THIS OPINION IS NOT INTENDED FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

THIS OPINION IS NOT INTENDED FOR PUBLICATION

IN RE	)	CASE NO. 98-51399-S
	)	
JAMES A. EDMINISTER, SR.	)	CHAPTER 7
COLLEEN A. EDMINISTER,	)	
	)	
DEBTORS.	)	
	)	**ORDER IMPOSING SANCTIONS**
	)	**FOR VIOLATION OF THE**
	)	**POST-DISCHARGE INJUNCTION**

On August 25, 1999, this Court granted the debtors' motion to reopen this case. Americorp Financial, Inc. ("Americorp") was served with debtors' motion to reopen. After the case was reopened, the debtors filed a motion to cite Americorp for contempt (the "Motion") for an alleged violation of the post-discharge injunction under 11 U.S.C. § 524. On September 23, 1999, Americorp filed a response to the Motion.[1] A hearing on the Motion was held on September 29, 1999. Appearing at the hearing were Morris A. Laatsch, counsel for debtors; James A. Edminister, debtor; and E. Jane Taylor, counsel for the creditor Americorp.

This matter is a core proceeding pursuant to 28 U.S.C. §§ 157(b)(2)(A), (L) and (O). This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334(b), 157(a) and (b)(1) and by the Standing Order of Reference entered in this District on July 16, 1984.

I. ISSUES PRESENTED

1. Whether the small claims case filed by Americorp constitutes a willful violation

[1] Attached to that response was an affidavit of Thomas A. Amell. Mr. Amell chose not to attend the scheduled hearing, and therefore, Mr. Amell was unavailable for cross-examination. Debtors' counsel's objection to the use of Mr. Amell's affidavit at the hearing was sustained both because the affiant was not available for cross-examination and the affidavit appeared to go beyond the personal knowledge of the affiant.

of the post-discharge injunction under 11 U.S.C. § 524(a)(2).

2. Whether a debtor is required to notify a creditor to try to resolve violations of the post-discharge injunction prior to filing a contempt motion.

II. FINDINGS OF FACT

In accordance with Bankruptcy Rule 7052, the Court makes the following findings of fact based on the stipulations of the parties and evidence presented at trial:

1. On May 6, 1998 debtors filed a joint chapter 7 bankruptcy petition. On August 31, 1998, debtors were granted a discharge under 11 U.S.C. § 727 of the Bankruptcy Code. Americorp was listed as a creditor on schedule D of debtors' petition. Prior to the filing of debtors' bankruptcy, Americorp moved to an address different from that listed on debtors' schedules. Debtors did not receive notice of the new address. The Office of the Clerk of Court sent notice of debtors' bankruptcy petition to Americorp on May 10, 1998 and notice of the discharge on September 2, 1998. Neither was returned to the Clerk's Office. On October 1, 1998, debtors moved to an address different from that listed on their schedules. Debtors had no reason to and did not provide notice of the change of address to Americorp.

2. On December 3, 1998, Americorp filed a small claims case against debtor, James Edminister, in the Michigan District Court for the 48th Judicial District, Small Claims Division for unpaid personal property taxes which arose prior to the petition. Debtors' Exhibit C. On December 14, 1998, certified mail service of the Notice of Hearing on the small claims action was made upon debtors at their new address. On January 14, 1999, Americorp received a default judgment in its small claims case.

3. On April 8, 1999, debtors filed a motion to reopen this bankruptcy case. A copy of the motion was served on Americorp and was not returned to the Clerk's Office.

The motion to reopen alleged that the default judgment obtained by Americorp was in violation of the post-discharge injunction under 11 U.S.C. § 524. The Court set a hearing on the matter and on June 10, 1999, debtors' counsel filed a notice of the hearing on debtors' motion to reopen the case with the Clerk's Office. A copy of the notice was served on Americorp on that same date. The notice was not returned to the Clerk's Office. On July 23, 1999, debtors' counsel sent correspondence to Americorp attempting to resolve the alleged violation of the post-discharge injunction. The correspondence stated that the motion to reopen the case would be withdrawn if (1) Americorp would file an order vacating the small claims judgment in Michigan, and (2) Americorp paid Debtors' counsel $500.00 in attorney's fees. Americorp rejected the debtors'counsel's offer to resolve the matter. On August 30, 1999, debtors' filed a Motion seeking $500.00 in attorney's fees as damages.

III. CONCLUSIONS OF LAW

A. Violation of the Post-discharge Injunction.

A discharge pursuant to 11 U.S.C. § 727(a) discharges all debts that arose before the date of the order for relief. 11 U.S.C. § 727(b). The discharge operates as an injunction against the commencement or continuation of any action to collect any such debt as a personal liability of the debtor. 11 U.S.C. § 524(a)(2).[2] A debtor injured by a violation of the discharge injunction may seek recovery of damages in a contempt action. *Hardy v. IRS* (*In re Hardy*), 97 F.3d 1384, 1389 (11th Cir. 1996); *In re Hill*, 222 B.R.

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[2] Section 524(a)(2) provides in relevant part:

> A discharge in a case under this title ... 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 [discharged] debt as a personal liability of the debtor....

11 U.S.C. § 524(a)(2) (1999).

119, 122 (Bankr. N.D. Ohio 1998); *Atkins v. Martinez* (*In re Atkins*), 176 B.R. 998, 1010 (Bankr. D. Minn. 1994). Damages may consist of actual damages, costs, attorney's fees, and, in some cases, punitive damages may be awarded. *In re Hill*, 222 B.R. at 122. Damages under section 524(a)(2) must be the result of a willful violation of the discharge injunction. *Id.* A violation is willful when the creditor was charged with notice of the debtor's bankruptcy discharge and the action constituting violation of that discharge was done intentionally. *In re Lafferty*, 229 B.R. 707, 712 (Bankr. N.D. Ohio 1998). Because debtors are requesting that the Court award damages in their favor and against Americorp for a willful violation of the post-discharge injunction, debtors bear the burden of proving Americorp's willful violation. The debtors have met that burden.

On December 3, 1998, Americorp filed a small claims action against the debtor James Edminister. On December 14, 1998, certified mail service of Americorp's small claims action was made upon debtors. On January 14, 1999, Americorp obtained a default judgment in its small claims case. Thus, the small claims action was commenced and judgment obtained by Americorp after notice of the discharge had been given to all scheduled holders of claims, including Americorp.

The small claims action filed by Americorp was a willful violation of the post-discharge injunction under 11 U.S.C. § 524(a)(2). Based on the evidence presented, Americorp was charged with notice of the debtors' bankruptcy. The record demonstrates that notice of the debtors' bankruptcy petition and subsequent discharge were mailed to Americorp. The record also shows that notice of debtors' petition and discharge were not returned to the sender. While the brief opposing the Motion generally alleges that Americorp had moved its operations and experienced difficulty receiving forwarded mail, no evidence supports that contention.[3] Americorp invested effort in finding debtors' new

address. There are numerous sources that would have also provided information on whether the debtors had filed a petition for relief.[4] When a commercial creditor is experiencing difficulty with mail delivery, as was alleged but not proven in this case, the prudent course of action would be to check such sources before filing a collection action.

Damage awards under both § 362(h), and as implied under § 524(a)(2), have as their primary function deterrence of a pattern of behavior that ignores the automatic stay and post-discharge injunction. Holders of discharged claims cannot be emboldened to attempt collection efforts because of the perception that there are few, if any, consequences. Businesses with a core mission of keeping accurate records of financial data cannot be permitted to excuse themselves from compliance with court orders by alleging, without proof, that their mail has somehow gone astray and not simply once but repeatedly. Accordingly, the Court finds that Americorp, having been duly served with two notices from the Clerk's Office, cannot shield itself by saying that it did not know of the debtors' bankruptcy.

The Court also finds that filing the small claims action and obtaining the default judgment were intentional actions which violated the post-discharge injunction. As noted above, a willful violation of the post-discharge injunction occurs when the creditor was charged with notice of the debtor's bankruptcy discharge and the action constituting violation of that discharge was done intentionally. *In re Lafferty*, 229 B.R. at 712. Americorp intentionally filed its small claims action and intentionally obtained a default

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[3] *See* Fn 1, *supra*.

[4] As early as 1984, the public has had access to computer files of reported bankruptcies in this Court, including when and who has filed bankruptcy. Since 1990, this Court has expended significant resources in providing the public with the ability to remotely access information on reported bankruptcies through the PACER system.

judgment against Mr. Edminister. Accordingly, the small claims action and default judgment obtained by Americorp were intentional actions that violated the post-discharge injunction.

The Court concludes that Americorp willfully violated the post-discharge injunction under 11 U.S.C. § 524(a)(2).

B. Pre-filing Notification.

Americorp argues, in essence, that the debtor has a duty to notify an offending creditor to resolve the stay or post-discharge violation prior to filing a motion for contempt. Such a requirement would unfairly shift the burden to the debtor of further notifying holders of claims of information which has already been communicated by the Clerk's Office. Holders of claims are appropriately expected to act in conformity with court notices and orders. *See Price v. Pediatric Academic Assc.*, 175 B.R. 219, 222 (Bankr. S.D. Ohio 1994).

Still, all counsel should recognize a professional obligation to nurture non-litigious solutions. On a motion to recover attorney's fees for willful violation of the post-discharge injunction, the debtor may have the burden of proving the necessity of filing a contempt motion. Specifically, such motions may not be appropriate when (1) injury caused and damages incurred, other than attorney's fees, only amount to cost of appearing in court to litigate contempt motion; (2) burden of requiring debtor's attorney to notify creditor of violations is insignificant; and (3) there is no bad faith on part of creditor. *See Price,* 175 B.R. at 222; *In re Robinson*, 228 B.R. 75, 85 (Bankr. E.D. N.Y. 1998). When these factors are established, a court can reasonably make a factual finding that filing a contempt motion to stop a willful violation was unnecessary and wasteful without a pre-filing notification to the creditor. *See Price,* 175 B.R. at 222. Americorp

alleges that the facts of this case establish the factors listed above and argue that debtors are not entitled to recover attorney's fees.

The facts of the case do not establish the three factors which would preclude a debtor from recovering attorney's fees for a willful violation of the post-discharge injunction. While the facts establish that ultimately the damages only amount to attorney's fees, debtors' counsel was asked to address, not a collection call or letter, but a default judgment from a court in another state.

The second factor is likewise not established because, on the facts of this case, it would be incongruous to place the burden of communicating a violation on the debtors when (1) they had done everything required of them to alert Americorp[5] and (2) Americorp already knew or should have known that its actions were improper.[6] The record evidence establishes that Americorp had sufficient notice of the bankruptcy and the discharge. Moreover, the record shows that even after being served with the April 8, 1999 motion to reopen the bankruptcy case, and the June 10, 1999 notice of the hearing on debtors' motion to reopen the case, Americorp failed to communicate with debtors' counsel regarding a resolution of the post-discharge violation. Americorp got the notice that it pretends it did not receive. Application of the criteria articulated in *In re Price* supports the prayer for relief in the Motion.

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[5] *See In re Hill*, 222 B.R. at 123 (holding that by listing creditor in bankruptcy schedules, debtors had done everything required of them to alert creditor); *Rainwater v. State of Alabama*, 233 B.R. 126 (Bankr. N.D. Alabama 1999) (holding that when creditor receives actual notice of the bankruptcy, burden is then on creditor to assure that the automatic stay is not violated or, if it has been violated prior to receipt of actual notice, burden is on creditor to reverse any such action taken in violation of the stay). In addition, this Court's requirements that motions to reopen a bankruptcy case be served on parties whose rights may be affected by such action provided Americorp the notice that it complains it has not received.

[6] *See Price*, 175 B.R. at 219.

Americorp should have at least picked up the phone after receiving the April 8, 1999 motion to reopen the case and called debtors' counsel to acknowledge its mistake and communicate its efforts to vacate its judgment against debtors. Instead, what is apparent from debtors' counsel's July 23, 1999 letter is that, even at that date, Americorp still had not communicated to debtors that it was allegedly trying to correct its mistake by vacating the default judgment it obtained. When a party is served with a motion that seeks to reopen a case in order to address possible violations of the post-discharge injunction, and the served party does not follow on promptly with communication with the serving party to resolve the issues, the party served should not be allowed to manufacture an affirmative defense from its own failure to attempt a resolution. When a debtor has already done all that is required to alert a creditor of a bankruptcy or discharge and the creditor received sufficient notice of the bankruptcy or discharge, the burden on the debtor to notify the creditor of a violation is not insignificant. Lawyers serving as debtors' counsel should not be expected to function for free. Any suggestion to the contrary dilutes the response that debtors might typically receive from their own counsel in these circumstances.

The third factor, that Americorp did not act in bad faith, is also not established. Americorp argues that it did not act in bad faith when it sought and obtained the default judgment against debtors because it asserts that it has instituted policies and procedures to terminate collection of stayed or discharged accounts and that it utilized these policies and procedures once it discovered that its claim against Mr. Edminister was discharged. No evidence supports this contention.[7] To the contrary, there was no affirmative

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[7] *See* Fn 1, *supra*.

communication by Americorp with either debtors or their counsel. While the Court wants to see matters such as this resolved efficiently and amicably, the Court also does not want to contribute to an environment where creditors holding discharged claims believe that they can operate with impunity simply by purporting to have instituted procedures designed to screen stayed or discharged accounts. Without any record evidence that such procedures exist and were employed in this case, the Court is left with the presumption that Americorp did not act in a manner consistent with the post-discharge injunction, particularly in failing to communicate with the debtors' counsel after receiving the motion to reopen.

The record establishes that debtors' counsel pursued his clients' rights appropriately and efficiently. Had Americorp simply communicated its mistake to debtors' counsel once it received the motion to reopen the case, the violations might have been resolved. Instead, Americorp allegedly chose to rely on its own procedures to resolve the violations which apparently did not include communication with the debtors. If anything, the situation in which Americorp finds itself seems to be self induced. Accordingly, the Court rejects the argument of Americorp and concludes that the debtors and their counsel acted properly and had no duty to further notify Americorp prior to filing the contempt motion.

When the violation is relatively minor and the plaintiff's sole damages are for attorney's fees, the fees should be reviewed carefully for reasonableness to avoid the reality or appearance that the court is rewarding an excessively litigious approach to such violations. *In re Hill*, 222 B.R. at 124. In this case, just the opposite is true. A judgment obtained by a creditor that had notice of a bankruptcy and discharge cannot be considered a minor violation. Although debtors' only damages are attorney's fees, on the facts of this case, an award of attorney's fees does not positively reinforce excessively litigious behavior. Counsel turned his attention to his clients' needs with respect to the default

judgment on numerous occasions detailed in the record. His hourly rate is extremely reasonable. Therefore, in light of the work done by debtors' counsel prior to and during the hearing on this matter, the $500 in attorney's fee sought by debtors is more than reasonable.

III. CONCLUSION

Based upon the foregoing, the Court holds that Americorp willfully violated the post-discharge injunction imposed by 11 U.S.C. § 524(a)(2) and that debtors had no duty to notify Americorp prior to filing the contempt motion. As such, debtors motion to cite Americorp for contempt is granted and debtors are entitled to recover attorney's fees. Therefore, by no later than **December 10, 1999**, Americorp shall pay debtors' counsel, Morris A. Laatsch, $500.00 in attorney's' fees.

IT IS SO ORDERED.

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MARILYN SHEA-STONUM
Bankruptcy Judge

DATED: 11/24/99