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NOT FOR PUBLICATION

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

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No. NC-13-1618-JuKuPa
)	
RICARDO R. PEDROCHE and)	Bk. No. NC-10-44376-MEH
NELIA V. PEDROCHE,)	
)	
Debtors.)	
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LAUNCE YEN,)	
)	
Appellant,)	
v.)	M E M O R A N D U M *
)	
RICARDO R. PEDROCHE;)	
NELIA V. PEDROCHE,)	
)	
Appellees.)	
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Argued and Submitted on October 23, 2014
at San Francisco, California

Filed - November 10, 2014

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

Honorable M. Elaine Hammond, Bankruptcy Judge, Presiding

Appearances: Marc E. Voisenat, Esq. argued for appellant
Launce Yen; Jeff David Hoffman, Esq. argued for
appellees Ricardo R. Pedroche and Nelia V.
Pedroche.

Before: JURY, KURTZ, and PAPPAS, Bankruptcy Judges.

* 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.

1 Judgment creditor Launce Yen appeals from the bankruptcy
2 court's order finding him in contempt for violating the § 524¹
3 discharge injunction and awarding compensatory and punitive
4 sanctions in favor of debtors, Ricardo and Nelia Pedroche. We
5 VACATE and REMAND.

6 I. FACTS

7 Prior to debtors' bankruptcy filing, Yen commenced a
8 lawsuit against Ricardo in the California state court. On the
9 form complaint, Yen checked the box showing that his claim was
10 based on breach of contract and that he sought \$11,760.00 in
11 damages. The state court entered a default judgment against
12 Ricardo and in favor of Yen.

13 The next day, on April 17, 2010, debtors filed a chapter 7
14 bankruptcy petition. Debtors listed Yen's lawsuit in their
15 statement of financial affairs, but he was not listed as a
16 creditor in their schedules or mailing matrix. The bankruptcy
17 court set July 12, 2010, as the last date for filing
18 dischargeability complaints under § 523(c).

19 On April 19, 2010, the state court issued an abstract of
20 judgment, which Yen recorded the next day, thereby creating a
21 judgment lien against debtors' home. Debtors were not aware of
22 the lien. In July 2010, debtors obtained their discharge in
23 their no asset case and the case was closed.

24 In early 2012, debtors attempted to refinance their home,
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26 ¹ Unless otherwise indicated, all chapter and section
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
28 "Rule" references are to the Federal Rules of Bankruptcy
Procedure.

1 but were unable to do so because of Yen's lien. Debtors moved
2 to reopen their case for the purposes of amending their
3 schedules to add Yen as a creditor and to bring a § 522(f) lien
4 avoidance action, which the bankruptcy court granted.²

5 Debtors then filed a motion to avoid Yen's judicial lien
6 under § 522(f). Yen opposed, arguing that he had no knowledge
7 of the bankruptcy filing when he recorded the abstract of
8 judgment and would be prejudiced if the motion were granted
9 because he had a nondischargeable claim. In an accompanying
10 declaration, Yen alleged that Ricardo falsely represented that
11 he would repay the loan when he had no intention of actually
12 repaying it.

13 In response, debtors pointed out that Yen had provided no
14 evidence that the debt was nondischargeable nor had he filed an
15 adversary proceeding. They further asserted that Yen's debt was
16 discharged under the holding in Beezley v. Cal. Land Title Co.,
17 994 F.2d 1433 (9th Cir. 1993), because their case was a no-asset
18 case and they did not intentionally omit him from their
19 schedules. For the first time, debtors maintained that Yen's
20 recording of the abstract of judgment postpetition violated the

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22 ² The bankruptcy court initially granted debtors' motion by
23 order entered June 25, 2012, for the limited purpose of adding an
24 omitted creditor. The court concluded however that debtors would
25 not be able to avoid Yen's lien based on the holdings in Dewsnup
26 v. Timm, 502 U.S. 410, 419 (1992) and Concannon v. Imperial
27 Capital Bank (In re Concannon), 338 B.R. 90, 95 (9th Cir. BAP
28 2006), both of which prohibited lien stripping under § 506.
Debtors moved for reconsideration, noting that they were seeking
to avoid Yen's judicial lien under § 522(f) and thus the holding
in In re Concannon was not applicable. Agreeing with debtors,
the bankruptcy court granted debtors' motion to reopen as
originally requested.

1 automatic stay.

2 In debtors' declaration filed in support, they explained
3 that (1) the basis for Yen's claim was not a loan, but from
4 football gambling debts; (2) Ricardo had paid approximately \$600
5 a month to Yen for a few months but was not able to continue the
6 payments; and (3) Yen demanded a promissory note on the gambling
7 debt, which Ricardo was forced to sign in fear of trouble at his
8 workplace since Yen and Ricardo worked for the same employer.
9 Debtors declared that they inadvertently left Yen off their
10 schedules and that Yen had been aware of their bankruptcy case
11 since, at the latest, March 19, 2012, but refused to voluntarily
12 withdraw the abstract of judgment.

13 In a supplemental opposition, citing out-of-jurisdiction
14 case law, Yen argued that a technical violation of the stay did
15 not warrant voiding his lien. Yen also asserted that debtors
16 should be equitably estopped from asserting a violation under
17 § 362 when they knew of the lawsuit but failed to list him in
18 their schedules. Alternatively, Yen requested the bankruptcy
19 court to grant him retroactive relief from stay.

20 In a supplemental reply, debtors argued that Yen was aware
21 of the bankruptcy case for no less than six months, yet he had
22 not filed a motion for relief from the automatic stay.

23 On October 10, 2012, the bankruptcy court entered an order
24 denying debtors' motion to avoid Yen's judicial lien under
25 § 522(f) and instead voiding Yen's judicial lien under § 362.³
26 Seven days later, debtors recorded the bankruptcy court's order.

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28 ³ This order was not appealed and became final.

1 The following day, without debtors' knowledge, Yen re-recorded
2 his judgment lien. Thereafter, debtors' case was closed a
3 second time.

4 About ten months later, debtors filed a second motion to
5 reopen their case, this time for the purpose of enforcing the
6 discharge injunction. Debtors maintained that the bankruptcy
7 court had previously found that the debt owed to Yen was
8 discharged. Yen disputed this contention, arguing that there
9 had been no determination whether or not his debt was
10 discharged, but he did not oppose the reopening of the case for
11 the purpose of determining whether the debt was discharged. In
12 reply, debtors asserted that it was improper for Yen to raise
13 the dischargeability of the debt in the context of the motion to
14 reopen. Debtors also noted that Yen had repeatedly stated that
15 the debt was nondischargeable, but provided neither facts nor
16 legal authority to support his assertion. The bankruptcy court
17 granted debtors' motion to reopen by order entered on
18 September 27, 2013.

19 Debtors subsequently filed a motion for contempt, asserting
20 that Yen violated the § 524 discharge injunction by re-recording
21 his lien for a discharged debt against their property. Debtors
22 argued that Yen's debt was discharged "by order of this court"
23 because Yen did not claim, nor could he, that the debt fell
24 within any exceptions to discharge under § 523(a)(2), (4) or
25 (6). Debtors requested actual and punitive damages. Filed with
26 the motion was the declaration of debtors' attorney who attached
27 copies of Yen's state court complaint and judgment. Also
28 included were invoices showing the attorney's fees debtors had

1 incurred to date.

2 Relying on Costa v. Welch (In re Costa), 172 B.R. 954
3 (Bankr. E.D. Cal. 1994), Yen argued in opposition that debtors
4 had the burden of demonstrating that the § 727 discharge applied
5 to his debt.⁴ Yen further maintained that because he did not
6 have actual knowledge that the petition had been filed in time
7 to file a timely dischargeability complaint, the failure to
8 initially schedule the claim may mean that it is
9 nondischargeable under § 523(a)(3)(B). Finally, citing Walls v.
10 Wells Fargo Bank, N.A., 276 F.3d 502, 507 (9th Cir. 2002), Yen
11 asserted that debtors were not entitled to punitive damages
12 because only compensatory damages were available in civil
13 contempt.

14 In reply, debtors argued there was "no dispute" regarding
15 whether the debt was discharged. Debtors maintained that Yen
16 would have no chance of prevailing in an adversary proceeding,
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18 ⁴ In Costa, the debtors had filed an adversary proceeding
19 seeking damages against a bank, the judgment creditor and the
20 judgment creditor's attorney on the theory that the bank had
21 violated the discharge injunction by honoring the judgment
22 creditor's writ of execution. Debtors had not listed the
23 creditor in their schedules and there was an issue regarding the
24 dischargeability of the debt. The bankruptcy court noted that
25 the debtor could have raised the affirmative defense of discharge
26 in the state court or have the state court or bankruptcy court
27 determine the dischargeability of the debt, but instead resorted
28 to an action for contempt. The bankruptcy court stated:
"[W]here, as here, a genuine question about the applicability of
a discharge to a particular omitted debt remains after reasonable
investigation, a declaratory judgment action under section
523(a)(3) is better suited to resolve the dispute than the
bludgeon of contempt." 172 B.R. at 964. In dismissing the
adversary proceeding for contempt, the court found that debtors
had not demonstrated that they were entitled to relief.

1 rendering it a useless waste of resources by the parties and the
2 bankruptcy court. Filed with the reply was another declaration
3 of debtors' attorney with additional invoices which showed
4 debtors' had incurred \$8,400 in fees for the reopening of their
5 case and filing the motion for contempt.

6 Yen filed a request for judicial notice of his declaration
7 filed July 30, 2012, which stated that Ricardo had falsely
8 represented that he would pay back the loan.

9 The bankruptcy court heard the matter on November 13, 2013.
10 The bankruptcy court expressed its opinion that Yen had the
11 obligation of proving his debt was nondischargeable. The court
12 noted that Yen, instead of choosing to bring an adversary
13 proceeding seeking to determine that his debt was exempted from
14 discharge, filed a lien only a few days after the court ruled
15 that his lien was void.

16 Yen's counsel argued that the burden on the issue of
17 nondischargeability should not shift to him when debtors had the
18 initial burden of providing notice to him so that he could file
19 a timely nondischargeability complaint.

20 The bankruptcy court found that when the case was reopened
21 and the lien set aside, Yen was on clear notice that there was a
22 bankruptcy, there was a discharge injunction, and then he took
23 affirmative action in violation of it. The court emphasized
24 that when a creditor doesn't know about the discharge then maybe
25 he isn't running afoul of it, but "that's not the case here."

26 The court entered its findings on the record:

27 Here I find the creditor was on notice of the
28 discharge injunction and the actions taken were
intentional. Although the creditor asserts a

1 discharge injunction may not apply if the debt were
2 determined to be nondischargeable, the only evidence
3 indicating a basis upon which to assert the debt may
4 be nondischargeable is a declaration from the creditor
5 with the conclusory statement that the debtor did not
6 intend to repay. In contradiction, the evidence
7 provided by the debtor, the state court complaint, and
8 the clerk's default judgment show that this was
9 originally brought as a breach-of-contract claim.
10 Their . . . and there's nothing in those documents
11 asserting a basis for additional claims.

7 Further, to the extent the creditor had any question
8 as to whether the discharge injunction applied, they -
9 the creditor should have sought a determination before
10 refiling the lien. The - the way the bankruptcy code
11 works is that when the debtor files . . . bankruptcy,
12 everything is discharged unless it is explicitly
13 exempt from discharge either by statute or by a
14 determination under an adversary proceeding. Here, if
15 there was a question after the creditor was on notice
16 of the discharge, essentially Beasley [sic] gives them
17 the opportunity to come back and open the time to
18 determine if it's nondischargeable, but it doesn't
19 shift the burden to the debtor to establish that a
20 debt is dischargeable.

15 In the end, the bankruptcy court awarded debtors \$8,400 in
16 compensatory damages. Regarding the punitive damages, the court
17 found that they were appropriate because Yen's actions were
18 either reckless or showed a callous disregard for the law under
19 the holding of Henry v. Assocs. Home Equity Servs., Inc.
20 (In re Henry), 266 B.R. 457, 481 (Bankr. C.D. Cal. 2001). The
21 bankruptcy court awarded \$8,000 in punitive damages, rather than
22 the \$50,000 requested, because that amount was approximately the
23 same as the compensatory damages.

24 The bankruptcy court entered the order granting debtors'
25 motion for contempt, to void lien and for actual and punitive
26 damages on December 12, 2013. Yen filed a timely notice of
27 appeal.

1 as an injunction to enjoin creditors from collecting a
2 prepetition debt. A party who knowingly violates the discharge
3 injunction under § 524(a)(2) can be held in contempt under
4 § 105(a). Zilog, Inc. v. Corning (In re Zilog), 450 F.3d 996,
5 1007 (9th Cir. 2006). To prove a sanctionable violation, the
6 debtor has the burden of showing that the creditor "(1) knew
7 the discharge injunction was applicable and (2) intended the
8 actions which violated the injunction." In re Nash, 464 B.R.
9 at 880 (quoting Espinosa v. United Student Aid Funds, Inc.,
10 553 F.3d 1193, 1205 n.7 (9th Cir. 2008)). Clear and convincing
11 evidence must be presented to show that a creditor has violated
12 the discharge injunction, and that sanctions are justified.
13 In re Zilog, 450 F.3d at 1007; In re Nash, 464 B.R. at 880.

14 With respect to the knowledge requirement, whether Yen
15 should be held in contempt for violating the discharge
16 injunction requires a factual inquiry into his knowledge.
17 In re Zilog, 450 F.3d at 1007-09.

18 It is certainly true that a trier of fact could infer
19 knowledge of an automatic stay or discharge injunction
20 from the fact that a creditor knew of the bankruptcy.
21 Such an inference, however, would be a matter of fact,
22 not a presumption implied in law. Knowledge of the
23 injunction, which is a prerequisite to its willful
24 violation, cannot be imputed; it must be found. If,
25 as here, the creditors dispute that they had such
26 knowledge, a finding that they knew of the injunction,
27 and thus willfully violated it, can only be made after
28 an evidentiary hearing. Id. at 1008.

24 Here, we conclude that the record does not support a contempt
25 order under Zilog's high burden of proof.

26 Yen filed a declaration in connection with the lien
27 avoidance proceeding alleging that Ricardo had falsely
28 represented that he would repay the loan thereby raising the

1 question whether the debt was nondischargeable. Yen requested
2 the bankruptcy court to take judicial notice of the declaration
3 in the contempt proceeding. The nondischargeability of the
4 debt, which was hotly contested throughout the lien avoidance
5 and contempt proceedings, raised a factual dispute as to whether
6 the discharge injunction applied to Yen's debt.⁵

7 At the hearing on contempt, the bankruptcy court found Yen
8 had notice of the discharge injunction and that his actions were
9 intentional. However, to be held in contempt, Yen must not only
10 have been aware of the discharge injunction, but must also have
11 been aware that the injunction applied to his claim. See
12 In re Zilog, 450 F.3d at 1010 n.14. The bankruptcy court made
13 no factual finding that Yen knew that the discharge injunction
14 applied to his claim. As a result, there remains the question
15 of whether Yen was, in fact, unaware of the discharge
16 injunction's potential applicability to his claim. Moreover,
17 since Yen disputed that the discharge injunction applied to his
18 debt, the bankruptcy court was required under Zilog to hold an
19 evidentiary hearing on that issue. This it did not do, instead
20 making its findings solely on a paper record.

21 Due to these shortcomings, we conclude that the bankruptcy
22 court abused its discretion by finding Yen in contempt. It
23 follows that the compensatory and punitive damage awards cannot
24 stand.

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26 ⁵ Although Yen failed to file a nondischargeability
27 complaint, there was no time limit for him to do so under
28 § 523(a)(3)(B). Furthermore, the bankruptcy court never set a
deadline for him to do so. Accordingly, whether the debt was
discharged is still at issue.

VI. CONCLUSION

For the reasons stated, we VACATE AND REMAND.

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