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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. NV-15-1380-BDF
)
 6 GIL KABILING and LINDA) Bk. No. 2:11-bk-11458-LED
 KABILING,)
 7)
 Debtors.)
 8 _____)
)
 9 DESERT PINE VILLAS HOMEOWNERS)
 ASSOCIATION,)
 10)
 Appellant,)
 11)
 v.) O P I N I O N
 12)
 13 GIL KABILING; LINDA KABILING,)
)
 Appellees.)
 14 _____)

Argued and Submitted on May 19, 2016
at Las Vegas, Nevada

Filed - June 14, 2016

Appeal from the United States Bankruptcy Court
for the District of Nevada

Honorable Laurel E. Davis, Bankruptcy Judge, Presiding

Appearances: _____
 Steven T. Loizzi, Jr. of Alessi & Koenig, LLC,
 argued for appellant Desert Pine Villas Homeowners
 Association; Malik W. Ahmad of the Law Office of
 Malik W. Ahmad argued for Appellees Gil Kabiling
 and Linda Kabiling.

Before: BARASH,¹ DUNN, and FARIS, Bankruptcy Judges.

¹ Hon. Martin R. Barash, United States Bankruptcy Judge
 for the Central District of California, sitting by designation.

1 BARASH, Bankruptcy Judge:
2

3 Secured Creditor Desert Pine Villas Homeowners Association
4 appeals from the bankruptcy court's order finding it in contempt
5 for violating the section 524² discharge injunction and awarding
6 compensatory damages in favor of debtors, Gil Kabiling and Linda
7 Kabiling. We AFFIRM the bankruptcy court's judgment.

8 **FACTUAL BACKGROUND**

9 **A. Prepetition Events and the Debtors' Chapter 7 Bankruptcy**
10 **Case**

11 Appellees Linda Kabiling ("Linda")³ and her then-husband,
12 Gil Kabiling ("Gil," and with Linda, the "Debtors"), owned a
13 condominium located in Las Vegas, Nevada (the "Property"), which
14 was part of a common interest development. The Debtors used the
15 Property as a rental property and resided elsewhere. The
16 Property was subject to a Declaration of Covenants, Conditions,
17 and Restrictions ("CC&Rs") in favor of Appellant Desert Pine
18 Villas Homeowners Association ("Desert Pines"). The CC&Rs
19 require homeowners, such as the Debtors, to pay regular
20 homeowners association ("HOA") assessments and grant Desert Pines
21 a lien against each condominium unit for any delinquent
22 assessments, late fees, interest, and collection fees and costs.
23 At some point in time prior to filing their bankruptcy case, the
24

25 ² Unless specified otherwise, all chapter and section
26 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.

27 ³ Because both of the Debtors retain the same surname, we
28 refer to them by their first names to identify them. No
disrespect is intended by their first name references.

1 Debtors became delinquent in paying assessments to Desert Pines
2 and liens arose against the Property to the extent of those
3 delinquencies. The Debtors received collection notices from
4 Desert Pines, and from counsel for Desert Pines, Alessi & Koenig,
5 LLC ("Alessi & Koenig").

6 On February 1, 2011, the Debtors filed a voluntary chapter 7
7 petition (the "Petition Date") along with a Statement of
8 Intention asserting that they would abandon the Property. On
9 their Schedule F, the Debtors listed a debt owed to "original
10 creditor Desert Pine Villas / 6134 Pine Villa Ave. #103/HO
11 #23141" for assessor's parcel number 138-11-517-007 in care of
12 "Alessi & Koenig, LLC, 9500 W. Flamingo Rd., Suite 100, Las
13 Vegas, NV 89147."

14 The Debtors received their discharge on June 28, 2011. A
15 discharge order, including an "Explanation of Bankruptcy
16 Discharge in a Chapter 7 Case" (the "Discharge Order"), was
17 mailed to creditors on June 30, 2011, by the Bankruptcy Noticing
18 Center. The Discharge Order includes the following admonition:

19 The discharge prohibits any attempt to collect from the
20 debtor a debt that has been discharged. For example, a
21 creditor is not permitted to contact a debtor by mail,
22 phone, or otherwise, to file or continue a lawsuit, to
23 attach wages or other property, or to take any other
24 action to collect a discharged debt from the
25 debtor . . . A creditor who violates this order can be
26 required to pay damages and attorney's fees to the
27 debtor.

24 Among the entities served with the Discharge Order was "Alessi &
25 Koenig, LLC, 9500 W. Flamingo Rd., Suite 100, Las Vegas, NV
26 89147-5720."

27 ///

28 ///

1 **B. Post-discharge Events and the Filing of the Quiet Title**
2 **Action**

3 Desert Pines nonjudicially foreclosed on its HOA liens in
4 2013 and thereby acquired title to the Property. On December 15,
5 2014, in the District Court for Clark County Nevada, Desert
6 Pines, through its counsel, Alessi & Koenig, filed a complaint
7 against the Debtors and three additional named defendants (the
8 "Complaint") seeking to quiet title to the Property and confirm
9 that it held good title to the Property based on its nonjudicial
10 foreclosure in 2013 (the "Quiet Title Action"). The Complaint
11 alleged that the Debtors were "the former record owners of the"
12 Property, that Linda took title to the Property in 2005, and that
13 Linda was indebted to Desert Pines:

14 22. Defendant Linda . . . failed to pay her regular
15 assessments and further failed to comply with other
16 requirements set forth in the CC&Rs and other related
governing documents.

17 * * *

18 30. Defendant Linda . . . failed to meet her
19 obligations to pay assessments pursuant to CC&Rs and
20 NRS 116, et al.

21 The Complaint also included a demand for attorneys' fees to
22 be awarded against the Debtors and their co-defendants:

23 41. It has been necessary for Plaintiff to employ the
24 legal services of [Alessi & Koenig], as duly licensed
25 and practicing attorneys in the State of Nevada to file
26 and litigate this action, and reasonable attorneys'
27 fees should be awarded to Plaintiff, to be paid by
28 Defendants.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for judgment against
Defendants and each them as follows:

* * *

3. For reasonable attorneys' fees

Desert Pines served the Complaint on the Debtors, who
thereafter retained counsel to respond on their behalf. The

1 Debtors' counsel sent a January 26, 2015 letter to Alessi &
2 Koenig alleging that the filing of the Complaint violated the
3 discharge injunction. Alessi & Koenig's first substantive
4 response to this allegation consisted of an April 2, 2015 email
5 from Steven Loizzi of Alessi & Koenig (the "A&K Email"),
6 acknowledging that the Discharge Order applied to the prepetition
7 HOA delinquency but denying that the Complaint violated the
8 discharge injunction:

9 THIS CASE DOES NOT SEEK MONEY, SET OFF, PROPERTY, OR
10 ANYTHING ELSE FROM YOUR CLIENTS . . . our action is NOT
11 intended to collect, recover, or offset any debt as a
12 personal liability of the debtors . . . again, we are
not trying to collect any debt from the debtors. The
discharge eliminated the personal liability of the
debtors for the HOA assessments

13 (Emphasis in original).

14 After reopening their bankruptcy case, the Debtors filed
15 their motion to have Desert Pines found in contempt based on the
16 filing and service of the Complaint (the "Debtors' Contempt
17 Motion"). The bankruptcy court conducted an initial hearing on
18 the Debtors' Contempt Motion on June 30, 2015, and thereafter
19 conducted an evidentiary hearing on August 6, 2015 (the
20 "Evidentiary Hearing"). The parties stipulated to the admission
21 of various exhibits; both Debtors and Harold Barling, president
22 of the board of directors of Desert Pines, testified. At the
23 conclusion of the Evidentiary Hearing, the bankruptcy court took
24 the matter under submission.

25 On October 20, 2015, the court issued its memorandum of
26 decision finding that Desert Pines (1) knew of the existence and
27 scope of the Discharge Order and (2) intended to file and serve
28 the Complaint on the Debtors. The bankruptcy court determined

1 that the filing and service of the Complaint violated the
2 Discharge Order because it was based on Desert Pines' prepetition
3 relationship with the Debtors and included an attorneys' fee
4 demand that appeared to arise out of discharged claims. The
5 bankruptcy court found Desert Pines in contempt and held it
6 liable for the Debtors' compensatory damages in the amount of
7 \$8,928.00. Desert Pines timely appealed.

8 **JURISDICTION**

9 The bankruptcy court had jurisdiction under 28 U.S.C.
10 §§ 1334 and 157(b) (2) (O). We have jurisdiction under 28 U.S.C.
11 § 158.

12 **ISSUE**

13 Whether the bankruptcy court erred when it determined that
14 Desert Pines willfully violated the discharge injunction.

15 **STANDARDS OF REVIEW**

16 The bankruptcy court's decision to impose civil contempt
17 sanctions for a violation of the discharge injunction is reviewed
18 for an abuse of discretion. Nash v. Clark Cty. Dist. Attorney's
19 Office (In re Nash), 464 B.R. 874, 878 (9th Cir. BAP 2012).
20 Under the abuse of discretion standard, the first step is to
21 determine de novo whether the court applied the correct legal
22 rule. United States v. Hinkson, 585 F.3d 1247, 1261-62 (9th Cir.
23 2009) (en banc). If it failed to do so, it abused its
24 discretion. Mujica v. AirScan, Inc., 771 F.3d 580, 589 (9th Cir.
25 2014). If the court applied the correct legal rule, the second
26 step is to determine whether the court's application of the law
27 to the facts was: "(1) 'illogical,' (2) 'implausible,' or
28 (3) without 'support in inferences that may be drawn from the

1 record.'" Id. (quoting Hinkson, 585 F.3d at 1262).

2 **DISCUSSION**

3 A discharge in a bankruptcy case "operates as an injunction
4 against the commencement or continuation of an action, the
5 employment of process, or an act, to collect, recover or offset
6 any [prepetition] debt as a personal liability of the debtor."

7 § 524(a)(2). A violation of this discharge injunction is
8 enforced through the court's civil contempt authority under
9 section 105(a). Renwick v. Bennett (In re Bennett), 298 F.3d
10 1059, 1069 (9th Cir. 2002). The debtor has the burden of
11 proving, by clear and convincing evidence, that the offending
12 creditor knowingly and willfully violated the discharge
13 injunction. ZiLOG, Inc. v. Corning (In re ZiLOG, Inc.), 450 F.3d
14 996, 1007 (9th Cir. 2006). The offending creditor acts knowingly
15 and willfully if (1) it knew the discharge injunction was
16 applicable and (2) it intended the actions which violated the
17 injunction. Id.

18 With respect to the first prong, a creditor cannot be held
19 in contempt for violating a discharge injunction unless it has
20 actual knowledge of the injunction, which is a question of fact.
21 ZiLOG, 450 F.3d at 1008. If the creditor disputes that it had
22 such knowledge, an evidentiary hearing is required. Id. Actual
23 knowledge of the discharge injunction does not end the inquiry,
24 however, as the creditor also must be aware that its claim
25 against the debtor was subject to the discharge injunction.
26 Emmert v. Taggart (In re Taggart), 548 B.R. 275, 288 (9th Cir.
27 BAP 2016). "Whether a party is aware that the discharge
28 injunction is applicable to his or her claim is a fact-based

1 inquiry which implicates a party's subjective belief, even an
2 unreasonable one." Id.

3 With respect to the second prong, courts employ the same
4 analysis regarding violations of the discharge injunction as they
5 do with violations of the automatic stay. Id. The focus is on
6 whether the creditor's conduct violated the injunction and
7 whether that conduct was intentional; it does not require a
8 specific intent to violate the injunction. Knupfer v. Lindblade
9 (In re Dyer), 322 F.3d 1178, 1191 (9th Cir. 2003) (citing Hardy
10 v. United States (In re Hardy), 97 F.3d 1384, 1390 (11th Cir.
11 1996); and Havelock v. Taxel (In re Pace), 67 F.3d 187, 191 (9th
12 Cir. 1995)).

13 The bankruptcy court applied the correct legal standard in
14 determining whether Desert Pines willfully violated the Discharge
15 Order. The bankruptcy court expressly cited to ZiLOG and its
16 progeny for the two-part test to determine whether the knowing
17 and willful standard had been met. After conducting an initial
18 hearing on the Debtors' Contempt Motion, the bankruptcy court
19 conducted an evidentiary hearing at which the parties were
20 allowed to present live testimony and submit stipulated
21 documentary evidence. The evidentiary record in this case
22 supports the bankruptcy court's ultimate conclusion that Desert
23 Pines knew that the Discharge Order applied and that Desert Pines
24 intended the actions that violated the discharge injunction.

25 **A. Desert Pines Knew That the Discharge Injunction Applied to**
26 **its Prepetition Claims Against the Debtors.**

27 Desert Pines does not dispute that it had actual knowledge
28 of the Discharge Order entered in the Debtors' bankruptcy case on

1 June 28, 2011. Desert Pines admits that the Debtors listed
2 Alessi & Koenig on their Schedule F as an agent for Desert Pines
3 with respect to the Property. The record is clear that Alessi &
4 Koenig was served on June 30, 2011, by the Bankruptcy Noticing
5 Center with a copy of the Discharge Order at Alessi & Koenig's
6 address listed on Schedule F. Desert Pines admits that Alessi &
7 Koenig received the Discharge Order and admits that Alessi &
8 Koenig represents Desert Pines with respect to the Debtors and
9 the Property. Indeed, at the Evidentiary Hearing, Desert Pines'
10 president, Harold Barling, acknowledged that Desert Pines had
11 been notified of the Debtors' discharge either directly or
12 through Alessi & Koenig. The bankruptcy court's conclusion that
13 Desert Pines had actual knowledge of the Discharge Order is
14 supported by the record and is neither illogical nor implausible.

15 Desert Pines, moreover, does not assert that it believed
16 that its prepetition claim against the Debtors was excepted from
17 the discharge. There is ample evidence in the record that Desert
18 Pines knew that the Discharge Order applied to its prepetition
19 claims against the Debtors. The bankruptcy court quoted at
20 length from the Discharge Order served on Alessi & Koenig
21 regarding the scope of the injunction. At the Evidentiary
22 Hearing, Mr. Barling testified that he knew that the entry of the
23 bankruptcy discharge precluded Desert Pines from collecting
24 delinquent sums owed by the Debtors. After filing the lawsuit,
25 Alessi & Koenig sent an email to the Debtors' counsel which
26 expressly states that the "discharge eliminated the personal
27 liability of the debtors for the HOA assessments." These
28 statements corroborate Mr. Barling's testimony that Desert Pines

1 knew that the Discharge Order meant Desert Pines could not try to
2 collect the prepetition delinquent assessments from the Debtors.
3 Thus, the bankruptcy court's conclusion that Desert Pines knew
4 that the Discharge Order applied to its prepetition claims
5 against the Debtors is supported by the record and is neither
6 illogical nor implausible.

7 **B. Desert Pines Intentionally Filed the Complaint Which**
8 **Violated the Discharge Injunction.**

9 1. Desert Pines Acknowledges That It Filed and Served the
10 Complaint Against the Debtors.

11 At the Evidentiary Hearing, Mr. Barling testified that
12 Desert Pines retained Alessi & Koenig to file the Quiet Title
13 Action and that the lawsuit was a prerequisite to obtaining title
14 insurance to sell the Property. He also testified to his
15 understanding that quieting title required providing notice of
16 the quiet title action to the Debtors in the event they wished to
17 intervene. During oral argument at the June 30, 2015 hearing,
18 counsel for Desert Pines specifically admitted that Desert Pines
19 filed the Complaint in the Quiet Title Action, that it named the
20 Debtors as defendants, and that it sought recovery of attorneys'
21 fees and costs. Thus, the record supports the bankruptcy court's
22 conclusion that Desert Pines intended to file the Quiet Title
23 Action. The only remaining question is whether the filing of the
24 Complaint violated the Discharge Order.

25 2. The Complaint Violated the Discharge Injunction.

26 Desert Pines argues that the Complaint could not have
27 violated the Discharge Order because it sought only a declaration
28 that it held good title to the Property and did not seek to
collect, recover, or offset any of the delinquent prepetition HOA

1 assessments.

2 The mere filing of a complaint against a debtor by a
3 prepetition creditor does not necessarily violate the discharge
4 injunction. For example, pursuing a post-discharge lawsuit in
5 which the debtor is named as a putative party to collect from a
6 collateral source, such as an insurance policy or an uninsured
7 employers' fund, does not violate section 524 provided "the
8 plaintiff makes it clear that it is not naming the debtor as a
9 party for anything other than formal reasons." Ruvacalba v.
10 Munoz (In re Munoz), 287 B.R. 546, 550 (9th Cir. BAP 2002)
11 (citing Patronite v. Beeney (In re Beeney), 142 B.R. 360, 363
12 (9th Cir. BAP 1992)).

13 But that is not the case here. The Complaint repeatedly
14 alleges that Linda failed to pay her HOA assessments to Desert
15 Pines and utterly fails to mention that the Debtors' prepetition
16 delinquencies had been discharged under section 524(a). Further,
17 the Complaint makes no attempt to communicate that the Debtors
18 were named only as putative parties, that no amounts were being
19 sought from the Debtors, or that the only circumstance in which
20 fees might be sought was if the Debtors elected to oppose the
21 relief requested.⁴ To the contrary, the Complaint alleges that
22 Desert Pines was required to incur attorneys' fees to file the

24 ⁴ The bankruptcy court noted that Desert Pines' counsel
25 could have contacted the Debtors prior to filing the Complaint to
26 explain the quiet title relief and request that the Debtors file
27 a "Disclaimer of Interest" with respect to the Property. Counsel
28 rejected the suggestion because "there are thousands of these
quiet title actions filed every single day No one does
that in any situation where there's been a bankruptcy because
it's only a title action." Hr'g Tr. (June 30, 2015) at 11:19-23.

1 action and prays for a fee award against each of the named
2 defendants, including the Debtors. Nothing within the four
3 corners of the Complaint indicates that Desert Pines was not
4 seeking an attorneys' fee award from the Debtors.

5 Desert Pines argues that it should not be held in contempt
6 because the Discharge Order does not prohibit it from seeking
7 attorneys' fees in a post-discharge lawsuit against the Debtors.
8 This argument is without merit. The argument is premised on
9 (1) an incomplete description of the applicable law and (2) the
10 incorrect assumption that the attorneys' fees asserted in the
11 Complaint were clearly post-discharge debts.

12 A chapter 7 discharge releases the debtor from personal
13 liability for debts arising "before the date of the order for
14 relief under this chapter." § 727(b). A "debt" means a
15 liability on a claim. § 101(12). While state law ordinarily
16 determines whether a claim exists, federal law determines whether
17 such claim arose prepetition or postpetition. SNTL Corp. v.
18 Centre Ins. Co. (In re SNTL Corp.), 571 F.3d 826, 839 (9th Cir.
19 2009); ZiLOG, 450 F.3d at 1000.

20 The general rule in the Ninth Circuit is that "a claim
21 arises, for purposes of discharge in bankruptcy, at the time of
22 the events giving rise to the claim, not at the time the
23 plaintiff is first able to file suit on the claim." O'Loughlin v.
24 Cty. of Orange, 229 F.3d 871, 874 (9th Cir. 2000) (plaintiff's
25 claims against debtor were discharged to the extent based on
26 pre-discharge violations of the Americans with Disabilities Act
27 despite plaintiff not receiving right-to-sue letter until
28 post-discharge, but claims based on post-discharge violations

1 were not discharged).⁵

2 Desert Pines' demand for attorneys' fees in the Quiet Title
3 Action appears to be based on prepetition events. The Complaint
4 alleges: (1) Linda took title to the Property in 2005; (2) Linda
5 failed to pay assessments; (3) by operation of the CC&Rs, Desert
6 Pines obtained a lien against the Property to the extent of such
7 delinquent assessments, late fees, interest, and collection fees
8 and costs; and (4) Desert Pines foreclosed nonjudicially on the
9 Property in 2013. Desert Pines does not dispute that the
10 delinquent assessments arose prior to the Petition Date. Thus,
11 the only relationship described in the Complaint between the
12 Debtors and the Property is based on pre-discharge circumstances.

13 Moreover, the Complaint does not identify any postpetition
14 conduct by the Debtors, any postpetition default by the Debtors,
15 or any postpetition contract between Desert Pines and the Debtors
16 on which the Quiet Title Action was based. It appears that --
17 other than the 2013 nonjudicial foreclosure -- the only events on
18 which that action could be based took place prepetition. Thus,
19 Desert Pines' demand for attorneys' fees in the Complaint appears
20 to be based on those events and discharged obligations. Under
21 O'Loughlin, Desert Pines' demand for attorneys' fees is reasonably
22 construed as an attempt to collect a claim that arose

23
24 ⁵ A narrow exception to this rule, not applicable here,
25 recognizes that even if a creditor's underlying substantive claim
26 against the debtor arose prepetition, postpetition attorneys'
27 fees "are not discharged where post-petition, the debtor
28 voluntarily commences litigation or otherwise [postpetition]
voluntarily 'return[s] to the fray'" of litigation commenced
prepetition. Boeing N. Am., Inc., v. Ybarra (In re Ybarra), 424
F.3d 1018, 1026 (9th Cir. 2005).

1 pre-discharge.

2 It does not matter whether Desert Pines believed in good
3 faith that including a demand for attorneys' fees in the
4 Complaint would not violate the discharge injunction. Dyer, 322
5 F.3d at 1191; Taggart, 548 B.R. at 287. By including allegations
6 regarding prepetition debts of the Debtors, failing to disclose
7 that those debts were discharged, and failing to make explicit
8 that the Debtors were named only as putative parties from whom no
9 sums were sought, Desert Pines violated the discharge
10 injunction.⁶ The bankruptcy court did not abuse its discretion
11 in reaching this conclusion and finding Desert Pines in contempt.

12 CONCLUSION

13 For the reasons stated, we AFFIRM the bankruptcy court's
14 judgment.

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20 ⁶ In its opening brief, Desert Pines also complains that
21 the Debtors' counsel "sent an extortion letter" to Alessi &
22 Koenig allegedly in violation of the Rules of Professional
23 Conduct. The relevance of Desert Pines' argument is unclear.
24 Section 524(a) includes express anti-waiver provisions and
25 therefore nothing a debtor does, or fails to do, post-discharge
26 diminishes or abrogates the discharge injunction. Roos v. Kimmel
27 (In re Kimmel), 378 B.R. 630, 638 (9th Cir. BAP 2007) ("[T]he
28 chapter 7 discharge is absolute and, in light of the anti-waiver
provisions of § 524(a), does not admit of an equitable exception
that would permit it to be waived by postdischarge conduct.");
Lone Star Security & Video, Inc. v. Gurrola (In re Gurrola), 328
B.R. 158, 172 (9th Cir. BAP 2005) ("The gravamen of our analysis
is that § 524(a) eliminates the revival of the discharged debt as
a remedy for postpetition misconduct.").