

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION



In re:) Case No. 09-13675
)
TAMMY S. MARTIN,) Chapter 7
)
Debtor.) Judge Pat E. Morgenstern-Clarren
)
) **MEMORANDUM OF OPINION**¹
) **AND ORDER**

The debtor asks the court to find John Hayes in contempt, alleging that he violated the discharge injunction by filing a state court lawsuit against the debtor to collect a discharged debt. Mr. Hayes defends by arguing that the debtor entered into a new oral agreement with him post-petition under which she agreed to pay the debt. For the reasons stated below, the court finds that Mr. Hayes violated the discharge injunction and is liable to the debtor for damages.

JURISDICTION

Jurisdiction exists under 28 U.S.C. § 1334 and General Order No. 84 entered in this district by the United States District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C. § 157(b)(2)(O).

PROCEDURAL HISTORY AND THE EVIDENTIARY HEARING

The court reopened this chapter 7 case to consider the debtor's motion for an order on John Hayes to appear and show cause why he should not be held in contempt for an alleged

¹ This opinion is not intended for commercial publication, either print or electronic.

violation of the discharge injunction. After a contested hearing, the court granted the debtor's motion and issued an order to show cause on Mr. Hayes.²

The court held an evidentiary hearing on March 11, 2011. The debtor presented her case through her own testimony and cross-examination of the witnesses called by the respondent. Mr. Hayes presented his case through his own testimony, the testimony of David Wolf, cross-examination of the debtor, and exhibits.

The following findings of fact are based on that evidence and reflect the court's weighing of the evidence presented, including determining the credibility of the witnesses. "In doing so, the Court considered the witness's demeanor, the substance of the testimony, and the context in which the statements were made, recognizing that a transcript does not convey tone, attitude, body language or nuance of expression." *In re The V Companies*, 274 B.R. 721, 726 (Bankr. N.D. Ohio 2002). See FED. R. BANKR. P. 7052 (incorporating FED. R. CIV. P. 52). When the court finds that a witness's explanation was satisfactory or unsatisfactory, it is using this definition:

The word satisfactory 'may mean reasonable, or it may mean that the Court, after having heard the excuse, the explanation, has that mental attitude which finds contentment in saying that he believes the explanation—he believes what the [witness] says with reference to the [issue at hand]. He is satisfied. He no longer wonders. He is contented.'

² Docket 34. The debtor seemed to be asking in her brief and at the hearing that attorney Daniel Wilt also be found to have violated the discharge order. The original motion did not ask for this relief and the court order did not state that it was directed against Mr. Wilt. The court will not, therefore, consider this issue further.

United States v. Trogdon (In re Trogdon), 111 B.R. 655, 659 (Bankr. N.D. Ohio 1990) (discussing the issue in context of bankruptcy code § 727) (quoting *First Texas Savings Assoc., Inc. v. Reed*, 700 F.2d 986, 993 (5th Cir. 1983)).

FACTS

John Hayes has been in the real estate business “on and off” for 30 years. He and the debtor Tammy Martin were friends for a number of years before they decided to enter into a business deal in December 2006. At that time, they agreed that the debtor would purchase a business called The Sea Level Lounge from a corporation owned by Mr. Hayes. The debtor agreed to pay \$210,000.00 to buy a building, real estate, equipment, inventory, and a liquor license. She paid \$30,000.00 down, with the balance to be paid to Mr. Hayes in monthly installments of about \$1,700.00. She signed a note and mortgage. The debtor took title to the property and then transferred it to a newly-formed corporation.

In January 2009, the debtor called Mr. Hayes to say that “it wasn’t working for me” and she wanted to “give the bar back.” Mr. Hayes did not want the bar back, and suggested that she pay a lower monthly amount. They agreed to \$800.00 a month.

By April 2009, the debtor found that she was not making enough money to keep the bar going, that she was about to lose her home, and that she could not pay her bills. She filed a chapter 7 bankruptcy case and listed among her creditors “Eagle Bar, Inc. c/o John Hayes”.

There was a conflict of testimony as to what happened after that. Mr. Hayes says that he called the debtor because she had missed a payment and she then told him for the first time about the bankruptcy. She also said, according to Mr. Hayes, that he shouldn’t worry because “she had no intention of bankrupting him.” Mr. Hayes called his business partner David Wolf as a witness

to corroborate this point. Mr. Wolf, however, only testified that he was under the impression that the debtor intended to keep the bar.

The court believed the debtor's testimony that at some point during the bankruptcy proceeding, Mr. Hayes called and told her that his lawyer said she needed to come in and sign a reaffirmation agreement. She refused to do so. They again discussed the debtor's desire to "give the bar back" to Mr. Hayes and his refusal to accept it. He *was* interested in the liquor license, but was surprised to learn that the mortgage did not give him a security interest in that property, and declined to buy it. The debtor told Mr. Hayes that she would keep the bar running so that he didn't have to close it down right away, due to their friendship. She voluntarily paid him \$800.00 a month in June, July, August, September, October, November, and December 2009, as well as in January, March and April 2010. The debtor did not sign a reaffirmation agreement with respect to this debt. She received her discharge on August 10, 2009.³

In September 2010,⁴ Mr. Hayes sued the debtor in state court for \$180,000.00 plus interest at 8%.

THE POSITIONS OF THE PARTIES

The debtor argues that the debt owed to Mr. Hayes was discharged in the bankruptcy. While she voluntarily made payments post-petition, her position is that she was free to stop making payments at any point because she did not enter into a reaffirmation agreement. She

³ The debtor and Mr. Hayes both testified to issues related to a January 2010 explosion in the neighborhood that damaged the building. The court will not recount that testimony here because it is not relevant to the question at hand. Suffice it to say that the property was insured and both parties wanted the insurance money.

⁴ Respondent's trial brief at 4, docket 38.

argues additionally that if she had entered into a new agreement to buy the property, it would have to have been in writing to overcome the statute of frauds. She asks for damages in the form of attorney fees and the time she had to take off from work to prepare for and attend the hearing.

Mr. Hayes contends that the debtor entered into a new oral agreement with him to pay the note secured by the mortgage. He argues that the law allows the debtor to enter into a new agreement to pay an old debt so long as there is adequate consideration given; he believes that the debtor's post-petition payments to him are such consideration. He also argues that equity favors his position because he relied on good case law in deciding to sue the debtor. Although he acknowledges that a reaffirmation agreement must be in writing and filed with the court, he states that a new agreement does not have to be in writing and that the payments made by the debtor take the situation outside of the statute of frauds. He denies that damages are appropriate on the ground that he followed legal precedent and asks for a declaration that he may continue his state court action.

ISSUES

1. Did the debtor enter into a reaffirmation agreement to pay the note?
2. When the debtor made voluntary payments post-petition on the note, did that obligate her to pay the balance on the note?
3. If not, did the debtor and Mr. Hayes enter into a new contract post-petition under which the debtor agreed to pay the note?
4. If not, did Mr. Hayes violate the discharge injunction when he sued the debtor post-petition?
5. If so, should the debtor be awarded damages?

DISCUSSION

1. Did the debtor enter into a reaffirmation agreement with Mr. Hayes to pay the note?

A debtor who has met her obligations under the Bankruptcy Code receives a discharge of most of her debts. 11 U.S.C. § 727. The discharge appears in an order that serves as an injunction to prohibit any party from acting to collect a discharged debt as a personal liability of the debtor. 11 U.S.C. § 524(a)(2). A violation of that order is dealt with as a contempt of court. *Pertuso v. Ford Motor Credit Co.*, 233 F.3d 417, 422 (6th Cir. 2000).

There are times when a debtor chooses to remain liable on a debt that would otherwise be discharged; this is often the case when the debt is secured by a house or a car. In that event, the debtor and the creditor sign a reaffirmation agreement and file it with the court. 11 U.S.C. § 524(c). A filed reaffirmation agreement that meets the detailed requirements of § 524(c) is then enforceable as a new contract between the parties. “The consequence of not meeting the conditions is that the agreement is unenforceable.” *Pertuso*, 233 F.3d at 421. The Bankruptcy Code does not recognize an oral reaffirmation agreement. *See* 11 U.S.C. § 524(c)(3) (providing that the agreement must be filed with the bankruptcy court).

In this case, the debtor and Mr. Hayes did not enter into a written reaffirmation agreement. The debt based on the note was, therefore, discharged in the bankruptcy.

2. When the debtor voluntarily made payments post-petition, did that obligate her to keep making payments on the discharged debt?

The Bankruptcy Code permits a debtor to voluntarily repay any debt. 11 U.S.C. § 524(f). There are very different consequences that flow from voluntarily repaying a debt instead of reaffirming it. A voluntary payment is one made by the debtor as a result of an uncoerced

decision made post-petition to pay money to a creditor on a debt that is otherwise discharged. If the payment is made voluntarily, the creditor may keep the funds without fear of having violated the discharge injunction. Making one such payment—or ten—is not, however, a legal commitment on the debtor’s part to make any further payments. To the contrary, the debtor may stop paying at any time for any reason because the debt is discharged. *Francis v. Nat’l Revenue Serv., Inc.* (*In re Francis*), 426 B.R. 398, 404 (Bankr. S.D. Fla. 2010); *In re Grabinski*, 150 B.R. 427, 431 (Bankr. N.D. Ill. 1993). The payments made by the debtor in this case did not, therefore, establish that she had an obligation to keep making payments.

3. Did the parties otherwise enter into a new contract for the debtor to pay the note?

To establish that the parties entered into a new contract, Mr. Hayes must prove these elements: an offer, acceptance of the offer, contractual capacity, consideration, manifestation of mutual assent, and legality of object and of consideration. *Minster Farmers Coop. Exch. Co. v. Meyer*, 884 N.E.2d 1056, 1061 (Ohio 2008). To be enforceable post-discharge, any consideration for the new contract must be entirely independent of the discharged debt. *Rajotte v. Carter (In re Rajotte)*, No. 02-5433, 81 Fed. Appx. 29, 32 (6th Cir. Nov. 7, 2003).

Based on the evidence, the court finds that the parties did not enter into a new contract. First, the court believed the debtor’s testimony that she refused to have any continuing obligation to Mr. Hayes, thus showing a lack of mutual assent. And second, there was no consideration independent of the discharged debt.⁵

⁵ The argument made by Mr. Hayes that the debtor’s payments on the discharged debt constitute consideration that would support a new contract is incorrect.

4. If the debtor did not reaffirm the debt or enter into a new contract, did Mr. Hayes violate the discharge injunction when he sued her to collect the discharged debt?

The debtor must show by clear and convincing evidence that Mr. Hayes violated a definite and specific order of the court requiring him to perform or refrain from performing a particular act or acts with knowledge of the court's order. *In re Walker*, 257 B.R. 493, 497 (Bankr. N.D. Ohio 2001) (citing *Rolex Watch U.S.A. v. Crowley*, 74 F.3d 716, 720 (6th Cir. 1996)). "Willfulness is not an element of civil contempt and intent to disobey the order is irrelevant." *Id.* In the context of an alleged violation of the discharge injunction, the debtor must prove that the alleged contemnor knew that the discharge injunction was invoked and intended the actions which violated the injunction. *Renwick v. Bennett (In re Bennett)*, 298 F.3d 1059, 1069 (9th Cir. 2002); *Hardy v. United States (In re Hardy)*, 97 F.3d 1384, 1390 (11th Cir. 1996).

The debtor showed by clear and convincing evidence that Mr. Hayes intentionally filed the state court action seeking to collect the prepetition debt even though he was fully aware of the court's discharge injunction. By doing so, Mr. Hayes placed himself in contempt of the discharge injunction.

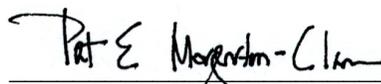
5. If Mr. Hayes violated the discharge injunction, should the debtor be awarded damages and in what amount?

Although § 524(c) does not specifically authorize monetary relief, "the modern trend is for courts to award actual damages for violation of § 524 based on the inherent contempt power of the court." *In re Hardy*, 97 F.3d at 1389. An award of actual damages can include the debtor's attorney fees. *Id.*; *Miles v. Clarke (In re Miles)*, 357 B.R. 446, 450 (Bankr. W.D. Ky. 2006).

The debtor has requested an award of damages for the time she was required to take off from work to prepare for and attend the court hearing, as well as for her attorney fees incurred in both state court and this court. Mr. Hayes argues that the court should not impose any damages because he relied on “good case law.” In response, the court finds that there was no testimony to that effect and, also, that the cases cited by Mr. Hayes in his brief and in argument may be “good” in the sense that they have not been overruled, but they are not applicable or persuasive under the facts presented in this case.⁶

The contempt is appropriately resolved by an award of damages for the debtor’s lost wages and attorney fees. Debtor’s counsel is to file a detailed fee statement on or before March 31, 2011 regarding the time spent on this matter and the debtor is to file an affidavit regarding the requested time by the same date. If Mr. Hayes objects to the debtor’s time or to the fees, he is to file an objection by April 14, 2011. The court will decide the damage award based on those filings.

IT IS SO ORDERED.



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

⁶ By way of example only, he cites *Minster State Bank v. Heirholzer (In re Heirholzer)*, 170 B.R. 938 (Bankr. N.D. Ohio 1994), an opinion which held that a post-discharge promissory note given by a debtor and supported by separate documentation and consideration was a completely separate obligation from a note that had been discharged. The circumstances here are entirely different.