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NOT FOR PUBLICATION

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

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No.	NC-14-1480-TaDKi
)		
MICHAEL JAMES HICKEY;)	Bk. No.	09-42629
MERCEDES HICKEY,)		
)		
Debtors.)		
<hr/>			
DOROTHY D. GUILLORY,)		
)		
Appellant,)		
)		
v.)	MEMORANDUM*	
)		
MICHAEL JAMES HICKEY;)		
MERCEDES HICKEY,)		
)		
Appellees.)		
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Submitted Without Oral Argument**
on May 14, 2015

Filed - July 16, 2015

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

Honorable William J. Lafferty, III, Bankruptcy Judge, Presiding

* 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 8024-1(c)(2).

** After examination of the briefs and record, and after notice to the parties, in an order entered March 16, 2015, the Panel unanimously determined that oral argument was not needed for this appeal. See Fed. R. Bankr. P. 8019(b); 9th Cir. BAP Rule 8019-1.

1 Appearances: Dorothy D. Guillory, pro se, on brief; Chris D.
2 Kuhner of Kornfield, Nyberg, Bendes & Kuhner, PC
3 on brief, for appellees Michael James Hickey and
Mercedes Hickey.

4 Before: TAYLOR, DUNN, and KIRSCHER, Bankruptcy Judges.

5
6 **INTRODUCTION**

7 The bankruptcy court found appellant Dorothy D. Guillory in
8 contempt for violation of the discharge injunction issued in the
9 chapter 7¹ case of debtors Michael James Hickey and Mercedes
10 Velasquez Hickey. It subsequently awarded damages to the
11 debtors in the form of an attorney's fees and costs award
12 against Guillory. Guillory appeals from this award. We AFFIRM
13 the bankruptcy court's decision to award damages; but, we VACATE
14 the award and REMAND to the bankruptcy court for the limited
15 purpose of clarifying its order so that it clearly states that
16 Guillory's co-contemnors are jointly and severally liable for
17 these damages under a separate order.

18 **FACTS**

19 In 2009, the Debtors filed a chapter 7 petition. The case
20 proceeded routinely; the Debtors promptly received their
21 bankruptcy discharge, and the bankruptcy court promptly closed
22 the case.

23 Four years later, however, the Debtors successfully
24 reopened their case and commenced an adversary proceeding

25
26 ¹ Unless otherwise indicated, all chapter and section
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.
28 All "Rule" references are to the Federal Rules of Bankruptcy
Procedure and all "Civil Rule" references are to Federal Rules
of Civil Procedure.

1 against William De Vine, Jr. and his company, W.E. De Vine &
2 Company, LLC (collectively "De Vine"), and Guillory. The
3 adversary complaint alleged that the defendants violated the
4 discharge injunction through De Vine's commencement of a 2011
5 state court collection action (the "Collection Action") against
6 the Debtors; Guillory represented De Vine in the Collection
7 Action at a point after filing of the complaint. Apparently,
8 the Debtors advised De Vine and Guillory of the bankruptcy
9 discharge and unsuccessfully sought dismissal. The Debtors also
10 filed a motion for a contempt order in the adversary proceeding,
11 which they later re-filed in the bankruptcy case.²

12 The bankruptcy court ultimately determined that four of the
13 six Collection Action causes of action violated the discharge
14 injunction; it thus found De Vine and Guillory in contempt and
15 issued an order so determining (the "Contempt Order"). The
16 Contempt Order, however, also established a deadline for De Vine
17 to file a § 523 nondischargeability complaint, and Guillory, on
18 behalf of De Vine, thereafter filed "counterclaims" seeking to
19 except these four alleged claims from discharge under
20 § 523(a)(2) and (a)(6).

21 In the background during this time, Guillory was in
22 disciplinary proceedings before the State Bar of California; she

23
24 ² The Debtors created a complex procedural path to the
25 bankruptcy court's final determination that discharge violations
26 occurred and that actual damages resulted. They utilized both
27 an adversary proceeding and two motions. Because the details of
28 this procedural confusion do not impact our decision, we
hereafter refer to the adversary proceeding and motion jointly
as the Discharge Violation Proceedings, unless a more specific
reference is appropriate.

1 was subsequently suspended from practice for a three-year
2 period. De Vine then attempted to handle his § 523 action by
3 himself but eventually dismissed the counterclaims with
4 prejudice.

5 After dismissal, the Debtors sought an award of
6 compensatory damages based on the discharge injunction
7 violation; they initially requested an award only against DeVine
8 of \$58,077.51³ on account of fees and costs incurred in the
9 Collection Action and in the Discharge Violation Proceedings.
10 The award requested in connection with the Discharge Violation
11 Proceedings included fees and costs incurred as a result of the
12 § 523 counterclaims. After adjusting the requested amount
13 downward based on a determination that some services were
14 duplicative, the bankruptcy court granted the request; it
15 awarded the Debtors \$53,077.51, plus interest, solely against
16 De Vine. De Vine did not appeal from this order, and it is now
17 final.

18 The Debtors then sought a second award, this time in the
19 amount of \$24,172, again on account of fees and costs incurred
20 in connection with the discharge injunction violation ("Guillory
21 Motion for Damages") and requested recovery jointly and
22 severally, from De Vine and Guillory. The Debtors calculated
23 their alleged damages by reducing actually incurred fees and
24

25 ³ The Debtors' request for fees and costs in the adversary
26 proceeding consisted of: \$21,311.40 incurred by Chris Kuhner,
27 Debtors' bankruptcy counsel, in 2013; \$11,573.51 incurred by
28 Kuhner in 2014; \$19,531.87 incurred by David Ginn, Debtors'
state court counsel, in the state court action; and \$5,660.73
incurred by Ginn in the adversary proceeding.

1 costs in the Collection Action and in a portion of the Discharge
2 Violation Proceedings, using a percentage based on the number of
3 Collection Action causes of action that violated the discharge
4 injunction. In particular, the new motion did not seek any
5 recovery in connection with the defense of the § 523
6 counterclaims. The fees and costs requested in connection with
7 the Guillory Motion for Damages, thus, duplicated a portion of
8 the damages already awarded solely against De Vine. Only
9 Guillory opposed this motion.

10 At the hearing both De Vine and Guillory appeared pro se.
11 Guillory initially argued that the automatic stay in her
12 husband's bankruptcy filing prevented the Debtors from obtaining
13 an order against her. The bankruptcy court disagreed. Debtors'
14 counsel clarified on the record that the fees and costs
15 requested in the Guillory Motion for Damages duplicated, in
16 part, those already awarded against De Vine. The Debtors then
17 requested a second sanctions award only against Guillory. After
18 it once again discounted the amount requested for duplicative
19 services, the bankruptcy court granted the Guillory Motion for
20 Damages. It thereafter entered an order awarding damages on
21 account of fees and costs in the amount of \$20,822.50 ("Guillory
22 Damages Award"), plus interest, solely against Guillory. She
23 timely appealed.

24 **JURISDICTION**

25 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
26 §§ 1334 and 157(b)(2)(O). We have jurisdiction under 28 U.S.C.
27 § 158.

28 ///

1 **ISSUE**

2 Whether the bankruptcy court abused its discretion in
3 awarding damages against Guillory for violation of the discharge
4 injunction.

5 **STANDARD OF REVIEW**

6 We review the decision to award sanctions for an abuse of
7 discretion. See Knupfer v. Lindblade (In re Dyer), 322 F.3d
8 1178, 1191 (9th Cir. 2003); Rosales v. Wallace (In re Wallace),
9 490 B.R. 898, 904-05 (9th Cir. BAP 2013). The underlying
10 factual findings are reviewed for clear error. In re Dyer,
11 322 F.3d at 1191.

12 A bankruptcy court abuses its discretion if it applies the
13 wrong legal standard, misapplies the correct legal standard, or
14 if its factual findings are illogical, implausible, or without
15 support in inferences that may be drawn from the facts in the
16 record. See TrafficSchool.com, Inc. v. Edriver Inc., 653 F.3d
17 820, 832 (9th Cir. 2011) (citing United States v. Hinkson,
18 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc)).

19 **DISCUSSION**

20 Guillory advances a number of arguments, some raised for
21 the first time on appeal. These include the assertion that the
22 Guillory Damages Award was based on an impermissible pro-rata
23 allocation of fees; she contends that counsels' timesheets did
24 not distinguish the time spent on the discharge injunction
25 violative and non-violative Collection Action causes of action.
26 As a result, she urges remand for a re-calculation of the
27 Guillory Damages Award. She also argues that the Guillory
28 Motion for Damages was time-barred under the doctrine of laches.

1 Guillory, however, did not raise either of these issues before
2 the bankruptcy court; thus, we do not address them on appeal.
3 See Mano-Y&M, Ltd. v. Field (In re The Mortg. Store, Inc.),
4 773 F.3d 990, 998 (9th Cir. 2014).

5 **A. Although the Contempt Order was a judgment within the**
6 **meaning of Civil Rule 54, the Guillory Motion for Damages**
7 **was not "time-barred."**

8 Guillory first argues that because the Contempt Order was a
9 judgment, Civil Rule 54 required that the Debtors file a motion
10 for fees and costs within 14 days of entry of the Contempt
11 Order. She argues that the Guillory Motion for Damages, filed
12 more than a year after the Contempt Order, therefore, was time-
13 barred. We disagree.

14 A contempt proceeding for violation of the § 524 discharge
15 injunction is initiated by motion in the bankruptcy case as a
16 contested matter under Rule 9014. Barrientos v. Wells Fargo
17 Bank, N.A., 633 F.3d 1186, 1191 (9th Cir. 2011). A contempt
18 determination is deemed final for the purposes of appeal. See
19 In re Dyer, 322 F.3d at 1186. Under Civil Rule 54(a),⁴ a
20 judgment includes an "order from which an appeal lies." Thus,
21 the Contempt Order was a "judgment" subject to Civil Rule 54.

22 Civil Rule 54(d)(2) provides that a claim for attorney's
23 fees must be made by motion within 14 days after the entry of
24 judgment, but includes a limitation on this requirement where:
25 "the substantive law requires those fees to be proved at trial
26

27 ⁴ Civil Rule 54 is made applicable in bankruptcy cases by
28 Rules 7054 and 9014.

1 as an element of damages.”

2 The Guillory Motion for Damages sought recovery of fees and
3 costs in the Collection Action and the Discharge Violation
4 Proceedings only as actual damages sustained by the Debtors as a
5 result of the discharge violation. The fees awarded constituted
6 compensatory damages; they fell outside the scope of Civil
7 Rule 54(d) (2) and were not subject to the procedural
8 requirements of that rule.⁵ As a result, the Guillory Motion
9 for Damages was not time-barred.

10 The bankruptcy court further found that Guillory suffered
11 absolutely no prejudice from the timing of the Motion for
12 Damages. On this record, we agree. Once the Contempt Order
13 issued, Guillory was on notice that sanctions would follow. At
14 the hearing on contempt, the bankruptcy court made this clear,
15 and Debtors’ counsel expressly reserved the Debtors’ rights to
16 sanctions. The Contempt Order then more formally preserved the
17 Debtors’ rights. Guillory could not reasonably assume that the
18 Debtors would pursue and obtain a contempt determination, but
19 then stop short of recovering actual damages. Guillory’s
20 argument as to the delay is also disingenuous. As the
21 bankruptcy court observed and the record confirms, the delay
22 resulted from De Vine’s assertion of § 523 counterclaims against
23 the Debtors. On this record, the gap in time between the
24 Contempt Order and the Motion for Damages does not reflect

25
26 ⁵ Even if the Guillory Damages Award was subject to Civil
27 Rule 54(d) (2), the bankruptcy court was well within its
28 discretion to enlarge the time to file the motion pursuant to
Rule 9006. The record is consistent with the conclusion that,
if necessary, the bankruptcy court implicitly did so.

1 unscrupulous conduct or any nefarious motive.

2 **B. Fees and costs included in the Guillory Damages Award.**

3 Guillory next argues that the bankruptcy court erred when
4 it included in the Guillory Damages Award fees incurred in the
5 Collection Action and for reopening the bankruptcy case. She
6 contends that the only appropriate fees were those incurred to
7 enforce the Bankruptcy Code and that an appropriate award should
8 not include fees to reopen the bankruptcy case to pursue the
9 contempt proceeding.

10 If a bankruptcy court finds that a party willfully violated
11 the discharge injunction, it may award sanctions in the form of
12 compensatory damages, including attorney's fees. Espinosa v.
13 United Student Aid Funds, Inc., 553 F.3d 1193, 1205 n.7 (9th
14 Cir. 2008), aff'd, 559 U.S. 260 (2010); In re Dyer, 322 F.3d at
15 1195. Here, the fees incurred in the Collection Action
16 constituted damages that flowed from the discharge injunction
17 violation; had De Vine - aided by Guillory's representation -
18 not commenced and then continued to litigate the Collection
19 Action, the Debtors would not have incurred attorneys fees and
20 costs in defending the discharge violative causes of action.
21 And, to the extent that the bankruptcy court subsequently deemed
22 two of the six state court causes of action non-violative of the
23 discharge injunction, counsel accounted for that by requesting
24 only 66% of the fees and costs incurred.

25 It is true that reopening the bankruptcy case was not
26 required to consider a discharge injunction violation.
27 Bankruptcy counsel's time itemization reflects minimal fees and
28 costs of \$1,044.30 in relation to reopening the case, while

1 state court counsel's time itemization includes no fees or costs
2 in connection with the motion to reopen. Thus, even if the fees
3 incurred to reopen the case were improperly included as
4 compensatory damages, the Damages Award reflected a built-in
5 discount that accounted for more than those fees. As was true
6 with state court counsel, the Debtors requested only 66% of
7 bankruptcy counsel's fees. Error, if any, was harmless.

8 **C. Entry of the Damages Award only against Guillory.**

9 Guillory complains briefly that the bankruptcy court failed
10 to explain the entry of the Damages Award solely against her,
11 when the Debtors moved for an award against both her and
12 De Vine. The record belies Guillory's complaint. At the final
13 hearing, however, Debtors' counsel clarified that the Guillory
14 Motion for Damages related only to Guillory, as the Debtors had
15 already obtained their requested relief against De Vine.
16 Guillory was present at the hearing; her complaint on this point
17 is meritless.

18 **D. Whether the Guillory Damages Award provided an**
19 **impermissible double recovery or unfair windfall.**

20 Finally, Guillory argues that the bankruptcy court abused
21 its discretion by twice awarding the same fees and costs as
22 damages. We agree in part. The awards do not constitute an
23 impermissible double recovery or unfair windfall. In the
24 Guillory Motion for Damages, the Debtors initially sought an
25 award against De Vine and Guillory based on joint and several
26 liability. In light of the award of \$53,077.51 against De Vine,
27 however, the Debtors eventually clarified that they sought
28 relief only as to Guillory; this avoided a double recovery by

1 the Debtors. That the Damages Award includes damages already
2 awarded against De Vine reflects intended joint and several
3 liability among Guillory and De Vine for a portion of the
4 Debtors' damages, or \$20,822.50. It is of no moment that the
5 awards were entered separately and individually against the co-
6 contemnors. Apparently Guillory does not appreciate that she is
7 neither jointly nor severally liable with De Vine for the fees
8 and costs incurred by the Debtors in defending against the
9 counterclaims - a not insignificant difference of \$32,255.01.

10 We also conclude, however, that the Guillory Damages Award
11 is ambiguous. It is not facially clear that Guillory is jointly
12 and severally liable with De Vine; any third party, including a
13 hypothetical judgment purchaser, would not appreciate from the
14 face of either award that any shared liability exists.
15 Understanding this critical fact would require reading the
16 Guillory Motion for Damages and the transcript of the September
17 2014 hearing. Guillory is entitled to an award that is clear on
18 its face. To the extent De Vine pays the Debtors on account of
19 their damages award against him, they cannot recover against
20 Guillory.⁶

21 As a result, we VACATE the Guillory Damages Award and
22 REMAND to the bankruptcy court for the limited purpose of
23 entering an order that clearly states that Guillory's liability
24 is joint and several with that of De Vine under the prior
25 contempt award to the extent of \$20,822.50.

27 ⁶ We take no position as to what rights De Vine might have
28 against Guillory in such a case.

CONCLUSION

Based on the foregoing, we AFFIRM the bankruptcy court's decision to award damages, but VACATE the award and REMAND for the bankruptcy court to clarify that the Guillory Damages Award is joint and several with the Debtors' damages award against De Vine.