IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

In re: **Marilyn Brewer,** Debtor.	Bankruptcy Number 98-29623 Chapter 7
Marilyn Brewer, Plaintiff, **vs.** **Harlan Brewer,** Defendant.	Adversary Proceeding Number 02-2465

MEMORANDUM OPINION AND DECISION

Thomas D. Neeleman, Thomas D. Neeleman, Esq., L.C., St. George, Utah for Plaintiff.
Dale M. Dorius, Dorius, Bond & Reyes, Brigham City, Utah for Defendant.

INTRODUCTION

This matter is before the Court on Marilyn Brewer's (the "Plaintiff") Complaint to Determine Dischargeability of a Debt and Request for Sanctions. In the complaint, Plaintiff asks the Court to: 1) find that the debt was incurred pre-petition; 2) find that the debt was discharged;

3) enjoin Defendant from further collection efforts; 4) require Defendant to "take all steps necessary to vacate the Order issued by State Court"; 5) require Defendant to pay Plaintiff all costs, including attorneys fees incurred in both the State Court proceeding and this adversary proceeding; and 6) require Defendant to pay punitive damages. The complaint was filed subsequent to the State Court[1] conducting a hearing on an order to show cause initiated by Defendant on the same claim issue. The State Court issued a ruling against Plaintiff on August 19, 2002, (the "Ruling") finding that the debt owed to Defendant was incurred post-petition and was not discharged. The current adversary proceeding was filed after the State Court issued its ruling.

The matter came on for trial before the Honorable William T. Thurman, United States Bankruptcy Judge, on the 19th day of August, 2003. Present representing the Plaintiff was Thomas D. Neeleman. Present representing the Defendant was Dale M. Dorius. Evidence was presented and received[2] and argument had thereon. Following the trial, the Court allowed Defendant to submit a post-trial brief, which was filed on August 29, 2003. The Court has reviewed that brief and other papers and pleadings on file with the Court, and has considered the evidence presented and received at the trial. Based on the same, the Court renders this

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[1] First District Court, Cache County, Utah.

[2] By stipulation, the following evidence was received: 1) Marilyn Brewer's Voluntary Petition for Bankruptcy; 2) docket report of this adversary proceeding dated August 15, 2003; 3) Marilyn Brewer's Order of Discharge; 4) Harlan Brewer's Motion for Order to Show Cause; 5) Harlan Brewer's Verified Affidavit in Support of his Motion for Order to Show Cause; 6) the State Court's Order dated August 19, 2002; 7) Affidavit of Suzanne Marychild; 8) Affidavit of Thomas D. Neeleman Concerning Attorneys Fees; and 9) Letter from Dale Dorius to Suzanne Marychild. The Court also considered the Decree of Divorce dated March 12, 1997, which was attached to Defendant's Trial Brief and to which both parties referred.

Memorandum Opinion and Decision, which will constitute the Court's Findings and Conclusions.

JURISDICTION

This Court has jurisdiction over the parties and this adversary proceeding pursuant to 28 U.S.C. § 1334, as prayed by Plaintiff and admitted by Defendant. This is a core proceeding under 28 U.S.C. § 157(b)(2), and as such the Court has authority to enter a final order. The Court notes that Defendant did not specifically deny that this is a core proceeding, and as such the Court deems the lack of denial an admittance. Venue is proper in the Central Division of the District of Utah pursuant to 28 U.S.C. § 1409.

FACTS

On March 12, 1997, Plaintiff and Defendant were divorced by Decree of Divorce and Judgment ("Divorce Decree") of the State Court. The Divorce Decree ordered Plaintiff to pay and assume certain debts, including the debts for two vehicles, upon which Plaintiff and Defendant had co-signed together prior to the divorce. One debt was owed to First Security Bank (the "Bank") in the amount of $22,000 and the other was owed to USAA Bank ("USAA") in the amount of $10,000.[3] In January of 1998 Plaintiff informed Defendant that she was going to file for bankruptcy.[4] To preserve his credit, Defendant began making monthly payments for both vehicles in February of 1998.[5] Defendant continued to make payments on the vehicles for

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[3] The obligation in favor of First Security Bank was secured by a 1996 Dodge Ram van. The other obligation was secured by a 1996 Dodge Neon car. The Dodge Ram was used by Plaintiff and the Neon was used by the parties' daughter.

[4] See Defendant's Verified Affidavit in Support Order to Show Cause.

[5] Id.

approximately 12 months, at which time the debts were paid in full by Defendant.

On September 8, 1998, Plaintiff filed a petition for Chapter 7 bankruptcy. The Trustee declared it a "No Asset" case and filed his No Asset Report on November 2, 1998. No bar date for filing claims was ever set. Plaintiff subsequently received a discharge on December 23, 1998 ("Discharge Order"). Plaintiff did not list Defendant as a creditor in her schedules. Plaintiff did not repay Defendant for any of his payments that he made to either the Bank or USAA. Subsequent to filing the petition, and during the pendency of the bankruptcy case, Defendant attempted to collect the referenced debt by making demands on Plaintiff for the same.

On December 19, 2001, almost three years after Plaintiff received her discharge from this Court, Defendant filed a Motion for Order to Show Cause in the State Court, asking, among other things, for that court to hold Plaintiff in contempt for failure to pay the debts to the Bank and to USAA, as ordered in the Divorce Decree. Defendant argued before the State Court that because Plaintiff did not list Defendant in her bankruptcy schedules as a creditor, and because Defendant had no actual or constructive notice of Plaintiff's filing for bankruptcy, Defendant's debts were not discharged and Plaintiff was required to repay Defendant for the amounts he had paid pursuant to the "pay and assume" language of the Divorce Decree.

On January 17, 2002 the State Court held a hearing on Defendant's Motion for Order to Show Cause. At the hearing, Plaintiff's attorney argued that, pursuant to In re Parker,[6] Defendant's debt was discharged despite the fact that he was not listed as a creditor or given

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[6] In re Parker, 264 B.R. 685 (B.A.P. 10th Cir. 2001), aff'd, 313 F.3d 1267 (10th Cir. 2002) (a pre-petition, unsecured debt is discharged by operation of law even when the unsecured creditor has been omitted from the petition and schedules therein).

notice of Plaintiff's filing.[7]

On March 18, 2002, the State Court ruled that because Plaintiff had failed to list Defendant as a creditor, the debts were not discharged and Plaintiff was obligated to pay the sums to Defendant unless she was able to establish offsets to the debts at an Evidentiary Hearing.

The State Court held the Evidentiary Hearing on July 29, 2002, at which time Plaintiff and her attorney, in open court, stipulated to waive the Evidentiary Hearing and further stipulated that "Respondent's Motion to Enter Judgment against Petitioner may be granted."[8] The State Court granted judgment against Plaintiff in the amount of $31,979.91, "together with legal interest thereon," on August 19, 2002. The State Court found that: 1) Plaintiff became indebted to Defendant *subsequent* to Plaintiff's filing of bankruptcy when Defendant paid said debts; and 2) that *because Plaintiff had failed to list Defendant as a Creditor*, the debt to Defendant was not discharged and Plaintiff was obligated to pay said sums to Defendant.

The Plaintiff now seeks declaratory relief that the obligations imposed on her by the notes and the divorce decree were discharged as a matter of law.

ANALYSIS

Under the principals of the Rooker-Feldman Doctrine, federal courts lack jurisdiction to hear a collateral attack on a state court judgment or to review final determinations of state court decisions.[9] The Rooker-Feldman doctrine applies even where a state court judgment may be in

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[7] Defendant proffered evidence at the trial held on August 19, 2003, that he did not receive actual notice of Plaintiff's bankruptcy until one year after it was filed.

[8] See State Court Order.

[9] Under 28 U.S.C. § 1257, "federal review of state court judgments can be obtained only in the United States Supreme Court." Kiowa Indian Tribe of Oklahoma v. Hoover, 150 F.3d

error, so long as the judgment is not void ab initio.[10]

This Court does not believe that the State Court had jurisdiction to hear Defendant's Motion for Order to Show Cause; therefore, the Rooker-Feldman Doctrine does not prevent the Court from considering a collateral attack on the Ruling. State courts possess jurisdiction concurrent with bankruptcy courts only for alimony, maintenance, or support debts.[11] The bankruptcy court has exclusive jurisdiction to determine dischargeability of other debts.[12] The instant debts were not characterized by the Defendant as in the nature of alimony, maintenance, or support.[13] Indeed, the State Court made no such characterization either. As such, the State Court had no jurisdiction to hear the order to show cause on these particular obligations, and its

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1163, 1169 (10th Cir. 1998). As a result, the Rooker-Feldman doctrine prohibits a lower federal court from considering claims actually decided by a state court. In other words, the Rooker-Feldman doctrine precludes a party losing in state court from seeking what in substance would be appellate review of a state judgment in a United States district court. Kenmen Engineering v. City of Union, 314 F.3d 468, 473 (10th Cir. 2002) (citing Johnson v. De Grandy, 512 U.S. 997, 1005-06 (1994)).

[10] An exception to the Rooker-Feldman doctrine applies when the state proceeding is a legal nullity and void ab initio (one which from its inception was a complete nullity and without legal effect). Furthermore, enforcing a bankruptcy court's discharge order in the face of a final state court judgment is permitted. In re Pavelich, 229 B.R. 777, 783 (B.A.P. 9th Cir. 1999) (citing Kalb v. Feuerstein, 308 U.S. 433, 438-40 (1940)); see also Local Loan Co. v. Hunt, 292 U.S. 234 (1934).

[11] See Goss v. Goss, 722 F.2d 599, 603 (10th Cir. 1983).

[12] Brown v. Felsen, 442 U.S. 127, 135-36 (1979), cited in, In re Innes, 184 F.3d 1275, 1283 (10th Cir. 1999); see also 4 Collier's on Bankruptcy ¶ 523.03 (15th ed. rev. 1998).

[13] Section 523(a)(5) states that a discharge in a Chapter 7 case does not discharge the individual debtor from any debt "to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse . . . ." 11 U.S.C. § 523(a)(5) (2002).

judgment is void ab initio.[14] Further, Bankruptcy Courts have authority to review a State Court action and enjoin proceedings in that court.[15]

The Tenth Circuit Court of Appeals ("Tenth Circuit") has held that any action taken in violation of the automatic stay is void and without effect.[16] An analogous situation exists here, except that the stay had terminated and a discharge was in place. Many of the same types of protections that existed under the stay extend with the issuance of a discharge. Section 524(a)(2) of the Bankruptcy Code provides that a discharge "operates as an injunction against the commencement or continuation of an action . . . to collect, recover or offset any such debt as a personal liability of the debtor, whether or not the discharge of such debt is waived."[17] Accordingly, the debt was a personal liability of the debtor and subject to discharge with its corresponding injunction. Defendant was enjoined from bringing any action to enforce that specific liability. Because the violation of a stay results in a void action under the Ellis theory,[18] so should a violation of the discharge result in a void action. The Motion for Order to Show Cause pursued in State Court by Defendant not only violated the discharge injunction, but also

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[14] Defendant argues that 28 U.S.C. § 1334(b) confers jurisdiction on the State District Court to hear this matter. The Court disagrees. The District Court referred to in § 1334 refers to the United States District Court, of which the Bankruptcy Court is a unit.

[15] In re Fernandez-Lopez, 37 B.R. 664 (B.A.P. 9th Cir. 1984). Defendant argues that the facts in this proceeding can be distinguished from those in Fernandez-Lopez, and therefore that case should not be considered instructive. The Court disagrees. The debts were incurred prepetition and none of the debts in either case were characterized as alimony, maintenance, or support.

[16] See Ellis v. Consolidated Diesel Electric Corp., 894 F.2d 371 (10th Cir. 1990).

[17] 11 U.S.C. § 524(a)(2) (2002).

[18] See Ellis, 894 F.2d at 372.

resulted in a void judgment and order. As such, the order of August 19, 2002 from the State Court was void ab initio and the Rooker-Feldman doctrine does not prevent this Court from reviewing the matter at this time.

This Court has some concern however, that it appears the Plaintiff stipulated to the entry of judgment at the State Court's Evidentiary Hearing. Such stipulation also appears to have been a primary concern for the State Court. No offsets were established at the Evidentiary Hearing and it appears that Plaintiff conceded all other points. Plaintiff argues before this Court that the stipulation only related to entry of judgment, not to the nature of the obligations being dischargeable. The evidence is unclear as to what Plaintiff's state court counsel was stipulating. Placed in the context of Plaintiff's opposition to the State Court proceedings, the only logical inference is that Plaintiff's counsel stipulated solely to the entry of judgment and not to the non-dischargeability of the obligation.[19] As such, the Court reviews the dischargeability of the debts as follows:

Date Debts Were Incurred

A contingent or unmatured claim is within the purview of the discharge granted under § 524 of the Bankruptcy Code, and the date of such a claim relates back to the inception of the contingent claim rather than when the indemnitee suffers an actual loss.[20] Furthermore, the Tenth Circuit has recently held that the date of a claim is determined by the date of the conduct

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[19] The Court notes that while Plaintiff could stipulate to entry of judgment against her, she could not stipulate to subject matter jurisdiction if the State Court lacked such jurisdiction. See Laughlin v. Kmart Corp., 50 F.3d 871 (10th Cir. 1995) (subject matter jurisdiction cannot be conferred or waived by consent, estoppel, or failure to challenge jurisdiction early in the proceedings).

[20] See In re Black, 70 B.R. 645, 647 (Bankr. D. Utah 1986).

giving rise to the claim, and that a Conduct Theory is properly used in determining the date on which a claim arose for purposes of classifying the claim as pre-petition or post-petition.[21] Although the specifics as to when the debts in favor of the Bank and USAA were incurred were not presented, it is clear that they were jointly incurred both in advance of the divorce and in advance of the filing of Plaintiff's bankruptcy case. In addition, Defendant began making payments for the vehicles, which were due on a monthly basis, in February 1998, six months before Plaintiff filed for bankruptcy. Under such conditions, the Court finds and concludes that both of these obligations were incurred pre-petition.

Dischargeability of Debts

In In re Parker,[22] the court held that non-scheduled debts in a no asset case are discharged by operation of law under certain conditions.[23] These conditions are: first, the case must be a "No Asset" case, meaning that there were no distributable assets by the Trustee from the liquidation of the Debtor's estate. Second, and in conjunction with the First, there must not have been a bar date set for the filing of claims by creditors. Third, the nature of the claims must not be in the nature of otherwise non-dischargeable claims, i.e. based upon the type of claims identified in 11 U.S.C. § 523(a) (2), (4), (6) or (15).[24]

Plaintiff's bankruptcy was declared a No Asset case on November 2, 1998. In addition, a

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[21] In re Parker, 313 F.3d 1267 (10th Cir. 2002).

[22] In re Parker, 264 B.R. 685 (B.A.P. 10th Cir. 2001), aff'd, 313 F.3d 1267 (10th Cir. 2002).

[23] Id.

[24] See id.

claims bar date was never set by the Court. Finally, there has been no argument that the obligation in favor of the Plaintiff was in the nature of fraud under 523(a) (2); fraud, defalcation in a fiduciary capacity, embezzlement, or larceny under 523(a) (4); willful and malicious injury under 523(a) (6); or alimony or support under 523(a) (15). Indeed, these obligations appear to be in addition to the alimony and support ordered in the Divorce Decree and not themselves in the nature of alimony and support or even related to them. Accordingly, because Defendant's debts were incurred pre-petition, and because Plaintiff's bankruptcy case meets all of the elements set forth in In re Parker, these obligations paid by Defendant were discharged along with all of Plaintiff's other unsecured debts on December 23, 1998.

Damages

Plaintiff claims that she has been damaged by Defendant's collection efforts because she was forced to incur attorneys fees in bringing this adversary proceeding and in defending herself in State Court. Plaintiff's evidence[25] shows that she incurred attorneys fees in this adversary proceeding in the amount of $7,401.25, and in the State Court proceeding in the amount of $1,150.00.

Plaintiff claims that by proceeding with the State Court Order to Show Cause post-petition, Defendant violated the discharge injunction of § 524 and therefore should be held in contempt of the Discharge Order. The Tenth Circuit has stated the conditions necessary for proving civil contempt for disobeying a court order. The case of Bad Ass Coffee of Hawaii v.

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[25] See Plaintiff's Exhibits 7 and 8.

Bad Ass Ltd. is instructive.[26] In that case, the court found that the complainant has the burden of proving, by clear and convincing evidence, that a valid court order existed, that the defendant had knowledge of the order, and that the defendant disobeyed the order.[27] Once civil contempt is shown, sanctions may be imposed to compel or coerce obedience and to compensate for injuries resulting from the noncompliance.[28]

The Court finds that the Order of Discharge, a valid court order, existed at the time Defendant filed his action in State Court; that Defendant had knowledge of the Order of Discharge as early as one year after Plaintiff filed her petition or at the latest on January 17, 2002, the date of the first hearing in State Court; and that Defendant disobeyed the Order of Discharge. The Court concludes that Plaintiff has met her burden in proving civil contempt, and that sanctions are appropriate to compensate her for injuries resulting from Defendant's disobedience. The Court further concludes, however, that while defending herself in the State Court action was necessary, Plaintiff has not carried her burden in showing that she proceeded properly in State Court. Further, Plaintiff's counsel, in "stipulating" at the Evidentiary Hearing, may have given some tacit approval of the State Court order to show cause hearing. Accordingly, this Court finds that Plaintiff's attorneys fees incurred in the State Court proceeding should not be awarded.

With respect to the present adversary proceeding, however, the Court determines that Plaintiff has met her burden in showing that she has been damaged by incurring attorneys fees in

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[26] Bad Ass Coffee of Hawaii v. Bad Ass Ltd., 95 F. Supp.2d 1252, 1256 (D. Utah 2000); see also Reliance Ins. Co. v. Mast Constr. Co., 159 F.3d 1311, 1315 (10th Cir. 1998).

[27] Bad Ass Coffee of Hawaii v. Bad Ass Ltd., 95 F. Supp.2d at 1256.

[28] Id.

this proceeding. Plaintiff has filed and the Court has received Exhibit 8, indicating the fees and costs incurred in this proceeding.[29] The Court concludes that this evidence is sufficient to award Plaintiff damages for her attorneys fees and costs. Accordingly, Plaintiff is awarded $7,401.25 as damages for her counsel's attorneys fees and costs incurred in this adversary proceeding.

Plaintiff also argues she should be awarded punitive damages. Punitive damages may be awarded under certain circumstances.[30] Five primary factors to be considered in determining whether to award punitive damages include: 1) the nature of the creditor's conduct; 2) the creditor's ability to pay damages; 3) the level of sophistication of the creditor; 4) the creditor's motives; and 5) any provocation by the debtor.[31] In this proceeding, Defendant filed a state action in the hopes of obtaining a judgment against Plaintiff for debts that had been discharged almost three years prior. Defendant did not object to Plaintiff's discharge, or even allege that the debts were of a non-dischargeable character under § 523(a)(2), (4), (5), (6), or (15). Defendant's arguments in State Court that the debts were incurred post-petition have been solidly rejected in bankruptcy cases, which might explain why Defendant elected to file his motion before the State Court. Defendant has not argued an inability to pay punitive damages, and therefore the Court concludes he is capable of paying such. The Court further concludes that Defendant is sufficiently sophisticated to understand that the Motion for Order to Show Cause was inappropriate as early as one year after the bankruptcy was filed and not later than the time of the first hearing in State Court when counsel was present. Finally, there was no evidence presented that Plaintiff provoked the Defendant into filing the State Court action. Accordingly, the Court

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[29] The Court notes that there was no objection to this evidence.

[30] See In re Gagliardi, 290 B.R. 808, 820 (Bankr. D. Colo. 2003).

[31] Id.

finds that punitive damages shall be awarded in the amount of $5,000.

CONCLUSION

From the foregoing analysis, the Court determines that the obligations imposed by the promissory notes and the State Court Divorce Decree, requiring the Plaintiff to pay and hold the Defendant harmless from the Bank and USAA obligations, were discharged as a matter of law with the issuance of the Plaintiff's discharge on December 23, 1998. Those obligations arose pre-petition. Once entered, the discharge barred and enjoined Defendant from seeking collection of the same. Finally, these obligations had no character of being non-dischargeable pursuant to §§ 523(a) (2), (4), (6) or (15) of the Bankruptcy Code. As such, the August 19, 2002 Order from the State Court was a nullity and was void ab initio.

The Court also determines that Plaintiff is entitled to actual damages in the amount of $7,401.25 for her attorneys fees and costs incurred in this adversary proceeding, and punitive damages in the amount of $5,000.00.

Counsel for the Plaintiff is directed to prepare and submit an appropriate Judgment for the Court to execute.

DATED this 3rd day of October, 2003.

William T. Thurman
United States Bankruptcy Judge

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I, the undersigned, hereby certify that I served a true and correct copy of the foregoing **MEMORANDUM OPINION AND DECISION** by mailing the same, postage prepaid, to the following, on the 6 day of October, 2003.

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