharge injunction, and attorney's fees may be awarded in compensation for such contempt. Id. at 507.

While such proceedings may be initiated by motion pursuant to Fed. R. Bankr. P. 9020, there has been no prejudice to Wesley in receiving the more elaborate procedures of an adversary proceeding. This rule also disposes of Wesley's contention that the debtor's adversary proceeding was procedurally improper.

The Ninth Circuit has held that contempt sanctions may be awarded even in circumstances where a debtor has failed to file a formal claim for such damages. Renwick v. Bennett (In re

Bennett), 298 F.3d 1059, 1069 (9th Cir. 2002). "So long as a party is entitled to relief, a trial court must grant such relief despite the absence of a formal demand in the party's pleadings." Id. The debtor's claim for violation of the discharge injunction was properly raised before, and considered by, the bankruptcy court.

4. The Bankruptcy Court's Award of Damages for Violation of the Stay is Supported by the Record.

Section 362(h), in effect at the time the debtor's chapter 13 petition was filed, provided that "[a]n individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages." 11 U.S.C. § 362(h) (Thomson/West 2003). As noted above, Wesley willfully violated the stay because he knew of the debtor's bankruptcy filing and intended to take the actions in the state court which violated the stay. Pace, 67 F.3d at 191.

Section 362(h) mandates an award of actual damages, including costs and attorney's fees, to a debtor injured by a stay violation. Roman, 283 B.R. at 7. Wesley was provided with an opportunity to object to Boone's and Bravos' fees and costs, and the bankruptcy court considered his objections when it awarded damages.

The bankruptcy court awarded the debtor the sum of $1,998.20 as actual damages for Wesley's violation of the stay. This damage award was conservative and properly calculated. It was based on evidence that the debtor's state court attorney had

attended a state court show cause hearing while the stay was in effect. Bravos' declaration in support of his fees states that monetary sanctions would have been imposed or the debtor's answer would have been stricken if he hadn't appeared in the state court action. The bankruptcy court did not include as damages any of the other fees Bravos billed, which were described in such general terms that their relation to the stay violation could not be determined. While § 362(h) also entitles an individual to seek punitive damages for willful stay violations, the debtor has waived any claim for punitive damages here. The bankruptcy court's award of $1,998.20 as actual damages for Wesley's violation of the automatic stay is supported by the record and was not clearly erroneous.

5. The Bankruptcy Court's Award of Damages for Violation of the Discharge Injunction is Supported by the Record.

The bankruptcy court also awarded attorney's fees and costs to the debtor as damages for Wesley's violation of the discharge injunction. A bankruptcy court has the discretion to impose such damages as a sanction for contempt under § 105(a). Bennett, 298 F.3d at 1069.

> "[C]ivil contempt is the normal sanction for violation of the discharge injunction." 4 Collier on Bankruptcy ¶ 524.02[2][c] (15th ed. 1999) . . . . [C]ompensatory civil contempt allows an aggrieved debtor to obtain compensatory damages, attorneys fees, and the offending creditor's compliance with the discharge injunction.

Walls, 276 F.3d at 507. To be awarded damages for contempt, the debtor had to prove, by clear and convincing evidence, that

Wesley knew the discharge injunction was applicable and intended the actions which violated the injunction. Zilog, 450 F.3d at 1007; see also Bennett, 298 F.3d at 1069. The bankruptcy court found that the debtor had satisfied this standard. Wesley knew the specific terms of the discharge injunction; he had a copy of the discharge order that had been entered in the bankruptcy court. Further, he intended to commit the acts which violated the stay. He planned to proceed with the state court action, through judgment, and attempted to place the burden on the debtor to then establish that the judgment was voidable.

Wesley argued in the bankruptcy court, and now argues before this panel, that the discharge order was vague and indefinite. He takes the position that language in the discharge order itself justifies his conclusion. To support his contention, he has selected from the order, piecemeal, the provision that excludes from discharge "any debt made nondischargeable by 18 U.S.C. Section 3613(f) . . . or by any other applicable provision of law."[5] Aplt's Opening Brief, at 7. The fallacy here is that the language of the discharge order is irrelevant because the terms of the discharge are fixed by statute, 11 U.S.C. § 524(a), and cannot be altered by the court. Moncur v. Agricredit Acceptance Co. (In re Moncur), 328 B.R. 183, 191-92 (9th Cir. BAP 2005). The statute is not ambiguous. Wesley never indicates that, at any time during this saga, he ever actually referred to this

[5] 18 U.S.C. § 3613(f) excepts from discharge certain fines imposed in federal criminal proceedings. Its relevance here is not articulated.

section or any other pertinent Code sections cited in the discharge order.

Wesley also argues, again, that comments made by the bankruptcy court at a status conference support his contention that Flores' debt has not been discharged. The court informed Wesley that his dischargeability complaint was moot in the chapter 13 context, but advised that if the debtor's case converted to chapter 7, he would have another opportunity to object to discharge of Flores' debt. The court also advised that if the debtor's case was not converted, and was dismissed, "there would be no such thing as dischargeability."[6] This advisory is confusing, but did inform Wesley of two contingencies under which he could resurrect his client's claim: conversion of the debtor's case to chapter 7 or dismissal of the bankruptcy proceeding. Neither of these contingencies occurred.

Like the creditor's explanation in Dyer, 322 F.3d at 1191, Wesley's explanation as to why he felt the discharge order didn't apply to him "rings hollow." Wesley's continued reliance on an erroneous legal position can't be justified. The debtor's bankruptcy attorney filed three notices of stay in the state court action. The debtor's counsel attended a state court hearing and asked Wesley to cease prosecution of that action. Wesley declined. Having been advised of the discharge

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[6] The transcript was prepared from a recording of the hearing, and it may well be that the word "dischargeablity" which appears in the transcript is a mis-transcription of "nondischargeablilty." Nothing in the record indicates whether the bankruptcy judge ever reviewed or approved the transcript, or that it was called to his attention.

injunction, he had an affirmative duty to investigate and remedy any violations of that injunction. Id. at 1192. But Wesley didn't investigate or, apparently, read the Code. He pressed on in spite of having received written notice of the discharge injunction as well as fair warning from the debtor's counsel that his actions might be amiss.

The bankruptcy court found that Wesley's conduct was not exonerated by his erroneous interpretation of the discharge order. It held that once Wesley had notice of the discharge injunction, he was subject to contempt liability for any actions taken in violation of the injunction. This conclusion is consistent with controlling Ninth Circuit law. Wesley's subjective beliefs regarding the effect of the discharge on the Flores litigation are irrelevant to a determination of whether he violated the injunction. Dyer, 322 F.3d at 1191. Because civil contempt serves a remedial purpose, the contemnor's intent is irrelevant to the determination of whether an order has been violated. Id., citing McComb v. Jacksonville Paper Co., 336 U.S. 187, 191 (1949). No evidence contradicts that Wesley knew the discharge injunction was applicable and intended the actions which violated the injunction. Zilog, 450 F.3d at 1007. The imposition of damages for contempt of the discharge injunction was appropriate.

An aggrieved debtor may recover compensatory damages, including attorney's fees and costs, for violation of the discharge injunction. Walls, 276 F.3d 507. The fees must be reasonable and must relate to the debtor's efforts to set aside the offending conduct. See, e.g., Dyer, 322 F.2d at 1195

(discussing civil contempt damages awarded to a trustee under § 105 for stay violations by a creditor). The bankruptcy judge reviewed the fees billed by Bravos and Boone. It found Boone's fees to be reasonable. The court deducted $6,184.50 from the total billed because it found that the fees for services in connection with the state court judge's motion to dismiss were unrelated to Wesley's violation of the discharge injunction. The balance of the fees, and all of Boone's costs, were awarded as damages for violation of the discharge injunction, together with a nominal amount of fees billed by Bravos after the discharge was entered.

Wesley argues that the fees and costs awarded cannot be considered "damages" because there is no evidence that the debtor has actually paid any of these fees to his attorneys. This argument is meritless. "'Actual damages' is not restricted to a certain dollar amount, but is simply a money judgment in compensation for a legally recognized injury or harm." Roman, 283 B.R. at 9. Violation of a discharge injunction is a legally recognized injury. The debtor incurred fees to stop Wesley's conduct. The issue of whether he can, or will, actually pay his attorneys for their services is immaterial. Even parties represented by pro bono counsel may recover attorney's fees in appropriate circumstances. First Card v. Hunt (In re Hunt), 238 F.3d 1098, 1104-05 (9th Cir. 2001).

Two factors are considered when a court awards attorney's fees as sanctions: "(1) what expenses or costs resulted from the violation and (2) what portion of those costs was reasonable, as opposed to costs that could have been mitigated." Roman, 283

B.R. at 12, citing In re GeneSys, Inc., 273 B.R. 290, 296 (Bankr. D.C. 2001). The portion of Boone's fees which were awarded as damages were incurred to stop Wesley from continuing to violate the discharge injunction. Wesley's contention that Boone was just trying to run up a bill for fees is unsupported by the record. Boone and Bravos attempted to resolve Wesley's violations first in the state court proceeding. When Wesley made it clear he intended to press on to judgment in that court, the debtor was left with no alternative but to seek relief in the bankruptcy court. Wesley, as the "offending creditor," cannot dictate how the debtor should have protected his rights. Roman, 283 B.R. at 9. The attorney's fees awarded as sanctions here are well supported by the record and not clearly erroneous.

CONCLUSION

For the foregoing reasons, the bankruptcy court's judgment is AFFIRMED.

KLEIN, Bankruptcy Judge, concurring:

I join the majority decision and write separately to add that the bankruptcy court was exceptionally measured and lenient under the circumstances.

In more than 20 years on the bankruptcy bench, this may be the single most egregious defiance of the discharge injunction

imposed by 11 U.S.C. § 524(a) that I have encountered.[7] The violation of black-letter law is stunning. The proffered excuses lack merit (and do not lend any "genuineness" to an otherwise material issue of fact). For example, the assertion that the discharge order was too vague turns the law on its head: § 524(a) fixes the terms of the discharge, which statutory terms the bankruptcy court lacks authority to alter. Moncur v. Agricredit Acceptance Corp. (In re Moncur), 328 B.R. 183, 191-92 (9th Cir. BAP 2005); see also Ozenne v. Bendon (In re Ozenne), 337 B.R. 214, 221-222 (9th Cir. BAP 2006); Morris v. Peralta (In re Peralta), 317 B.R. 381, 389-90 (9th Cir. BAP 2004). The only term of a discharge order that matters is the fact of entry of the discharge.

If we were to find a genuine issue of material fact and remand, the outcome of further proceedings would be a foregone conclusion. In addition, the appellants' liability would be materially increased.

There was, of course, a simple strategy by which the debtor's counsel could have nipped the entire problem in the bud: removal under 28 U.S.C. § 1452(a). It is difficult, however, to criticize debtor's counsel for not knowing that strategy was available. It is obscure because Federal Rule of Bankruptcy Procedure 9027(a), which fixes times for removal because no statutory times are fixed, appears to be written in terms of

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[7] The members of this panel have a combined total of more than 54 years on the bench. My brethren agree that this is one of the most extreme violations of the discharge injunction that they have observed.

mandatory time limits. Fed. R. Bankr. P. 9027(a). However, what is not obvious about Rule 9027(a) is that Rule 9006(b) permits retroactive enlargement of the times for removal upon showing of "excusable neglect." Fed. R. Bankr. P. 9006(b)(1).

Surely it would have been Rule 9006(b)(1) "excusable neglect" for the debtor's counsel to assume that the appellants, one of whom is a member of the State Bar of California, would obey an injunction imposed by black-letter law. The legitimacy of this expectation is reinforced by California's statutory requirement that judicial sanctions of at least $1,000.00 awarded against an attorney be reported to the state bar. See CAL. BUS. & PROF. CODE § 6086.7. It follows that removal under 28 U.S.C. § 1452(a) should have afforded an avenue for bringing the entire dispute into the control of the bankruptcy court where it could have been resolved without the need for a separate adversary proceeding targeted at the state court.