

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: September 30 2010

Mary Ann Whipple
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re: Francine K. Smith,)	Case No. 03-34099
)	
Debtor.)	Chapter 7
)	
Francine K. Smith,)	Adv. Pro. No. 09-3119
Plaintiff,)	
)	Hon. Mary Ann Whipple
v.)	
)	
Bennett & Deloney, P.C.,)	
)	
Defendant.)	
)	
)	
)	

MEMORANDUM OF DECISION AND ORDER GRANTING MOTION FOR DEFAULT JUDGMENT

This adversary proceeding is before the court upon Plaintiff's Complaint for Injunctive Relief and Monetary and Punitive Damages ("Complaint") [Doc. #1]. Plaintiff was the debtor in prior Chapter 7 Case No. 03-34099 in this court.

On October 14, 2009, the Clerk issued a second alias summons and notice of pre-trial conference [Doc. # 15]. The summons required an answer or other response to the Complaint to be filed by November 13, 2009, and scheduled a pretrial conference. On November 24, 2009, the court held the

scheduled pre-trial conference. There was no appearance by or on behalf of Defendant and no answer or other response to Plaintiff's complaint had been served and filed. The Clerk entered Defendant's default [Doc. ## 21,24] and Plaintiff accordingly filed a Motion for Default Judgment. [Doc. # 23]. The court scheduled a hearing on the motion and notice of the hearing was also duly and properly served on Defendant. [Doc. ## 26, 27]. On February 23, 2010, the court held the noticed hearing on the motion. [Doc. # 29]. There was no appearance on behalf of Defendant and a review of the record shows no answer or other response to either the Complaint or to the motion has been filed. Therefore, pursuant to Fed. R. Civ. P. 55, made applicable by Fed. R. Bankr. P. 7055, Plaintiff's Motion for Default Judgment will be granted.

The district court has jurisdiction over Plaintiff's underlying Chapter 7 bankruptcy case and this adversary proceeding as a civil proceeding arising under Title 11 or related to a case under Title 11. 28 U.S.C. § 1334(a), (b). Plaintiff's Chapter 7 case and all proceedings arising under Title 11 or related to a case under Title 11, including this adversary proceeding, have been referred to this court for decision. 28 U.S.C. § 157(a) and General Order No. 84-1 entered on July 16, 1984 by the United States District Court for the Northern District of Ohio. This contested matter is a core proceeding that this court may hear and determine because it involves Debtor's Chapter 7 discharge. 28 U.S.C. § 157(b)(2)(L) and (O); see *Rodriguez v. Countrywide Home Loans, Inc.*, 396 B.R. 436 (Bankr. S.D. Tex. 2008).

The court finds that notice, including the service of the second alias summons and Complaint pursuant to Fed. R. Bankr. P. 7004(b)(7), has validly and properly been served upon Defendant. The return on service of the second alias summons [Doc. # 16], including the certified mail receipt card attached thereto, shows that the second alias summons and Complaint were timely served on Defendant directly at a regular place of business as authorized by Fed. R. Bankr. P. 7004(b)(7) and Rule 4.2(F) and (G) of the Ohio Rules of Civil Procedure. In further support that actual notice of these proceedings has

been received by Defendant, the court notes that no notices or mailings to Defendant from the court have been returned to the Clerk. Thus, the court finds that the Defendant has failed to appear, plead, or otherwise defend this action as required by the applicable rules of procedure.

The court finds that the well-pleaded factual allegations of the Complaint constitute a valid cause of action against Defendant, and deems them as true. This is an action for civil contempt for violation of the discharge injunction entered in Plaintiff's captioned Chapter 7 bankruptcy case. 11 U.S.C. §§ 524(a)(2). All of the well-pleaded facts alleged in the complaint are also taken as true as a result of the default. Also, the court takes judicial notice of the docket and the case file in the underlying Chapter 7 case, which confirms that the original creditor of the Plaintiff's in whose shoes Defendant now stands, State National Training Service, was properly served with notice of commencement of the Chapter 7 case and with the discharge order. [Case No. 03-34099, Doc. ## 2, 7]. *See* Fed. R. Evid. 201.

Pursuant to Paragraph 4 of and Exhibit D to the Complaint, Plaintiff properly alleged facts that established a violation of the discharge injunction of 11 U.S.C. § 524(a)(2). Defendant is subject to and disregarded the discharge injunction by sending Plaintiff a demand letter dated January 9, 2009, seeking to collect a debt incurred by Plaintiff to State National Training and included in her Chapter 7 discharge.

The avenue for redress of violations of the discharge injunction in the Sixth Circuit, *In re Perviz*, 302 B.R. 357, 370 (Bankr. N.D. Ohio 2003); *cf. Pertuso v. Ford Motor Credit Co.*, 233 F.3d 417, 421, 422 (6th Cir. 2000)(no implied right of action for statutory damages under § 524), is invocation of the court's inherent and statutory power under 11 U.S.C. § 105(a) to hold parties in contempt upon a willful violation. A creditor found in contempt of violating the discharge injunction, or other orders of the court, is subject to sanctions, including actual damages, attorney's fees and,

where there has been shown a willful violation that amounts to a clear disregard and disrespect of the bankruptcy laws, punitive damages. *Perviz*, 302 B.R. at 371-73; *Nibbelink v. Wells Fargo Bank (In re Nibbelink)*, 403 B.R. 113 (Bankr. M.D. Fla. 2009).

Plaintiff failed to appear in person at the damages hearing. The only evidence of damages submitted, which the court finds Plaintiff is entitled to be awarded in a reduced amount, is Plaintiff's counsel's attorney's fee statement in the amount of \$2,251.25. [Doc. # 30]. The court will apply a reasonableness standard to the attorney's fees sought in this adversary proceeding. To determine the reasonableness of attorney fees, this court generally applies the "lodestar" method of fee calculation endorsed by the Supreme Court and the Sixth Circuit under numerous other federal fee shifting statutes whereby the court multiplies the reasonable number of hours billed by a reasonable billing rate. *See Reed v. Rhodes*, 179 F.3d 453, 471 (6th Cir. 1999) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 432 (1983) and employing the lodestar method in determining an award of attorney fees in a civil rights case); *In re Boddy*, 950 F.2d 334, 337 (6th Cir. 1991)(adopting lodestar method of fee calculation in bankruptcy cases); *accord In re Pawlowicz*, 337 B.R. 640, 647 (Bankr. N.D. Ohio 2005)(following lodestar method in awarding attorney's fees under former § 362(h)). The court then considers other factors that may be relevant to adjust the award upward or downward to achieve a reasonable result.¹ *Reed*, 179 F.3d at 471. The fee applicant "should submit evidence supporting the hours worked and rates claimed." *Id.*

The fee statement is based on an hourly rate of \$200. In determining the reasonableness of

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These factors are: (1) the time and labor required by a given case; (2) the novelty and difficulty of the questions presented; (3) the skill needed to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Reed*, 179 F.3d at 472, n.3.

an attorney's claimed hourly rate, the court considers "the prevailing rate in the relevant market - i.e., 'the rate that is customarily paid in the community to attorneys of reasonably comparable skill, experience, and reputation.'" *Disabled Patriots of Am., Inc. v. Reserve Hotel, Ltd.*, 659 F. Supp.2d 877, 885 (N.D. Ohio 2009) (internal citation omitted). The relevant market is "the venue of the court of record," rather than the "geographical area wherein [counsel] maintains his office and/or normally practices." *Id.* (citing *Adcock-Ladd v. Sec'y of Treasury*, 227 F.3d 343, 350 (6th Cir.2000)). In determining a reasonable rate, the court may consider "a party's submissions, awards in analogous cases, and its own knowledge and experience from handling similar requests for fees." *Id.*; see *Loranger v. Stierheim*, 10 F.3d 776, 781 (11th Cir.1994) (stating that the court is "itself an expert on the question and may consider its own knowledge and experience concerning reasonable and proper fees and may form an independent judgment either with or without the aid of witnesses as to value.")

While Plaintiff offered no evidence regarding the reasonableness of counsel's requested hourly rate of \$200, the court takes judicial notice of the hourly rates charged by attorneys representing debtors in consumer bankruptcy cases in this court. Those rates generally range from \$125 to \$225 per hour. Having reviewed the Attorney Time Sheet, which itemizes the work performed by counsel and the time expended doing so, and having considered the exceedingly straightforward and routine nature of both the legal, factual and procedural issues presented in this case, the court finds that an hourly rate of \$200 is generally reasonable for tasks that need to be performed by a lawyer. However, the court notes that many of the tasks listed are clerical in nature, and should be performed not by professional personnel billing at \$200 an hour but by clerical personnel included in overhead and already built into the hourly rate of counsel. The court finds from the submitted time descriptions that the following tasks were clerical in nature (02/02/09 [VOS file preparation for \$80]; 06/30/09 [scanned paperwork for \$40]; 08/18/09 [filing and mailing

documentation for \$400]; 08/25/09 [checking on issuance of summons for \$60]; 10/14/09 [sent summons out for \$60]; 11/02/09 [receiving and filing return receipt for \$200]). The court will deduct the time for these actions in the total amount of \$840 from the fee request. Also, the statement includes one hour of time on 02/02/09 at a total of \$200 for preparation of the fee agreement with Plaintiff. While appropriately prepared by counsel or by a trained legal assistant, the court finds that this action is nevertheless also part of the overhead already built into counsel's \$200 hourly rate for which he is not entitled to bill separately. This additional amount of \$200 will also be deducted from the fee request. The court finds that the other time entries represent fees reasonably incurred in prosecuting this action and that the reasonable fees to which Plaintiff is entitled total \$1,211.25 (\$2,251.25 - \$1,040.00=\$1,211.25). As Plaintiff was the Debtor in the underlying Chapter 7 case, there was no filing fee required or paid for the Complaint.

The Complaint also demands punitive damages. However, even taken as true as they are upon default, the averments of the Complaint do not establish the type of exacerbated or particularly egregious conduct, beyond one demand letter sent in violation of the discharge injunction, required for an award of punitive damages. *Cf. Wagner v. Ivory (In re Wagner)*, 74 B.R. 898 (Bankr. E.D. Pa. 1987)(standards for award of punitive damages for violation of the automatic stay); *In re Johnson*, 253 B.R. 857, 861 (Bankr. S.D. Ohio 2000)(same). Nor has Plaintiff submitted any evidence entitling her to punitive damages.

Lastly, the complaint requests an injunction against Defendant, however, there are not specific enough allegations in the Complaint, and no other evidence has been submitted, of the conduct sought to be enjoined such that an injunction can appropriately be crafted and entered in this case beyond the discharge injunction of § 524(a)(2) .

Plaintiffs' Motion for Default Judgment [Doc. # 23] is hereby **GRANTED**. A separate final

judgment against Defendant will be entered in accordance with this Memorandum of Decision.

IT IS SO ORDERED.

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