

The court incorporates by reference in this paragraph and adopts as the findings and orders of this court the document set forth below. This document has been entered electronically in the record of the United States Bankruptcy Court for the Northern District of Ohio.



Dated: July 06 2005

Mary Ann Whipple
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

| | | |
|---------------------------------|---|-----------------------|
| In Re: |) | Case No.: 02-38048 |
| |) | |
| Tony M. Gallo and Joy E. Gallo, |) | Chapter 7 |
| |) | |
| Debtors. |) | Adv. Pro. No. 04-3387 |
| |) | |
| Tony M. Gallo, |) | Hon. Mary Ann Whipple |
| |) | |
| Plaintiff, |) | |
| v. |) | |
| |) | |
| Sherry Zimmerman, |) | |
| |) | |
| Defendant. |) | |

**ORDER REGARDING MOTION TO DISMISS
AND MOTION FOR SUMMARY JUDGMENT**

Sherry Zimmerman (“Defendant”) is before the court on the “Reply to Violation of Stay” that she filed in this adversary proceeding on November 10, 2004, and again on March 3, 2005, which is in the nature of a motion to dismiss (the “Motion to Dismiss”). Plaintiff Tony M. Gallo (“Debtor”) is before the

court on the Motion for Summary Judgment that he filed in this proceeding on March 2, 2005 (the “S/J Motion”). On April 14, 2005, the court entered a Memorandum of Decision and Order Regarding Motion to Dismiss and Motion for Summary Judgment, affording the parties an opportunity to submit properly authenticated evidence regarding whether the debt in question was incurred pre-petition and/or whether it is of a type described in 11 U.S.C. § 523(a)(2), (4), or (6). The court also expressed its disinclination “to award attorney’s fees or other damages due to both the lack of admissible factual proof in that regard in the record, and the lack of any legal support advanced in the S/J Motion for such relief on a claim for a violation of the discharge injunction.”

On May 5, 2005, Debtor filed of record in this court a properly authenticated copy of Defendant’s small claims court complaint against him. The complaint shows that Defendant filed her complaint against Debtor in the Tiffin Municipal Court on July 31, 2003, after the commencement of Debtor’s Chapter 7 case on November 22, 2002. The small claims court complaint requests relief in the form of damages for breach of an obligation to repay a loan that dates back to at least April 17, 2002, before the commencement of Debtor’s bankruptcy case. On May 17, 2005, Defendant filed a Memorandum of Law essentially reiterating the arguments she previously made and which the court previously rejected, and an affidavit in support of those arguments. Defendant has offered no evidence that the debt was incurred postpetition or is of a type described in § 523(a)(2), (4), or (6). Nor does the small claims court complaint show that the debt is of a type described in § 523(a)(2), (4), or (6). There is thus no genuine issue of material fact and the debt is shown by the record to be a simple, pre-petition breach of contract debt. As a result, based on the reasons and authorities explained in the court’s first memorandum and as a matter of law, the debt owed by Debtor to Defendant was discharged in the underlying Chapter 7 case notwithstanding the lack of original notice of commencement of the Chapter 7 case to Defendant.

Upon entry of Debtor’s discharge on March 20, 2003, a statutory injunction arose under § 524(a) of the Bankruptcy Code. As the court has determined, that injunction applies to Debtor’s debt to Defendant. The Sixth Circuit Court of Appeals has held that, in contrast to a violation of the automatic stay of § 362(a), a debtor has no private cause of action against a creditor for violation of the discharge injunction. *Pertuso v. Ford Motor Credit Co.*, 233 F.3d 417, 421 (6th Cir. 2000). Instead, a debtor’s

sole avenue of recourse—and the one that is the traditional remedy for a violation of a court injunction—is an action for contempt. The next questions that must be addressed are thus whether Defendant violated the discharge injunction and, if so, what the remedy is in contempt.

Debtor also filed on May 5, 2005, an itemization indicating that he had paid \$175 of the debt in question. Payments were made in installments of varying amounts on 8/2/02, 9/6/02, 9/7/02, 9/14/02 and an unidentified date.¹ As the record shows that these payments were all made before the commencement of Debtor's Chapter 7 case on November 22, 2002, there is no violation of the discharge injunction shown by these payments.

The small claims court complaint was filed on July 31, 2003, after the commencement of Debtor's bankruptcy case and after the discharge injunction was entered. This was thus a violation of the discharge injunction under § 524(a)(2). But Debtor has not proven that Defendant was on notice of the commencement of the bankruptcy case or of the discharge when she filed the small claims court complaint. Debtor has not proven that the filing of the complaint was in contempt of the discharge injunction.

The affidavit and a certified copy of a statement of the Tiffin Municipal Court filed by Defendant does show that a total of \$56.83 has been garnished from Debtor in varying amounts on August 24, 2004, August 31, 2004, September 8, 2004, and October 14, 2004. The garnishment necessarily occurred after Defendant filed the small claims court complaint and obtained judgment thereon, which in turn occurred after the court entered Debtor's discharge. Therefore, the garnishments occurred in violation of the discharge injunction.

Moreover, the garnishments all occurred after this court's order entered on March 26, 2004, in Debtor's underlying Chapter 7 Case No. 02- 38048, denying his motion to reopen the case to add Defendant to his Schedule F as unnecessary. [Case No. 02-38048: Doc. ##16,17]. The court's docket and record in that case, of which the court takes judicial notice, shows that its March 26, 2004, order was served on Defendant at the same address identified in her affidavit filed in this case. Further, the court records do not show that the order sent to Defendant was returned, and receipt is presumed. That order

¹ As Debtor has the burden of proving when payments were made, the court cannot find that the \$50.00 payment was made after his Chapter 7 discharge.

stated that Debtor had received a discharge on March 20, 2003, and that any pre-petition debts not within 11 U.S.C. § 523(a)(2), (4) or (6) were discharged, whether creditors were scheduled or not. Therefore, in subsequently pursuing and successfully obtaining garnishments, Defendant violated the discharge injunction, the fact and the scope of which she had previously been put on notice by the court.² Willfulness is not an element of civil contempt and the intent to disobey the order is irrelevant. *In re Walker*, 257 B.R. 493, 497 (Bankr. N.D. Ohio 2001). Therefore, the court finds that the elements of civil contempt have been satisfied by clear and convincing evidence as to the garnishments.

The final issue is therefore what sanctions are appropriate. “The primary purpose of a civil contempt order is to compensate for injuries caused by non-compliance.” *McMahan & Co. v. Po Folks, Inc.*, 206 F.3d 627, 634 (6th Cir. 2000). Sanctions of this kind must be based on evidence of actual loss. *Walker*, 257 B.R. at 498. The only evidence in the record of damages arising from the violation of the discharge injunction is the \$56.83 garnished after the small claims court judgment was entered. Debtor has not offered any other evidence of damages.

Nor will the court exercise its discretion and award attorney’s fees as a sanction. The amount in issue is minimal, there is no indication that Defendant will not abide in the future by the discharge order, and Debtor failed to originally schedule Defendant as a creditor when he filed his bankruptcy case, preventing initial and more timely notice of the Chapter 7 case and of the discharge to Defendant, which in turn would have reduced the likelihood of later confusion by a layperson about the discharge status of the debt.

For the foregoing reasons and those set forth in the April 14 Memorandum of Decision and Order, the Motion to Dismiss is denied and the S/J Motion is granted in part and denied in part. Specifically, the court will enter a separate judgment holding Defendant in contempt for violating the discharge injunction and awarding as sanctions for contempt a sum representing all money garnished from Plaintiff after the

² Defendant asserts in her Affidavit [Doc. #26] that the first time she was aware of “a court order from the Federal Bankruptcy Court” [emphasis added] was when it was sent “file stamped November 24, 2004,” a date after her answer in this case was filed. This statement does not create a genuine issue of material fact because it is ambiguous and can be read to refer only to her first knowledge of the order she identifies, which is the original adversary proceeding scheduling order in this case. Defendant’s statement does not, however, disclaim knowledge or receipt of the March 26, 2004, order, which was sent to the same address as the November 26, 2004, order in this adversary proceeding.

commencement of his Chapter 7 case. The court will not enjoin further collection efforts, as such action is already prohibited by law, namely 11 U.S.C. § 524(a). Nor will the court award attorney's fees or other damages. It is therefore

ORDERED that Defendant's Motion to Dismiss [Doc. #21] is hereby **DENIED**; and

It is **FURTHER ORDERED** that Debtor/Plaintiff's Motion for Summary Judgment [Doc. #20] is **GRANTED** in part and **DENIED** in part as set forth above.