

JAN 29 2015

SUSAN M. SPRAUL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:) BAP Nos. CC-14-1175-KuPaTa
) CC-14-1224-KuPaTa
6 RICHARD J. SEGAL,) (Cross-Appeals)
))
7 Debtor.) Bk. No. 08-12110
))
8))
9 STEPHEN S. FADEN,))
))
10 Appellant and Cross-Appellee,))
))
11 v.) **MEMORANDUM***
))
12 RICHARD JOEL SEGAL;))
))
13 JUDITH SEGAL,))
))
14 Appellees and Cross-Appellants.))

Argued and Submitted on November 20, 2014
at Los Angeles, California

Filed - January 29, 2015

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

Honorable Meredith A. Jury, Bankruptcy Judge, Presiding

Appearances: Gerald N. Silver argued for appellant and cross-
appellee Stephen S. Faden.

Before: KURTZ, PAPPAS and TAYLOR, Bankruptcy Judges.

Memorandum by Judge Kurtz
Concurrence by Judge Taylor

*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 **INTRODUCTION**

2 Richard and Judith Segal commenced contempt proceedings
3 against Stephen Faden for violation of the discharge injunction.
4 The bankruptcy court awarded \$7,616 in sanctions against Faden
5 based on the Segals' attorney's fees, but the court denied Judith
6 Segal's request for emotional distress damages because it found
7 that she did not suffer emotional distress as a result of Faden's
8 violation of the discharge injunction.

9 Faden appealed the bankruptcy court's contempt ruling.
10 Faden challenges both the finding of contempt and the amount of
11 the sanctions award. The Segals filed a cross-appeal focusing on
12 the court's denial of emotional distress damages.

13 We agree with the bankruptcy court's careful determination
14 that Faden violated the discharge injunction. Additionally, the
15 court's emotional distress findings are not clearly erroneous.
16 However, with respect to the amount of sanctions awarded, we need
17 additional findings. While the answers to our questions might
18 seem obvious to the bankruptcy court in light of its familiarity
19 with the parties and the proceedings, the existing findings and
20 record leave us uncertain as to the precise basis for the court's
21 sanctions award.

22 Consequently, we AFFIRM in part and VACATE AND REMAND in
23 part, so the bankruptcy court can make further findings
24 concerning its sanctions award.

25 **FACTS**

26 In 2007, Faden filed a lawsuit in the Los Angeles County
27
28

1 Superior Court against Segal, Segal's wife Judith,¹ and several
2 businesses owned or controlled by Segal. In that lawsuit, Faden
3 sought relief from the defendants' default on a promissory note.
4 All of the defendants stipulated to entry of judgment against
5 them, jointly and severally, in the amount of \$346,997.08. A
6 stipulated judgment was entered for that amount in December 2007.

7 A few months later, in February 2008, Faden and others filed
8 an involuntary chapter 7² bankruptcy petition against both Segal
9 and Judith. In March 2008, the petitioning creditors filed an
10 "amended" involuntary petition purporting to dismiss the petition
11 as against Judith only.³ Over a year later and after a highly-
12 contentious litigation process involving numerous filings and
13 hearings, the bankruptcy court entered an order for relief
14 against Segal only on March 26, 2009.

15 During the course of the bankruptcy case, Faden purported to
16 sell the Faden judgment to a third party by the name of David
17 Silberstein. Silberstein used the Faden judgment as the alleged
18 basis for an exception to discharge claim against Segal under
19 § 523(a)(2)(A). Ultimately, the bankruptcy court dismissed with
20 prejudice Silberstein's nondischargeability adversary proceeding.

22 ¹We refer to Segal's wife Judith by her first name for
23 clarity. No disrespect is intended.

24 ²Unless specified otherwise, all chapter and section
25 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
26 all "Rule" references are to the Federal Rules of Bankruptcy
Procedure, Rules 1001-9037.

27 ³The petitioning creditors' actions against Judith
28 ultimately led to a damages award in her favor pursuant to
§ 303(i).

1 Meanwhile, in 2012, the bankruptcy court granted Segal a
2 discharge in his bankruptcy case. The bankruptcy court entered a
3 standard form chapter 7 discharge order granting Segal a
4 discharge pursuant to § 727. The bankruptcy court's docket
5 reflects that a copy of the discharge order was mailed to Faden.
6 The form order was substantially the same as Official Form 18
7 and, on the reverse side, described in lay terms the effect of
8 the discharge as follows:

9 The discharge prohibits any attempt to collect
10 from the debtor a debt that has been discharged. For
11 example, a creditor is not permitted to contact a
12 debtor by mail, phone, or otherwise, **to file or**
13 **continue a lawsuit**, to attach wages or other property,
14 or to take any other action to collect a discharged
15 debt from the debtor. [In a case involving community
property: There are also special rules that protect
certain community property owned by the debtor's
spouse, even if that spouse did not file a bankruptcy
case.] A creditor who violates this order can be
required to pay damages and attorney's fees to the
debtor.

16 Reverse Side of Discharge Order (March 9, 2012) (emphasis added).

17 The reverse side of the discharge order further explained
18 that "[m]ost, but not all, types of debts are discharged if the
19 debt existed on the date the bankruptcy case was filed." Id.
20 The reverse side also provided a list of common types of debt
21 excepted from the discharge. The concluding paragraph on the
22 reverse side cautioned that its explanation of the effect of the
23 discharge was a general summary of the law and encouraged
24 interested parties to consult an attorney if they needed to
25 ascertain the precise effect of the discharge to their specific
26 situation.

27 Notwithstanding the entry of the discharge order, in October
28 2013, Faden took legal action against the Segals. In a state

1 court lawsuit commenced by RJS Realty LTD and Greenstone LLC (two
2 of Segal's affiliated business entities), Faden filed a cross-
3 complaint against the Segals and others based on the Faden
4 judgment and other prepetition claims.⁴

5 Within a couple of weeks, Segal (a licensed attorney)
6 reopened his bankruptcy case and filed a motion on behalf of
7 himself and Judith seeking an order to show cause why Faden
8 should not be held in contempt for violation of the discharge
9 injunction. In the motion, the Segals asserted that Faden
10 violated the discharge injunction as to both of them by filing
11 the cross-complaint. They further asserted that they were
12 entitled to compensatory damages in the form of the attorney's
13 fees Segal would incur in representing them, damages resulting
14 from the emotional distress that Judith had suffered as a result
15 of the filing of the cross-complaint, and punitive damages.

16 In response, Faden filed a preliminary opposition to the
17 Segals' motion arguing that an order to show cause should not
18 issue. Faden denied that he had knowingly violated the discharge
19 injunction and also argued that his actions were justified by
20 Segal's alleged misconduct in the state court litigation and in
21 the transactions leading up to the state court litigation. In
22 addition, Faden asserted that his actions were beyond the scope
23 of the discharge injunction afforded to Judith as a non-debtor
24 spouse.

25 After the bankruptcy court entered the order to show cause,
26

27 ⁴Faden contended that the sale of the Faden judgment to
28 Silberstein was invalid and that he thus retained ownership of
and the right to enforce that judgment.

1 both sides filed additional papers in support of their positions.
2 Upon reviewing the additional filings, the court issued a notice
3 in January 2014 identifying certain facts as undisputed and other
4 facts as disputed and setting an evidentiary hearing.

5 The court identified as undisputed Faden's active
6 participation in Segal's bankruptcy case as a petitioning
7 creditor, his assignment or sale of the Faden judgment to
8 Silberstein, and Silberstein's unsuccessful attempt to except the
9 Faden judgment from discharge. The court further noted that the
10 discharge order in Segal's bankruptcy case was mailed to Faden
11 and that the discharge protected both Segal and Judith. With
12 respect to Judith, the court stated that the Faden judgment was a
13 community claim and that, unless Judith had separate property,
14 any action against her would constitute a discharge injunction
15 violation. Finally, the court stated that Faden filed the cross-
16 complaint in part based on the Faden judgment and that Faden
17 still had not dismissed the cross-complaint as against the
18 Segals.

19 The court identified the following factual issues to be
20 resolved at the evidentiary hearing:

21 1. [Whether], despite the notice of discharge from the
22 bankruptcy court, Faden had no knowledge of the
discharge prior to this OSC.

23 2. [Whether] Judith Segal has separate property which
24 would be subject to the Faden Judgment.

25 3. [Whether] any of the documents attached to any of
26 the pleadings filed by debtor or Faden in support of or
opposition to this OSC lack authenticity or would be
otherwise inadmissible.

27 4. [Whether] debtor incurred recoverable damages as a
28 result of the discharge violation and the amount of
those damages.

1 Notice of Issues for Evidentiary Hearing on OSC (Jan. 22, 2014)
2 at 2:21-3:2.

3 In the final sentence of the evidentiary hearing notice, the
4 court directed that Faden would be the first to present evidence
5 at the hearing because Segal already had presented a prima facie
6 case in support of his contempt motion.

7 The bankruptcy court held the hearing on the contempt motion
8 on February 7, 2014. Through most of the contempt proceedings,
9 the Segals represented themselves, but the Segals retained
10 counsel by the name of Craig Smith to represent them at the
11 evidentiary hearing. Faden was represented by counsel as well,
12 but Faden did not appear for examination at the hearing, nor did
13 his counsel request a continuance so that Faden could appear and
14 testify. The court expressed surprise at Faden's failure to
15 appear given that the contempt proceedings were brought against
16 Faden and some of the factual issues concerned Faden's state of
17 mind, particularly his knowledge of the discharge injunction.

18 Faden's counsel's presentation was limited to argument and
19 the declarations and exhibits that Faden had presented to the
20 court before the evidentiary hearing. One of Faden's key points
21 was that Faden never served a summons or the cross-complaint on
22 either of the Segals in their personal capacity. Faden
23 acknowledged that he served Segal in his capacity as counsel for
24 RJS Realty Ltd, but he pointed out that the only act he arguably
25 took in violation of the discharge injunction was the filing of
26 the cross-complaint naming both of the Segals as defendants.

27 Faden also pointed out that, several days before the
28 evidentiary hearing, he filed in the state court a request for

1 dismissal of the Segals from the cross-complaint and that he
2 notified the Segals of the filing of this request.

3 Faden's counsel also attempted to frame other arguments at
4 the hearing, including arguments regarding Faden's knowledge of
5 the discharge injunction. The court advised Faden's counsel
6 that, without Faden's live testimony, these other arguments were
7 virtually worthless.

8 The Segals then presented their testimony, and Faden's
9 counsel cross-examined them both. Their testimony principally
10 focused on damages they allegedly suffered as a result of Faden's
11 filing of the cross-complaint. Their evidence regarding Judith's
12 emotional distress was limited to their testimony.

13 The court accepted into evidence all of the exhibits offered
14 by the parties. Among those exhibits were invoices for legal
15 services rendered in the contempt proceedings by Segal and Smith.
16 Smith's invoice covered services rendered beginning on
17 February 3, 2014, and ending on February 7, 2014, and was first
18 presented to the court and Faden's counsel at the time of the
19 hearing. After the close of evidence, the bankruptcy court set a
20 schedule for post-hearing briefs and concluded the hearing.

21 Faden's trial summation and closing brief principally
22 challenged the Segals' \$20,000 claim for attorney's fees Segal
23 incurred in representing the Segals. Faden argued that
24 attorney's fees for in pro per representation are not recoverable
25 as compensatory damages in a contempt proceeding, and the Segals
26 ultimately conceded this issue and withdrew the damages claim
27 based on Segal's legal services.

28 Faden also challenged the \$7,616 in attorney's fees incurred

1 by Smith in representing the Segals in the contempt proceedings.
2 Faden argued that Smith's fees were completely unnecessary and
3 unreasonable because Faden already had requested dismissal of the
4 cross-complaint as against the Segals at the time Smith began
5 representing the Segals. Faden further argued that Smith's
6 services were partly duplicative of the legal services provided
7 by Segal. Finally, Faden specifically claimed as excessive and
8 unreasonable the 6.6 hours Smith billed as time spent preparing
9 for the evidentiary hearing and the seven hours Smith billed as
10 time spent attending the hearing and in transit to and from the
11 hearing.

12 The Segals filed a one-sentence post-hearing brief, in which
13 they withdrew their damage claim based on Segal's \$20,000 in
14 legal services.

15 After the parties filed their post-hearing briefs, the
16 bankruptcy court issued a memorandum decision. In it, the court
17 first noted that it already had accepted into evidence, without
18 objection, all of the declarations and exhibits presented by the
19 parties at and before the hearing. The court also reiterated the
20 undisputed facts and factual issues recited in its January 2014
21 evidentiary hearing notice.

22 The court supplemented the undisputed facts with findings
23 based on the evidence presented. In relevant part, the court
24 found that Faden violated the discharge injunction by filing the
25 cross-complaint against the Segals, but the court also noted that
26 neither a summons nor the cross-complaint had been served on the
27 Segals in their personal capacities. The court further found
28 that Faden knew of the discharge injunction and its effect on the

1 Faden judgment when he filed the cross-complaint. The court
2 emphasized that Faden's denial of this knowledge was not
3 credible.⁵

4 With respect to damages, the court noted that the only types
5 of compensatory damages the Segals claimed were for emotional
6 distress and for attorney's fees. The court ruled that the
7 Segals' evidence of the emotional distress Judith allegedly
8 suffered was subject to a fatal deficiency:

9 To award emotional distress damages, the Court must
10 find causation between the offending act of Faden -
11 filing the cross complaint - and the distress caused to
12 Judith. The evidence fails to show that causal
13 connection: The cross complaint was not served upon
14 Judith. She only learned about it when Segal showed
15 her a copy which was served on him by mail as attorney
16 for RJS Realty. Faden did not directly cause her
17 distress. The Court cannot award emotional distress
18 damages based on the undisputed evidence.

19 Mem. Dec. (March 27, 2014) at 9:17-22.

20 As for attorney's fees, the court rejected Faden's
21 contention that the Segals could not recover any of Smith's
22 attorney's fees because they all were incurred after Faden had
23 advised the Segals that he had filed a request to dismiss them
24 from the cross-complaint. Instead, the court noted that it had

25 ⁵The bankruptcy court also rejected Faden's argument that
26 Judith was not protected by the discharge in Segal's bankruptcy
27 case. In so ruling, the court focused on the lack of evidence
28 that Judith had separate property; it thus concluded that the
litigation necessarily involved an act against her community
property and a violation of the non-debtor spouse discharge
injunction. We question this determination as the non-filing
spouse discharge injunction protects against collection activity
as opposed to liquidation of a debt that may be collectible from
non-community assets at any future point in time. Faden,
however, failed to raise this point on appeal, so we do not
address it further.

1 discretion to award Smith's fees "as § 105 damages" based on
2 Faden's willful violation of the discharge injunction. The court
3 then stated: "On the facts of this case, the court will award
4 those damages as a sanction for Faden's calous [sic] disregard of
5 the protection the Segals received when Segal's bankruptcy case
6 was discharged." Id. at 10:10-12.

7 After two paragraphs identifying Faden's conduct supporting
8 the sanctions award, the court summed up by stating: "This
9 egregious and blatant behavior warrants a sanction from this
10 Court. **Unable to award any compensatory damages to Segal and
11 Judith, the Court's decision to award those attorney's fees as a
12 sanction is well-founded.**" Id. at 10:24-26 (emphasis added).

13 On March 28, 2014, the court entered its order awarding
14 \$7,616 in contempt sanctions against Faden. The Segals then
15 filed a reconsideration motion seeking to reargue the emotional
16 distress issue, which motion the court denied. Faden timely
17 appealed the bankruptcy court's sanctions order, and the Segals
18 cross-appealed.

19 JURISDICTION

20 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
21 §§ 1334 and 157(b)(2)(O). We have jurisdiction under 28 U.S.C.
22 § 158.

23 ISSUES

- 24 1. Did the bankruptcy court abuse its discretion when it held
25 Faden in contempt of court and awarded sanctions against him
26 in the amount of \$7,616 based on the fees Smith incurred in
27 representing the Segals in the contempt proceedings?
- 28 2. Did the bankruptcy court abuse its discretion when it denied

1 the Segals' claim for emotional distress damages?

2 **STANDARDS OF REVIEW**

3 The bankruptcy court's decision to impose contempt sanctions
4 for violation of the discharge injunction is reviewed for an
5 abuse of discretion. Nash v. Clark Cnty. Dist. Atty's. Office
6 (In re Nash), 464 B.R. 874, 878 (9th Cir. BAP 2012).

7 The bankruptcy court abuses its discretion if its decision
8 was based on an incorrect legal rule or its factual findings were
9 illogical, implausible, or without support in the record. Id.
10 (citing United States v. Hinkson, 585 F.3d 1247, 1262 (9th
11 Cir.2009) (en banc)).

12 The bankruptcy court's findings of fact are not clearly
13 erroneous unless they are "illogical, implausible, or without
14 support in the record." Retz v. Samson (In re Retz), 606 F.3d
15 1189, 1196 (9th Cir. 2010).

16 **DISCUSSION**

17 A discharge in a bankruptcy case "operates as an injunction
18 against the commencement or continuation of an action, the
19 employment of process, or an act, to collect, recover or offset
20 any [prepetition] debt as a personal liability of the debtor
21" § 524(a)(2). The discharge also protects all community
22 property of the debtor and the debtor's spouse acquired after the
23 commencement of the case. § 524(a)(3); see also Rooz v. Kimmel
24 (In re Kimmel), 378 B.R. 630, 635-36 (9th Cir. BAP 2007).

25 When creditors willfully violate the discharge injunction,
26 they may be held in contempt. See ZiLOG, Inc. v. Corning
27 (In re ZiLOG, Inc.), 450 F.3d 996, 1007 (9th Cir. 2006). For
28 purposes of finding creditors in contempt, the creditors act

1 willfully if they: "(1) knew the discharge injunction was
2 applicable and (2) intended the actions which violated the
3 injunction." Id. This is so even if the creditors did not
4 specifically intend to violate the discharge injunction. See
5 Knupfer v. Lindblade (In re Dyer), 322 F.3d 1178, 1191 (9th Cir.
6 2003).

7 Faden does not dispute on appeal that, under § 524(a)(2) and
8 (3), he was enjoined from commencing or pursuing legal actions
9 against both Segal and Judith based on his prepetition claim
10 associated with the Faden judgment. Accordingly, we need not
11 address the scope of the injunction under § 524(a)(3) as it
12 applied to Judith's community property interests. See id. at
13 1182 (stating that appellate court does not need to consider
14 issue not raised on appeal).⁶

15 However, Faden does challenge on appeal the bankruptcy
16 court's determination that his filing of the cross-complaint
17 naming the Segals as cross-defendants constituted a violation of
18 the discharge injunction sufficient to justify a contempt
19 sanctions award. According to Faden, because he never served the
20 cross-complaint on the Segals, and because the state court never
21 acquired personal jurisdiction over the Segals, his action of
22 filing the cross-complaint was at most a mere "technical"
23 violation of the discharge injunction, which did not justify the
24 imposition of any sanctions award.

25 We disagree. We have not found any law prohibiting or
26

27 ⁶We also need not address this issue because Faden's
28 violation of § 524(a)(2) was sufficient to support the court's
contempt finding.

1 limiting the remedies a court may impose on account of a so-
2 called technical violation of the discharge injunction, and Faden
3 has not cited any. Nor can we narrowly read § 524(a)(2) in the
4 way Faden urges - to permit the filing of his cross-complaint
5 against Segal - without departing from the plain meaning of the
6 statute's clear language.

7 Moreover, the bankruptcy court considered the nature and
8 impact of Faden's violative conduct before it determined the
9 extent to which sanctions should be imposed against Faden. Thus,
10 the bankruptcy court's ruling already accounted for the limited
11 nature of Faden's discharge injunction violation.

12 Faden alternately argues on appeal that the bankruptcy court
13 did not find, as required, that he "actually knew" of the
14 discharge injunction. In essence, Faden contends that the court
15 only found that he had constructive or imputed knowledge of the
16 discharge injunction. Because the court based its knowledge
17 finding in part on circumstantial evidence and in part on the
18 application of the "mailbox rule," Faden reasons that the court
19 could not have correctly found that he actually knew about the
20 discharge in Segal's bankruptcy case.

21 Before imposing contempt sanctions for violation of the
22 discharge injunction, the bankruptcy court needed to find, among
23 other things, that Faden actually knew of the discharge
24 injunction. In re ZiLOG, Inc., 450 F.3d at 1007. Faden's actual
25 knowledge of the discharge injunction was a question of fact, id.
26 at 1007-08, and the bankruptcy court here unequivocally found
27 that Faden actually knew of the discharge injunction. In
28 relevant part, the bankruptcy court explicitly found that Faden's

1 "ignorance of the discharge is feigned" and that Faden's
2 declaration testimony that he did not know of the bankruptcy
3 discharge was "not credible." Bk Ct. Mem. Dec. (March 28, 2014)
4 at 6:2-8. Furthermore, the court explicitly found "based on
5 circumstantial evidence that Faden knew of the discharge and the
6 imposition of an injunction against collection of a discharged
7 debt." Id. at 7:22-23.

8 Faden's argument attacking the bankruptcy court's knowledge
9 finding lacks merit. It is common for the trier of fact to rely
10 on circumstantial evidence to resolve factual issues bearing on a
11 party's state of mind. See, e.g., In re Zilog, Inc.,
12 450 F.3d at 1008; United States v. Sullivan, 522 F.3d 967, 974
13 (9th Cir. 2008). Indeed, absent an admission, circumstantial
14 evidence typically is the only means by which a party may prove
15 another party's state of mind.

16 As for the bankruptcy court's invocation of the mailbox
17 rule, we perceive no error. The mailbox rule creates a
18 rebuttable presumption that documents duly served by mail have
19 been received by the addressee at the address stated in the proof
20 of service. See Schikore v. BankAmerica Supp. Ret. Plan,
21 269 F.3d 956, 961 (9th Cir. 2001) (citing Hagner v. United
22 States, 285 U.S. 427, 430 (1932)). To overcome the mailbox rule
23 presumption, the party served ordinarily must present something
24 more than a bald denial of receipt. See Berry v. U.S. Trustee
25 (In re Sustaita), 438 B.R. 198, 209 (9th Cir. BAP 2010), aff'd,
26 460 Fed.Appx. 627 (9th Cir. 2011).

27 Here, the bankruptcy court correctly invoked the mailbox
28 rule. Based on the court's records regarding the mailing of the

1 discharge order, the court presumed that Faden received written
2 notice of the discharge, and Faden did nothing to counter that
3 presumption except to deny receipt of that notice.

4 In any event, the court's finding regarding Faden's actual
5 knowledge was not based solely on the mailbox rule, but rather on
6 the entirety of the circumstances. In making its knowledge
7 finding, the court noted the critical and active role Faden
8 played as a petitioning creditor in Segal's bankruptcy case, and
9 the fact that Faden as a petitioning creditor had been included
10 in the court's mailing matrix from and after the commencement of
11 the case in 2008. The court further inferred that Faden
12 understood the effect the discharge would have on his right to
13 enforce the Faden judgment, as he conveyed the Faden judgment to
14 Silberstein so that Silberstein could bring an adversary
15 proceeding attempting to except the Faden judgment from Segal's
16 discharge. That adversary proceeding was unsuccessful. On these
17 facts, we cannot say that the bankruptcy court's finding
18 regarding Faden's actual knowledge of the discharge injunction
19 was illogical, implausible or without support in the record.
20 In re Retz, 606 F.3d at 1196.

21 Even if we were to discern some error in the bankruptcy
22 court's actual knowledge finding (which we do not), Faden has
23 admitted that he received Segal's order to show cause motion. As
24 a result, Faden indisputably knew of the discharge injunction on
25 and after his receipt of this motion, and he had an ongoing and
26 affirmative duty after that point to unwind the effects of his
27 discharge injunction violation. See In re Dyer, 322 F.3d at
28 1192.

1 In spite of this duty, instead of taking immediate action to
2 remedy his violative conduct, Faden responded to Segal's order to
3 show cause motion by denying that he had knowingly violated the
4 discharge injunction and also by arguing that his actions were
5 justified by Segal's alleged misconduct in the state court
6 litigation and in the transactions leading up to the state court
7 litigation. In fact, it took Faden nearly three months to take
8 the simple step of dismissing the cross-complaint as against the
9 Segals, and he finally did so only a few days before the
10 evidentiary hearing on the contempt motion. Faden's knowledge of
11 the discharge injunction on and after his admitted receipt of
12 Segal's order to show cause motion and Faden's failure to
13 expeditiously dismiss out the Segals from his cross-complaint
14 dispels any doubt regarding Faden having the requisite knowledge
15 for the bankruptcy court to hold him in contempt for violation of
16 the discharge injunction. See Id.

17 A bankruptcy court may award sanctions for a violation of
18 the discharge injunction under the court's contempt power.
19 In re ZiLOG, Inc., 450 F.3d at 1007 (citing § 105). Civil
20 contempt sanctions may be either compensatory or coercive in
21 nature. In re Dyer, 322 F.3d at 1192. The sanctions are
22 compensatory only if they reimburse the injured party for losses
23 suffered as a result of the sanctionable conduct. Gen. Signal
24 Corp. v. Donallco, Inc., 787 F.2d 1376, 1380 (9th Cir. 1986)
25 (citing Shuffler v. Heritage Bank, 720 F.2d 1141, 1148 (9th Cir.
26 1983)). If the sanctions are not compensatory and instead are
27 aimed at deterring future or continued contumacy, they may be
28 coercive in nature, In re Dyer, 322 F.3d at 1192, but such

1 coercive civil contempt sanctions must afford the contemnor some
2 opportunity to reduce or avoid the sanction. Id. If there is no
3 such opportunity, a flat, unconditional, noncompensatory fine for
4 willfully violating a court order is considered to be a punitive
5 or criminal contempt sanction. Id.

6 Bankruptcy courts are not authorized to award "serious"
7 criminal contempt sanctions, but "relatively mild" non-
8 compensatory fines may be permissible under some circumstances,
9 especially when there is no other practicable means of addressing
10 the contumacious conduct. Id. at 1193 & n.16. Under no
11 circumstances should the relatively mild non-compensatory fine
12 exceed several thousand dollars. Id.

13 The bankruptcy court imposed against Faden a sanctions award
14 of \$7,616, payable to the Segals. The court made it clear that
15 the amount of the sanctions award was based on the attorney's
16 fees Smith billed for the services he performed in relation to
17 the contempt proceedings, beginning on February 3, 2014, and
18 ending on February 7, 2014. On appeal, Faden argues that the
19 amount of the award was an abuse of discretion under three
20 distinct theories: (1) the fees billed were "completely
21 unnecessary and unreasonable" because they were needlessly
22 incurred after the Segals and Smith had been notified that Faden
23 had remedied his discharge injunction violation by requesting
24 dismissal of the cross-complaint as against the Segals;
25 (2) Smith's fees were duplicative of the fees claimed by Segal in
26 the contempt proceedings; and (3) the court did not make any
27 evaluation or findings regarding the reasonableness of the fees
28 Smith claimed. We will address each of these theories in turn.

1 We reject Faden's theory that the Segals' entitlement to
2 recover fees ceased upon Faden dismissing the Segals from the
3 cross-complaint. Faden cited no legal authority to support this
4 theory. Moreover, we agree with the bankruptcy court's well-
5 reasoned analysis of this issue. Citing Sternberg v. Johnston,
6 595 F.3d 937, 945-48 (9th Cir. 2010), the bankruptcy court
7 acknowledged that, in an adversary proceeding brought pursuant to
8 § 362(k), the debtor cannot claim as an element of damages fees
9 incurred after the stay or discharge injunction violation has
10 been undone. On the other hand, the bankruptcy court pointed out
11 that its contempt powers are not so limited. See Rediger Inves.
12 Servs. v. H Granados Commc'ns, Inc. (In re H Granados Commc'ns,
13 Inc.), 503 B.R. 726, 734-35 (9th Cir. BAP 2013).

14 In re H Granados Commc'ns, Inc. stands for the proposition
15 that a bankruptcy court may include in its compensatory civil
16 contempt award reasonable attorney's fees incurred during the
17 entirety of the contempt proceedings - even those incurred after
18 the violative conduct has been set aside. In this respect,
19 In re H Granados Commc'ns, Inc. is consistent with the Ninth
20 Circuit's broad general statements regarding the injured party's
21 entitlement to recover attorney's fees as an element of
22 compensatory civil contempt sanctions. See, e.g., In re Dyer,
23 322 F.3d at 1195 ("attorneys fees are an appropriate component of
24 a civil contempt award"); Perry v. O'Donnell, 759 F.2d 702, 705
25 (9th Cir. 1985) ("an award of fees and expenses is appropriate as
26 a remedial measure"). Simply put, neither Dyer nor Perry nor any
27 other Ninth Circuit decision we know of has refused to award fees
28 as part of a compensatory civil contempt sanctions award because

1 those fees were incurred in the contempt proceedings after the
2 violative conduct had been remediated.

3 As for Faden's theory that Smith's fees were duplicative of
4 those incurred by Segal while Segal was representing himself in
5 the contempt proceedings, we can quickly dispose of this theory.
6 It makes no sense for Faden to complain of this duplication of
7 effort when none of Segal's attorney's fees incurred in
8 representing himself were awarded against Faden. Put another
9 way, Faden lacks standing on appeal to complain regarding any
10 duplication of effort between Segal and Smith because any such
11 duplication of effort did not adversely affect him pecuniarily.
12 See generally Fondiller v. Robertson (In re Fondiller), 707 F.2d
13 441, 442 (9th Cir. 1983) ("Only those persons who are directly
14 and adversely affected pecuniarily by an order of the bankruptcy
15 court have been held to have standing to appeal that order.").

16 Faden's third theory, that the bankruptcy court did not
17 evaluate the reasonableness of Smith's fees, requires greater
18 thought. Generally speaking, a compensatory civil contempt fee
19 award should be supported by a reasonableness finding. Perry,
20 759 F.2d at 706. Furthermore, in assessing the reasonableness of
21 such fees, a court typically must consider factors like those
22 articulated in Kerr v. Screen Extras Guild, Inc., 526 F.2d 67, 70
23 (9th Cir. 1975).⁷ See Perry, 759 F.2d at 706. While some Ninth
24

25 ⁷Kerr listed the following factors to be considered: (1) the
26 time and labor required, (2) the novelty and difficulty of the
27 questions involved, (3) the skill requisite to perform the legal
28 service properly, (4) the preclusion of other employment by the
attorney due to acceptance of the case, (5) the customary fee,
(continued...)

1 Circuit decisions subsequent to Kerr have indicated that slavish
2 adherence to a rigid and formulaic recitation of the Kerr factors
3 is not a prerequisite to a fee award, Brown v. Baden
4 (In re Yagman), 796 F.2d 1165, 1184 (9th Cir. 1986), amended by
5 803 F.2d 1085 (1986), "the court must make some evaluation of the
6 fee breakdown submitted by counsel." Id.

7 The contemnor may forfeit the reasonableness issue if he or
8 she does not raise it in the trial court, Perry, 759 F.2d at 706,
9 but Faden here sufficiently raised the reasonableness issue to
10 preserve it for appeal. More specifically, Faden argued the
11 reasonableness of Smith's fees in the post-trial brief the
12 bankruptcy court authorized Faden to file. Even though most of
13 Faden's reasonableness argument in his post-trial brief was
14 dedicated to his first two theories, discussed above, that we
15 already have rejected, Faden also contended that some of Smith's
16 specific time entries were excessive under the circumstances.

17 We consider Faden's raising of the reasonableness issue in
18

19 ⁷(...continued)

20 (6) whether the fee is fixed or contingent, (7) time limitations
21 imposed by the client or the circumstances, (8) the amount
22 involved and the results obtained, (9) the experience,
23 reputation, and ability of the attorneys, (10) the
'undesirability' of the case, (11) the nature and length of the
professional relationship with the client, and (12) awards in
similar cases. Id. at 70.

24 The Supreme Court has explicitly rejected consideration of
25 at least one of these factors - the factor regarding whether the
26 fee is fixed or contingent. See City of Burlington v. Dague,
505 U.S. 557, 567 (1992). Additionally, a number of courts have
27 indicated that the lodestar method of evaluating fees has
28 replaced and/or subsumed most of the Kerr factors. See, e.g.,
Gonzalez v. City of Maywood, 729 F.3d 1196, 1204 n.3 (9th Cir.
2013).

1 his post-trial brief timely because the record indicates that
2 Smith's invoice was not made available to Faden for review until
3 the day of the evidentiary hearing. On this record, we hold that
4 Faden sufficiently preserved the reasonableness issue for
5 appellate review.

6 Even though the bankruptcy court did not explicitly address
7 the reasonableness issue, we arguably could conclude that the
8 court implicitly found Smith's fees to be reasonable. Both the
9 relatively small amount of fees involved (\$7,616) and the limited
10 effort Faden devoted to addressing the reasonableness issue could
11 support a conclusion that the court found it unnecessary to make
12 an explicit reasonableness finding. Indeed, Faden concedes in
13 his appeal brief that an explicit reasonableness finding is not
14 always required. See Aplt. Opn. Br. at p. 13 (citing Lloyd v.
15 Schlag, 884 F.2d 409, 413 (9th Cir. 1989)).

16 Moreover, bankruptcy courts have extensive experience in
17 approving the reasonableness of fees in conjunction with
18 professional fee applications filed under § 330, as well as in
19 adversary proceedings in which fee shifting statutes and
20 contractual attorney's fee provisions often come into play.
21 These fee issues, some of them involving hundreds of thousands of
22 dollars in requested fees, are routinely scrutinized by the
23 bankruptcy court under the "loadstar approach," which subsumes
24 many of the Kerr factors. See Gonzalez, 729 F.3d at 1204 n.3.
25 Under these circumstances, we might assume that, at a glance, the
26 bankruptcy court here was able to implicitly find that the \$7,616
27 in fees claimed by Smith were reasonable.

28 Nonetheless, there are at least a couple aspects of the

1 bankruptcy court's fees ruling that prevent us from affirming
2 that ruling based on the notion that the bankruptcy court
3 implicitly found Smith's fees to be reasonable. One aspect that
4 concerns us is the need for the bankruptcy court to parse Smith's
5 fees to identify those that flowed from Faden's violation of the
6 discharge injunction and those that did not. As explained in
7 In re Dyer, only those fees flowing from the contumacious conduct
8 can be awarded as part of a compensatory civil contempt sanctions
9 award. Id. at 1195. In fact, In re Dyer ruled that a remand was
10 necessary so that the bankruptcy court could make precisely that
11 type of determination. Id.

12 Here, as we discuss below, the bankruptcy court found that
13 the Segals failed to prove that they suffered any emotional
14 distress as a result of Faden's contumacious conduct. Yet the
15 record reflects that a significant portion of Smith's fees were
16 incurred attempting to elicit from the Segals testimony regarding
17 Judith's emotional distress. If the emotional distress did not
18 flow from Faden's discharge injunction violation, how is it that
19 the bankruptcy court could find that Smith's services aimed at
20 presenting emotional distress evidence flowed from Faden's
21 discharge injunction violation? Without a finding of a causal
22 link between the fees incurred and the contumacious conduct, the
23 fees are not properly part of a compensatory civil contempt
24 sanctions award. In re Dyer, 322 F.3d at 1195.

25 The other aspect of the fees ruling that concerns us
26 pertains to some of the statements the bankruptcy court made in
27 the process of imposing the \$7,616 in sanctions. Among other
28 things, the court stated: "On the facts of this case, the court

1 will award those damages [Smith's fees] as a sanction for Faden's
2 calous [sic] disregard of the protection the Segals received when
3 Segal's bankruptcy case was discharged." Mem. Dec. (March 28,
4 2014) at 10:10-12. The court further stated: "This egregious and
5 blatant behavior warrants a sanction from this Court. **Unable to**
6 **award any compensatory damages to Segal and Judith, the Court's**
7 **decision to award those attorney's fees as a sanction is**
8 **well-founded.**" Mem. Dec. (March 28, 2014) at 10:24-26 (emphasis
9 added).

10 These statements, especially the latter one, perhaps suggest
11 that the bankruptcy court intended its fee award to constitute a
12 flat, unconditional, noncompensatory fine on account of Faden's
13 contumacious conduct. However, if the court intended the \$7,616
14 in sanctions to be a relatively minor punitive sanction, we have
15 a different set of concerns. For instance, whether or not a
16 punitive sanction should be considered serious depends in part on
17 the financial condition of the sanctioned party. See F.J.
18 Hanshaw Enters., Inc. v. Emerald River Dev., Inc., 244 F.3d 1128,
19 1140 n.10 (9th Cir. 2001). In other words, the seriousness of
20 the sanction award depends in part on whether the sanctioned
21 party is a multinational corporation, an impoverished debtor or
22 something in between. Here, the bankruptcy court made no finding
23 regarding Faden's financial condition. The absence of a finding
24 on the seriousness of the sanction or on Faden's financial
25 condition makes us hesitant to conclude that the bankruptcy court
26 intended to impose a noncompensatory fine.

27 Furthermore, the court's findings were not 100% clear on the
28 mental state accompanying Faden's violation of the discharge

1 injunction. Even though a finding that the contemnor
2 intentionally violated the court's order is not necessary to
3 support a civil contempt sanctions award, In re Dyer, 322 F.3d at
4 1191, a punitive or criminal contempt sanctions award - even a
5 minor one - should be supported by a finding that the contemnor
6 violated the court's order intentionally or in bad faith. See
7 Perry, 759 F.2d at 705; see also Zambrano v. City of Tustin,
8 885 F.2d 1473, 1482 (9th Cir. 1989). Here, the bankruptcy court
9 referred to Faden's violation of the discharge injunction as
10 "willful," "egregious," "blatant" and in "calous [sic] disregard"
11 of the discharge order, but the bankruptcy court did not find
12 that the discharge injunction violation was either intentional or
13 in bad faith.

14 There are a handful of other questions that a bankruptcy
15 court ordinarily should answer before imposing a noncompensatory
16 fine as a remedy for violation of the court's order. See
17 Zambrano, 885 F.2d at 1480. These factors include: (1) whether
18 the fine is consistent with applicable statutes and rules;
19 (2) whether the fine is necessary to support the proper
20 functioning of the court; (3) whether the fine is proportionate
21 to the offense; and (4) whether the fine is consistent with the
22 interests of justice. Id.; accord, In re 1601 W. Sunnyside Dr.
23 #106, LLC, 2010 WL 5481080, at *6-7 (Bankr. D. Idaho 2010). We
24 are not saying that explicit findings on these questions are
25 necessary every time the bankruptcy court imposes a non-
26 compensatory fine, but we are saying that the absence here of
27 explicit findings addressing these issues further calls into
28 question whether the bankruptcy court intended to impose a minor

1 punitive sanction or a compensatory civil contempt sanction.

2 In sum, we cannot tell from the bankruptcy court's
3 memorandum decision or the entirety of the record whether the
4 bankruptcy court intended the \$7,616 in sanctions to be a
5 compensatory civil contempt sanctions award or a minor punitive
6 contempt sanctions award. Either way, there are a number factors
7 that ordinarily must be considered. Because there is
8 insufficient indication in the court's memorandum decision that
9 it implicitly addressed these factors, we cannot uphold the
10 \$7,616 in sanctions as either a compensatory civil contempt
11 sanctions award or as a minor punitive contempt sanctions award.

12 The bankruptcy court needs to make sufficient findings to
13 support its ruling, and when there are insufficient findings, we
14 must vacate and remand for further findings. Veal v. Am. Home
15 Mortg. Servicing, Inc. (In re Veal), 450 B.R. 897, 919-20 (9th
16 Cir. BAP 2011). On remand, the bankruptcy court will be free to
17 re-open the record to address the issues we have referenced in
18 this decision, or the bankruptcy court may address them without
19 reopening the record. The bankruptcy court also may choose to
20 adjust its sanctions award either upwards or downwards depending
21 on what its findings support.

22 The only remaining issue that we must address is the sole
23 issue raised in the Segals' cross-appeal. The Segals contend
24 that the bankruptcy court erred when it ruled that Judith was not
25 entitled to emotional distress damages. Neither party disputes
26 on appeal the bankruptcy court's holding that a court may award
27 emotional distress damages as an element of a compensatory civil
28 contempt sanctions award. See Dawson v. Washington Mutual Bank

1 (In re Dawson), 390 F.3d 1139, 1148 (9th Cir. 2004). Nor does
2 either party dispute that, in proving up an emotional distress
3 claim, an individual must:

4 (1) suffer significant harm, (2) clearly establish the
5 significant harm, and (3) **demonstrate a causal**
6 **connection between that significant harm and the**
7 **violation of the automatic stay** (as distinct, for
8 instance, from the anxiety and pressures inherent in
9 the bankruptcy process).

10 Id. at 1149 (emphasis added). The Segals take issue with the
11 bankruptcy court's finding that Judith's emotional distress was
12 not caused by Faden's violative conduct - the filing of the
13 cross-complaint.

14 A party seeking compensatory damages for contempt must
15 demonstrate that those damages occurred as a result of the
16 contumacious conduct. Gen. Signal Corp., 787 F.2d at 1380;
17 Shuffler, 720 F.2d at 1148; see also In re Dawson, 390 F.3d at
18 1150 (stating that the causal link between the emotional distress
19 and the contumacious conduct must be "clearly established or
20 readily apparent"). Some courts have stated the causation rule
21 even more emphatically, effectively holding that compensatory
22 contempt sanctions are limited to damages directly resulting from
23 the contumacious conduct. See, e.g., Valdez v. Kismet
24 Acquisition, LLC, 474 B.R. 907, 922-23 (S.D. Cal. 2012), aff'd,
25 567 Fed. Appx. 517 (9th Cir. 2014); Lovell v. Evergreen
26 Resources, Inc., 1995 WL 761269, at *3 (N.D. Cal. 1995).

27 It suffices for us to say that the record supports the
28 bankruptcy court's finding that the Segals did not adequately
demonstrate the required causal link between Judith's emotional
distress and Faden's violative conduct. While the court

1 generally credited the Segals' testimony regarding Judith's
2 emotional distress, the court ultimately inferred from the facts
3 in the record that Faden's violative conduct did not cause
4 Judith's emotional distress. We cannot say that this inference
5 was illogical, implausible or without support in the record.
6 In re Retz, 606 F.3d at 1196.⁸

7 Citing California Supreme Court decisions and the
8 Restatement of the Law of Torts, the Segals assert that the
9 bankruptcy court misapplied causation doctrine. However, we are
10 not dealing with a state law issue or a tort issue. We are
11 dealing with a creditor's failure to comply with federal law and
12 a bankruptcy court's order. None of the cases we have cited
13 herein have looked to state law or tort law to resolve questions
14 concerning causation and damages arising from contempt of court.
15 Nor are we aware of any federal cases doing so. See generally
16 Henry v. Assocs. Equity Home Servs. (In re Henry), 266 B.R. 457,
17 480 (Bankr. C.D. Cal. 2001) (holding that contempt proceedings
18 are not equivalent to tort actions for purposes of determining
19 damages).

20 In short, we disagree with the Segals' causation argument,
21 and we decline their invitation to apply California Supreme court
22 precedent and the common law of torts to a federal proceeding
23 concerning contempt of court.

24 CONCLUSION

25 For the reasons set forth above we AFFIRM the bankruptcy
26

27 ⁸And given our concerns about the existence of any discharge
28 violation as to Judith, we also note that any error in the
court's causation analysis would be harmless.

1 court's contempt finding and its denial of emotional distress
2 damages. However, we VACATE the bankruptcy court's sanctions
3 award and REMAND for further findings on that issue.

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9 Concurring decision begins on next page.
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1 Taylor, Bankruptcy Judge, concurring:

2 I concur in the result reached by the Panel. I write
3 separately, however, because I do not question the basis for the
4 bankruptcy court's sanction award. A bankruptcy court may award
5 attorney's fees as part of a civil contempt sanction award for
6 violation of the discharge injunction. See Walls v. Wells Fargo
7 Bank, N.A., 276 F.3d 502, 507 (9th Cir. 2002) ("[C]ompensatory
8 civil contempt allows an aggrieved debtor to obtain compensatory
9 damages, **attorneys fees**, and the offending creditor's compliance
10 with the discharge injunction.") (emphasis added); Nash v. Clark
11 Cnty. Dist. Attys' Office (In re Nash), 464 B.R. 874, 880 (9th
12 Cir. BAP 2012) ("If a bankruptcy court finds that a party has
13 willfully violated the discharge injunction, the court may award
14 actual damages, punitive damages and **attorney's fees** to the
15 debtor.") (emphasis added). Based on Walls and Nash, a
16 bankruptcy court appropriately may award attorney's fees as an
17 independent sanction for a discharge injunction violation, even
18 in the rare absence of actual damages.

19 Here, based on the bankruptcy court's comments at the
20 hearing, I firmly believe that it appropriately awarded
21 attorney's fees to Segal as a sanction against Faden and that it
22 was not a purely punitive sanction. Nonetheless, I also agree
23 that an award of attorney's fees must be reasonable. Given that
24 some of the attorney's fees were incurred in connection with
25 Judith's emotional distress claim, remand is necessary so that
26 the bankruptcy court may conduct a reasonableness analysis.