Honorable Gary Spraker
United States Bankruptcy Judge

Entered on Docket
April 20, 2016

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

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In re:	)	Case No.: 12-16811-mkn
	)	Chapter 7
HOLIDAY GUBLER,	)	
	)	**Oral Argument:**
Debtor.	)	
	)	**Date: March 9, 2016**
	)	**Time: 2:30 p.m.**

MEMORANDUM ON DEBTORS' MOTION TO REOPEN CHAPTER 7 UNDER § 350 AND F.R.B.P. 5010 TO HOLD CREDITORS IN CONTEMPT AND AN ORDER SANCTIONING THE CREDITORS FOR VIOLATION OF THE DISCHARGE INJUNCTION 11 U.S.C. § 524(A)(2)[1]

Before the court is debtor Holiday Gubler's *Motion to Reopen Chapter 7 under § 350 and F.R.B.P 5010 to Hold Creditors in Contempt and an Order Sanctioning the Creditors for Violation of the Discharge Injunction 11 U.S.C. § 524(a)(2)* ("*Motion for Sanctions*").[2] The motion was timely opposed by creditors Bruce and Mary Crater.[3] A hearing on the *Motion for Sanctions* was held on March 9, 2016, with appearances as noted on the record. No testimony was presented at the hearing, in large part because the underlying facts are not in dispute.

[1] In this Memorandum, all references to "Section" or "§" are to provisions of the Bankruptcy Code, 11 U.S.C. §§ 101-1532, unless otherwise indicated. All references to "ECF No." are to the numbers assigned to the documents filed in the case as they appear on the docket maintained by the clerk of the court.

[2] ECF No. 21.

[3] *Opposition to [Motion for Sanctions]*, ECF No. 25.

Accordingly, the court will rely on the factual representations set forth in the parties' briefing, and the substance provided in the exhibits to the *Motion for Sanctions*, to determine the issues raised herein.[4]

FACTS

I. PREPETITION LITIGATION.

On February 22, 2011, roughly 15 months before this chapter 7 case was initiated, the debtor, then known as Holiday Towles, entered into a settlement with Bruce and Mary Crater to resolve claims asserted against her and her former husband (collectively, the "defendants") in *Crater et al. v. The Amargosa Country Store, et al*, Case No, CV26759 (Fifth Jud. Dist., Nye County, Nevada). Under the settlement, brokered by the court at trial, "the Craters will enter a judgment for breach of contract in the amount of $50,000 with $100 per month beginning April 1 for 24 months by the defendants."[5] The Craters acknowledged in court that the defendants were "judgment proof." All parties were present and represented by counsel at this hearing; the defendants' counsel was Thomas Gibson, and the Craters were represented by Carl Joerger.[6]

A judgment by stipulation was entered June 11, 2011.[7] The Craters did not receive any of the monthly payments required under the brokered settlement. In July 2011, their counsel, Mr. Joerger, filed an Application for an Order to Show Cause re: Contempt of Court Order, dated February 22, 2011.[8] This application asked the court to require the debtor to appear and show

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[4] Both parties asked that the court determine the issues herein on the record, without the need for an evidentiary hearing. The parties also consented to the court taking judicial notice of the record in this bankruptcy case. Given that the debtor is unemployed, and the Craters' retirement income is not substantial, counsel for the parties expressed a desire to resolve this matter as economically as possible.

[5] ECF No. 21-1 (State Court Docket), at 2. The Craters had also asserted a claim for fraud against the defendants, but the settlement was founded on their breach of contract claim.

[6] *Id.*

[7] *Id.* at 3.

[8] ECF No. 21-2. The date in the title of the application refers to the settlement date.

cause why she should not be found in violation of a court order, in that she had failed to make a single monthly payment as required under the settlement.[9] The state court issued an Order to Show Cause on August 29, 2011, that directed both defendants to appear before it on September 26, 2011, "to Show Cause why this Court should not impose sanctions for their failure to purge themselves of Contempt of Court, to include imposition of a sentence of Confinement in Jail."[10]

At the show cause hearing held September 26, 2011, Mr. Gibson appeared on the debtor's behalf. He informed the court that he had no contact with the debtor, and that her former husband was in prison.[11] He also advised the court that he intended to file a motion withdraw from the defendants' representation. The court instructed him to file his motion.[12] Further, as a result of the debtor's failure to appear, the state court entered a bench warrant that commanded any law enforcement officer to "forthwith arrest [the debtor], and deliver her to the Nye County Jail . . . in order that she may be detained therein pending her appearance in District Court."[13] An amended bench warrant was subsequently issued that contained the same provision, subject to a $10,000.00 bail.[14] An order authorizing Mr. Gibson's withdrawal was

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[9] The application noted that the debtor's former spouse was currently "a resident of the Nevada prison system," and suggested that the debtor also be incarcerated "until she can figure out how she can obey this Court's orders." ECF No. 21-1 at 5:8-13.

[10] ECF No. 21-3 at 2:28-3:2.

[11] There is nothing in the record to indicate whether debtor herself was served with either the Craters' Show Cause application or the court's subsequent order setting the show cause hearing. The Craters' *Opposition* filed herein states that the debtor "was properly noticed" with the order to show cause by the service on her attorney of record, Mr. Gibson. *See* ECF No. 15 at 3:9-13.

[12] *See* ECF No. 21-1 at 3.

[13] ECF No. 21-4 at 2:23-24.

[14] *Id.* at 5.

entered September 30, 2011.[15]

The debtor acknowledges the terms of the settlement reached with the Craters. She avers that she was never notified of the Order to Show Cause entered by the state court, nor was she notified that her attorney in the state court action had withdrawn.[16] She further maintains that she was not notified that a bench warrant had issued for her arrest.[17]

II. THE CHAPTER 7 BANKRUPTCY.

The debtor filed a chapter 7 petition on June 6, 2012. She did not list the Craters as creditors on her bankruptcy schedules or creditor matrix, though she did disclose a lawsuit for breach of contract, as well as a "Notice of Entry of Judgment by Stipulation" in the amount of $50,000.00, on her Statement of Financial Affairs.[18] Because the debtor failed to list the Craters as creditors, they were not served with notice of the debtor's bankruptcy.

The debtor's case was declared a no asset case. While the bankruptcy trustee obtained an extension of time to file objections to discharge, none were ever filed. An Order Discharging Debtor was entered on November 13, 2012, relieving the debtor of her personal liability for all dischargeable prepetition debt. Her bankruptcy case was thereafter closed, on November 16, 2012.

III. POSTPETITION EVENTS.

Three years after her bankruptcy case was closed, on December 4, 2015, the debtor was arrested in Mesquite, Nevada, based upon the outstanding, prepetition bench warrant.[19] She was

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[15] ECF No. 21-5 at 2.

[16] ECF No. 21-6 (Gubler Aff.), ¶¶ 6-7.

[17] *Id.*, ¶ 8.

[18] ECF No. 1 at 31. The state court action is identified by case number, but the Craters themselves are not mentioned.

[19] ECF No. 21-6 (Gubler Aff.), ¶¶ 11-15.

held in the Mesquite jail overnight, and then transported to the jail in Pahrump, Nevada.[20] At the time of her arrest, the debtor was unemployed, but she was able to borrow $10,000.00 from her father to post bail.[21]

On December 15, 2015, the debtor, with attorney Jason Earnest, attended a hearing in district court. Mr. Joerger attended on behalf of the Craters. The state court docket, attached to the *Motion for Sanctions* as Exhibit 1, summarizes the discussion that was held at this hearing:

> The court reviews the case history and continues to inquiring [sic] regarding the settlement. Mr. Joerger reiterates the facts of the case and the payment arrangement which the defendant failed to comply with. Mr. Earnest outlines the issues and notes that the judgment was discharged in bankruptcy in 2012. Mr. Earnest continues to note that he has a copy of the notice of discharge. The court informs the parties that the plaintiff must have been named in the bankruptcy in order for the debt to be discharged. Mr. Joerger requests a status check to confirm the bankruptcy status.[22]

The matter was put over for a status check on December 18, 2015.

In the interim between these two hearings, on December 16, 2015, Mr. Joerger prepared and submitted to the state court a writ and notice of execution, for the purpose of satisfying the Craters' judgment through execution on the debtor's wages or other personal property.[23] It appears the writ was issued the same day that it was submitted. Mr. Joerger also filed an application for a judgment debtor examination. He admits that the debtor was given notice of both applications, but points out that the debtor examination was never scheduled and the writ itself was never executed. He further states that he told the Sheriff not to proceed with execution on the writ in a subsequent telephone call. The debtor does not challenge these contentions.

At the December 18, 2015 status check, Mr. Joerger appeared with the Craters, and Mr.

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[20] *Id.*, ¶ 17.

[21] *Id.*, ¶¶ 18-19.

[22] ECF No. 21-1 (State Court Docket), at 5.

[23] ECF No. 21-7.

Earnest appeared with the debtor. The state court docket summarizes the proceedings as follows:

> Court informs parties [the Craters] were not named within the bankruptcy and therefore the debt was not discharged. Mr. Earnest concurs with the court's finding that [the Craters] were not listed and notes said bankruptcy filing as a no asset bankruptcy. Mr. Earnest expresses his concern as he is not a bankruptcy attorney and notes his main focus as return of the bail money. Mr. Earnest argues it as improper if the bail money were to be credited towards the judgment. Court inquires as to the possibility of the parties reaching a payment agreement. Mr. Earnest informs the court of another attorney's advice that [the debtor] not make payments towards the judgment based on the no asset bankruptcy filing. Mr. Crater addresses the court. Court suggests counsel discuss possible remedies to this matter and expresses her frustration as no effort has been made to make [the Craters] whole. Mr. Crater again addresses the court. Mr. Joerger argues the bail money as executable as it is money held in [the debtor's] name. Court admonishes parties to do the right thing and continues the matter to February 9, 2016.[24]

The debtor's recollection of the December 18 hearing is slightly different. She avers that, although the court and the Craters acknowledged her bankruptcy filing, the court nonetheless proposed that the bail money be turned over to the Craters.[25] She states that her counsel produced case law to the Craters' counsel which told them the discharge was applicable to their debt, even though they had not received notice of the bankruptcy, but the court continued the hearing "to allow time for the parties to settle how the bail would be transferred."[26]

After this second hearing, the debtor retained bankruptcy counsel Jerimy Kirschner, who wrote a "cease and desist" letter to Mr. Joerger in January 2016. This letter provided the debtor's bankruptcy case number and the fact of her discharge in November 2012. It further stated:

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[24] ECF No. 21-1 (State Court Docket), at 5.

[25] ECF No. 21-6 (Gubler Aff.), ¶¶ 23, 24.

[26] *Id.*, ¶¶ 26, 27.

> Since at least December 7, 2015, you and [the Craters] have had actual notice of [the debtor's] bankruptcy and Discharge. Despite this knowledge, you and the Craters have made no effort to cease collection efforts or to dismiss the [state court action]. Regardless of whether the Craters received notice of [the debtor's] bankruptcy, they are bound by the discharge which prevents any and all collection actions against her. *In re Beezley*, 994 F.2d 1433 (9th Cir. 1993) (Where a creditor is omitted from notice of a no asset Chapter 7, the discharge still applies to the debt if it is of a kind that would have been discharged if listed.). Violations of the discharge are dealt with harshly and treated as a contempt of court. 11 U.S.C. § 105(a), 524(a). A bankruptcy court is given wide latitude for establishing penalties for such a violation, which markedly increase when the violation is willful.[27]

The letter demanded that Mr. Joerger "immediately cooperate with obtaining the release of the bail funds back to [the debtor], . . . and immediately dismiss the [state court action] . . . by January 20, 2016."[28] It further advised that if no progress was made towards dismissal or release of the bail money by this deadline, "we will reopen [the debtor's] bankruptcy . . . to obtain an emergency injunction, and move to hold everyone involved with the [state court action] in contempt of court."[29]

Mr. Joerger received this letter via facsimile on January 11, 2016. The demands stated in the cease and desist letter were not met by the deadline stated therein. The *Motion for Sanctions* was filed in this court on February 5, 2016. The state court action is still pending. The continued status check was held on February 9, 2016. Mr. Kirschner appeared at that status check, and advised the court that the *Motion for Sanctions* had been filed in the bankruptcy court. Mr. Joerger was present for the Craters.[30] The state court continued the status check

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[27] ECF No. 21-8 at 2.

[28] *Id.* at 3.

[29] *Id.*

[30] At oral argument, Mr. Joerger complained that Mr. Kirschner hadn't brought a copy of the *Motion for Sanctions* to the February 9 hearing. The court notes that the *Motion* was served on Mr. Joerger and his clients by first class mail on February 5, 2016. *See Cert. of Service*, ECF No. 21 at 10. The state court hearing was only four days afterwards. Mr. Joerger says he had not received his service

again, pending this court's determination of the *Motion.*

Mr. Joerger says no collection actions were taken on the Craters' behalf after receipt of the cease and desist letter. However, he did seek and obtain both a writ of execution and an order authorizing a judgment debtor examination prior to receiving Mr. Kirschner's letter. Mr. Joerger emphasizes that he advised the Sheriff not to execute on the writ, and, further, that he never actually scheduled the debtor's examination. The debtor was served with the underlying applications as to both the writ and judgment debtor examination, though.

ANALYSIS

I. CASE WILL BE REOPENED TO ACCORD RELIEF TO THE DEBTOR.

A bankruptcy case may be reopened "to accord relief to the debtor."[31] Such relief is clearly appropriate here, to address the matters that have occurred postpetition in the state court action. Accordingly, the court grants the debtor's request to reopen this case.

II. THE DISCHARGE INJUNCTION UNDER § 524(a).

The debtor seeks sanctions against the Craters for violation of the discharge injunction imposed under § 524(a), which provides that a bankruptcy discharge:

> (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;
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> (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[.][32]

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copy by the time of the hearing. *See Opposition to [Motion for Sanctions]*, ECF No. 25 at 5:17-28. However, the significance of this point is lost on the court, particularly in light of the fact that Mr. Joerger acknowledges his earlier receipt of the cease and desist letter on January 11.

[31] 11 U.S.C. § 350(b).

[32] 11 U.S.C. § 524(a).

"The purpose of the discharge injunction is to protect the debtor from having to put on a defense in an improvident state court action or otherwise suffer the costs, expense and burden of collection activity on discharged debts."[33]

Both the state court and the Craters appear to have operated under the assumption that the debtor's discharge did not apply to the Craters' debt because they were not listed as creditors in the debtor's bankruptcy case. Their position is premised on § 523(a)(3)(A), which excludes from discharge any debt that is "neither listed nor scheduled . . . in time to permit . . . timely filing of a proof of claim, unless [the affected creditor] had notice or actual knowledge of the case in time for such filing."[34]

The Craters did not receive notice of the debtor's bankruptcy until three years after her discharge was entered and the bankruptcy case was closed. Under a simple reading of § 523(a)(3)(A), it would appear their debt was excepted from discharge. However, the operative language of this subsection requires that the creditor does not receive notice of the bankruptcy in time to permit "the timely filing of a proof of claim."[35] The debtor correctly relies on the Ninth Circuit's decision in *Beezley v. California Land Title Co. (In re Beezley*),[36] for the proposition that "in a no asset, no bar date case, section 523(a)(3)(A) is not implicated because there can never be a time when it is too late 'to permit timely filing of a proof of claim.'"[37] For this reason, even unlisted debts are discharged in a no asset chapter 7 bankruptcy case, because the

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[33] *Emmert v. Taggart (In re Taggart)*, ___ B.R. ___, 2016 WL 1445210, at *8 (B.A.P. 9th Cir. Apr. 12, 2016)(quoting *In re Eastlick*, 349 B.R. 216, 229 (Bankr. S.D. Idaho 2004)).

[34] 11 U.S.C. § 523(a)(3)(A). Debts arising from intentional torts such as fraud, embezzlement, or willful and malicious injury, are excluded from this subsection and covered in § 523(a)(2)(B).

[35] 11 U.S.C. § 523(a)(3)(A).

[36] 994 F.2d 1433 (9th Cir. 1993).

[37] *Id*. at 1436 (O'Scannlain, concurring)(internal quotations omitted).

creditor was never deprived "of the opportunity to file a timely claim."[38]

The Ninth Circuit reiterated this point of law in *White v. Nielsen (In re Nielsen),*[39] stating that "[s]uch a failure to list nevertheless does not make the debt non-dischargeable in a no-assets, no-bar-date Chapter 7 bankruptcy because, in such a bankruptcy, there is no time limit for 'timely filing of a proof of claim,' so none are untimely."[40] The court in *Nielsen* noted, however:

> This is not to say that if [the creditor's] debt is non-dischargeable, she has lost the opportunity to litigate its dischargeability. Rather, if the debt is non-dischargeable *for reasons other than failure to schedule it*, then it was not discharged, and non-dischargeability can be litigated outside the normal time limits.[41]

During oral argument on the *Motion for Sanctions*, this court examined Mr. Joerger as to whether the Craters intended to challenge the discharge of their judgment on a ground other than lack of notice. While Mr. Joerger suggested that the Craters might be able to challenge dischargeability based on fraud, he conceded that his clients were unlikely to do so.[42] Because the parties have very limited means, counsel for both emphasized to this court that they would like this matter resolved as expeditiously and economically as possible. Therefore, the court finds that lack of notice is the sole basis on which the Craters contest the nondischargeability of their claim.

Based on clear Ninth Circuit authority – the *Beezley* and *Nielsen* decisions – the Craters'

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[38] *Id.*

[39] 383 F.3d 922 (9th Cir. 2004).

[40] *Id.* at 926-27.

[41] *Id.* at 927 (emphasis added); *see also In re Beezley*, 994 F.3d at 1436 (a discharge in a no asset chapter 7 case does not cover an unscheduled debt if, "with respect to an intentional tort debt covered by § 523(c), the failure to schedule deprives the creditor of the opportunity to file a timely claim *or* a nondischargeability complaint.")(emphasis in original).

[42] As discussed above, the Craters' state court action asserted claims for both fraud and breach of contract. During oral argument on the *Motion for Sanctions*, Mr. Kirschner submitted that the fraud claim was now barred, in light of the stipulated judgment based solely on breach of contract. Under the circumstances, it is unnecessary for the court to determine this point.

debt has been discharged in this bankruptcy; the debtor's failure to list them as creditors was legally irrelevant in this no asset, chapter 7 bankruptcy. Indeed, *had* the Craters received the initial notice of the debtor's bankruptcy filing, they would have been advised, "Please Do Not File a Proof of Claim Unless You Receive a Notice To Do So."[43] A subsequent notice advising creditors to file claims was never served in this case. Because a deadline for filing claims was never set, the Craters have not missed an opportunity to file a claim in this case. The debtor's discharge injunction, therefore, applies to the Craters' debt. Under § 524(a), their judgment is void "to the extent that [it] is a determination of the personal liability of the debtor,"[44] and the continuation of the state court action, including the "employment of process, or an act, to collect, recover or offset [the Craters'] debt as a personal liability of the debtor," is enjoined.[45]

III. VIOLATIONS OF THE DISCHARGE INJUNCTION HAVE OCCURRED.

Based on the record presented herein, the court finds that the postpetition enforcement of the bench warrant, the subsequent state court hearings, Mr. Joerger's applications for a writ of execution and a judgment debtor examination, and the issuance of orders on those applications, each violated the discharge injunction.[46] The post-arrest court proceedings are squarely directed

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[43] ECF No. 6, at 1 (Notice of Chapter 7 Bankruptcy Case, Meeting of Creditors, & Deadlines).

[44] 11 U.S.C. § 524(a)(1). The debtor's discharge has no affect on her former husband's liability, however.

[45] 11 U.S.C. § 524(a)(2).

[46] The *Motion for Sanctions* argues that all post-discharge events in the state court action, including the postpetition enforcement of the bench warrant, which resulted in the debtor's arrest, and the requirement to post a bond, violated the discharge injunction. Part of the relief requested by the debtor is expungement of records related to her arrest and the release of the bail money. *See* ECF No. 21 at 9:9-13. Whether the acts related to enforcement of the bench warrant violated the discharge injunction is a question of some complexity. From this court's research, the most recent pronouncement on the subject involves an appeal from a ruling by Judge Beesley in *Yellow Express, LLC v. Dingley (In re Dingley*), 514 BR 591 (B.A.P. 9th Cir. 2014), wherein the Bankruptcy Appellate Panel noted:

> The Ninth Circuit has created a bright-line rule on whether the automatic stay applies to state court contempt proceedings, whether they are based on nonpayment of a monetary sanction or some other

toward collection of the discharged debt. As such, those proceedings, and the Craters' collection efforts, clearly constitute the "continuation of an action, the employment of process, or an act, to collect, recover or offset [the Craters'] debt as a personal liability of the debtor."[47] All such actions violated 11 U.S.C. § 524(a).

IV. SANCTIONS FOR VIOLATION OF THE DISCHARGE INJUNCTION.

Having found a violation of the discharge injunction, the question becomes whether the Craters or their attorney are liable for damages, including attorney fees, arising from those violations. A party who knowingly violates the discharge injunction can be held in contempt under 11 U.S.C. § 105(a).[48] The party seeking contempt sanctions must prove, by clear and convincing evidence, that such sanctions are justified.[49] To satisfy this standard, the moving party must show that "the creditor (1) knew the discharge injunction was applicable and (2) intended the actions which violated the injunction."[50]

> behavior which violates a state court order: if the sanction order "does not involve a determination [or collection] of the ultimate obligation of the bankrupt nor does it represent a ploy by a creditor to harass him" the automatic stay does not prevent the proceeding from going forward.

Id. at 597 (quoting *David v. Hooker, Ltd.*, 560 F.2d 412, 418 (9th Cir. 1977)). The *Dingley* decision is currently on appeal to the Ninth Circuit, with oral argument scheduled in the near future.

The court observes that, even under the "bright line rule" stated in *In re Dingley*, the record here does not support a finding that enforcement of the bench warrant was directed to the "nonpayment of a monetary *sanction* or some other behavior which violates a state court order." *Id.* (emphasis added). The show cause hearing was scheduled based on the debtor's nonpayment of a stipulated civil judgment and payment plan, rather than a monetary sanction. The state court issued the bench warrant in spite of being informed that the debtor's counsel had been unable to contact her, and in aid of the Craters' collection of the stipulated civil judgment. Under the circumstances, the court finds that all postpetition activity in the state court action was directed to "collection of the ultimate obligation of the bankrupt," rather than the debtor's contempt of court for failure to appear at the prepetition show cause hearing. *Id.*

[47] 11 U.S.C. § 524(a)(2).

[48] *ZiLOG, Inc. v. Corning (In re ZiLOG, Inc.)*, 450 F.3d 996, 1007 (9th Cir. 2006).

[49] *Id.*

[50] *Id.* (citing *Renwick v. Bennett (In re Bennett)*, 298 F.3d 1059, 1069 (9th Cir. 2002)).

A. Creditor's Knowledge of the Discharge Injunction.

The first prong of the contempt analysis requires the debtor to establish that the creditor knew the discharge injunction was applicable. A creditor's knowledge of the injunction cannot be imputed; it is a question of fact that typically requires an evidentiary hearing.[51] However, such a hearing is not required if the facts are not in dispute.[52] Here, the facts are not in dispute and the parties have agreed to submit the matter on the existing record, without testimony.

Innocent violations of the discharge injunction are not sanctionable. On the other hand, once a creditor *knows* that the discharge injunction is applicable to its claim, it has an affirmative duty to remedy any violations of that injunction.[53] Knowledge of the discharge injunction, however, requires more than a finding that the creditor knew of the debtor's bankruptcy. Rather, there must be evidence showing that the creditor was aware of the discharge injunction *and* that it was applicable to its claim.[54] To determine "awareness" under this standard "implicates a party's subjective belief, even an unreasonable one," although "subjective self-serving testimony may not be enough to rebut actual knowledge when the undisputed facts show otherwise."[55]

The Ninth Circuit discussed this standard in *In re ZiLOG, Inc.*[56] In that matter, the court considered whether damages for violation of the discharge injunction were properly imposed on employees who commenced a civil action against their employer, a chapter 11 debtor, post-confirmation. The employees were keenly aware of the bankruptcy proceedings, and knew that a

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[51] *In re ZiLOG*, 450 F.3d at 1008. While the court might *infer* knowledge of the discharge injunction from the fact that the creditor knew of the bankruptcy, "only actual knowledge of the discharge injunction suffices for a finding of contempt." *Id.*

[52] *Id.* n.11 (citing *Knupfer v. Lindblade (In re Dyer)*, 322 F.3d 1178, 1191-92 (9th Cir. 2003)).

[53] *Id.* at 1009 (citing *In re Dyer*, 322 F.3d at 1192).

[54] *In re Taggart*, ___ B.R. ___, 2016 WL 1445210, at *10 (emphasis in original).

[55] *Id.*

[56] 450 F.3d 996 (9th Cir. 2006).

plan had been confirmed. The bankruptcy court inferred the employees' knowledge of the discharge injunction from these facts, and granted summary judgment to the debtor. The Ninth Circuit reversed, noting that the "willfulness question" was clouded because the debtor had sent deficient, confusing notices to the employees, preconfirmation, regarding the claims they asserted post-discharge.[57] Because these notices may have led the employees to believe, even unreasonably, that the discharge injunction did not apply to their claims, the court reversed and remanded the matter to the bankruptcy court.[58]

In the instant case, the court must determine when the Craters were aware that the discharge injunction applied to their judgment. Clearly, "awareness" cannot be found in any act that occurred in the state court action before the parties had actual knowledge of the debtor's bankruptcy. Thus, the postpetition execution of the bench warrant, the debtor's arrest, and the imposition of bail, are not sanctionable because there is nothing in this record to establish that the Craters, their counsel, or the state court knew of the debtor's bankruptcy when these events occurred.

Nor can the court find that the Craters were both aware of the discharge injunction *and* that it was applicable to their claim with respect to the other events that occurred in December 2015. The Craters and Mr. Joerger were informed of the debtor's bankruptcy filing at the December 15, 2015 hearing in the state court.[59] The state court judge stated that the Craters must have been named in the debtor's bankruptcy for their judgment to be discharged. Mr. Joerger asked the state court to put the matter over so he could confirm the debtor's bankruptcy status. Because the Craters and their counsel were not yet aware that the discharge applied to the

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[57] *Id.* at 1011 n.14.

[58] *Id.* at 1009-1010.

[59] The "cease and desist" letter stated that they actually knew of the debtor's bankruptcy filing as early as December 7, 2015. There is no other evidence on this point, which is immaterial to the analysis in any event.

judgment, no sanctionable conduct occurred at this initial hearing.

The day after the initial hearing, Mr. Joerger applied for both a writ of execution and a judgment debtor examination. He explains that he had checked the debtor's bankruptcy case and found that his clients were not listed as creditors.[60] The court presumes Mr. Joerger believed, at the time these applications were filed, that the discharge injunction did not apply to his clients. There is no evidence that the debtor or her counsel spent any time responding to either application.

At the second status check, held December 18, 2015, the state court informed the parties that the Craters' judgment had not been discharged because the debt was not listed in the bankruptcy. The court then turned its focus to having the parties work out some sort of payment plan. While the debtor's attorney, Mr. Earnest, agreed that the debt had not been listed, he again observed that the debtor's bankruptcy had been a no asset chapter 7. Neither the state court nor the Craters recognized the significance of this fact, and Mr. Earnest conceded he was not a bankruptcy attorney. He also stated that another attorney had advised him the debtor should not make payments on the judgment, nor should the bail money be applied toward that debt. Mr. Joerger disagreed. The matter was put over to February 9, 2016, with the state court admonishing the parties to "do the right thing."

The court declines to find sanctionable conduct in either Mr. Joerger's filing of the applications or the events of the December 18 hearing. Even though the Craters and their counsel knew of the debtor's bankruptcy, they had also been informed by the state court at both of the December hearings that their debt would not be discharged unless they were listed in the bankruptcy. Mr. Joerger had checked the debtor's bankruptcy file to confirm that his clients were not listed. The Craters and their counsel could reasonably rely on the state court's assessment that their unlisted debt was not discharged. "[S]tate courts have the power to

[60] *Opposition to [Motion for Sanctions]*, ECF No. 25 at 4:7-14.

construe the discharge and determine whether a particular debt is or is not within the discharge."[61] "A party who acts in reliance on a facially valid determination that the discharge does not apply cannot be guilty of 'willfully' violating the discharge injunction."[62]

The state court's pronouncement was in error. This point was clearly made in the cease and desist letter that the debtor's bankruptcy counsel, Mr. Kirschner, served on Mr. Joerger on January 11, 2016. That letter cited the Ninth Circuit's *Beezley* decision, and explained that the Craters' debt had been discharged in the debtor's no asset chapter 7 case, in spite of her failure to list these creditors in her bankruptcy. This letter wholly undermined the state court's reasoning as to why the Craters' claim had survived the bankruptcy. The court finds that, upon Mr. Joerger's receipt of this letter, the Craters had the requisite "awareness" as to the effect of the debtor's bankruptcy, i.e., they were aware of the discharge injunction *and* that it was applicable to their claim.[63] Having this knowledge, the Craters had an affirmative duty to remedy any violations of that injunction.[64] They have not done so. They did not make any effort to dismiss the state court action or otherwise notify the state court that they would no longer seek recovery on the judgment. Nor did they arrange for the release of the bail money. As a result of their inaction, and the continued hearings in state court, the debtor was compelled to seek reopening

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[61] *In re Taggart*, ___ B.R. ___, 2016 WL 1445210 at *11 n.12 (quoting *Pavelich v. McCormick, Barstow, Sheppard, Wayte & Carruth LLC (In re Pavelich)*, 229 B.R. 777, 783 (B.A.P. 9th Cir. 2000)). However, if the state court incorrectly construes the discharge, its determination may be void and subject to collateral attack in the bankruptcy court. *Id.*

[62] *Id.* at *11.

[63] *Id.* at *10.

[64] *In re ZiLOG*, 450 F.3d at 1009 (citing *In re Dyer*, 322 F.3d at 1192). *See also Faden v. Segal (In re Segal)*, 2015 WL 400643, at *8 (B.A.P. 9th Cir. Jan. 29, 2015) (once creditor know of the discharge injunction, "he had an ongoing and affirmative duty after that point to unwind the effects of his discharge injunction violation.").

of this case and a decision from this court to lay the matter to rest.

B. Creditor Intended the Actions Which Violated the Injunction.

The court finds that the Craters knew the discharge injunction applied to their claim as of January 11, 2016, when their counsel received the cease and desist letter. To satisfy the second element of the sanctions analysis, the debtor must establish that the Craters intended the actions which violated the injunction. Unlike the first prong of the contempt analysis, which rests on the creditor's subjective intent, this second element focuses on whether the creditor's conduct "in fact complied with the order at issue."[65] The creditor's belief or intent with respect to its actions is immaterial.[66] Further, a creditor is not free to violate the discharge injunction because it has doubts as to its validity; it should instead seek to reopen the bankruptcy case and obtain a determination of its rights, post-discharge.[67]

After the Craters received the cease and desist letter, the following events occurred:

1) Mr. Joerger advised the Sheriff not to serve the writ of execution, and did not schedule the judgment debtor examination authorized by the state court.

2) Mr. Joerger attended the continued status hearing in state court on February 9, 2016. The debtor's bankruptcy counsel, Mr. Kirschner, also attended this hearing and advised the court and parties that the *Motion for Sanctions* had been filed.

3) The Craters filed their *Opposition* to the *Motion for Sanctions* in this court, and attended two hearings on that *Motion.*

4) Mr. Joerger offered to continue the next state court status hearing, scheduled for April 19, 2016, pending this court's ruling on the *Motion for Sanctions.*

5) The Craters and their counsel have made no effort to arrange for release of the bail money posted by the debtor's father, nor have they advised the state court that they will no longer pursue collection of the judgment.

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[65] *In re Taggart*, ___ B.R. ___, 2016 WL 1445210 at *10.

[66] *Id.*

[67] *Espinosa v. United Student Aid Funds, Inc.*, 553 F.3d 1193, 1205-06 n.7 (9th Cir. 2008), *aff'd*, 559 U.S. 260 (2010).

All of these actions are intentional. Some are also remedial. Specifically, Mr. Joerger "called off" execution on the writ and did not schedule a judgment debtor examination. These actions are not sanctionable. But, from the court's perspective, these actions did not go far enough to fully remediate the situation in state court. The ongoing status hearings in state court, the Craters' failure to advise the state court that their debt had been discharged under federal law, and their failure to arrange for return of the bail money, are all actions that violate the discharge injunction. Having found that these are intentional acts that violate the injunction, the burden shifts to the Craters to demonstrate why they were unable to comply with its requirements.[68] Compliance in this instance would have required them to cease prosecution of the state court action and arrange for return of the bail money.

During argument, Mr. Joerger explained that he felt he was obligated to appear at the state court's continued hearings, because that was what the judge had ordered. He argues that he has simply maintained the status quo pending this court's determination of the *Motion for Sanctions.* Maintaining the status quo, however, does not comply with the affirmative duty placed upon creditors "to unwind the effects of [their] discharge violation" once they become aware of the discharge injunction.[69] Given the circumstances of this case, the sanctionable conduct springs not from the arrest, the initial hearings, or the Craters' initial collection activity. Rather, it rests upon the Craters' lack of action with respect to the bail money, and their failure to affirmatively advise the state court that, under controlling Ninth Circuit law, their judgment was discharged in the debtor's bankruptcy. Having been notified of irrefutable authority on this point in the cease and desist letter, their delay is inexplicable. In fact, it was their delay in acting that required the debtor to seek relief in this court.

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[68] *In re Bennett*, 296 F.3d at 1069.

[69] *In re Segal*, 2015 WL 400643, at *8.

V. THE DEBTOR IS ENTITLED TO SANCTIONS.

The debtor has established, by clear and convincing evidence, that the Craters knew the discharge injunction was applicable to their judgment on January 11, 2016, when their counsel received the cease and desist letter. Further, she has established that the Craters have failed to take the remedial actions demanded in that letter to prevent further violations of the discharge injunction. These failures were intentional, rather than negligent, and consist of: 1) the Craters' willingness to continue the state court action in spite of having received the cease and desist letter, 2) their failure to acknowledge to the state court the controlling Ninth Circuit case law as set out in that letter, and 3) their inaction as to the bail money. The debtor has, therefore, shown that a willful violation of the discharge injunction has occurred.

The bankruptcy court may impose civil penalties for such violation under 11 U.S.C. § 105(a).[70] Such penalties "must either be compensatory or designed to coerce compliance."[71] The court "may award a debtor actual damages and attorney's fees," and may also order the offending creditor's compliance with the discharge injunction.[72] In this instance, the court finds that the debtor is entitled to recover, as compensatory sanctions, the amount of reasonable attorney's fees incurred by her bankruptcy counsel to resolve this matter. Her recoverable fees include the amounts required for her counsel to prepare the cease and desist letter, and the *Motion for Sanctions*. She is also entitled to recover the fees incurred by her bankruptcy counsel to attend any of the state court status hearings, and the two hearings in this court.

At oral argument, Mr. Kirschner estimated that his fees in this matter were approximately $4,000.00, not including the two bankruptcy court hearings. Mr. Kirschner will be required to

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[70] *ZiLOG*, 450 F.3d at 1007.

[71] *In re Dyer*, 322 F.3d at 1192.

[72] *Redinger Inv. Corp. v H. Granados Commc'n, Inc. (In re H Granados Commc'n, Inc.)*, 503 B.R. 726, 735 (B.A.P. 9th Cir. 2013)(citing *Walls v. Wells Fargo Bank, N.A.*, 276 F.3d 502, 507 (9th Cir. 2002)).

file an itemization of his fees for the court's review. Mr. Joerger will have an opportunity to respond as to the reasonableness of the services and amounts listed on that itemization. The court will then review the itemization and the response, and determine the appropriate amount of fees to be awarded to compensate the debtor in this matter.

The debtor also seeks to recover her costs in this matter, consisting of the fee to reopen this bankruptcy case, and $28.50 in copying costs to obtain copies of documents in the state court action. The court will award the copying costs, upon proof by itemization. Further, it will direct the Clerk to refund the reopening fee, which is not chargeable when a debtor seeks to reopen a case "based on an alleged violation of the terms of the discharge under 11 U.S.C. § 524."[73]

Additionally, Mr. Joerger must accomplish the following tasks to comply with the discharge injunction. First, he must advise the state court that the Craters' debt has been discharged. He shall also clarify with that court whether there is any purpose to holding further hearings in that civil action, in light of this fact. Unless the state court seeks to impose sanctions on the debtor *for a reason other than her failure to pay the Craters' judgment*, Mr. Joerger shall arrange to vacate any further hearings in the state court civil action. Most significantly, Mr. Joerger shall arrange for the release of the bail money. The Craters' judgment has been discharged, and any further collection activity on that debt would be an additional, sanctionable violation of the discharge injunction. The bail money cannot, under any circumstance, be applied in satisfaction of that obligation.

Finally, the debtor has requested an award of damages for emotional distress, as well as punitive damages. The court may not award punitive damages under the authority of § 105,[74] but

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[73] 28 U.S.C. § 1930(b); Bankruptcy Court Miscellaneous Fee Schedule, ¶ 11.

[74] *In re Dyer*, 322 F.3d at 1191.

in appropriate circumstances, it may award compensatory damages for emotional distress.[75] An award of such damages is justified if there is a clear showing that the debtor suffered significant harm, and a causal connection is found between the harm and the creditor's violation of the discharge injunction.[76]

The debtor's emotional distress argument primarily hinges on the prepetition issuance of the bench warrant and her arrest.[77] The issuance of the bench warrant did not violate the discharge injunction because it predates the filing of this bankruptcy case. There may be other significant issues with the warrant, as it appears the debtor had no knowledge that she had been ordered to appear before the state court for the failure to make payments on a civil judgment. However, the bankruptcy court lacks jurisdiction to address those issues here. Further, even though the arrest based upon the bench warrant occurred after entry of the debtor's discharge, neither the state court nor the Craters had knowledge of her bankruptcy filing at that time. Without question, the debtor suffered distress from her arrest and jailing. Yet, with respect to these acts, there is no causal connection between her anguish and a willful violation of the discharge injunction.

The debtor also argues that she is entitled to emotional distress damages based on the Craters' failure to stop their collection activities after being notified of her bankruptcy. As discussed in detail above, a creditor's liability for violation of the discharge injunction requires

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[75] *C & W Asset Acquisition, LLC, v. Feagins (In re Feagins)*, 439 B.R. 165, 178 (Bankr. D. Hawai'i 2010)(citing *Dawson v. Washington Mutual Bank, F.A. (In re Dawson)*, 390 F.3d 1139, 1149 (9th Cir. 2004)); *see also In re Feldmeier*, 335 B.R. 807, 814 (Bankr. D. Or. 2005)(emotional distress damages are available for a creditor's willful violation of the discharge injunction).

[76] *In re Feagins*, 439 B.R. at 178 (citing *Dawson v. Washington Mutual Bank, F.A.*, 390 F.3d at 1149); *see also In re Feldmeier*, 335 B.R. at 814 (same).

[77] The only evidence of emotional distress is found in Ms. Gubler's statement in her affidavit that "[t]his is one of the most humiliating moments of my life." ECF No. 21-6 (Gubler Aff.), ¶ 20. The statement was made in relation to her arrest, and the need to contact her father for the bail money. No other direct evidence of emotional distress was presented.

more than that the creditor knew of the bankruptcy. The creditor must also know that the discharge applies to its claim. In this instance, the state court twice pronounced that the Craters' debt was not discharged because it had not been listed in the bankruptcy. The Craters' reliance upon the state court was reasonable, until their counsel received the cease and desist letter in January 2016. Further, by the time of the December 2015 hearings, the debtor was no longer in jail. Her efforts to obtain a resolution of this matter have cost her time, attorney's fees, and a good deal of frustration, but there is no clear evidence of significant harm that would justify an award of emotional distress damages.

For the foregoing reasons, the debtor's *Motion for Sanctions* will be GRANTED. An order shall be entered consistent with this *Memorandum.*

* * * *

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