

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

In re: BKY 3-92-6336
Wanda Smith, ORDER
Debtor.

This matter came before the Court on motion by Debtor for relief from alleged violation of 11 U.S.C. Section 524(a). Barbara May appeared on behalf of Debtor. Kevin Donovan appeared pro se. Based upon the files, records, evidence and arguments of the parties, the Court makes this Order pursuant to the Rules of Bankruptcy Procedure.

I.

Debtor's motion for relief from violation of the Section 524(a) injunction arises from a garnishment of her wages post-discharge by Mr. Donovan on a prepetition judgment. The Debtor filed for relief under Chapter 7 on November 30, 1992, and received her general discharge under 11 U.S.C. Section 727 on March 9, 1993. Debtor's bankruptcy was and remains a no-asset case. Mr. Donovan is a prepetition judgment creditor of Debtor. Ms. Smith did not list Mr. Donovan on her schedules in bankruptcy.(FN1)

On February 10, 1993, Debtor received a post-judgment Order for Disclosure from Mr. Donovan requesting information regarding her assets in connection with a garnishment proceeding. In response, she sent Mr. Donovan a copy of her First Meeting of Creditors to advise him of her bankruptcy. She also called Mr. Donovan and left a message on his answering machine to stop the garnishment. She alleges that Mr. Donovan also made a threatening phone call to her.

On March 23, 1993, Mr. Pearson, Debtor's then attorney, sent a letter to Mr. Donovan advising him to "cease all collection activity against Wanda Smith as that action is in violation of 11 U.S.C. Section 362 and Section 524." Mr. Pearson did not quote the substance of the sections or explain to Mr. Donovan the potential consequences of his actions. Notwithstanding his receipt of the letter, Mr. Donovan served a Writ of Execution, Earnings Disclosure Statement, and Third-Party Levy on Debtor's employer on March 30, 1993, and \$136.32 was withheld from Debtor's wages. Thereafter, on May 18, 1993, Mr. Pearson sent a notice of case filing to the Sheriff. This proceeding followed.

As a result of Mr. Donovan's actions, Debtor claims she became physically ill, suffering from a nervous stomach, diarrhea, cramps, nausea, cluster headaches, elevated blood pressure; and, that she has suffered humiliation and embarrassment. Additionally, she was forced to hire Ms. May to bring this motion. Accordingly, she asks

for actual damages, attorney's fees and punitive damages.

Mr. Donovan basically claims ignorance as a defense. He testified that he was unaware of Debtor's bankruptcy, as he was not listed on her schedules and did not receive notice of her bankruptcy until she sent him a copy of the First Meeting Notice. Once he was advised of Debtor's bankruptcy, he called a friend of his father's, an attorney practicing in Texas, as well as the Sheriff for advice. They both informed him that as long as he was not listed on Debtor's bankruptcy schedules as a creditor, neither the filing of the petition nor the discharge affected him. Based on this information, he proceeded with the garnishment.

On his cross-examination of Debtor, Mr. Donovan elicited testimony from her that he had never called her as she alleged in her pleadings. In fact, she testified that she had called him. An answering machine tape which contained a message left by Debtor at Mr. Donovan's home was offered and received into evidence. The tape reveals Debtor as a self-confident, self-assured individual, under no apparent extreme duress, at least at the time that the call was made. She did seem exasperated.(FN2)

Mr. Donovan testified that he meant Debtor no ill-will or harm; he never threatened her; and he was only proceeding based on the advice given him. He claims that if he had known that he legally could not proceed with the garnishment, he would not have done so. He also testified that he felt quite sorry for his actions. When advised by the Court that he could not continue with the garnishment, he agreed to immediately stop all garnishment proceedings and to release all garnished wages to Ms. Smith. He has complied by letter dated June 19, 1993, to Debtor's employer with a copy to the Sheriff; wherein he advised them to lift the levy and return all earnings.

II.

As a defense, Mr. Donovan asserts that because he was an unsecured creditor the Section 524 injunction does not apply to him. However, clearly it does. Where a debtor unintentionally fails to schedule a creditor in a no-asset case, the unsecured debt is discharged, unless the debt is of the type subject to nondischargeability under 11 U.S.C. Section 523(a)(2), (4) or (6). See: Peterson v. Anderson (In re Anderson), 72 B.R. 783, 787 (Bankr. D. Minn. 1987). Here, the Debtor contends that Mr. Donovan was not a creditor of hers, and that she had no knowledge of the pre-bankruptcy judgment until February of 1993. Therefore, she did not list Mr. Donovan on her schedules.

There was no fraud or intentional omission by the Debtor in not listing Mr. Donovan on her schedules. The debt is not of the type that is subject to nondischargeability under 11 U.S.C. Section 523(a)(2), (4), or (6). Accordingly, since this was and remains a no-asset case, the debt of Mr. Donovan was discharged and the Section 524(FN3) injunction applies.

524(a) is civil contempt and may be redressed by extraction of attorney's fees. However, each violation must be considered in its entirety, with due consideration to the underlying facts. Olson v. McFarland Clinic (In re Olson), 38 B.R. 515, 518 (Bankr. N.D. Iowa 1984); Rhyne v. Cunningham (In re Cunningham), 59 B.R. 276, 278

(Bankr. E.D. Penn. 1986). Here, Mr. Donovan proceeded with the garnishment of Debtor's wages after being advised several times by Debtor's attorney and Debtor that she was in bankruptcy, she had received a discharge of her prepetition debts, and that he was in violation of the Section 524 injunction. Regardless, Mr. Donovan proceeded with the garnishment of Debtor's wages. Debtor was forced to hire an attorney to represent her in this proceeding in order to obtain the return of her garnished wages and compliance of the Section 524 injunction. Accordingly, Debtor should be awarded attorney's fees and costs in this proceeding.

Violation of the injunction also can result in a claim for general compensatory damages to a debtor injured by the violation. Here, Debtor has not shown any compensatory injury. The Court is not persuaded that Ms. Smith suffered significant and compensable emotional distress or physical illness in connection with the matter.

While violation of the injunction can give rise to punitive damages, Mr. Donovan's actions and behavior did not rise to a level of outrageousness necessary to justify punitive damages. Mr. Donovan testified that he proceeded with garnishment based on information received from the Sheriff and an attorney in Texas. Even though it was incorrect advice, he thought he was proceeding legally. He stated that if he had known he was in the wrong he would not have proceeded. Additionally, he testified that he did not mean to harm the Debtor in any way. After being ordered by the Court to stop garnishment and return Debtor's wages, he immediately complied. Under the circumstances, an award of punitive damages is inappropriate.

NOW, THEREFORE, IT IS HEREBY ORDERED: Wanda Smith is awarded \$800 for her attorney's fees and costs in this proceeding from Kevin Donovan, as and for his violation of the 11 U.S.C. Section 524 injunction resulting from her general discharge, entered March 9, 1993, under 11 U.S.C. Section 727..

Let Judgment Be Entered Accordingly.

Dated: July 23, 1993.

BY THE COURT:

DENNIS D. O'BRIEN
U.S. Bankruptcy Judge

(FN1) Before Debtor's bankruptcy and her marriage dissolution, Mr. Donovan painted a family portrait for the Debtor and her husband. The Debtor's husband failed to pay for the portrait, so Mr. Donovan obtained a conciliation court judgment against Debtor and her ex-husband on March 4, 1991, for his services. Debtor alleges she did not have knowledge or notice of the conciliation court proceeding, and was unaware of the judgment until February of 1993.

END FN

(FN2) Debtor accused Mr. Donovan of being no better than her ex-

husband; that she was not about to let him walk all over her as her ex-husband did; and, she threatened legal action against him.
END FN

(FN3)11 U.S.C. 524(a) provides:

A discharge in a case under this title--

(1) voids any judgment at any time obtained, to the extent that such judgment is a determination of personal liability of the debtor with respect of any debt discharged under section 727...of this title, whether or not discharge of such debt is waived;

(2) 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 such debt as a personal liability of the debtor, whether or not discharge of such debt is waived; and . . .

The legislative history of 524 makes clear that the section operates as an injunction against the commencement or continuation of an action, the employment of process, or any act, including telephone calls, letters, and personal contacts, to collect any discharged debt as personal liability of the debtor. The injunction is to give complete effect to the discharge and to eliminate any doubt concerning the effect of the discharge as a total prohibition on debt collection efforts. See: Notes of Committee on The Judiciary, Senate Report No. 95-989.

END FN