2020 Mont. B.R. 20

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MONTANA

In re

EDWARD D ADKINS,

Debtor.

Case No. **13-61521-7**

ORDER

At Butte in said District this 30th day of January, 2020.

Pending in this Chapter 7[1] bankruptcy is Debtor's Amended Motion to Enforce Discharge and Sanctions ("Debtor's Motion") filed April 4, 2019, at ECF No. 39. Debtor requests that the Court enter an order enforcing Debtor's discharge against Julia Swingley ("Swingley"), Dantro, LLP, a dissolved Florida limited liability partnership ("Dantro"), PhoenixEquities /DHDC-Reflection Lakes, LLP, a dissolved Florida limited liability partnership ("Phoenix") (collectively Dantro and Phoenix are referred to as the "Creditors"), Stok Folk + Kon ("SFK"), and Robert Stok ("Stok"), and that the Court award Debtor sanctions against Dantro, Phoenix, SFK and Stok for their alleged violation of the discharge injunction.

Also pending is the "1st Amended & Substituted Motion for Sanctions Pursuant to Rule 9011, Court's Inherent Authority and 28 U.S.C. § 1927" ("Creditor Motion") filed on November 8, 2019, at ECF No. 98 by Dantro and Phoenix.

[1] Unless specified otherwise, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, all "Rule" references are to the Federal Rules of Bankruptcy Procedure, and all "Civil Rule" references are to the Federal Rules of Civil Procedure.

FACTUAL FINDINGS

The parties filed a Stipulation of Facts at ECF No. 94, and a Joint Statement of Disputed Facts at ECF No. 95.[2] After reviewing the record, the Court makes the following findings of fact:

1. Pre-Petition Events

Debtor owned an interest in McGregor Properties Partnership ("McGregor"), a Florida Partnership, which in turn owned an interest in Dantro. ECF No. 39, ¶3. Debtor was the managing partner of McGregor. Debtor was also a partner in another entity Phoenix. *Id*. As a result of a falling out among the various partners, Debtor, McGregor and/or other managing entities controlled by Debtor were removed as the managing partners from Phoenix in January 2012 and Dantro in February 2012. ECF No. 39, ¶5. Following Debtor's loss of management authority, Debtor was removed as Dantro's Registered Agent. ECF No. 39, ¶6. On February 10, 2012, Debtor transferred a total of $80,000 from accounts in the name of Dantro to the trust account of the Schutt law firm in Florida. ECF No. 39, ¶5.

On June 1, 2012, Dantro and Phoenix filed a lawsuit in the Florida 20th Judicial Circuit, Lee County, naming Debtor and others as defendants ("Florida Litigation"). ECF No. 94, ¶4. At some point, Dantro was administratively dissolved by the Florida Secretary of State. ECF No. 39, ¶9. On March 13, 2013, Christopher Byrd ("Byrd"), a Florida attorney working for Debtor,

[2] Many of the disputed facts are not necessary to this Court's decision. The parties have been engaged in protracted litigation in Florida with each other for at least 7 years, both prior to and after Debtor's bankruptcy filing with this Court. For purposes of adjudicating the issues before this Court, this Court has reviewed the Orders of the Florida court. The decisions entered by the courts in Florida are detailed and provide a clear explanation of the events that resulted in entry of a judgment against Debtor. While the parties may disagree with the Florida courts' findings and conclusions, those issues are not subject to being relitigated here.

filed a reinstatement for Dantro ("Reinstated Dantro"). *Id*. Months later, in September 2013, Byrd appeared in the state court litigation on behalf of Reinstated Dantro. *Id*. The next month, Stok[3] appeared as substitute counsel for Dantro and Phoenix in the Florida Litigation. *Id* at ¶10.

2. Debtor's Bankruptcy Case

On November 19, 2013, Debtor commenced this case by filing a Voluntary Petition for relief under Chapter 7 of the Bankruptcy Code in the District of Montana. ECF No. 94, ¶1. On Schedule B, Debtor disclosed that he and his wife owned a 50% interest in McGregor, which in turn owned a 50% interest in Dantro. ECF No. 94, ¶2. Debtor listed Stok[4] as a creditor on his schedule F, with a claim for legal services in an "unknown" amount disclosing that "Debtor has a full release of this claim but has asserted recently that he has some kind of claim." ECF No. 12, p.15.

In January 2014, while Debtor's bankruptcy case was pending, the Schutt law firm deposited the funds it held in its trust account into the state court's registry in conjunction with the Florida Litigation. ECF No. 94, ¶7. Creditors filed an Amended Complaint on April 29, 2014. ECF No. 94, ¶6. The Amended Complaint did not name Debtor as a defendant in the Florida Litigation because it was an *in rem* action to determine the ownership of the funds deposited into the registry of the Florida Court. *Id*. No complaint to determine the

[3] Stok was a principal of the law firm Stok Kon + Braverman formerly known as SFK. ECF No. 94, ¶2.

[4] The record reflects that Stok provided services to Debtor, his entities, and/or his family members prior to November 19, 2013. ECF No. 67. At some point during this pre-petition period the relationship between Stok and Debtor soured and Stok represented entities or parties that were adverse to Debtor. Stok continued to represent those parties adverse to Debtor in the Florida Litigation referenced in this decision.

dischargeability of a debt was filed in the case, and Debtor received his discharge under § 727 on May 15, 2014. ECF No. 94, ¶¶ 1, 9.

3. Post-Discharge Events

Although Debtor was no longer a defendant in the Florida litigation, Byrd filed an answer, affirmative defenses, and a counterclaim in the Florida Litigation on behalf of an entity identified as "active Dantro," which asserted an interest or claim to the interplead funds of $85,000. ECF No. 94, ¶8. On September 9, 2014, Dantro and Phoenix filed a motion to strike Reinstated Dantro's answer, affirmative defenses and counterclaim arguing Reinstated Dantro was reinstated without authorization, was not a party to the Florida Litigation and further, that Debtor was not a party to the Florida Litigation because he was in bankruptcy.[5] ECF No. 94, ¶10. The motion to strike was granted on February 6, 2015 and Debtor was granted 30 days to make an appearance in the case. ECF No. 94, ¶12.

On March 4, 2015, Byrd filed another answer and claim naming Dantro, on behalf of Debtor as the litigant, asserting a claim to the $85,000.00 held in the Court's registry. ECF No. 94, ¶13. A motion to strike was filed on April 13, 2015, and was granted on July 6, 2015. *Id.* Debtor was granted another ten days to file an amended answer and counterclaim. *Id.* Debtor filed another amended answer and counter claim on July 15, 2015. ECF No. 94, ¶14. On December 2, 2015, Dantro and Phoenix filed a motion for summary judgment, which was granted on March 3, 2016. *Id.* The funds in the Court's registry were ordered to be turned over to Dantro and Phoenix's attorney. *Id.*

[5] Debtor's case was closed November 6, 2014.

Rather than admit defeat, Debtor engaged new counsel, Jason P. Ramos, Esq. ("Ramos"), who appeared in the Florida Litigation as substitute counsel for Byrd on behalf of Debtor. ECF No. 94, ¶15. Ramos filed a motion for rehearing. *Id*. Dantro and Phoenix opposed the motion for rehearing and filed a motion for attorney's fees to be awarded against Byrd and Debtor, who was still not a party to the litigation. *Id*. At that time, Dantro and Phoenix did not specify the dollar amount of the attorney's fees they were seeking. They also did not list the work for which the fees were sought. *Id*.

On September 19, 2016, the Florida court denied the motion for rehearing and entered an Order granting attorney's fees against Debtor and Byrd without specifying an amount and "reserve[d] jurisdiction for a determination of the amount of the award." ECF No. 94, ¶16.[6] The award of fees made the specific findings including:

> Adkins directed and funded the litigation spearheaded by Byrd under the guise of "Reinstated Dantro," who unleashed a slew of frivolous and unauthorized filings on Plaintiffs throughout this litigation, including:
>
> - Adkin's first Answer, Affirmative Defenses and Counterclaim, filed on May 14, 2014, under the "Active Dantro" moniker;
> - A Motion for Default against Plaintiffs on Adkin's Counterclaim, filed on June 4, 2014;
> - A Motion to Strike various allegations from the Amended Complaint, filed on June 17, 2014, which was ultimately denied;
> - Notwithstanding that Plaintiffs moved for an extension of time and filed a Motion to Strike Adkin's Counterclaim, which Motion to Strike the Court granted, Adkins sent the default to the Court for consideration on July 29, 2014, which caused the Court to enter it on July 31, 2014;
> - A Motion for Entry of Final Judgment after Default, filed on September 16, 2014;
> - Adkin's Answer to Amended Complaint and Statement of Claim, filed on March 4, 2015, as "DANTRO LLP, a dissolved Florida limited liability Partnership, on behalf of its former managing member, Edward Adkins," as opposed to in his personal capacity, in direct contravention of this Court's February 3, 2015 order;

[6] The parties' Stipulation of Facts refers to September 21, 2016. However, the Order granting attorney's fees is dated September 19, 2016.

- An Amended Answer and Amended Statement of Claim, filed on July 15, 2015, again as "DANTRO LLP, a dissolved Florida limited liability Partnership, on behalf of its former managing member, Edward Adkins," after the Court struck the previous answer; and,
- A Motion for Disqualification of Plaintiffs' counsel, also filed on July 15, 2015, as a way to further confuse the issues.

ECF No. 66-14 ("Florida Order") at ¶ 8. Ramos, on behalf of Debtor as "Non-party/Appellant," filed a notice of appeal on October 18, 2016. ECF No. 94, ¶17. On October 25, 2017, the appellate court issued a memorandum opinion affirming the trial court with respect to personal jurisdiction over Debtor and dismissed all other claims unrelated thereto. *Id*. The appellate court's mandate was issued on November 20, 2017. *Id.*

On December 15, 2017, Dantro and Phoenix filed a motion for attorney's fees. ECF No. 94, ¶18. On January 31, 2018, Debtor's bankruptcy attorney forwarded a letter to counsel for Dantro and Phoenix explaining that the motion for attorney's fees against Debtor may be a violation of the discharge. ECF No. 94, ¶19. A hearing on attorney's fees was held on February 5, 2018. ECF No. 94, ¶20. The time records submitted to the Florida Court in conjunction with the February 2018 hearing, begin with April 3, 2012, 18 months prior to the petition date.

A judgment awarding fees against the Debtor was entered on February 28, 2018, in the amount of $86,817.12 ("Florida Judgment"). The Florida Judgment included fees and costs attributable to the following time periods:

Time Period	Fees or costs
April 3, 2012 – January 8, 2013	$11,837.08
November 13, 2013	*Petition Date*
September 17, 2013 – March 17, 2016	$23,011.73
May 17, 2016 – November 20, 2017	$51,518.31

See ECF Nos. 20-21. The Florida Judgment was premised on the Florida Order. Based on the record, approximately $74,500, or 87% of the attorneys' fees underlying the judgment were

incurred after Debtor's petition date. Further, the majority of the fees were incurred after Debtor's discharge was entered on May 15, 2014.

On September 19, 2018, Dantro and Phoenix filed a motion to amend the caption of the Florida Litigation to add Debtor as a party defendant. ECF No. 94, ¶94. That motion was granted and an amended judgment with the amended caption was entered on January 17, 2019. ECF No. 94, ¶94. On March 6, 2019, Swingley filed a Notice of Filing Foreign Judgment with the Clerk of Court in Ravalli County, Montana. ECF No. 39-6. On March 12, 2019, a writ of execution was issued by the Ravalli County Clerk of Court for $86,817.12 plus interest. ECF No. 39-7.

CONTENTIONS OF THE PARTIES

In Debtor's Motion, "Debtor prays for an Order enforcing the discharge entered in this case, for an Order compelling the plaintiffs in the Florida state court case and their attorneys to withdraw the Notice of Filing Foreign Judgment, for an Order declaring the Florida judgment void to the extent that it is a judgment against the Debtor, and for sanctions for having to seek the Order enforcing the discharge." In opposition, Dantro, Phoenix, SFK, Stok and Swingley argue that Debtor returned to the fray post-petition, and as a result, the judgment entered against him for fees and costs, and their attempt to collect the same, is not a violation of the discharge injunction. The responding parties also countered with Creditor's Motion seeking Rule 11 sanctions against Debtor and his counsel, including "Creditors' reasonable attorneys' fees and costs[.]" For the reasons discussed below, the Creditors' Motion is denied, and Debtor's Motion is granted in part and denied in part.

The issue in this case is whether an award entered post-petition after Debtor "returned to the fray" of attorney's fees and costs incurred pre and post-petition by Creditors violates §§ 727 and 524.

APPLICABLE LAW and DISCUSSION

A. The Florida Judgement is Enforceable, as to the post-petition fees and costs because Debtor returned to the fray.

Subject to exceptions not applicable in this case, a discharge under § 727(a) eliminates a debtor's personal liability for pre-petition debts. *See* § 727(b). The discharge "operates as an injunction against the commencement or continuation of an action ... to collect, recover or offset any [discharged] debt as a personal liability of the debtor." § 524(a)(2). The term "debt" is defined in the Bankruptcy Code as "liability on a claim." 11 U.S.C. § 101(12). A "claim" is defined as a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured[.]" § 101(5)(A).

As explained in *Ybarra*,[7] "[A] claim arises, for purposes of discharge in bankruptcy, at the time of the events giving rise to the claim...." *In re Ybarra*, 424 F.3d 1018, 1022 (9th Cir. 2005) (quoting *O'Loghlin v. County of Orange*, 229 F.3d 871, 874 (9th Cir.2000)). In holding

[7] In *Ybarra*, the debtor filed an employment discrimination suit against her employer in state court. 424 F.3d at 1020. Thereafter, the debtor filed a Chapter 11 bankruptcy petition which was subsequently converted to Chapter 7. *Id*. The Chapter 7 trustee negotiated a settlement of the employment discrimination action, which settlement was, over debtor's objection, approved by the bankruptcy court. Following approval of the settlement, the state court action was dismissed. *Id.* Despite the dismissal of the lawsuit, the debtor took affirmative actions "to revive the state suit." *Id*. at 1020, 1027. In particular, the debtor amended her schedules to claim her employment discrimination action as exempt property, litigated this issue in bankruptcy court, and after prevailing on appeal, rejected the settlement agreement and "successfully persuaded the state court to set aside the dismissal." *Id*. at 1020. The debtor ultimately lost in state court and the employer was awarded attorneys' fees and costs. *Id*. at 1020-21.

that a post-petition award of fees and costs were not discharged in the debtor's bankruptcy, the Ninth Circuit explained:

> In sum, we have held that post-petition attorney fee awards are not discharged where post-petition, the debtor voluntarily "pursue[d] a whole new course of litigation," commenced litigation, or "return[ed] to the fray" voluntarily. [*Siegel v. Federal Home Loan Mortgage Corp.*, 143 F.3d 525, 533-34 (9th Cir.1998)]. We have also endorsed the notion that by voluntarily continuing to pursue litigation post-petition that had been initiated pre-petition, a debtor may be held personally liable for attorney fees and costs that result from that litigation.

Ybarra, 424 F.3d at 1024. In other words, actions by the debtor that revived the state court action were "sufficiently voluntary and affirmative" to be considered "returning to the fray." *Id*. at 1028.

In *Ybarra*, the Ninth Circuit noted that the bankruptcy court had held that the debtor's former employer "could collect the portion of the fees and costs *incurred* after Ybarra filed for bankruptcy." 424 F.3d at 1020. The Ninth Circuit Bankruptcy Appellate Panel ("BAP") reversed, holding that the entire award of fees and costs awarded to the debtor's former employer had been discharged. *Id.* The Ninth Circuit reversed the BAP, finding "that the fees and costs *incurred* post-petition were not discharged[.]" *Id.* (Emphasis added). The Ninth Circuit reiterated that when a debtor returns to the fray post-petition, the "claims for attorney fees and costs *incurred* post-petition are not discharged[,]" and that by affirmatively reviving the state suit, the debtor in *Ybarra* "returned to the fray" and thus, the debtor's former employer's "claim for attorney fees and costs *incurred* post-petition were not discharged in the bankruptcy." *Id*. at 1026-27.

Debtor's Chapter 7 discharge was entered May 15, 2014. One day before his discharge was entered in this bankruptcy case, Debtor elected to be an active participant in the Florida Litigation. As the Florida Court explained, "Adkins directed and funded the litigation

spearheaded by Byrd under the guise of 'Reinstated Dantro,' who unleashed a slew of frivolous and unauthorized filings on Plaintiffs throughout this litigation." Florida Order at ¶ 8. Notably, each of the specific examples that follow this conclusion occurred post-petition. And, as a result of this post-petition conduct, Debtor was sanctioned. Creditors correctly conclude that, "Pursuant to the 'return to the fray' analysis, the claim arose based entirely on Debtor's post-petition conduct." ECF No. 98 Page 19. This Court agrees and concludes that the fees and costs incurred post-petition included in the Florida Judgment are not subject to Debtor's discharge under §727, or the injunction under § 524.

Creditors' arguments are more tenuous when addressing the pre-petition fees included in the Florida Judgment. Although Creditors take the position that the conduct supporting the fee award was all post-petition, they also try to justify the award of pre-petition fees by reference to pre-petition conduct. Creditors point to *In re MacQuarrie*, 2017 WL 4158337, at *3 (Bankr. M.D. Fla. 2017), noting that it involved, "a post-petition violation of § 817.535, Florida Statutes—the same criminal statute that Debtor violated." Creditors' briefing explains:

> Debtor violated § 817.535, which is punishable in Florida as a third- degree felony, and therefore, is penal in nature. The Judgment was entered under the inequitable conduct doctrine against Debtor to serve as restitution due to his litigation misconduct and the intentionally vexatious nature demonstrated by Debtor's repetitive frivolous filings and repeated intentional violations of court orders.

ECF No. 98 at 17. Debtor's alleged violation of § 817.535 relates to the unauthorized reinstatement of Dantro. This was a pre-petition act or event that occurred in March 2013, more than 7 months before the November 2013 petition date. Any claim for attorney's fees or costs related to this pre-petition event was discharged. Further, the Florida Judgment was entered in a civil case, not a criminal case, so efforts by Creditors to construe the pre-petition event of

reinstating Dantro as giving rise to a fine, criminal forfeiture or other non-dischargeable obligation are not persuasive.

Creditors cite other cases, including *In re Water Valley Finishing, Inc.*, 139 F.3d 325 (2nd Cir. 1998) and argue that "[I]t is well-established that when fees are awarded as sanctions and incurred due to bad faith litigation or for an improper purpose, they are not a pre-petition claim." This broad statement glosses over distinctions between this case and *Water Valley Finishing*. First, the issue in Water Valley Finishing was whether the claim for sanctions accrued before or after the date of confirmation for purposes of determining discharge under § 1141(d)(1). In this case, the Florida Order upon which the Florida Judgment is premised plainly shows that Debtor's vexatious conduct occurred after November 19, 2013, the petition date. Except for dates referred to for context in paragraphs 1-7 of the Florida Order, every other important date in paragraphs 8-24 is post-petition. Creditor's suggestion that *Water Valley Finishing* supports their case is not tenable.

Ybarra is clear that when a debtor returns to the fray, only the fees and costs incurred after a bankruptcy petition is filed are outside the scope of the debtor's discharge. The Court considers the Creditors' concession, "the claim arose based entirely on Debtor's post-petition conduct," irreconcilable with their alternative arguments that the award and collection of pre-petition fees is consistent with *Ybarra*, §§ 524 and 727.

In this case, the Creditors incurred something less than $74,980.04 in legal fees after Debtor's November 19, 2013, petition date. The Notice of Filing Foreign Judgment in the amount of $86,817.12, filed by Swingley on March 6, 2019, included pre-petition fees in the approximate amount of $11,800. Based on the record presented by the parties, post-petition fees were $74,980.04. Debtor's Motion is granted because Debtor's discharge precluded Swingley,

Dantro, Phoenix, SFK, and Stok from collecting or attempting to collect that portion of the fees and costs that were incurred prior to November 19, 2013. The parties can calculate the exact amount of fees and costs that were incurred after November 19, 2013, and Creditors may collect that amount.[8]

B. Sanctions will be awarded.

A discharge under 11 U.S.C. § 524(a)(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...." *In re Ellett*, 254 F.3d 1135, 1148 (9th Cir. 2001), cert. denied, 534 U.S. 1127, 122 S.Ct. 1064, 151 L.Ed.2d 968 (2002). Civil contempt is the normal sanction for violation of the discharge injunction. *In re Gomez*, 17 Mont. B.R. 166, 170 (Bankr. D. Mont. 1998), citing 4 *Collier on Bankruptcy*, ¶ 524.02[2][c], at 524-18 (15th ed. 1998). In order to hold a creditor in civil contempt for violating a discharge order, the debtor must show there was no objectively reasonable basis for concluding that the creditor's conduct might be lawful. *Taggart v. Lorenzen*, 139 S. Ct. 1795, 204 L. Ed. 2d 129 (2019).

Debtor has requested an award of sanctions arguing:

> To the extent that Plaintiffs in the Florida state court litigation are seeking fees and costs incurred before the date the bankruptcy petition was filed, they are violating the discharge injunction.

ECF No. 39 at ⁋ 31. Although the Court has concluded that Creditors award of pre-petition fees and costs, and effort to collect those fees and costs, violated Debtor's discharge and the

[8] If the Parties are incapable of agreeing on the total fees and costs incurred after Debtor's petition date, a further evidentiary hearing will be held at the request of either party. Further, if for collection purposes an Order is needed setting out the specific post-petition amount to be collected, this Court will entertain such a motion.

discharge injunction, the Court is not persuaded that imposition of civil contempt is appropriate, or required. First, although some of the fees that were included in the Florida Judgment were pre-petition, those fees are a mere fraction of the overall amount awarded. The bulk of the fees awarded Creditors were incurred post-petition and neither the award nor the effort to collect those fees violated the discharge or injunction. More importantly, civil contempt is a severe remedy and the conduct by Creditors in this case does not warrant its imposition, particularly given Debtor's own conduct in the Florida Litigation.[9]

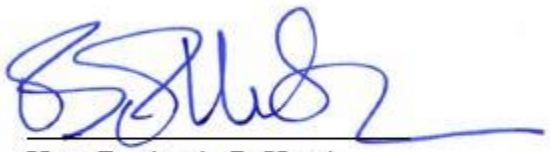
Creditors request sanctions "pursuant to Bankruptcy Rule 9011, the Court's Inherent Authority, and 28 USC § 1927." Creditors are not entitled to sanctions under Rule 9011, the Court's Inherent Authority, or § 1927. First, although Debtor multiplied the proceedings before the Florida court, in this case Debtor appropriately defended against Creditors attempt to collect a post-petition award of pre-petition attorney's fees and cost which was inconsistent with §§ 727, 524 and *Ybarra*. Despite this, the Court concluded that sanctions against Creditors were not warranted and it similarly concludes sanctions against Debtor, or his counsel are equally unwarranted. For the reasons explained above,

IT IS ORDERED that Debtor's Motion filed April 4, 2019, at ECF No. 39 is granted to the extent that Creditors are prohibited from collecting that portion of the Florida Judgment that relates to fees and costs that were incurred prior to November 19, 2013, and Debtor's Motion is denied in all other respects.

[9] By any measure Debtor's litigation conduct in Florida was unjustifiable. Further, given this Court's decision and the record before it, future litigation by Debtor in any court intended to evade the Florida Judgment should be the subject of intense scrutiny. Although sanctions were not awarded in this case, Debtor should not construe the Court's decision as an endorsement of his individual conduct.

IT IS FURTHER ORDERED that Creditors' Motion filed November 8, 2019, at ECF No. 98 is denied.

BY THE COURT:



Hon. Benjamin P. Hursh
United States Bankruptcy Court
District of Montana