

DEC 15 2016

NOT FOR PUBLICATION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. WW-15-1416-JuTaKu
)	
JESSICA ARLENE NELSON,)	Bk. No. 11-12572-MLB
)	
Debtor.)	
_____)	
)	
DARRYL PARKER,)	
)	
Appellant,)	
v.)	MEMORANDUM*
)	
JESSICA ARLENE NELSON,)	
)	
Appellee.)	
_____)	

Argued and Submitted on November 17, 2016
at Pasadena, California

Filed - December 15, 2016

Appeal from the United States Bankruptcy Court
for the Western District of Washington

Honorable Marc L. Barreca, Bankruptcy Judge, Presiding

Appearances: Appellant Darryl Parker argued pro se; Marc S. Stern argued for appellee Jessica Arlene Nelson.

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

Memorandum by Judge Jury
Dissent by Judge Kurtz

* 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 This appeal marks the second occasion in which this case
2 has come before the Panel. In the first proceeding, the
3 bankruptcy court found appellant, Darryl Parker (Mr. Parker), in
4 contempt for violating the § 524¹ discharge injunction and
5 awarded sanctions to appellee-debtor, Jessica Arlene Nelson
6 (Debtor), consisting of \$2,048.45 in attorney's fees and costs.
7 Mr. Parker appealed to this Panel. The Panel vacated the
8 judgment and remanded the matter to the bankruptcy court to make
9 findings consistent with the Ninth Circuit's decision in Zilog,
10 Inc. v. Corning (In re Zilog, Inc.), 450 F.3d 996, 1007 (9th
11 Cir. 2006).

12 On remand, following an evidentiary hearing, the bankruptcy
13 court found the Zilog standards met and entered an order finding
14 Mr. Parker in contempt. The bankruptcy court later entered a
15 judgment awarding Debtor attorney's fees and costs of
16 \$17,887.50. Mr. Parker appeals from the order finding him in
17 contempt and the judgment awarding sanctions. For the reasons
18 stated below, we AFFIRM in part and REVERSE in part.

19 I. FACTS

20 A. Events Leading Up to the First Appeal Decision

21 In July 2010, Debtor retained Mr. Parker, a personal injury
22 attorney, to represent her on a contingency fee basis in actions
23 involving two auto accidents (Accident Claims) that occurred on
24 March 11 and 12, 2010. The actions were pending when Debtor
25

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 filed her chapter 7 petition on March 9, 2011. In Schedule B,
2 Debtor listed her interest in the Accident Claims with values
3 unknown. In Schedule C, she took exemptions in the Accident
4 Claims of \$21,625 and \$525. In Schedule F, she identified
5 Mr. Parker as an unsecured creditor owed \$9,000 for "costs for
6 prior representation," which related to his work for Debtor in
7 an unrelated malpractice matter.

8 On March 29, 2011, Mr. Parker emailed Debtor notifying her
9 that he was aware of her bankruptcy filing and reminding her
10 that she needed to schedule the Accident Claims. Debtor
11 contacted Mr. Parker with questions about how medical treatment
12 out of state would affect her Accident Claims and complained
13 that Mr. Parker had not responded to her multiple requests in
14 April and May 2011.² On June 9, 2011, Debtor terminated
15 Mr. Parker's employment.

16 Six days later, on June 15, 2011, Mr. Parker wrote a letter
17 to Berkley North Pacific (BNP), one of the insurance companies
18 involved, which stated: "Please be advised this office no
19 longer represents the [D]ebtor in regards to the March 11, 2011,
20 motor vehicle accident." Mr. Parker also asserted that he had
21 an attorney's lien of \$5,000 plus costs against any proceeds
22 from this claim. The letter did not state the amount of the
23 fees owed or whether the lien was for work done before or after
24 the bankruptcy petition was filed. Mr. Parker sent this letter
25

26 ² Mr. Parker asserts that he had numerous telephone
27 conversations with Debtor after March 28, 2011, while Debtor
28 asserts that March 28, 2011, was the last time that she
communicated with him.

1 approximately three months after the petition date and one month
2 before the discharge date, while the automatic stay of § 362(a)
3 was in effect.³

4 On July 18, 2011, Debtor received her discharge and on
5 July 22, 2011, the case was closed and the Accident Claims were
6 deemed abandoned to Debtor. Due to the discharge, the debt of
7 \$9,000 owed to Mr. Parker was discharged along with the debt
8 associated with the Accident Claims that Mr. Parker accrued
9 prepetition. The bankruptcy court mailed Mr. Parker, who was on
10 the court's mailing matrix, a copy of the Official Form 18
11 discharge order. Although Mr. Parker disputed receiving this
12 notice, he acknowledged that the address on the mailing matrix
13 was correct.

14 On March 1, 2012, Mr. Parker sent a second letter to BNP
15 referring to a conversation he had with a representative of the
16 office regarding Debtor's discharge:

17 Yesterday, February 27, 2012 we received a letter from
18 you alleging that our lien was discharged in
19 bankruptcy and that our lien was satisfied. I have no
20 idea where you obtained this information. We have a
21 lien for services rendered for Ms. Nelson in a matter
22 that was not discharged in bankruptcy. I do not know
23 the source of your information or what code section
24 you are relying on to make a claim that our lien was
25 discharged in bankruptcy.

26 Mr. Parker threatened action against BNP if it gave effect to
27 the discharge order by releasing all the settlement proceeds to
28 Debtor.

26 ³ Although there were two Accident Claims that were defended
27 by two insurance companies, the evidence in the record pertains
28 only to the claim assigned to BNP. There is no evidence with
respect to the other claim.

1 A July 9, 2012 email exchange between Debtor and a BNP
2 representative indicated that Mr. Parker continued to assert the
3 validity of his attorney's lien against the proceeds at that
4 time.

5 After her discharge, Debtor attempted to settle the
6 Accident Claims but learned that the pending settlements of the
7 claims could not be finalized until Mr. Parker's liens were
8 resolved. Debtor's counsel, Mr. Stern, contacted Mr. Parker
9 twice by letter informing him that his attorney's liens violated
10 the automatic stay and the discharge injunction. The first
11 letter was dated November 6, 2012, and another letter dated
12 December 6, 2012, followed. The second letter was sent by
13 certified mail, and the signed receipt was returned to
14 Mr. Stern's office showing that it had been delivered.
15 Mr. Parker did not respond to either letter.

16 On February 6, 2013, Debtor filed a motion seeking to hold
17 Mr. Parker in contempt for violation of the discharge injunction
18 and to declare his attorney's liens void. In a supporting
19 declaration, Debtor stated that Mr. Parker did not work on the
20 Accident Claims after she filed her bankruptcy petition.
21 Mr. Stern served Mr. Parker by mail with the motion for contempt
22 and notice of hearing at the address listed for Mr. Parker on
23 the court's mailing matrix. Mr. Parker did not respond.

24 On March 8, 2013 – the day of the scheduled contempt
25 hearing – Mr. Parker went to the bankruptcy court, but he was
26 advised that the hearing was vacated since he had not responded
27 and that the matter had already been ruled upon.

28 The bankruptcy court entered the contempt order against

1 Mr. Parker by default on March 26, 2013, finding him in contempt
2 and voiding his asserted attorney's liens. The order further
3 provided that "Debtor may serve a copy of this Order on any
4 insurance company or attorney for the purpose of informing them
5 so, and for the purpose of authorizing them to deal with the
6 Debtor or personal injury counsel without the interference of
7 Darryl Parker." The court struck out the portion of the order
8 which awarded \$1,000 in attorney's fees for the contempt and
9 replaced it with the following: "Should counsel believe
10 attorney's fees are appropriate, he may bring a separate motion
11 with appropriate evidentiary support as to the amount of fees
12 incurred." Neither the order nor a separate document contained
13 the bankruptcy court's findings of fact or conclusions of law on
14 the contempt.

15 On April 15, 2013, Mr. Stern filed a motion seeking the
16 approval of his attorney's fees in the amount of \$2,048.45
17 incurred for bringing the motion for contempt. This motion was
18 noticed for hearing on May 31, 2013, and Mr. Stern again served
19 the motion and notice of hearing on Mr. Parker at the address
20 listed on the mailing matrix.

21 On May 6, 2013, about six weeks after the contempt order
22 was entered, Mr. Parker filed a motion to set aside the order.
23 He later filed an opposition to the fee motion. In his motion
24 to vacate, Mr. Parker stated that he learned of the motion for
25 contempt before the March 8, 2013 hearing date, but when he
26 arrived at court he discovered that the hearing had been
27 stricken and the motion granted due to his failure to respond.

28 In late May 2013, the bankruptcy court heard Mr. Parker's

1 motion and his objection to Mr. Stern's request for attorney's
2 fees. The court denied his set-aside motion, granted the
3 requested fees and costs, and entered a judgment and order
4 consistent with its ruling on July 8, 2013.

5 On July 12, 2013, Mr. Parker filed a notice of appeal (NOA)
6 of the judgment and order denying his motion to set aside the
7 order of contempt and awarding attorney's fees. He filed an
8 amended NOA on July 17, 2013, which included the court's rulings
9 on March 26, 2013, and July 8, 2013.

10 On July 11, 2014, the Panel issued a Memorandum Decision
11 and on August 4, 2014, a final order and judgment was entered.
12 The BAP vacated the underlying contempt order and judgment and
13 remanded the matter to the bankruptcy court, instructing the
14 court to make findings of fact and conclusions of law pertaining
15 to the two-part test set forth in Zilog necessary to hold a
16 party in contempt for violation of the discharge injunction.

17 **B. The Decision on Remand**

18 **1. The Evidentiary Hearing**

19 On remand, the bankruptcy court held an evidentiary hearing
20 on March 16, 2015, to determine whether Mr. Parker's conduct met
21 the two-part test for contempt under Zilog. We briefly
22 summarize the relevant testimony elicited at the hearing.

23 Debtor testified that she had been paid \$40,000 on her two
24 Accident Claims but indicated that funds were still being held
25 in trust for payment of Mr. Parker's asserted liens.

26 Mr. Parker testified that on March 8, 2013, the day he
27 appeared for the hearing on Debtor's motion for contempt, he had
28 knowledge that Debtor had received a discharge because he went

1 to the clerk's office and saw a copy of the discharge order. He
2 also admitted that the address listed on the court's mailing
3 matrix to which the discharge order and Mr. Stern's letters were
4 sent was accurate and that he had received at least the letters.
5 However, he testified that he searched his office, but, due to
6 some clerical issues in his office, he had not actually seen the
7 letters until after the contempt motion was filed.

8 Mr. Parker also testified that he continued working on the
9 Accident Claims until Debtor terminated him, and that the
10 attorney's liens were for a combination of prepetition and
11 postpetition work. However, he did not testify about the total
12 amount of his fees nor did he provide specific evidence on the
13 amount of work he did prepetition versus postpetition.

14 After closing arguments, the bankruptcy court asked
15 Mr. Parker whether it was "unequivocal" that he was aware that
16 Debtor was issued her discharge.

17 MR. PARKER: I was on notice that there was a discharge
18 order when [Mr. Stern] filed the motion for contempt.
19 When I came into court that day when the contempt
20 hearing was supposed to be had, as of that day --
21 because when I learned that the hearing was not
22 scheduled because I hadn't responded, I went down to
23 the clerk's office. And as of that day, I knew that
24 the debtor had been discharged.

25 The court then asked Mr. Parker if he was still asserting
26 the lien: "[A]s we speak, are you not?" Mr. Parker responded
27 that he still did not know whether the Accident Claims were
28 discharged and then later clarified what he meant was: "[A]s we
sit here right now, I still do not know that my claim for fees
regarding the automobile accident was discharged in bankruptcy."
Mr. Parker further stated that he understood he was owed pre-

1 and postpetition fees. The bankruptcy court informed Mr. Parker
2 that it did not have any sort of clarity on what fees were
3 incurred prepetition and what fees were incurred postpetition.
4 The court then took the matter under advisement.

5 **2. The Bankruptcy Court's Ruling on Contempt**

6 On April 10, 2015, the bankruptcy stated its findings of
7 fact and conclusions of law on the record.

8 The court observed that under Washington law, Mr. Parker
9 did not have a lien against the auto accident settlement
10 proceeds until the insurance company received his letter
11 asserting the lien. Since the letter was sent on June 15, 2011,
12 after the petition date and prior to the entry of a discharge
13 order and while the case was open, the court found the lien void
14 as it was in violation of the automatic stay. § 362(a)(4)-(6).
15 The court noted that under the holding in Schwab v. Reilly,
16 560 U.S. 770, 774 (2010), the Accident Claims were property of
17 the estate at the time Mr. Parker sent the letter since Debtor
18 had claimed only a partial exemption in the asset.

19 The bankruptcy court also found that Mr. Parker's
20 prepetition unsecured claim for fees associated with the
21 Accident Claims was discharged on July 18, 2011, and that he had
22 not established the amount of any claim for postpetition
23 services.

24 Finally, the bankruptcy court found Mr. Parker in contempt
25 under the two-part test set forth in Zilog. On the knowledge
26 requirement, the court found that Mr. Parker had knowledge of
27 the discharge injunction as of March 8, 2013, when he arrived at
28 court for a hearing on the contempt motion and learned about the

1 discharge order. The court further observed that unlike the
2 creditors in Zilog who stayed their action pending the
3 bankruptcy court's resolution of the issue, Mr. Parker continued
4 the action "with his continued assertion of the lien up to and
5 at the time of the hearing." The bankruptcy court found that
6 Mr. Parker's continued assertion of the lien continued to impair
7 the settlement in Debtor's exempt Accident Claims by causing a
8 portion of the settlement funds to be held in trust. The court
9 reiterated that despite Mr. Parker's testimony that he had been
10 on notice of the discharge order as of March 8, 2013, he still
11 asserted the lien up until the evidentiary hearing which was two
12 years later. The bankruptcy court thus concluded that the
13 standards in Zilog for holding Mr. Parker in contempt were met.

14 On April 24, 2015, the bankruptcy court entered the order
15 holding that Mr. Parker's attorney's liens were void and finding
16 him in contempt of the discharge order. The court further
17 ordered that Debtor was entitled to actual damages, including
18 attorney's fees incurred in the matter after March 8, 2013, but
19 required that Debtor's counsel move separately to establish the
20 amount of the damages.

21 **3. The Bankruptcy Court's Award of Attorney's Fees**

22 On July 6, 2015, Mr. Stern moved for attorney's fees and
23 costs in the amount of \$17,887.50. Attached to the motion were
24 Mr. Stern's time records showing that he had spent 43.10 hours
25 at \$400 an hour for a total of \$17,240.00 and that his assistant
26 spent 4.90 hours at \$125 an hour for a total of \$612.50.

27 Mr. Parker objected to the fees on several grounds. He
28 re-argued the bankruptcy court's finding of contempt, asserting

1 that there was no evidence that he made any effort to collect on
2 the debt that Debtor owed him after he learned of the discharge
3 on March 8, 2013. He further argued there was no evidence that
4 he knew the bankruptcy discharge applied to the debt for work he
5 had done on the Accident Claims after the bankruptcy case was
6 filed. Mr. Parker also challenged Mr. Stern's hourly rate.
7 Last, Mr. Parker asserted that Mr. Stern was not entitled to
8 attorney's fees because his efforts after March 15, 2013, were
9 not for the purpose of protecting Debtor or enforcing the
10 discharge order by demonstrating contempt but were motivated
11 solely by his desire to maintain an award of attorney's fees and
12 an order of contempt.

13 Debtor argued in response that the bankruptcy court had
14 already found Mr. Parker in contempt and asserted that the award
15 of reasonable fees was appropriate.

16 In reply, Mr. Parker asserted that Mr. Stern was not
17 entitled to fees incurred on the previous appeal because Debtor
18 was not the prevailing party based on the holding in Am.
19 Servicing Co. v. Schwartz-Tallard (In re Schwartz-Tallard),
20 803 F.3d 1095, 1097 (9th Cir. 2015) (overruling Sternberg v.
21 Johnston, 595 F.3d 937 (9th Cir. 2010) and construing § 362(k)
22 to be a fee-shifting statute authorizing an award of attorney's
23 fees incurred in prosecuting an action for damages under the
24 statute, including fees incurred in successfully defending the
25 judgment on appeal).

26 On August 6, 2015, the bankruptcy court held a hearing on
27 the matter. The court found that the attorney's fees and costs
28 resulting from the violation of the discharge injunction were

1 those incurred between March 8, 2013, and April 24, 2015, the
2 date the contempt order was entered and the contemptuously
3 asserted lien voided, but excluding any fees during that period
4 which were associated with pursuing the damages based on
5 attorney's fees. The court further found that the costs and
6 attorney's fees (excluding fees solely related to seeking the
7 fee award) incurred within the period were reasonable and could
8 not have been mitigated by Debtor. Finally, the court allowed
9 Mr. Stern to supplement the record to support his hourly rate of
10 \$350-\$400 an hour.

11 On November 19, 2015, the bankruptcy court ruled on the
12 sanction request. The court found that the fees incurred by
13 Mr. Stern on Debtors' behalf through April 24, 2015, the date of
14 the contempt order, were reasonable. The court also found that
15 the Mr. Stern's rate was reasonable in the current local market
16 for someone with his experience. The court briefly addressed
17 whether the case of Schwartz-Tallard was applicable to fees
18 awarded for violation of the discharge injunction and indicated
19 that it was inclined to request further briefing on that issue.
20 Mr. Stern however waived the issue.

21 On December 4, 2015, the bankruptcy court entered a
22 judgment and order awarding sanctions to Debtor consisting of
23 \$17,887.50 in attorney's fees and costs. This appeal followed.

24 **II. JURISDICTION**

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

1 determining whether the bankruptcy court abused its discretion
2 we first determine de novo whether the trial court identified
3 the correct legal rule to apply to the relief requested and
4 then, if the correct legal standard was applied, we determine
5 whether the court's application of that standard was
6 "(1) illogical, (2) implausible, or (3) without support in
7 inferences that may be drawn from the facts in the record."
8 Loew, 593 F.3d at 1139.

9 V. DISCUSSION

10 A. Finality and Appealability of the Contempt Order

11 Initially, Debtor contends that Mr. Parker's appeal of the
12 contempt order, which was entered on April 24, 2015, was
13 untimely. Accordingly, we consider whether this order
14 constitutes a final, appealable order.

15 "A disposition is final if it contains 'a **complete** act of
16 adjudication,' that is, a full adjudication of the issues at
17 bar, and clearly evidences the judge's intention that it be the
18 court's final act in the matter.'" Brown v. Wilshire Credit
19 Corp. (In re Brown), 484 F.3d 1116, 1120 (9th Cir. 2007)
20 (emphasis in original). "'Evidence of intent consists of the
21 [o]rder's content and the judge's and parties [sic] conduct.'" Id.
22 Id. at 1121. The Ninth Circuit has recognized that "'[w]hile no
23 formal words of judgment are necessary to convey finality,'
24 there must be **some** dispositive language sufficient to put the
25 losing party on notice that his **entire** action - and not just a
26 particular motion or proceeding within the action - is over and
27 that his next step is to appeal." Id. (emphasis in original).

28 Here, the April 24, 2015 contempt order did not "clearly"

1 evidence the bankruptcy judge's intent that it be final.
2 Rather, it gave exactly the opposite notice because the court
3 ordered that Debtor was entitled to actual damages including
4 attorney's fees incurred after March 8, 2013, and ordered
5 Mr. Stern to move separately to establish the amount of the
6 damages. Accordingly, the ruling on its face demonstrated that
7 the court contemplated further action. See Id. (citing Nat'l
8 Distrib. Agency v. Nationwide Mut. Ins. Co., 117 F.3d 432, 434
9 (9th Cir. 1997) ("The rulings on their face demonstrate that the
10 court contemplated further action, and we will not venture to
11 guess whether the court subjectively intended otherwise.")).

12 In addition, the Ninth Circuit follows a "pragmatic
13 approach" to finality in bankruptcy. In re Brown, 484 F.3d at
14 1121. "[A] complete act of adjudication need not end the
15 entire case, but need only end any of the interim disputes from
16 which an appeal would lie.'" Id. On this point, Brown is
17 instructive. There, the debtor filed an adversary proceeding
18 alleging that the creditor had violated the stay. On cross-
19 motions for summary judgment, the bankruptcy court ruled from
20 the bench in favor of the creditor and, later that same day,
21 signed a minute entry stating that the creditor's motion was
22 granted and debtor's motion was denied, and taking under
23 advisement a related motion for sanctions. The debtor filed an
24 appeal nearly three months later when the court entered judgment
25 awarding sanctions against his counsel. The district court
26 dismissed the appeal from the summary judgment as untimely, and
27 debtor appealed. The Ninth Circuit reversed finding, among
28 other things, that the two motions – the one for summary

1 judgment and the other for sanctions – were intertwined and that
2 the motion for sanctions could not be characterized as involving
3 “discreet issue[s]” apart from the summary judgment motion.

4 Similarly, Debtor’s motion for contempt and later filed
5 motion for sanctions were intertwined. Debtor’s motion for
6 sanctions, which was based on the finding of contempt, simply
7 cannot be characterized as involving “discrete issue[s]” apart
8 from the contempt order itself. See Id. at 1122 (citing
9 Schulman v. State of Cal. (In re Lazar), 237 F.3d 967, 985 (9th
10 Cir. 2001) (“[B]ankruptcy court order is final, and thus
11 appealable, where it (1) resolves and seriously affects
12 substantive rights and (2) finally determines discrete issue to
13 which it is addressed.”)).

14 In the end, the Brown court noted: “Lest litigants be
15 misled about when their time to appeal begins to run, there must
16 be some ‘clear and unequivocal manifestation by the trial court
17 of its belief that the decision made, so far as it is concerned,
18 is the end of the case.’” 484 F.3d at 1222. Because there is
19 not that kind of clarity here, the April 24, 2015 contempt order
20 cannot be deemed a final, appealable order.

21 Thus, the contempt order became final on December 4, 2015,
22 when the bankruptcy court entered the judgment and order on
23 sanctions, and Mr. Parker’s appeal from that order was timely.
24 See In re Webb, 742 B.R. 665, 2012 WL 2329051, at *5 (6th Cir.
25 BAP Apr. 9, 2012) (Table). Accordingly, we have jurisdiction
26 over the appeal from the contempt order and the subsequent
27 judgment regarding the award of fees.

1 **B. The Merits**

2 In a chapter 7 case, with exceptions not relevant here,
3 "[t]he [bankruptcy] court shall grant the debtor a discharge."
4 § 727(a). When entered, that order "discharges the debtor from
5 all debts that arose before the date of the [bankruptcy
6 filing]." § 727(b). Section 524(a)(2) states that a discharge
7 "operates as an injunction against the commencement or
8 continuation of an action . . . to collect, recover or offset
9 any such debt as a personal liability of the debtor, whether or
10 not discharge of such debt is waived[.] Therefore, once Debtor
11 received her discharge, § 524(a)(2) operated as an injunction to
12 enjoin creditors from collecting a prepetition debt.

13 A party who knowingly violates the discharge injunction
14 under § 524(a)(2) can be held in contempt under § 105(a).
15 In re Zilog, 450 F.3d at 1007. To prove a sanctionable
16 violation, the debtor has the burden of showing that the
17 creditor "(1) knew the discharge injunction was applicable and
18 (2) intended the actions which violated the injunction.'" Id.;
19 see also In re Nash, 464 B.R. at 880 (quoting Espinosa v. United
20 Student Aid Funds, Inc., 553 F.3d 1193, 1205 n.7 (9th Cir.
21 2008)). This is so even if the creditors did not specifically
22 intend to violate the discharge injunction. See In re Dyer,
23 322 F.3d at 1191.

24 Clear and convincing evidence must be presented to show
25 that a creditor has violated the discharge injunction and that
26 sanctions are justified. In re Zilog, 450 F.3d at 1007;
27 In re Nash, 464 B.R. at 880. Clear and convincing proof "has
28 been defined as 'between a preponderance of the evidence and

1 proof beyond a reasonable doubt.'" Singh v. Holder, 649 F.3d
2 1161, 1165, n.7 (9th Cir. 2011). It requires that the evidence
3 presented by the party bearing the burden must be "highly
4 probable or reasonably certain." Black's Law Dictionary (10th
5 ed. 2014).

6 The record after remand does not convince us that Debtor
7 proved the Zilog elements by clear and convincing evidence.
8 With respect to the knowledge requirement, the bankruptcy court
9 found that Mr. Parker had knowledge of the discharge order at
10 least by March 8, 2013.⁴ However, standing alone, knowledge of
11 the discharge injunction is not enough. In this circuit, there
12 must be evidence showing that the alleged contemnor was aware of
13 the discharge injunction **and** aware that it applied to his or her
14 claim. Emmert v. Taggart (In re Taggart), 548 B.R. 275, 288
15 (9th Cir. BAP 2016). "Whether a party is aware that the
16 discharge injunction is applicable to his or her claim is a
17 fact-based inquiry which implicates a party's subjective belief,
18 even an unreasonable one." Id.

19 Here, the bankruptcy court never made an explicit finding
20 regarding Mr. Parker's knowledge about the applicability of the
21 discharge injunction to his fee claims nor is it apparent that
22 it conducted the necessary fact-based inquiry. On appeal, we
23 cannot assume that Mr. Parker was aware of the applicability of
24 the discharge injunction to his fee claims. Indeed, Mr. Parker
25

26 ⁴ Although there are numerous events prior to this date that
27 may have shown Mr. Parker's knowledge of the discharge
28 injunction, the bankruptcy court did not rely on those events
when making its decision.

1 continues to assert on appeal that he did not know whether the
2 discharge injunction applied to his fees for his postpetition
3 work.

4 He asserted throughout this case that his liens were based
5 on both pre and postpetition fees. Therefore, the scope of the
6 discharge injunction with respect to some of the fees was at
7 issue. Further, although Mr. Parker did not prove that he had
8 incurred postpetition fees, his failure to do so does not show
9 by clear and convincing evidence that he subjectively knew that
10 the discharge injunction applied to his claims.⁵ While we can
11 only surmise due to the lack of findings, the bankruptcy court
12 apparently found the knowledge requirement was met either
13 because it concluded that notice of the discharge injunction was
14 sufficient notice of its scope or, alternatively, the court
15 improperly shifted the burden to Mr. Parker to disprove the
16 applicability of the discharge order to his claims; i.e., prove
17 that they were postpetition claims.

18 The second Zilog element requires that Mr. Parker intended
19 the actions which violated the discharge injunction. The
20 bankruptcy court found that intent was shown because Mr. Parker
21 failed to release his liens after he learned of the discharge on
22 March 8, 2013. However, there is no evidence in the record
23 showing that Mr. Parker affirmatively sought to enforce his
24 liens after that date. Instead, his testimony was that he
25 thought the bankruptcy court's order finding him in contempt

26
27 ⁵ Although the bankruptcy court stated Mr. Parker did not
28 delineate his pre- and postpetition work, it did not make a
finding that no work was done postpetition.

1 voided the liens and thus, implicitly, there was nothing left
2 for him to do to remedy a discharge violation.

3 The postpetition creation of a lien violates § 362(a)(4)
4 and renders any such lien void as a matter of law. Schwartz v.
5 United States (In re Schwartz), 954 F.2d 569, 571 (9th Cir.
6 1992) (actions taken in violation of the automatic stay are
7 void, not voidable). A close examination of the March 26, 2013
8 contempt order shows that the bankruptcy court voided the liens
9 because Mr. Parker obtained them in violation of the automatic
10 stay of § 362. Accordingly, Mr. Parker could not be faulted for
11 failing to affirmatively release his liens after those liens
12 were voided by bankruptcy order. Accordingly, the bankruptcy
13 court's finding that Mr. Parker continued to violate the
14 discharge injunction by failing to release his liens a full two
15 years after he had knowledge of the discharge order is not
16 plausible or supported by inferences drawn from the facts in the
17 record.

18 In sum, on this record Debtor did not meet her burden of
19 showing by clear and convincing evidence that the Zilog
20 requirements were met for holding Mr. Parker in contempt. Due
21 to our conclusion, it is unnecessary for us to address the
22 issues raised pertaining to the sanctions.

23 VI. CONCLUSION

24 Because appellant's brief did not address the part of the
25 order on appeal which voided the attorney's lien as a violation
26 of § 362, that part of the order is affirmed. Therefore, we
27 AFFIRM in part and REVERSE in part.

28 DISSENT BEGINS ON NEXT PAGE

1 KURTZ, Bankruptcy Judge, Dissenting.

2 Unlike my colleagues, I perceive no reversible error. The
3 bankruptcy court cited In re ZiLOG, Inc. and correctly stated
4 and applied ZiLOG's legal standard for the imposition of
5 discharge violation contempt sanctions. Moreover, the
6 bankruptcy court expressly found that Nelson had satisfied both
7 elements of the ZiLOG test, and these findings were not clearly
8 erroneous. They were supported by the record when viewed in its
9 entirety, and they were logical and plausible. Accordingly, I
10 respectfully dissent.

11 While the majority decision amply sets forth the relevant
12 facts, I reiterate certain facts to highlight their importance.
13 This is the Panel's second appellate review of this matter. In
14 2014, the Panel vacated the bankruptcy court's prior contempt
15 and sanctions rulings due to insufficient findings, and we
16 remanded so the bankruptcy court could make findings consistent
17 with In re ZiLOG, Inc. Yet our 2014 disposition went further
18 than that. It also vacated the bankruptcy court's ruling
19 declaring Parker's attorney fees liens void for violating the
20 § 362 automatic stay.

21 Consequently, between the date of our 2014 decision and the
22 date of the bankruptcy court's order on remand in April 2015,
23 there was no order in effect declaring Parker's liens void. In
24 fact, the bankruptcy court found that Parker continued to assert
25 his liens up through the time of the bankruptcy court's April
26 2015 ruling and that, as a result of this assertion, a portion
27 of the proceeds from the settlement of Nelson's accident claims
28 continued to be withheld from her. This finding is a reasonable

1 inference based on the evidence in the record. Also, it is
2 undisputed that a portion of Parker's liens were for prepetition
3 attorney services. Indeed, Parker admitted during his
4 evidentiary hearing testimony that the liens were for a
5 combination of prepetition and postpetition work.

6 The bankruptcy court determined on remand that, as of
7 March 8, 2013 - the day Parker arrived at the court for a
8 hearing on Nelson's contempt motion - he knew that the discharge
9 injunction was applicable to his efforts to collect his
10 prepetition attorney fees. As reflected in the record, by that
11 date, Parker knew: (1) his client had filed bankruptcy; (2) she
12 had listed him as a creditor; (3) his contract for legal
13 services predated the petition date; (4) some of his services
14 were rendered before the petition date; (5) he perfected his
15 attorney fees liens after the petition date; (6) his client had
16 received a discharge; (7) for that reason, the insurance company
17 wanted to settle his client's claims without honoring his liens;
18 (8) he had threatened the insurance company with legal action if
19 they settled the claims without honoring his liens; (9) he had
20 received and reviewed two letters from Nelson's bankruptcy
21 attorney informing him that his conduct violated the discharge
22 injunction; (10) he had received and reviewed Nelson's motion
23 for contempt; and (11) he learned that, because he had not
24 objected to the contempt motion, the court had granted the
25 motion without a hearing. Based on these facts, the bankruptcy
26 court's finding against Parker on ZiLOG's knowledge element was
27 logical, plausible, and supported by the record.

28 The court further determined that, both before and after

1 March 8, 2013, Parker violated the discharge injunction by
2 continuing to maintain that his debt for prepetition legal
3 services was not discharged and secured by liens he asserted in
4 violation of § 362 but never rescinded. On May 31, 2013 - some
5 eight weeks after the March 8 date - Parker returned to court to
6 ask the bankruptcy court to set aside the order holding him in
7 contempt and declaring his lien void. Even though he
8 acknowledged that he had been retained prepetition, had
9 performed legal services prepetition and had sent the notice of
10 his liens to the insurance company postpetition, he continued to
11 argue that the liens were proper and that his fees were not
12 discharged in Nelson's bankruptcy case. After considering
13 Parker's argument, the court once again informed him that his
14 purported liens were void due to the § 362 stay. The court
15 further explained that an attorney's debt for prepetition
16 services based upon a prepetition retention agreement not
17 assumed in bankruptcy would be discharged in the client's
18 bankruptcy. The court denied Parker's motion to set aside the
19 contempt order.

20 On June 28, 2013 - some three months after the March 8 date
21 - Parker returned to court to contest the entry of the contempt
22 sanctions judgment. Parker steadfastly made the same arguments,
23 which the court once again rejected. Then, Parker successfully
24 appealed the judgment holding him in contempt and declaring his
25 liens void.

26 On March 16, 2015 - more than two years after the March 8
27 date - Parker returned to court for the evidentiary hearing
28 resulting from his successful appeal. The court allowed Parker

1 to testify in a narrative form, subject to cross-examination by
2 Nelson's attorney and to questions from the court. Although his
3 testimony was confusing, he continued to maintain "There's
4 absolutely no proof that the automobile accident was discharged
5 in bankruptcy; and certainly if it was, I did not know it. I
6 did not act in a contemptuous manner because the automobile
7 case, to my knowledge, was exempt from the bankruptcy. The
8 medical bills were not discharged in bankruptcy. The work that
9 I did for Jessica Nelson on the automobile accident was not
10 discharged in bankruptcy." Hr'g Tr. (March 16, 2015) at
11 58:6-13. Although there was some equivocation, Parker responded
12 in the affirmative when the court asked him whether his attorney
13 fees claim was still covered by his purported liens. The court
14 was trying to determine whether Parker's position, more than two
15 years after March 8, 2013, was the same as he had maintained in
16 his previous appearances before the court.

17 After hearing Parker's testimony and argument, the
18 bankruptcy court, as the trier of fact, found that "Parker's
19 continued assertion of the lien[s] still impairs the settlement
20 in debtor's exempt auto accidents by causing a portion of the
21 settlement funds to be held in trust." Hr'g Tr. (April 10,
22 2015) at 15:5-8. In addition, the bankruptcy court unfavorably
23 compared Parker's behavior to the creditors in ZiLOG, who stayed
24 their lawsuit pending the bankruptcy court's resolution of the
25 contempt issue. The majority opines that Parker had no
26 affirmative duty to disclaim his asserted interest in the
27 settlement proceeds; on these facts, however, I agree with the
28 bankruptcy court that Parker did have such a duty. See, e.g.,

1 In re Kuehn, 563 F. 3d 289, 292-93 (7th Cir. 2009) (rejecting
2 the creditor's argument that its conduct was passive as opposed
3 to coercive, the court held the university creditor's refusal to
4 provide a transcript to the debtor violated both the § 362
5 automatic stay and the § 524 discharge injunction) and State of
6 California v. Farmers Markets, Inc. (In re Farmers Markets,
7 Inc), 792 F. 2d 1400, 1404 (9th Cir. 1986) ("the state's refusal
8 to transfer the [liquor] licenses constituted an act to collect
9 or recover a claim, and thus violated § 362(a)(6)").

10 Essentially, the majority finds reversible error because
11 the bankruptcy court did not make an express finding that Parker
12 knew that the discharge injunction applied to his attorney fees
13 claims and because they are not convinced that the record would
14 support such a finding by clear and convincing evidence. The
15 majority also expresses concern that some of Parker's acts that
16 violated the discharge injunction occurred before March 8, 2013,
17 the date on which the court found he knew that the discharge
18 injunction applied to his prepetition attorney fees debt. The
19 majority posits that the second element of ZiLOG, intentional
20 acts in violation of the discharge injunction, was not satisfied
21 because there is no evidence in the record showing that Parker
22 acted to collect his discharged debt or to enforce his purported
23 liens after the March 8 date. In fact, the majority argues that
24 Parker cannot be "faulted" for failing affirmatively to release
25 his purported liens.

26 I respectfully disagree with these aspects of the majority
27 decision. I consider the majority's construction of the
28 bankruptcy court's findings overly strict. As an appellate

1 court, we must construe the bankruptcy court's findings of fact
2 favorably, such that any doubt as to what the bankruptcy court
3 meant is resolved in favor of upholding rather than invalidating
4 the bankruptcy court's judgment. See Brock v. Big Bear Market
5 No. 3, 825 F.2d 1381, 1384 (9th Cir. 1987) (citing Wells Benz,
6 Inc. v. United States ex rel. Mercury Elec. Co., 333 F.2d 89, 92
7 (9th Cir. 1964)). As a result, "whenever, from facts found,
8 other facts may be inferred which will support the judgment,
9 such inferences will be deemed to have been drawn." Id.
10 Accord, Clyde Equipment Co. v. Fiorito, 16 F.2d 106, 107 (9th
11 Cir. 1926).

12 Here, the bankruptcy court's reliance on the ZiLOG standard
13 is clear, and its finding was unequivocal that the first element
14 of the ZiLOG test had been met. Moreover, a fair reading of the
15 entirety of the bankruptcy court's ruling reflects the
16 bankruptcy court's understanding that ZiLOG's first element
17 required proof by clear and convincing evidence that Parker knew
18 the discharge applied to his prepetition attorney fees claims.
19 The evidence in the record, recited above, was sufficient to
20 support this finding.

21 As for the bankruptcy court's finding that the second ZiLOG
22 element was met, Parker's continued assertion of his lien
23 against a portion of the settlement proceeds effectively
24 prevented Nelson from receiving all of those proceeds. It is
25 irrelevant that a portion of Parker's liens might have been for
26 postpetition legal services. So long as the liens were
27 asserted, at least in part, on account of his prepetition
28 claims, Parker's continued interference with Nelson's right to

1 receive the settlement proceeds constituted intentional acts in
2 violation of the discharge injunction.

3 Furthermore, the majority arguably reads In re ZiLOG, Inc.
4 too broadly. Under the majority's reading, Parker avoids a
5 finding of contempt simply by testifying (credibly) that he did
6 not subjectively believe that the discharge applied to his
7 attorney fees claims, no matter how misguided or unreasonable
8 his belief might have been. I question whether In re ZiLOG,
9 Inc. intended such an expansive reading of its holding, given
10 that such a reading seemingly would render the bankruptcy
11 discharge all but toothless.

12 In my view, ZiLOG's holding was dependent on the facts of
13 that case. In ZiLOG, employees of the debtor corporation
14 violated the discharge injunction because they had received
15 conflicting and deficient information regarding whether it
16 applied to their employment discrimination lawsuit. 450 F.3d at
17 1003-05. Clearly, the ZiLOG court was troubled by the
18 difference between a litigant who knowingly and intentionally
19 violates a court order about which the litigant has personal
20 knowledge and a creditor who violates an injunction imposed by a
21 statute without the same knowledge and understanding of its
22 application to the creditor's conduct. Id. at 1007-09.
23 In re ZiLOG, Inc. holds that creditors should not be held in
24 contempt for violation of an order unless they are actually
25 aware that the subject order applies to them. Id.

26 Parker's knowledge and conduct is in no way similar to the
27 ZiLOG creditors. He is an attorney. He was informed by
28 Nelson's bankruptcy attorney and by the bankruptcy court that

1 his prepetition attorney fees were discharged in Nelson's
2 bankruptcy case and that his attorney fees liens were void
3 because they were perfected in violation of the automatic stay.
4 Despite this information, Parker bullheadedly continued to
5 assert a contrary position so that, more than two years after
6 her discharge was entered, a portion of Nelson's settlement
7 proceeds was still being withheld due to Parker's continued
8 assertion of his liens. In short, Parker's knowledge and
9 conduct in no way resembles that of the creditors in ZiLOG; it
10 is clear here that Parker knowingly and intentionally violated
11 the discharge injunction.

12 Parker's knowledge and conduct actually is more similar to
13 that of the contemnors in McComb v. Jacksonville Paper Co.,
14 336 U.S. 187, 191 (1949). In McComb, the contemnors adopted new
15 employee compensation plans designed to circumvent a court order
16 requiring them to comply with federal law regulating overtime
17 pay. In response to the contempt citation, the employers argued
18 the provisions in their new employee compensation plans were not
19 specifically enjoined, so they could not be held in contempt.
20 The Supreme Court rejected this argument:

21 We need not impeach the findings of the lower courts that
22 respondents had no purpose to evade the decree, in order to
23 hold that their violations of it warrant the imposition of
24 sanctions. They took a calculated risk when under the
25 threat of contempt they adopted measures designed to avoid
26 the legal consequences of the Act. Respondents are not
27 unwitting victims of the law. Having been caught in its
28 toils, they were endeavoring to extricate themselves. They
29 knew full well the risk of crossing the forbidden line.
30 Accordingly where as here the aim is remedial and not
31 punitive, there can be no complaint that the burden of any
32 uncertainty in the decree is on respondent's shoulders.

33 Id. at 193; see also Donovan v. Sureway Cleaners, 656 F2d 1368,

1 1372-73 (9th Cir. 1981) (analogous facts and holding). Like the
2 contemnors in McComb, Parker knew and understood the legal
3 effect of the discharge order and, instead of complying with the
4 discharge order, he continued to insist that his prepetition
5 attorney fees were not discharged and were secured by his
6 purported liens.

7 Unlike the majority, I believe the bankruptcy court
8 correctly held Parker in contempt based on his demonstrated
9 knowledge and conduct. Therefore, I respectfully dissent.

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