

  
Honorable Mike K. Nakagawa  
United States Bankruptcy Judge



Entered on Docket  
October 19, 2018

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEVADA

\* \* \* \* \*

In re: ) Case No.: 17-14004-MKN  
          ) Chapter 7  
DEAN TYLER BUSH, )  
  ) Date: October 17, 2018  
Debtor. ) Time: 2:30 p.m.  
  )

**ORDER ON MOTION FOR SANCTIONS<sup>1</sup>**

On October 17, 2018, the court heard the Motion for Sanctions for Intentional Violation of the Automatic Stay and Discharge Injunction (“Sanctions Motion”) brought by Dean Tyler Bush (“Debtor”). The appearances of counsel were noted on the record. After arguments were presented, the matter was taken under submission.

**BACKGROUND**

On July 25, 2017, Debtor filed a voluntary Chapter 7 bankruptcy petition along with his schedules of assets and liabilities (“Schedules”), Statement of Financial Affairs, and other required information. (ECF No. 1).<sup>2</sup> On the same date, the Clerk of the Court issued a notice to all creditors (“Bankruptcy Notice”) that the case was assigned to Shelley D. Krohn, as Chapter 7 bankruptcy trustee (“Trustee”). (ECF No. 7). The Bankruptcy Notice also informed creditors of the date of a meeting of creditors, the deadline to object to discharge or to determine

<sup>1</sup> In this Order, all references to “ECF No.” are to the number assigned to the documents filed in the case as they appear on the docket maintained by the clerk of court. All references to “Section” are to the provisions of the Bankruptcy Code, 11 U.S.C. §§ 101-1532.

<sup>2</sup> Included with the bankruptcy petition and other documents is a Verification of Creditor Matrix to which is attached a list of the Debtor’s creditors (“Creditor Matrix”).

1 dischargeability of debt, and the deadline to object to the Debtor's exemptions. Additionally, the  
2 Bankruptcy Notice informed all creditors that no property appeared to be available to pay claims,  
3 and that creditors therefore need not file proofs of claim unless otherwise notified by the court.

4 On September 19, 2017, Debtor filed amended Schedules "A/B" and an amended  
5 Statement of Financial Affairs. (ECF Nos. 15 and 16).

6 On October 24, 2017, an order was entered granting Debtor his Chapter 7 discharge  
7 ("Order of Discharge"). (ECF No. 19).

8 On October 27, 2017, a Final Decree was entered discharging the Trustee of any further  
9 duties and closing the case. (ECF No. 21).

10 On June 29, 2018, Debtor filed a motion to reopen his Chapter 7 case. (ECF No. 22).

11 On July 2, 2018, an order was entered reopening the case. (ECF No. 24).

12 On August 24, 2018, the instant Sanctions Motion was filed by Debtor, and noticed to be  
13 heard on October 3, 2018. (ECF Nos. 25 and 26).

14 On October 1, 2018, an opposition to the Sanctions Motion ("Opposition") was filed by  
15 Las Vegas Hospitalists ("LVH"). (ECF No. 30). At the October 3 hearing, the matter was  
16 continued to October 17, 2018, to permit a response to be filed by the Debtor.

17 On October 9, 2018, Debtor filed a reply to the Opposition ("Reply"). (ECF No. 32).

## 18 DISCUSSION

19 The court having considered the written and oral arguments presented, along with the  
20 entire record in this proceeding, concludes that the Sanctions Motion must be denied in part and  
21 granted in part.

### 22 1. The Automatic Stay.

23 Debtor seeks damages for violation of the automatic stay pursuant to Section 362(k)(1).  
24 Debtor attests that after he received his Chapter 7 discharge, he "began received (sic) debt  
25 collection letters from LVH regarding the discharged debt." Bush Declaration at ¶¶ 7 to 23.<sup>3</sup>  
26 The record reflects that the Order of Discharge was entered on October 24, 2017. (ECF No. 19).

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28 <sup>3</sup> The exhibits attached to the Bush Declaration appear to be typical billing statements rather than "collection letters."

1 Under Section 362(c)(1)(C), the automatic stay terminated with respect to the Debtor when he  
2 received his Chapter 7 discharge. Because the only actions taken by LVH occurred after the  
3 Debtor received his discharge, the automatic stay did not apply to those activities. Accordingly,  
4 there was no automatic stay violation and no sanctions are available under Section 362(k).

5 **2. The Discharge Injunction.**

6 Debtor also seeks damages under Section 105(a) for violation of the discharge injunction  
7 that arose under Section 524(a)(2). Under the latter provision, a bankruptcy discharge “operates  
8 as an injunction against...an act, to collect, recover or offset any such debt as a personal liability  
9 of the debtor...” 11 U.S.C. §524(a)(2). Under the former provision, a bankruptcy court may  
10 “issue any order, process, or judgment that is necessary or appropriate to carry out the  
11 provisions...” of the Bankruptcy Code. 11 U.S.C. §105(a). Enforcement of the discharge  
12 injunction pursuant to Section 105(a) may include the imposition of civil contempt sanctions.  
13 See In re Zilog, Inc., 450 F.3d 996, 1007 (9th Cir. 2006). Civil contempt sanctions may include  
14 an award of compensatory damages, attorney’s fees and costs, and relatively mild, non-  
15 compensatory fines. See In re Dyer, 322 F.3d 1178, 1193-95 (9th Cir. 2003). The party seeking  
16 contempt sanctions must prove by clear and convincing evidence the violation committed by the  
17 respondent. Id. at 1191.

18 The Ninth Circuit recently clarified the applicable standard for imposition of contempt  
19 sanctions for violation of the discharge injunction. In Lorenzen, et al. v. Taggart (In re Taggart),  
20 888 F.3d 438 (9th Cir. 2018), the circuit observed:

21 [A] bankruptcy court may hold a party in contempt for knowingly violating the  
22 discharge injunction...We have adopted a two-part test for determining the  
23 propriety of a contempt sanction in the context of a discharge injunction: “[T]o  
24 justify sanctions, the movant must prove that the creditor (1) knew the discharge  
25 injunction was applicable and (2) intended the actions which violated the  
26 injunction.”...To satisfy the first prong, knowledge of the applicability of the  
27 injunction must be proved as a matter of fact and may not be inferred simply  
28 because the creditor knew of the bankruptcy proceeding...Additionally, the  
creditor’s good faith belief that the discharge injunction does not apply to the  
creditor’s claim precludes a finding of contempt, even if the creditor’s belief is  
unreasonable.

1 888 F.3d at 443-44.<sup>4</sup>

2 In response to the instant Sanctions Motion, LVH maintains that it never had notice of the  
3 Debtor's bankruptcy case because it was never listed as a creditor in the Schedules. See  
4 Opposition at 4:18-24. Moreover, it maintains that it was never included in the Creditor Matrix  
5 submitted by the Debtor nor in any certificate of service for any notices issued during the  
6 Debtor's bankruptcy case. Id. at 4:25 to 7:2. Because it was not scheduled and did not receive  
7 notice, LVH also asserts that the Debtor's obligation was not discharged in this Chapter 7 case.  
8 Id. at 5:17-19 ("This debt of \$180 was not discharged as this was not listed anywhere (SOFA) of  
9 Debtor's Voluntary Petition. It may not be collectible but definitely was not discharged through  
10 Debtor's listing and schedules."). The latter assertion, of course, is clearly incorrect because  
11 unsecured debts otherwise excepted from discharge under Section 523(a)(3) are discharged in  
12 "no asset" cases under Chapter 7.<sup>5</sup>

13 But the failure to schedule a creditor or to provide notice of the bankruptcy is not  
14 immaterial to whether a creditor has violated the discharge injunction. In this instance, however,  
15 Debtor attests that after he received a collection letter from LVH in January 2018, he called LVH  
16 on January 25, 2018, and spoke to an individual named "Kym." See Bush Affidavit at ¶¶ 9-10.

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18 <sup>4</sup> In Taggart, contempt sanctions were denied because the creditors at issue were found to  
19 have a good faith belief that the discharge injunction did not apply to their claims. The circuit  
20 panel observed: "Much like the creditors in Zilog relied on statements by debtor's counsel and  
21 the bankruptcy court in concluding that their claims were not impacted by the discharge  
22 injunction, the Creditors relied on the state court's judgment that the discharge injunction did not  
23 apply to their claim for post-petition attorney's fees. Although the Creditors – like the creditors  
24 in Zilog – were ultimately incorrect, their good faith belief, even if unreasonable, insulated them  
25 from a finding of contempt." 888 F.3d at 444.

24 <sup>5</sup> There is no dispute that the Bankruptcy Notice served on the entire Creditor Matrix  
25 instructed creditors not to file proofs of claim as no deadline had been set. (ECF No. 7). There  
26 also is no dispute that on October 18, 2017, the Trustee completed the meeting of creditors and  
27 docketed a "no asset" report the following day. (ECF Nos. 17 and 18). As the Debtor's  
28 bankruptcy was determined to be a no asset case, a deadline to file proofs of claim was never  
established. Because no deadline to file proofs of claim was established in this Chapter 7 case, it  
is settled in this circuit that the Debtor's discharge includes the claims of creditors who were not  
scheduled and who did not receive notice of the bankruptcy in time to file a claim. See In re  
Beezley, 994 F.2d 1433, 1434 (9th Cir. 1993).

1 He attests that Kym agreed to note the Debtor's bankruptcy filing and discharge in the LVH  
2 records. Id. Debtor attests that he received another collection letter in February 2018 and again  
3 spoke to Kym on February 22, 2018, who requested a copy of his discharge order. Id. at ¶¶ 11-  
4 12. He testifies that on the same date he faxed a copy of the discharge order to Kym who  
5 confirmed receipt the following day. Id. at ¶¶ 13-14. Debtor attests that he received another  
6 collection letter in March 2018 and again spoke to Kym on March 20, 2018, who requested  
7 another copy of his discharge order. Id. at ¶¶ 15-16. He testifies that he faxed another copy of  
8 the discharge order to Kym the same day, who again confirmed receipt. Id. at ¶¶ 17, 18 and 19.  
9 In addition to confirming receipt, Debtor attests that Kym advised him that he would receive a  
10 final billing showing a zero balance. Id. Despite Kym's assurance, Debtor testifies that he  
11 received additional collection letters from LVH in April 2018, May 2018, June 2018, and July  
12 2018. Id. at ¶¶ 20, 21, 22, and 23. A copy of each billing statement from February through July  
13 is attached as Exhibits 1 through 6 of the Bush Affidavit.<sup>6</sup> Each billing statement is in the  
14 amount of \$180.00 and each of them states that it is for services rendered on December 10, 2016,  
15 i.e., before the Debtor's bankruptcy was filed. Debtor attests that through August 6, 2018, he  
16 incurred attorney's fees and costs in the amount of \$19,500 to stop LVH's efforts to collect a  
17 \$180.00 debt. Id. at ¶ 28.<sup>7</sup>

18 In response, LVH has offered the declaration of its principal, Amit Valera ("Valera  
19 Declaration"), as well as the declaration of Hussain Hassanally ("Hassanally Declaration"), who  
20 is the owner of Expert Medical Services LLC ("EMS"). Except for paragraph 4 of each  
21 declaration describing the addresses for each entity, the remaining paragraphs of the two  
22 declarations are identical. Apparently, EMS is a billing service and LVH is a client of EMS, and  
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24 <sup>6</sup> No objections were raised to the authenticity or admissibility of the Debtor's exhibits.

25 <sup>7</sup> Attached as Exhibit "7" to the Bush Affidavit is a copy of another billing statement  
26 dated August 7, 2018. It is not exactly clear to the court how a billing statement dated August 7,  
27 2018, got attached to an affidavit signed on August 6, 2018. In any event, the Debtor's affidavit  
28 does not discuss ever receiving the August billing statement. In his reply to LVH's Opposition,  
Debtor attempts to include Exhibit "7" as part of his sanctions request, see Reply at 7:4-7 & n.5  
and 10:23-24, but there is no testimony from the Debtor that the August billing statement was  
ever received.

1 Kym is an employee of EMS but not LVH. Both declarants attest that LVH was never listed as a  
2 creditor in the Debtor's bankruptcy case and that neither entity received notice of the Debtor's  
3 bankruptcy. See Valera Declaration at ¶¶ 7-8; Hassanally Declaration at ¶¶ 7-8. Neither  
4 declarant, however, denies that EMS was acting on LVH's behalf, that the Debtor informed Kym  
5 of both the bankruptcy filing and the discharge, and that Kym acknowledged that the Debtor's  
6 resulting balance was zero. Rather, both simply attest that any collection letters "were sent  
7 through billing software." Valera Declaration at ¶ 10; Hassanally Declaration at ¶ 10.<sup>8</sup>

8 Based on this record, the court concludes that LVH had actual knowledge that the  
9 discharge applied to its claim no later than January 25, 2018. Thereafter, LVH could not assert  
10 that it was unaware of the bankruptcy and that the discharge applied to its claim, because that  
11 information was repeatedly provided to its agent, EMS, through EMS's employee, Kym. Under  
12 these circumstances, the first prong of the two-part test has been met.<sup>9</sup>

13 The second prong of the two-part test also has been met. The second prong focuses on  
14 whether the creditor intended the action that violated the discharge injunction. It is undisputed  
15 that the billing statements sent to the Debtor were generated through software used by EMS.  
16 Debtor's un rebutted testimony is that he informed EMS's employee that LVH's claim had been  
17 discharged, but EMS apparently took no effective steps thereafter to prevent the software from  
18 sending further billing statements to the Debtor. The failure of LVH's agent to act on the  
19 information does not excuse the issuance of the subsequent billing statements. Compare Eskanos  
20 & Adler, P.C. v. Leetien (In re Eskanos & Adler, P.C.), 309 F.3d 1210, 1215 (9th Cir. 2002)  
21 (creditor offered no evidence that it moved expeditiously to correct violation of the automatic  
22 stay). Nor would the ordinary functions of EMS's software negate the intentional nature of the  
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24 <sup>8</sup> There was no conflict in the testimony between the Debtor's and LVH's witnesses, the  
25 attorneys did not seek to cross-examine any witnesses, and no evidentiary hearing was requested.

26 <sup>9</sup> Unlike the circumstances in Taggart, LVH does not allege that after EMS was informed  
27 of the Debtor's discharge in January 2018, it held a belief that the discharge injunction did not  
28 apply to its claim. Rather, it asserts that it did not intend to violate the discharge injunction  
because the software automatically issued the subsequent billing statements. Under these  
circumstances, it is unnecessary to examine whether LVH had a relevant belief that was held in  
good faith.

1 issuance of the billing statements. Compare Sundquist v. Bank of Am., N.A., 566 B.R. 563, 591  
2 (Bankr. E.D. Cal. 2017) (“A business organization that elects to use computers to control acts  
3 that are in the line of fire of the automatic stay is no less exposed to damages for ‘willful’ stay  
4 violations than entities that rely on real people to direct action. In other words, Bank of America  
5 is responsible for (1) the structure of its software and procedures, (2) the accuracy and timeliness  
6 of data entry and implementation, and (3) the efficiency and accuracy of its personnel.”). See  
7 also Associated Credit Services, Inc. v. Champion (In re Champion), 294 B.R. 313, 316 (B.A.P. 9th  
8 Cir. 2003) (willful postpetition wage garnishment occurred because debt collector’s computer  
9 system failed to recognize that the individual debtor had filed for bankruptcy relief). EMS relied  
10 on its software to generate the LVH billing statements that were sent to the Debtor rather than  
11 having an employee prepare them manually. Reliance on the anticipated functions of the  
12 software was intentional and the resulting actions also were intentional.

13 Based on the foregoing, the court concludes that the Debtor has met his burden by clear  
14 and convincing evidence that contempt sanctions for violation of the discharge injunction are  
15 appropriate. The evidentiary record establishes that the violation occurred from January 2018  
16 through July 2018, i.e., a seven-month period.<sup>10</sup> Compensatory damages, if any, proximately  
17 caused during that period will be considered as well as any reasonable attorney’s fees incurred.<sup>11</sup>  
18 A determination of any request for attorney’s fees under a “lodestar” standard will require the  
19 submission of contemporaneously maintained hourly fee statements.<sup>12</sup> Absent a settlement of  
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21 <sup>10</sup> Although there is an August billing statement attached as Exhibit “7” to the Bush  
22 Declaration, see discussion at note 7, supra, there is no testimony in the record that the Debtor  
received any additional billing statements from LVH after July 2018.

23 <sup>11</sup> Debtor apparently requests “an award of actual and punitive damages, attorney’s fees  
24 and costs in the amount of \$95,500 for the willful and deliberate violation of the automatic stay  
25 and discharge injunction.” Sanctions Motion at 11:14-17. For the reasons discussed, no punitive  
26 damages under Section 362(k)(1) are available because the automatic stay was not violated.  
27 Likewise, only mild, non-compensatory (exemplary) fines, if at all, are available for a discharge  
violation. Moreover, any compensatory damages, if any, are limited to those sustained during  
the period of the violation.

28 <sup>12</sup> Whether the Debtor was billed \$19,500 by his counsel for legal services in this matter  
is immaterial to whether the amount of any fee request is reasonable. The lodestar method for

1 this matter, an evidentiary hearing will be scheduled, limited to the determination of damages  
2 and legal fees.

3 **IT IS THEREFORE ORDERED** that the Motion for Sanctions for Intentional  
4 Violation of the Automatic Stay and Discharge Injunction, brought by Dean Tyler Bush, Docket  
5 No. 25, be, and the same hereby is, **DENIED IN PART** and **GRANTED IN PART**.

6 **IT IS FURTHER ORDERED** that the instant motion is **DENIED** with respect to any  
7 sanctions for violation of the automatic stay.

8 **IT IS FURTHER ORDERED** that the instant motion is **GRANTED** with respect to  
9 sanctions for violation of the discharge injunction, with the amount of damages, if any, to be  
10 determined at a limited evidentiary hearing. Additionally, the award of attorney's fees and costs,  
11 if any, in connection with the violation of the discharge injunction, will require the submission of  
12 an hourly billing statement by counsel for the Debtor.

13 **IT IS FURTHER ORDERED** that a status conference to schedule a limited evidentiary  
14 hearing will be held on November 14, 2018, at 2:30 p.m. in the Foley Federal Building, 300 Las  
15 Vegas Blvd. South, Las Vegas, Nevada, in Courtroom 2.

16  
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22 # # #  
23  
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26 determining the amount of attorney's fees takes into consideration, *inter alia*, the necessity and  
27 reasonableness of the time spent by counsel, as well as the appropriate hourly rate that should be  
28 allowed for counsel. See, e.g., In re Eliapo, 468 F.3d 592, 598 (9<sup>th</sup> Cir. 2006) ("The customary  
method for assessing an attorney's fee application in bankruptcy is the 'lodestar,' under which  
'the number of hours reasonably expended' is multiplied by a 'reasonable hourly rate' for the  
person providing the services.").