

NOT FOR PUBLICATION

NOV 09 2005

**HAROLD S. MARENUS, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT**

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

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In re:)	BAP No.	CC-05-1025-PaLMa
)		
YVETTE SILVA and)	Bk. No.	LA 04-16116 SB
GREGORIO BALTAZAR,)		
)		
Debtors.)		
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DAVID A. GROSS, dba Freedom)		
Funding,)		
)		
Appellant,)		
)		
v.)	MEMORANDUM¹	
)		
UNITED STATES TRUSTEE,)		
)		
Appellee.)		
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Argued at Los Angeles, California
on October 19, 2005

Filed - November 9, 2005

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

Honorable Samuel L. Bufford, Bankruptcy Judge, Presiding.

Before: PAPPAS, LEE² and MARLAR, Bankruptcy Judges.

¹ This disposition is not appropriate for publication and may not be cited except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel. See 9th Cir. BAP Rule 8013-1.

² Hon. W. Richard Lee, United States Bankruptcy Judge for the Eastern District of California, sitting by designation.

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1 Appellant, a creditor, appeals from a final order of the
2 bankruptcy court finding that Appellant violated the discharge
3 order and injunction and imposing sanctions of \$1,548.72. We
4 AFFIRM IN PART, REVERSE IN PART AND REMAND.

5
6 **FACTS**

7 In February, 1998, Debtors Gregorio Baltazar and Yvette Silva
8 ("Debtors") signed a 36-month "purchase lease" with David A. Gross
9 ("Gross" or "Appellant"), dba Freedom Funding, for a \$1,500 baby
10 stroller.³ On September 15, 2003, five years after the contract
11 was executed and two years after the conclusion of the lease term,
12 Gross sued Debtors under the contract in state small claims court
13 claiming Debtors had failed to make the lease payments. Gross was
14 awarded a judgment of \$2,024.68 on December 16, 2003. Gross
15 obtained a writ of execution on the judgment and began garnishing
16 Debtor Silva's wages on January 30, 2004.

17 On March 16, 2004, Debtors filed a petition for relief under
18 Chapter 7 of the Bankruptcy Code. On their schedule F, they
19 listed a debt to Freedom Funding of \$900.00. Gross admits that he
20 received notice of the Debtors' filing.

21 On or about March 30, 2004, Gross mailed a letter to Debtors
22 demanding that they return the leased property, retain the
23 property and resume monthly payments, or redeem the property for
24 \$988.00. Appellant's Opening Br. at 1-2, lines 24-25, 1-3. There
25 is nothing in the record to show that Debtors complied with any of

26 _____
27 ³ At oral argument, Appellant's counsel suggested that the
28 leased property was furniture, rather than a stroller. That can
not be confirmed in the record.

1 the demands in Appellant's letter.

2 The bankruptcy court entered a discharge order (the
3 "Discharge Order") in Debtors' case on June 28, 2004. Freedom
4 Funding is listed on the Clerk's Certificate of Service dated July
5 1, 2004 as one of those sent notice of entry of the Discharge
6 Order.

7 Appellant sent Debtors an invoice on October 7, 2004, for
8 \$361.14, including \$301.14 in payments due and \$60 in late
9 charges, for the period April 11, 2004 through September 16, 2004.
10 The invoice contained the following statement in boldface at the
11 bottom: **"Monthly Rental Charges Have Accrued Since Your
12 Bankruptcy."** Appellant sent a second invoice to Debtors on
13 October 28, 2004, with the same information as the prior invoice,
14 listing an additional late charge of \$10 entered October 11, 2004
15 and a payment due of \$43.02 entered October 16, 2004.

16 On November 29, 2004, the U.S. Trustee filed and served a
17 Notice of Application and Application for Issuance of Order
18 Directing David A. Gross to Personally Appear and Show Cause Why
19 He and Freedom Funding Should Not Be Found in Civil Contempt and
20 be Sanctioned for Violating the § 524⁴ Discharge Injunction (the
21 "Show Cause Application"). According to the Declaration of
22 Service of the U.S. Trustee, the Show Cause Application was served
23 on Appellant at Post Office Box 462001, Escondido, CA 92046 (the
24 "Escondido Address"). The Escondido Address is the return address
25 provided by Appellant on: (i) the envelope accompanying the

26 _____
27 ⁴ Unless otherwise noted, all section and chapter references
28 are to the Bankruptcy Code, 11 U.S.C. §§101-1330, and all Rule
references are to the Federal Rules of Bankruptcy Procedure.

1 invoice of October 28; (ii) Appellant's Reply to Order to Appear
2 in the bankruptcy court; (iii) the Declaration of David Gross in
3 the bankruptcy court; (iv) the cover page of Appellant's Opening
4 Brief to this Panel; and (v) the address provided to the court
5 reporter for the cover page of the transcript of proceedings
6 regarding the sanctions order before the bankruptcy judge on
7 December 21, 2004.

8 On December 7, 2004, the bankruptcy court issued and mailed
9 to Appellant at the Escondido Address the Order Directing David A.
10 Gross to Personally Appear and Show Cause why He and Freedom
11 Funding Should Not be Found in Civil Contempt and be Sanctioned
12 for Violating the § 524 Discharge Injunction and This Court's
13 Discharge Order (the "Show Cause Order"). The hearing on the Show
14 Cause Order was set for December 21, 2004. Appellant filed a
15 Reply to Order to Appear ("Reply") on December 14, 2004.⁵

16 Appellant and the U.S. Trustee appeared at the Show Cause
17 hearing. The bankruptcy court provided an opportunity for the
18 parties to be heard. In an oral ruling, the bankruptcy court then
19 found that Appellant had violated the Discharge Order and the
20 § 524 injunction; found that Appellant was in civil contempt; and
21 sanctioned him \$1,548.72.

24 ⁵ Appellee suggests that the copy of Appellant's Reply in
25 the Exhibits to Appellant's Opening Br. at 5-7 is facially
26 different from the Reply in the Appellee's Excerpts of Record at
27 51-54. Because the Appellee's copy bears the filing stamp of the
28 Clerk of the Bankruptcy Court for the Central District of
California, the Panel will rely upon the Appellee's copy for
purposes of this appeal. We have examined both documents and find
them identical in content, although there are certain immaterial
differences in format.

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JURISDICTION

The Panel has jurisdiction over this appeal of the final order of the bankruptcy court pursuant to 28 U.S.C. § 158(a)(1).

ISSUES

1. Did Appellant receive sufficient notice and opportunity to be heard on the Show Cause Order, which led to the decision holding the Appellant in civil contempt and imposing sanctions for violating the Discharge Order and § 524 discharge injunction?
2. Is the bankruptcy court’s decision to hold Appellant in civil contempt supported by adequate findings of fact and conclusions of law?
3. Is the bankruptcy court’s decision to award sanctions in the amount of \$1,548.72 supported by adequate findings of fact and conclusions of law?

STANDARD OF REVIEW

Although its conclusions of law are subject to de novo review, the bankruptcy court’s findings of fact, whether based upon oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard must be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses. Fed. R. Bankr. P. 8013. The Panel reviews an award of sanctions for an abuse of discretion. In re Deville, 361 F.3d 539, 547 (9th Cir. 2004) (citing Caldwell v. Unified Capital Corp. (In re

1 Rainbow Magazine), 77 F.3d 278, 283 (9th Cir. 1996)). Before this
2 Panel may reverse under an abuse of discretion standard, it must
3 be definitely and firmly convinced that the bankruptcy court
4 committed a clear error of judgment. Price v. United States
5 Trustee (In re Price), 280 B.R. 499, 501 (9th Cir. BAP 2002),
6 aff'd 353 F.3d 1135 (9th Cir. 2004).

8 DISCUSSION

9 1. Appellant received adequate notice and opportunity to be 10 heard on the Show Cause Order.

11 Appellant argues that he was given insufficient notice of the
12 Show Cause Order. This argument was not raised in his Reply filed
13 with the bankruptcy court, nor in oral argument at the Show Cause
14 hearing. Instead, Appellant first raises his concerns here in his
15 Opening Brief at 6-7. If defective notice is not raised at the
16 hearing before the bankruptcy court, it is deemed waived. First
17 Nat'l Bank of Peoria v. Muller (In re Muller), 851 F.2d 916, 919
18 (7th Cir. 1988), cert. denied, 490 U.S. 1007 (1989).

19 Even were we to consider Appellant's lack of notice argument,
20 however, we would conclude it is without merit.

21 In contrast to the unsupported allegation of Appellant that
22 he did not receive the Show Cause Application, the Panel accepts
23 the Declaration of Service accompanying the Show Cause Application
24 as evidence that Appellant received the Show Cause Application
25 with its supporting documentation. Rule 9014 provides that
26 motions under that Rule shall be served in the manner provided for
27 service of a summons and complaint by Rule 7004. Rule 7004(b)(1)
28 provides that service may be made within the United States by

1 first class mail postage prepaid

2 [u]pon an individual other than an infant or incompetent
3 by mailing a copy of the summons and complaint to the
4 individual's dwelling house or usual place of abode or
5 to the place where the individual regularly conducts a
6 business or profession (emphasis added).

7 The Declaration of Service accompanying the Show Cause
8 Application is signed under penalty of perjury by DeLoris Owens,
9 an employee of the U.S. Trustee, and states that she served by
10 United States mail a copy of the Show Cause Application on David
11 A. Gross on November 29, 2003 at the Escondido Address. As
12 described in the facts section above, Appellant has used the
13 Escondido Address as the return address for all correspondence in
14 this bankruptcy case and appeal, including the Reply directed to
15 this Panel's attention. Therefore, the evidence shows that the
16 U.S. Trustee properly served the Show Cause Application with its
17 supporting documentation on Appellant at the place where he
18 regularly conducts his business. This service fulfilled the
19 requirements of Rule 7004(b)(1) and related Rules.

20 There is additional evidence in the record that contradicts
21 Appellant's argument that "[t]he Application was filed ex parte,
22 without any notice whatsoever to Appellant," Appellant's Opening
23 Br. at 2. In his Reply to the Show Cause Order, Appellant
24 references the Freedom Funding lease at Exhibit E of the Show
25 Cause Application and correctly identifies the Bates stamp number
26 appearing on the bottom of the page Appellant cites. Although
27 Appellant could perhaps guess that the Freedom Funding lease was
28 included in the Show Cause Application and papers, it is doubtful
Appellant would know the exact page within the Application where
that particular document is found unless he had a copy of the Show

1 Cause Application before preparing and submitting the Reply on
2 December 14, 2004.

3 The record also adequately demonstrates that the bankruptcy
4 court's Show Cause Order was mailed to Appellant two weeks before
5 the Show Cause hearing. The Show Cause Order informed Appellant
6 that, at the hearing, the bankruptcy court would be asked to find
7 Appellant in civil contempt and subject to sanctions for violating
8 the § 524 discharge injunction and the Discharge Order. Appellant
9 filed a Reply to the Show Cause Order. Appellant was present at
10 oral argument and had an opportunity to be heard. The bankruptcy
11 court considered Appellant's arguments and submissions. In short,
12 Appellant had proper notice of the Show Cause proceedings and was
13 given an adequate opportunity to present his position to the
14 bankruptcy court at the hearing.

15
16 **2. The bankruptcy court made adequate findings of fact and**
17 **conclusions of law to support its decision to hold**
18 **Appellant in civil contempt.**

19 The transcript of the sanctions hearing of December 21, 2004,
20 shows that the bankruptcy court, at the conclusion of the Show
21 Cause hearing, entered its oral findings of fact and conclusions
22 of law on the record in support of its decision to hold Appellant
23 in civil contempt.⁶ Based upon the record, the bankruptcy court
24 found and concluded that:

25 A. The debt to Appellant was incurred prepetition.
26 Transcript of hearing at 4, lines 8-9, 16-17, December
27 21, 2004.

28 ⁶ Fed. R. Civ. P. 52(a), made applicable in bankruptcy
proceedings by Fed. R. Bankr. P. 7052, provides that "[i]t will be
sufficient if the findings of fact and conclusions of law are
stated orally and recorded in open court."

- 1 B. Debtors received a discharge of all debts that were
2 incurred prepetition, including the debt to Appellant.
Transcript of hearing at 3, lines 1-2, 4-5, 8-10.
- 3 C. Appellant's invoices and billing of the Debtors post-
4 discharge violated the § 524 discharge injunction.
Transcript of hearing at 2, lines 17-19, 21-22.
- 5 D. Appellant violated the discharge injunction. Transcript
6 of hearing at 1, lines 23-24.
- 7 E. Appellant is in contempt. Transcript of hearing at 8,
lines 5-6.⁷

8 The bankruptcy court does not appear to have found that
9 Appellant received a copy of the Discharge Order. However, the
10 record indicates that the bankruptcy court had a copy of the
11 Clerk's Certificate of Service of the Discharge Order and that a
12 copy of the Discharge Order was served on Appellant at the
13 Escondido Address.

14 The Court of Appeals for the Ninth Circuit has held that a
15 court is justified in imposing sanctions for violation of the
16 § 524 discharge injunction if the putative violator (1) knew the
17 discharge injunction was applicable and (2) intended the actions
18 which violated the injunction. In re Bennett, 298 F.3d 1059, 1069
19 (9th Cir. 2002), (citing Hardy v. United States (In re Hardy), 97
20 F.3d 1384, 1388-89 (11th Cir. 1996)). Here, there is no dispute
21 that Debtors' debt to Appellant is based upon a pre-bankruptcy
22 contract; the Discharge Order was entered in Debtors' bankruptcy

23
24 ⁷ The court also stated two additional conclusions of law on
the record:

25 "Sanctions are appropriate under these circumstances."

26 Transcript of hearing at 8, lines 6-7.

27 "Sanction in the amount of \$1,548.72, as suggested by the
28 U.S. Trustee, is appropriate." Transcript of hearing at 8,
lines 7-8.

29 However, for the reasons stated below, the Panel does not find
that these conclusions are supported by adequate findings of fact
or other reasons.

1 case; the Discharge Order was served on Appellant; and Appellant
2 sent the Debtors billings for payments allegedly due under the
3 contract after the entry of the Discharge Order. In other words,
4 all the necessary facts to show that Appellant violated the
5 Discharge Order and § 524 discharge injunction clearly appear in
6 the record. The findings of fact and conclusions of law recited
7 by the bankruptcy court on the record were sufficient under the
8 Bennett standards to allow the bankruptcy court to conclude that
9 Appellant was in civil contempt and to impose sanctions.

10 Appellant argues that his conduct was consistent with his
11 understanding of the law and that he never intended to engage in
12 any improper behavior or to circumvent the law. It was not
13 necessary that the bankruptcy court consider whether Appellant
14 intended to violate the Code. Under Bennett, it is sufficient
15 that Appellant was aware that a discharge had been entered and
16 that he intended the actions (i.e., the billings) that violated
17 the discharge. Because civil contempt serves a remedial purpose,
18 "it matters not with what intent the defendant did the prohibited
19 act." McComb v. Jacksonville Paper Co., 336 U.S. 187, 191, 69 S.
20 Ct. 497, 93 L. Ed. 599 (1949), cited in In re Dyer, 322 F.3d 1178,
21 1191 (9th Cir. 2003).

22
23 **3. The bankruptcy court failed to make adequate findings of**
24 **fact, conclusions of law or provide reasons to support**
25 **its decision to award sanctions of \$1,548.72 against**
Appellant payable to Debtors.

26 Although the bankruptcy court provided adequate findings of
27 fact and conclusions of law in support of its decision that
28 Appellant was in contempt, the court failed to explain and support

1 the purpose for imposition of \$1,548.72 in sanctions against
2 Appellant, or why that award should be payable to Debtors.
3 Indeed, the bankruptcy court merely accepted a figure suggested by
4 counsel for the U.S. Trustee representing the supposed balance
5 owed by Debtors on the lease without independently assessing the
6 reasonableness or efficacy of this sanction. This approach is
7 problematic.

8 In the Show Cause Application, the U.S. Trustee asserted that
9 the bankruptcy court could impose sanctions "for contempt,
10 including awarding punitive damages, against a person who violates
11 the discharge injunction," citing In re Henry, 266 B.R. 457, 481
12 (Bankr. C.D. Cal. 2001). The U.S. Trustee described Appellant's
13 allegedly contumacious conduct as

14 abusive, egregious, willful, intentional, and done on
15 multiple occasions. Gross knew pre-petition that the
16 debtors did not have possession of the furniture and
17 knew of the bankruptcy filing. He seeks to collect on a
18 36 month lease, whose term expired pre-petition by
19 creating a new 36 month lease term for the purpose of
20 harassing and intimidating debtors to make payments on
21 an obligation that has been discharged. Thus, the court
22 can conclude that Gross' multiple violations of the
23 discharge injunction were willful and intentional.

24 Show Cause Application at 4. From these allegations, it is
25 presumed the U.S. Trustee had requested sanctions against
26 Appellant as punishment for his conduct. At no time did the U.S.
27 Trustee argue that the U.S. Trustee or Debtors had incurred costs
28 or other monetary damages as a result of the Appellant's conduct
that should be compensated. Rather, at the conclusion of the
hearing, the bankruptcy court asked the attorney for the U.S.
Trustee if she wished to be heard on the appropriate amount of
sanctions. The attorney repeated the argument that punitive

1 sanctions should be awarded and that the appropriate amount is
2 \$1,548.72, the amount that the creditor was attempting to obtain
3 from the debtor.

4 The bankruptcy court then found that the \$1,548.72 "fine"
5 suggested by the U.S. Trustee was "appropriate under the
6 circumstances" and directed the U.S. Trustee to prepare and submit
7 an order incorporating that amount. The bankruptcy court made no
8 findings or conclusions on the record indicating that the amounts
9 awarded were in the nature of punitive damages or designed to be
10 coercive or compensatory, nor did the court explain why it felt
11 that the measure of damages for a creditor's violation of the
12 discharge injunction and Discharge Order should be the total
13 amount of the creditor's claim against the Debtors. The
14 bankruptcy court also did not address why the sanction award
15 should be paid to the Debtors.

16 It was not an abuse of discretion for the bankruptcy court,
17 given the facts of this case, to impose a \$1,548,72 non-
18 compensatory sanction for what amounts to a per se violation of
19 the discharge injunction. In re Dyer, 322 F.3d 1178, 1194 n.16
20 (9th Cir. 2003) (noting that "relatively mild" non-compensatory
21 fines may be imposed for civil contempt under some circumstances,
22 not to exceed \$5,000) (citing Mark Indus. v. Sea Captain's Choice,
23 Inc., 50 F.3d 730, 733 (9th Cir. 1995)). But the Panel is
24 concerned about the apparent inconsistency of the bankruptcy
25 court's approach in ordering what appears to be a punitive
26 sanction paid to Debtors. The Supreme Court has suggested that a
27 fine "is remedial when it is paid to the complainant, and punitive
28 when it is paid to the court" Hicks v. Feiock, 485 U.S.

1 624, 632, 108 S. Ct. 1423, 1429, 99 L. Ed. 2d 721 (1988), cited in
2 F.J. Hanshaw Enters., Inc. v. Emerald River Dev., Inc., 244 F.3d
3 1128 (9th Cir. 2001).

4 Under § 362(h), punitive damages can be awarded to an
5 individual debtor who has suffered an actual loss when there has
6 been a willful violation of the automatic stay. However, the
7 § 362(h) exception to the general rule that punitive damages
8 should be payable to the court, and not the complainant, is
9 founded upon the statute. Since § 362(h) only applies to
10 violations of the automatic stay, it could not serve as the basis
11 of the bankruptcy court's award here, and no comparable statute or
12 case law has been suggested by the U.S. Trustee to support, as
13 here, sanctions payable to a third party (Debtor) who asserts no
14 claim for compensatory damages.⁸

15 Although the bankruptcy court was justified in finding that
16 Appellant violated the § 524 injunction and Discharge Order, and
17 holding Appellant in civil contempt, the bankruptcy court's award
18 of sanctions against Appellant of \$1,548.72 payable to Debtors
19 must be reversed. If the award was intended as a punitive fine,
20 the bankruptcy court's order is improper since such a sanction
21 should be payable to the court. If the award was intended by the
22 bankruptcy court as compensation to Debtors, it is not supported
23 by the evidence. Therefore, the matter must be remanded to the
24 bankruptcy court for further proceedings consistent with this

25
26 ⁸ The U.S. Trustee has never contended in its submissions or
27 at the hearing that it was acting on behalf of the Debtors.
28 Instead, it appears the U.S. Trustee was acting in its own
capacity under the authority of 11 U.S.C. § 307. It also does not
appear that the U.S. Trustee suggested on the record that any
sanctions be payable to Debtors instead of the court.

1 decision, including a determination by the bankruptcy court
2 whether any damages should be awarded, and if so, the nature and
3 amount of those damages and to whom they should be paid.

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CONCLUSION

For these reasons, the bankruptcy court's determination that Appellant was in civil contempt is AFFIRMED. However, the bankruptcy court's award of sanctions against Appellant of \$1,548.72 is REVERSED and the case is REMANDED to the bankruptcy court for further proceedings consistent with this decision.