United States Bankruptcy Court
District of New Mexico

Document Verification

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:
PATRICIA CULLEY,
Debtor. No. 7-01-18446 SR

PATRICIA CULLEY,
Plaintiff,
v. Adv. No. 03-1371 S

ALLSUP'S CONVENIENCE STORES, INC., et al..
Defendants.

MEMORANDUM OPINION

This matter came before the Court for trial of Plaintiff's Complaint of Violation of Permanent Stay ("Complaint") against Allsup's Convenience Stores, Inc. ("Allsup's") and Glen Castleberry ("Defendant" or "Castleberry"). For the reasons stated, judgment will be granted against Castleberry and the Complaint dismissed as to Allsup's.

Plaintiff appeared through her attorney Law Offices of R. Matthew Bristol (Matthew Bristol). Allsup's appeared through its attorneys Tatum & McDowell (James F. McDowell, III) and Rodey, Dickason, Sloan, Akin & Robb, P.A. (James A. Askew). Defendant appeared through his attorney Martin & Lara (W.T. Martin, Jr.). The Complaint seeks damages from defendants in the amount of wages garnished post-discharge, the fees associated with the garnishments, attorney fees and costs, punitive damages, a finding of contempt, fines, and any other

appropriate relief. This Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. § 1334 and the United States District Court for the District of New Mexico's Administrative Order 84-0324 (D. N.M. March 19, 1992) (referring all cases under Title 11 and all proceedings arising under Title 11 or arising in or related to Title 11 to the Bankruptcy Court), and 11 U.S.C. §§ 524 and 105. This is a core proceeding. 28 U.S.C. § 157(b)(2)(A), (E) and (O). See also Mountain States Credit Union v. Skinner (In re Skinner), 917 F.2d 444, 448 (10th Cir. 1990)(Contempt proceedings arising out of a core matter are also core matters.)

FACTS

1. Plaintiff and Defendant were married in June, 1996, and divorced by a final decree entered in the Fifth Judicial District Court case DM-99-264 on August 19, 1999. Ex. E.
2. During the marriage, Plaintiff was a victim of domestic violence. On August 15, 1999, Defendant repeatedly punched Plaintiff in the face, fracturing her cheek and nose. Plaintiff filed a criminal complaint concerning this incident. This was not the first complaint.
3. The divorce decree incorporates a marital settlement agreement ("MSA")(Ex. C.) Under the MSA, Plaintiff was

to pay 1) the balance owed on a 1989 Cutlass, 2) the balance of $7,693.46 owed on a USA credit card, and 3) all her medical bills.

4. After the divorce, the physical abuse continued. In 2001 Defendant pushed Plaintiff through a window, severing an artery, nerves and tendons in her arm.

5. Plaintiff made payments per the MSA and, by December, 2001, believed she had paid all amounts required. At that time, she also believed she owed no other obligations to Defendant.

6. Plaintiff filed a voluntary chapter 7 bankruptcy in the District of New Mexico on December 21, 2001. The Court fixed February 2, 2002 as the date for the first meeting of creditors, which was to take place in Roswell, New Mexico. The notice also stated that there appeared to be no assets available for distribution to creditors and instructed that no proofs of claim should be filed at that time. The notice also set the deadlines for filing complaints objecting to discharge under 11 U.S.C. §727 or objecting to dischargeability under 11 U.S.C.§§ 523(a)(2), (4), (6) and (15) for April 22, 2002.

7. Plaintiff believed Defendant was paid in full so did not list him as a creditor in the bankruptcy.

8. At trial, Plaintiff testified that she told Defendant that she had filed bankruptcy before she attended the first meeting of creditors in Roswell on February 2, 2002. This testimony was not challenged on cross examination. Defendant's testimony on this point was internally inconsistent, and completely disproved by the attachment to Exhibit F, discussed below. And, at closing argument, Defendant's attorney conceded that Defendant was probably orally informed, but then reiterated the (undisputed) fact that Defendant never received notice in writing from the Court. The Court finds that Plaintiff told Defendant that she had filed bankruptcy before February 2, 2002.

9. On February 21, 2002, the Chapter 7 Trustee filed a report of no distribution and abandonment of assets.

10. No creditors filed complaints under § 727 or § 523.

11. The Court entered Plaintiff's discharge on April 30, 2002 and closed the bankruptcy case.

12. Defendant claims that Plaintiff owed him about $2,900 in May, 2002.

13. On May 20, 2002, Defendant filed a "Motion to Enforce" in DM-99-264, with a two-page letter attached claiming that Plaintiff owed him about $2,900, and asking the court to

order Plaintiff to pay $100 per month to his attorney until the balance was paid. Ex. F. The letter also states that Plaintiff had filed bankruptcy[1].

14. Presumably the state court set a hearing on the Motion to Enforce, because the record contains a "Sheriff's Return of Service", Ex. G, that states the Sheriff served a notice of hearing on Plaintiff on May 23, 2002. The record in this case does not contain the actual notice of that hearing.

15. On May 31, 2002, Defendant filed another "Motion to Enforce" in DM-99-264 asking the state court to order Plaintiff to pay his credit card bills. Ex. H.

16. On May 31, 2002, Defendant also filed a "Motion for Order to Show Cause" in DM-99-264 asking the state court to order Plaintiff to pay $100 per month to his attorney until the credit card bills were paid[2]. Ex. I.

17. On May 31, 2002, the state court set a hearing for June 27, 2002. Ex. J.

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[1] In discovery, Plaintiff asked Defendant to produce copies of all documents he had filed during 2002 and 2003 in DM-99-264. See Ex. 2, p. 041. Apparently Defendant did not produce Exhibit F; it does not appear among Plaintiff's exhibits, but rather is found in Allsup's exhibits.

[2] Apparently this document was also not produced to Plaintiff.

18. The Sheriff served the Motion to Enforce, Motion for Order to Show Cause, and Notice of Hearing on Plaintiff on June 6, 2002. Ex. K, L, M.

19. After one of the state court hearings, Plaintiff saw Defendant outside the courthouse and asked why he was pursuing collection on debts she did not owe. In her words, he responded "No, this isn't about money." The logical inference therefore is that Defendant was bringing Plaintiff before the court more in an attempt to intimidate or harass her than to collect a debt.

20. On November 25, 2002, Defendant filed another "Motion for Order to Show Cause" in DM-99-264 asking the Court to issue an Order to Show Cause because Plaintiff had failed to pay payments pursuant to the divorce decree and claimed that Plaintiff was in contempt of court since June, 2002[3]. Ex. N.

21. On November 25, 2002, Defendant filed another "Motion to Enforce" in DM-99-264, claiming that Plaintiff was in contempt of court for refusing to pay the monthly payments on the credit card. Ex. O.

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[3] Apparently this document was also not produced to Plaintiff.

22. On January 22, 2003, the state court entered an "Order Regarding Enforcement" which stated that it had conducted a hearing on June 26, 2002 (unexplained, the Notice of Hearing at Exhibit J set the hearing for June 27, 2002) at which the parties appeared pro se[4], and at which the Court heard testimony and found: 1) it had jurisdiction of the parties and subject matter, 2) the parties had "amicably resolved the issues", 3) the parties agreed that by June 29, 2002, Plaintiff would reimburse Defendant for the payments on the credit card, and 4) the parties agreed that Plaintiff would make future payments to satisfy the credit card debt. The Court then ordered that 1) Plaintiff will reimburse Defendant on June 29, 2002, for payments made on the card, and 2) Plaintiff will make necessary payments to satisfy the debt. Ex. P.

23. On March 21, 2003, Defendant filed another Motion to Enforce in DM-99-264, attaching a two-page letter and twelve pages of exhibits. The Motion sets forth amounts Defendant claimed Plaintiff owed under the terms of the divorce. Ex. Q.

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[4] While Defendant consistently stated that he was pro se during this entire matter, and his attorney argued this at closing, this Order states that it was submitted by "Law Offices of W.T. Martin, Jr., P.A."

24. There is nothing in the record that shows that the state court ever set a hearing on the March 21, 2003, Motion to Enforce or that the Sheriff served the notice on Plaintiff, or that Plaintiff ever had notice of this hearing. At trial, she testified that she had no notice of this hearing.

25. On June 5, 2003, the state court entered a second "Order Regarding Enforcement" in DM-99-264. It states that the Court conducted a hearing on May 20, 2003 on the Motion to Enforce, that Defendant appeared pro se, and that Plaintiff did not appear. The Order states that the Court heard testimony, and found: 1) it had jurisdiction of the parties and the subject matter, 2) the court resolved the issues addressed in the Motion to Enforce, 3) the court ordered Plaintiff to reimburse Defendant $847 for payments he made from April 2002 through March 2003, 4) "[Plaintiff] is also ordered, to pay $2158.50, for balance of MasterCard Credit Card.", 5) the court ordered Plaintiff to make a one-time payment of $847 + $2158.50 "immediately." Although the Order made "findings" that ordered Plaintiff to pay, in fact the Order contained no decretal portion and did not order anything. Ex. R. The Order does not refer to

Plaintiff's bankruptcy or discharge, and makes no findings that would support a Bankruptcy Code section 523 judgment or indicate that those factors were considered.

26. Plaintiff did not appeal or otherwise attempt to overturn this Order.

27. Based on the June 5, 2003, Order, Defendant applied for a writ of garnishment directed to Plaintiff's employer, Allsup's, in the amount of $3,005.50. Ex. S.

28. The state court issued the Writ of Garnishment on July 17, 2003. Ex. T.

29. Allsup's commenced withholding $105.62 per week from Plaintiff's pay, plus a $1.00 garnishment fee on July 19, 2003. Ex. 4, p. 117.

30. On July 31, 2003, Plaintiff, through her attorney, filed a "Notice of Bankruptcy and Permanent Injunction" in DM-99-264. Ex. 1-B. Defendant admits receiving it. Ex. 1, p. 003.

31. On August 7, 2003, Plaintiff, through her attorney, filed a "First Amended Notice of Bankruptcy and Permanent Injunction" in DM-99-264. Ex. 1-C. Defendant admits receiving it. Ex. 1, p. 004.

32. On August 11, 2003, Allsup's filed its "Answer by Garnishee," answering the writ in full, and stating that

Plaintiff was an employee. Allsup's raised as "Other issues" Plaintiff's bankruptcy, her discharge, and the state court's jurisdiction over the matter. Ex. U.

33. On August 19, 2003, Plaintiff's attorney wrote to Defendant stating that his claim was discharged in Plaintiff's bankruptcy and "strongly urg[ing]" that he speak to a bankruptcy attorney. The letter stated that a continuation of the garnishment could result in a contempt finding in bankruptcy court, and formally demanded that he stop the garnishment. Ex. 1-J. Defendant admits receiving it. Ex. 1, p. 004.

34. Plaintiff's employment at Allsup's was terminated around the end of August, 2003. The termination was unrelated to the garnishment.

35. In all, Allsup's garnished six paychecks for $105.62 each, and took six $1.00 fees, for a total of $639.72. The last paycheck was on August 23, 2003.

36. Plaintiff testified that to her the amounts garnished were significant and caused her to fall behind on bills such as rent and her car, which she lost. Any damages, however, were not quantified.

37. On October 10, 2003, Plaintiff's attorney wrote another letter to Defendant formally demanding return of the

garnished funds plus his attorneys fees. Ex. 1-K. Defendant admits receiving it. Ex. 1, p. 008.

38. Despite Defendant's actual knowledge of the bankruptcy since at least February 2, 2002, the notices filed in DM-99-264 giving formal notice of the discharge in July and August, 2003, and letters from Plaintiff's attorney to Defendant in August and October, 2003, warning him of potential consequences of his actions and advising him to contact an attorney, Defendant failed and refused, and to this date fails and refuses, to release the garnishment or take any steps to return Plaintiff to the status quo.

39. Defendant never sought a judgment on the writ of garnishment and, to date, Allsup's retains the garnished funds.

40. The Court takes judicial notice of the Debtor's main bankruptcy file, Case 7-01-18446-SR, and finds that no reaffirmation agreements were filed.

41. The Court found Plaintiff to be credible.

42. The Court finds that Defendant was not credible. For example:

A) During his defense case, Defendant testified that he acted pro se in enforcing the settlement. This is contradicted by the attachment to the May 20, 2002 Motion

to Enforce, which states Defendant's lawyer sent Plaintiff a letter on May 6, 2002, and which asks the court to order payments to his lawyer. Ex. F. Similarly, the May 31, 2002 Motion for Order to Show Cause references the attorney letter and asks the court to order payments to his attorney. Ex. I. The Order Regarding Enforcement entered on January 22, 2003 was prepared by a law firm. The March 21, 2003, Motion to Enforce seeks attorney fees. The June 5, 2003 Order Regarding Enforcement waives attorney fees.

B) Defendant testified that he had no notice of the bankruptcy before the garnishment, and if he had notice he would not have garnished but rather would have contacted an attorney. By the time of the garnishment application, July 17, 2003, he already had consulted two attorneys, as demonstrated by Exhibits F and P. He also had notice of the bankruptcy since February, 2002. He also testified that either he or Plaintiff had, at two prior state court hearings, informed the state court judge of the bankruptcy. Defendant also testified that he informed the judge at one of these hearings that his debt had not been discharged. Defendant's original Motion to Enforce, Exhibit F, filed on May 20, 2002

stated that Plaintiff had filed bankruptcy. Furthermore, as stated above, the Court finds that Plaintiff informed Defendant of her bankruptcy before the February 2, 2002 creditors meeting.

C) Defendant testified that Plaintiff told the judge about her bankruptcy at the June, 2002 hearing and then agreed to settle for the full amount Defendant claimed due. Plaintiff testified that while she did attend this hearing, she never agreed to pay anything and that the judge made no findings or orders; rather, he counseled both parties to get attorneys. In addition, Defendant testified clearly[5] that Plaintiff made no payments to him after April, 2002. Based on these conflicting representations, the Court believes Plaintiff and finds it more likely than not that Plaintiff did not agree to settle anything or to pay anything.

43. Plaintiff proved no damages resulting from anything Allsup's did or did not do. The Court also finds that Allsup's took all the steps that could reasonably be expected from it in this situation: it notified the state court that there was an issue related to Plaintiff's

[5] Earlier, Defendant testified alternatively that Plaintiff had made some payments after the hearing, and that she had made some partial payments after the hearing.

bankruptcy. After that, it complied with the state court's orders.

44. Plaintiff's uncontradicted testimony was that Defendant owned his house outright, which had a value of $90,000; that Defendant had income from being a musician and songwriter; and that he had royalties from his music. He also owned two vehicles which were paid for, and various quantities of music equipment and guitars.

CONCLUSIONS OF LAW

I. **GENERAL PRINCIPLES**

The Court will first discuss some general principles involved in this case, then turn to specific application of those principles to the case.

1. Plaintiff brings this suit to enforce her rights under Bankruptcy Code § 524. That section states, in relevant part:

> (a) A discharge in a case under this title--
>
> (1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section 727, 944, 1141, 1228, or 1328 of this title, whether or not discharge of such debt is waived;
> (2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal

liability of the debtor, whether or not discharge of such debt is waived; ...

(b) ...

(c) An agreement between a holder of a claim and the debtor, the consideration for which, in whole or in part, is based on a debt that is dischargeable in a case under this title is enforceable only to any extent enforceable under applicable nonbankruptcy law, whether or not discharge of such debt is waived, only if--

(1) such agreement was made before the granting of the discharge under section 727, 1141, 1228, or 1328 of this title;

(2) (A) such agreement contains a clear and conspicuous statement which advises the debtor that the agreement may be rescinded at any time prior to discharge or within sixty days after such agreement is filed with the court, whichever occurs later, by giving notice of rescission to the holder of such claim; and

(B) such agreement contains a clear and conspicuous statement which advises the debtor that such agreement is not required under this title, under nonbankruptcy law, or under any agreement not in accordance with the provisions of this subsection;

(3) such agreement has been filed with the court and, if applicable, accompanied by a declaration or an affidavit of the attorney that represented the debtor during the course of negotiating an agreement under this subsection, which states that--

(A) such agreement represents a fully informed and voluntary agreement by the debtor;

(B) such agreement does not impose an undue hardship on the debtor or a dependent of the debtor; and

(C) the attorney fully advised the debtor of the legal effect and consequences of--

(i) an agreement of the kind specified in this subsection; and

(ii) any default under such an agreement; [and]

(4) the debtor has not rescinded such agreement at any time prior to discharge or within sixty days after such agreement is filed with the court, whichever occurs later, by giving notice of rescission to the holder of such claim.

2. The history, purpose and effects of Section 524 are well stated in In re Hensler, 248 B.R. 488, 491-92 (Bankr. D. N.J. 2000):

> Section 524 of the Bankruptcy Code both (1) voids any judgment of any court that violates the bankruptcy discharge, and (2) operates as an injunction against the continuation or commencement of an action to collect any discharged debt. 11 U.S.C. § 524(a)(2); See also In re Pavelich, 229 B.R. 777, 781 (9th Cir. BAP 1999). Thus, it protects the debtor from a subsequent suit in a state court by a creditor whose claim had been discharged in the bankruptcy proceeding.
>
> ...
>
> Section 524 amended § 14f of the Bankruptcy Act. Under § 14f the effect of a discharge was to create an affirmative defense that the debtor could plead in any action brought on the

discharged debt. Bankruptcy Act § 14f, added by Pub.L. 91-467, § 3, 84 Stat. 991, repealed by Pub.L 95-598. If the debtor failed to affirmatively plead the discharge, the defense was deemed waived and an enforceable judgment could then be taken against him or her. See Household Finance Corporation v. Dunbar, 262 F.2d 112 (10th Cir. 1958) (debtor waived defense of discharge by failing to take any action to set up discharge as a defense in state action). Thus, section 524 was added to section 14f as part of the 1978 amendments to the Bankruptcy Act in order to confirm that the discharge operated automatically. 4 LAWRENCE P. KING, ET AL., COLLIER ON BANKRUPTCY ¶ 524-13[1] (15th ed. Rev. 1998).

The House Committee on the Judiciary explained the basis for the addition of § 14f as follows:

> As stated in the report on this measure by the Senate Judiciary Committee, the major purpose of the proposed legislation is to effectuate, more fully, the discharge in bankruptcy by rendering it less subject to abuse by harassing creditors. Under present law creditors are permitted to bring suit in State courts after a discharge in bankruptcy has been granted and many do so in the hope the debtor will not appear in that action, relying to his detriment upon the discharge. Often the debtor does not appear because of such misplaced reliance, or an inability to retain an attorney due to lack of funds, or because he was not properly served. As a result a default judgment is taken against him and his wages or property may again be subjected to garnishment or levy. All this results because the discharge is an affirmative defense which, if not pleaded, is waived.

H.Rep. No. 91-1502, 91st Cong., 2d Sess. 1- 2 (1970); 4 LAWRENCE P. KING, ET AL., COLLIER ON BANKRUPTCY ¶ 524.LH (15th ed. Rev. 1998).

Macysyn repeatedly asserts that the Henslers should be denied the effect of the

> discharge as they did not object to the prosecution of the worker's compensation claim until after judgment was entered against them. Macysyn's argument flies in the face of the purpose behind section 524. As stated above, under § 524(a)(1) the debtors were not required to assert the discharge or otherwise object to the continued prosecution of the discharged claim in the subsequent action. This court, therefore, finds that the debtors are not personally liable on the discharged debt as the state court judgment is void ab initio as a matter of federal statute. See In re Pavelich, 229 B.R. at 782.

See also In re Melvin, 186 B.R. 276, 279 (Bankr. M.D. Fla. 1994)("Section 524(a) renders null and void any judgment affecting the personal liability of the debtor obtained in any forum other than the bankruptcy court [on a discharged debt]. The purpose of [Section 524] is to make it absolutely unnecessary for the debtor to do anything at all in the state court action.")

3. "A reaffirmation agreement is the only means by which a dischargeable debt may survive a chapter 7 discharge." Schott v. WyHy Federal Credit Union (In re Schott), 282 B.R. 1, 6 (10th Cir. BAP 2002)(citing In re Turner, 156 F.3d 713, 715 (7th Cir. 1998).) The procedures required for reaffirmation are very specific and explicitly set out in Section 524(c). If the procedures are not followed the debt is not reaffirmed. See In re Cruz, 254 B.R. 801, 815 (Bankr. S.D. N.Y. 2000)(A postpetition

settlement agreement that does not comport with Section 524 is void.); Mickens v. Waynesboro Dupont Employees Credit Union, Inc. (In re Mickens), 229 B.R. 114, 118 (Bankr. W.D. Va. 1999) (Reaffirmation must be truly voluntary on the part of the debtor; Section 524(c)'s requirements are mandatory and may not be waived by debtor.); Melvin, 186 B.R. at 279 (Postdischarge promissory note did not comply with Section 524 and was void.)

4. The Tenth Circuit follows the "Conduct Theory" analysis to determine the date on which a claim arises for bankruptcy purposes. A claim arises on the date of the conduct giving rise to the claim. Watson v. Parker (In re Parker), 313 F.3d 1267, 1269 (10th Cir. 2002), cert. denied, 540 U.S. 965 (2003). Under the conduct theory it is generally irrelevant when a cause of action based on the claim accrues under state law, or when the claim is actually due and payable. Id. See also Pension Benefit Guarantee Corp. v. Skeen (In re Bayly Corp.), 163 F.3d 1205, 1209 (10th Cir. 1998) (dicta):

> [A] claim by a guarantor against a debtor to recover post-petition payments made by the guarantor on behalf of the debtor under the terms of a pre-petition guarantee agreement is treated as a pre-petition claim under 11 U.S.C. § 502(e)(2), which deals with the allowance and

> disallowance of contingent claims. See 4 Collier on Bankruptcy, ¶ 502.06[3]. The claim's pre-petition status remains undisturbed even if the guarantor pays the creditor post-petition.

See also, e.g., Stratton v. Mariner Health Care, Inc. (In re Mariner Post-Acute Network, Inc.), 303 B.R. 42, 45 (Bankr. D. Del. 2003)(Postpetition breach of prepetition contract results in a prepetition claim.)

5. Section 524 does not create a cause of action for damages. Compare 11 U.S.C. § 362(h) ("An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.") Before 1984, neither section 362 or 524 created a cause of action for damages. In 1984, Congress amended 11 U.S.C. § 362 in section 304 of the Bankruptcy Amendments and Federal Judgeship Act of 1984 (BAFJA), PL 98-353, to include subsection (h). BAFJA section 308 also amended certain provisions of 11 U.S.C. § 524, but did not provide a similar remedy for its violation.

> Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.

Russello v. United States, 464 U.S. 16, 23 (1983)(quoting United States v. Wong Kimm Bo, 472 F. 2d 720, 722 (5th Cir. 1972)). Therefore, section 524 does not create its own right of action for its violation.

6. A bankruptcy discharge is a federal court order. See, e.g., Tennessee Student Assistance Corp. v. Hood, 541 U.S. 440, 449 n.4 (2004)("[A] discharge order under the Bankruptcy Code 'operates as an injunction' against creditors who commence or continue an action against a debtor in personam to recover or to collect a discharged debt.")

7. A creditor that attempts collection of a discharged debt is in contempt of the bankruptcy court that issued the discharge, and that court can impose sanctions under Bankruptcy Code § 105. Schott, 282 B.R. at 5-6. See also Skinner, 917 F.2d at 447 (Bankruptcy courts have statutory authorization to enter civil contempt orders.)

8. In a civil contempt proceeding, the Court does not focus on the alleged contemnor's subjective belief that his actions are appropriate; rather, the Court focuses on whether those actions violate a court's order. Hardy v. United States (In re Hardy), 97 F.3d 1384, 1390 (11th Cir. 1996)(quoting Howard Johnson Co. v. Khimani, 892

F.2d 1512, 1516 (11th Cir. 1990)); Diviney v. Nationsbank of Texas, N.A. (In re Diviney), 225 B.R. 762, 774 (10th Cir. BAP 1998)("Whether the party believes in good faith that it had a right to the property is not relevant to whether the act was 'willful' or whether compensation must be awarded.")(quoting INSLAW, Inc. v. United States (In re INSLAW, Inc.), 83 B.R. 89 (Bankr. D. D.C. 1988)).

9. The appropriate sanction for civil contempt is an award of costs, attorney fees, and damages caused by the violation. Skinner, 917 F.2d at 446 (Bankruptcy Court imposed sanctions and awarded compensatory damages, attorneys fees and costs.) and at 450 (Tenth Circuit found that the Bankruptcy Court's awards were "appropriate.") See also McComb v Jacksonville Paper Co., 336 U.S. 187, 193 (1949)("The measure of the court's power in civil contempt proceedings is determined by the requirements of full remedial relief.")

10. If a creditor's violation is willful, wanton, malicious, or taken in clear disregard or disrespect of the bankruptcy laws, punitive damages may be awarded. Vazquez v. Sears, Roebuck & Co. (In re Vazquez), 221 B.R. 222, 231 (Bankr. N.D. Ill. 1998)(collecting cases.)

Reckless disregard of a federally protected right is also sufficient for a punitive damage award. See also Diviney, 275 B.R. at 777 (Creditor's willful failure to return vehicle to debtor after learning of bankruptcy justified punitive damages); and Knaus v. Concordia Lumber Co., Inc. (In re Knaus), 889 F.2d 773, 776 (8th Cir. 1989)(Creditor's failure to return property to a debtor after learning of a bankruptcy constitutes "egregious, intentional misconduct on the violator's part," justifying punitive damages.)

11. A creditor's action is "willful" if it acts deliberately with knowledge of the bankruptcy petition, regardless of whether the creditor specifically intended to violate the stay. Knaus, 889 F.2d at 775; Diviney, 225 B.R. at 774; Cox v. Billy Pounds Motors, Inc. (In re Cox), 214 B.R. 635, 641 (Bankr. N.D. Ala. 1997). A violation is also "willful" if the creditor has notice of the bankruptcy and refuses to restore the debtor to the status quo. Skinner, 917 F.2d at 450.

12. In the Tenth Circuit, courts use two different tests to determine if punitive damages are appropriate in addition to compensatory relief. If the violation is willful or in reckless disregard of the law, punitive damages are

proper. Diviney, 225 B.R. at 777. A creditor is liable for punitive damages to a debtor if it knew of the federally protected right and acted intentionally or with reckless disregard of that right. Id. (citing cases). A slightly different test looks at 1) the defendant's conduct, 2) the defendant's ability to pay, 3) the motives for the defendant's actions, and 4) any provocation by the Debtor. Id. at 778 (citing cases.)

13. Proof of civil contempt must be "clear and convincing." United States v. Professional Air Traffic Controllers Organization, Local 504, 703 F.2d 443, 445 (10th Cir. 1983).

II. **APPLICATION OF PRINCIPLES IN THIS CASE**

Next, the Court will apply the principles discussed above to the facts of this case. In so doing, the Court finds and concludes that Plaintiff has presented clear and convincing proof in support of the legal conclusions reached by the Court.

14. Defendant's claim against Plaintiff is a prepetition debt. The debt Defendant seeks to collect arose out of and is documented in the divorce settlement, before the bankruptcy case was filed. The fact that some payments may have come due after the case was filed is not relevant to its classification as a prepetition debt. The fact

that Defendant made payments after the bankruptcy on this debt is also irrelevant, because Plaintiff's contingent debt to Defendant arose when the divorce settlement was entered.

15. Defendant had actual notice of Plaintiff's bankruptcy filing in time to file a timely claim or timely file a proceeding to determine dischargeability of the debt. Therefore, Bankruptcy Code section 523(a)(3) does not apply to this case. Chanute Production Credit Assn. v. Schicke (In re Schicke), 290 B.R. 792, 799 (10th Cir. BAP 2003), aff'd, 97 Fed.Appx. 249 (10th Cir. 2004)(unpublished). Additionally, Section 523(a)(3)(A) does not apply in no-asset cases with no claims bar date, such as this case, because if any assets are later discovered the creditor can still timely file a proof of claim. Parker, 313 F.3d at 1269. Therefore, Defendant's debt was not excepted from discharge under this subsection.

16. Plaintiff did not reaffirm the debt to Defendant.

17. Debtor received a discharge under Bankruptcy Code Section 727.

18. Defendant's debt was discharged. 11 U.S.C. 727(b)[6].

19. The state court orders in DM-99-264 after April 30, 2002 are void because they are based on Plaintiff's personal liability for a debt discharged in the bankruptcy. 11 U.S.C. § 524(a)(1). See, e.g., Mariner Post-Acute Network, 303 B.R. at 47 ("It is well settled bankruptcy law that a state court judgment obtained in violation of a discharge injunction is void.")(citing In re Pavelich, 229 B.R. 777 (9th Cir. BAP 1999) and In re Motley, 268 B.R. 237, 242 (Bankr. C.D. Cal. 2001)); In re Alexander, 300 B.R. 650, 658 (Bankr. E.D. Va. 2003)(A judgment based on a discharged debt is void.)(Citing cases.); Cruz, 254 B.R. at 813 (A default judgment based on a discharged debt is void.) Cf. Franklin Savings Ass'n v. Office of Thrift Supervision, 31 F.3d 1020, 1022 (10th Cir. 1994)(Actions in violation of automatic stay are void.)

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[6] This section provides:
Except as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter, and any liability on a claim that is determined under section 502 of this title as if such claim had arisen before the commencement of the case, whether or not a proof of claim based on any such debt or liability is filed under section 501 of this title, and whether or not a claim based on any such debt or liability is allowed under section 502 of this title.

20. Defendant's actions in the state court to collect on Plaintiff's debt violated the discharge injunction and were void ab initio. Mariner Post-Acute Network, 303 B.R. at 47.

21. Defendant raised several defenses. The first defense was that when Plaintiff attended the first collection hearing and raised bankruptcy as a defense, the state court judge requested documentation and then made his own determination that the debt was not discharged; Defendant claims he reasonably relied on the judge and therefore should not be found to be in contempt. This defense fails. First, Defendant's state of mind is not relevant to whether his actions violated the discharge injunction. Diviney, 225 B.R. at 774; Cox, 215 B.R. at 641 n.6. His reliance may be relevant, however, to an award of punitive damages. Second, the very filing of the collection action itself was a violation of the discharge injunction, and this was before any judge was involved. And, there is no evidence before this Court that the judge counseled him to file five more motions, schedule hearings, submit orders, garnish Plaintiff, or refuse to release the garnishment. Third, Defendant was aware of the bankruptcy before filing the action, and therefore on notice that he should make

himself aware of the law or proceed at his own peril. See Schicke, 290 B.R. at 800 (Once a creditor has notice or knowledge of a chapter 7 case, it must take affirmative actions to protect its rights by informing itself and taking appropriate actions in bankruptcy court.); In re McNickle, 274 B.R. 477, 480 (Bankr. S.D. Ohio 2002)(Once warned, a creditor should seek clarification from the Bankruptcy Court before proceeding further.); In re Gray, 97 B.R. 930, 936 (Bankr. N.D. Ill. 1989)("A creditor takes a calculated risk, under threat of contempt of § 524 or sanctions under the § 362 automatic stay where it undertakes to make its own determination of what the stay or discharge in bankruptcy means."); In re Roush, 88 B.R. 163, 164 (Bankr. S.D. Ohio 1988)("[A] party's behavior is willful if it has knowledge or notice of sufficient facts to cause a reasonably prudent person to make additional inquiry to determine whether a bankruptcy petition has been filed and such party fails to make such inquiry.")(Citation and punctuation omitted.) Fourth, only a bankruptcy court has jurisdiction to determine the dischargeability of a debt under Bankruptcy Code sections 523(a)(2), (4), (6) [and (15)] and the deadline for filing

these actions had passed[7]. Resolution Trust Corporation v. McKendry (In re McKendry), 40 F.3d 331, 335-36 (10th Cir. 1994); Rey v. Laureda (In re Rey), 324 B.R. 449, 454 (Bankr. E.D. N.Y. 2005); Bankruptcy Rule 4007(c). Finally, the evidence before this Court does not show that Defendant relied on the judge; rather, it demonstrates that he gave legal advice to the judge by stating that his debt was not discharged in Plaintiff's bankruptcy.

22. Defendant next claims that the Rooker-Feldman doctrine[8] prohibits this court from reviewing what the state court did, even if it were wrong. The Court disagrees. The post-discharge orders entered in DM-99-264 were in violation of the discharge injunction and void and unenforceable. See Conclusion 19, above. Federal courts recognize an exception to the Rooker-Feldman doctrine when the state court judgment is void. Rey, 324 B.R. at 452; Farrell v. Decew (In re Farrell), 293 B.R. 99, 100 (Bankr. D. Ct. 2003); Pavelich v. McCormick, Barstow, Sheppard, Wayte & Carruth, LLP (In re Pavelich), 229 B.R. 777, 783

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[7]Defendant was probably unaware of this, but ignorance of the law generally does not prevent its application or the resulting consequences. Utermehle v. Norment, 197 U.S. 40, 55 (1905).

[8] See Rey, 324 B.R. at 452-53 for a concise statement of this doctrine.

(9th Cir. BAP 1999). Cf. Johnson v. Rodrigues (Orozco), 226 F.3d 1103, 1110 (10th Cir. 2000)(Rooker-Feldman does not bar a federal action if the plaintiff lacked a reasonable opportunity to litigate the federal issues in the state court.) See also In re Bock, 297 B.R. 22, 32-33 (Bankr. W.D. N.C. 2002)(Rooker-Feldman doctrine not applied by court because the record did not clearly indicate that the state court intended to or was ruling on the issue of dischargeability.)

23. Defendant also argues that no debt was owed to him until Plaintiff defaulted on the payments to the credit card company. This argument was addressed in Conclusion 4, above. Under the "Conduct Theory," the debt was a prepetition debt.

24. Defendant argues that his debt was not discharged because he was not listed in the bankruptcy schedules and did not receive notice from the bankruptcy court. This argument was addressed in Conclusion 15, above. One need not be listed as a creditor in a no-asset case to have one's debt discharged, especially if one has actual notice of the case.

25. Defendant's final argument is that this case is "something like" a reaffirmation issue and/or settlement of a

dischargeability complaint. This argument was addressed in Conclusion 3, above. Furthermore, even if this were effectively a post-petition contract (none of which contract's elements were introduced into evidence, however) the consideration for this post-petition contract was based "in whole or in part" on a dischargeable debt and therefore had to comply with Section 524(c). And, the contract was not made before the granting of the discharge. See Section 524(c)(1).

26. The Court concludes that Defendant willfully violated the discharge injunction by communicating with Plaintiff in an attempt to collect a discharged debt, by filing suit in state court to collect, by having process issued and serving process on Plaintiff, by continuing to prosecute the action in state court, by obtaining a judgment against her, by applying for a garnishment, causing her employer to garnish her wages, and, even after notice from Plaintiff's attorney, by refusing to release the garnishment or return or allow the return of garnished funds. All of these actions were taken after Defendant knew of the bankruptcy filing, and in disregard of Plaintiff's rights and in disrespect for the laws of the United States. He also undertook these collection actions

in bad faith, more in an attempt to intimidate or harass Plaintiff than in any bona-fide attempt to collect a debt. The Court finds and concludes that punitive damages are appropriate in this case. The Defendant's statement, "No, this isn't about money", strongly suggests the need for a significant award of punitive damages to effectively coerce Defendant into honoring the discharge injunction. That conclusion is reinforced by taking into consideration the domestic violence wreaked on Plaintiff by Defendant; Defendant's post-discharge financial or legal harassment of Plaintiff, even to the point of violating a court order (the discharge injunction), is consistent with Defendant's continuing abusive treatment of Plaintiff, and thus likely to continue in some form or other unless deterred. Although it is not the province of this Court to address and deter Defendant's continuing abuse of Plaintiff in general, this Court does have a duty to ensure no more violations of the discharge injunction. And in doing so, the Court takes into consideration the considerable amount of time, effort and expense, including perhaps some expenditure for attorney fees, that Defendant incurred prior to this litigation in order to violate Plaintiff's bankruptcy protections. And in assessing the amount of

the punitive damages awarded, the Court also has taken into account Defendant's acting with actual knowledge or, at a minimum, reckless disregard of Plaintiff's federally protected discharge rights. Alternatively, the Court has taken into consideration the nature of Defendant's conduct, his ability to pay (based on Plaintiff's testimony about his assets which presumably can be liquidated if needed), Defendant's motives and the lack of any provocation by Plaintiff. See Diviney, 225 B.R. at 776-77 (punitive damage award of 2.25 times the debtor's actual damages including attorney fees was not excessive).

27. Plaintiff has been damaged by the lack of use of $639.72 in garnished funds taken in July and August, 2003. She should be awarded pre-judgment interest from September 2003 to October 2005, a period of 26 months. She has also incurred attorney fees in securing her rights under the Bankruptcy Code. She should be awarded a judgment against Glen Castleberry for the amounts garnished, plus pre-judgment interest, plus her reasonable attorneys fees and costs, punitive damages, and post-judgment interest until paid.

28. The Court will award pre-judgment interest at the federal statutory rate for judgments pursuant to 28 U.S.C. § 1961(a). August 23, 2003 was a Saturday; the "calendar week preceding" this date ended August 22, 2003. On that date, the 1-year constant maturity Treasury yield published by the Board of Governors of the Federal Reserve System was 1.33%, available at http://www.federalreserve.gov/Releases/H15/ 20030825/ (last visited October 14, 2005). Therefore, Plaintiff shall have judgment for the $639.72, plus 26 months of interest at 1.33% per annum, or $18.43, for a total of $658.15.

29. The Court will award Plaintiff judgment against Glen Castleberry for the reasonable amount of her attorneys fees and costs in pursuing this adversary proceeding, in an amount to be determined as follows:

    A. Mr. Bristol shall file a fee application with the Court within 15 days of the entry of this Memorandum, setting forth in detail his time records and hourly rate, and an itemized list of costs incurred.

    B. Mr. Bristol shall immediately serve a copy of the fee application on Defendant and his counsel.

C. Defendant shall have 15 days from the date of mailing of the fee application to file an objection with the Court detailing any objections to the rate, hours, or costs and immediately serve the same on Mr. Bristol. If Defendant files an objection, the Court will set a hearing on short notice to the parties.

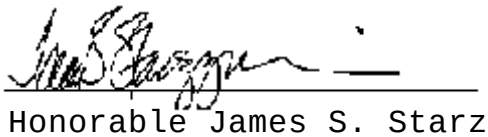
D. If Defendant files no objections, the Court will review the fee application for reasonableness.

E. After determining reasonable fees and costs, the Court will enter final judgment for those amounts.

30. The Court will also award Plaintiff judgment against Castleberry for $10,000.00 in punitive damages.

31. The total amount shall bear interest at the rate of 3.95% from the date of entry of judgment until paid. The 3.95% is the 1-year constant maturity Treasury yield published by the Board of Governors of the Federal Reserve System for the week ending October 3, 2005, available at http://www.federalreserve.gov/releases/h15/20051003/ (last visited October 14, 2005).

32. The Court will award Plaintiff nothing from Allsup's and the complaint against Allsup's will be dismissed with prejudice.



Honorable James S. Starzynski
United States Bankruptcy Judge

I hereby certify that on October 14, 2005, a true and correct copy of the foregoing was electronically transmitted, faxed, delivered, or mailed to the listed counsel and/or parties.

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