

MEMORANDUM OPINION

February 22, 2005

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

IN RE: :

DAVID DEWAIN MORGAN : Case No. 03-36950
f/d/b/a CREDIT UNION FINANCIAL : Chapter 7
SERVICES (CUFS) :
TAMARA SMITH MORGAN :
Debtors :

BEFORE THE HONORABLE RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

FOR DEBTORS:

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FOR MOVANTS:

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1 THE COURT: This contested matter is before me upon the Plaintiffs' Amended
2 Joint Motion for Order Granting Relief from Discharge Injunction or, in the Alternative, Relief
3 from Automatic Stay filed January 31, 2005, by the Movants, Alice Bray, Roger Brown, Jerry
4 Chilton, Joseph Cogdell, Katherine Cogdell, Judy Ellison, Ronnie Herbin, Lyndon Hiatt,
5 Thomas Hooper, Artres Johnson, Mildred Jones, James Mills, John Price, and Margaret
6 Tickle, who are unsecured creditors of the Debtor, David Dewaine Morgan. The Movants are
7 Plaintiffs in fourteen pending adversary proceedings seeking to determine the dischargeability of
8 their respective claims against Mr. Morgan. By the present Motion, the Movants request relief
9 from the discharge injunction of 11 U.S.C. § 524(a)(2), or in the alternative, relief from the
10 automatic stay of 11 U.S.C. § 362(a), in order to add Mr. Morgan as a defendant in thirteen
11 lawsuits pending against American Partners Federal Credit Union and two of its officers in the
12 General Court of Justice, Superior Court Division for Guilford County, North Carolina.

13 The hearing on the Motion was held this afternoon, February 22, 2005. The
14 record before me consists of one consolidated exhibit stipulated into evidence containing
15 copies of the thirteen Complaints filed in North Carolina.

16 This is a core proceeding under 28 U.S.C. § 157(b)(2)(A), (G), and (O).

17 The Debtors filed the Voluntary Petition commencing their case under Chapter 7 of
18 the Bankruptcy Code on December 23, 2003, and they were granted a discharge on
19 August 23, 2004. On June 30, 2004, each of the Movants timely filed an adversary
20 proceeding against Mr. Morgan. The Adversary Proceedings each allege the following
21 underlying facts:

22 The Movants were members of American Partners Federal Credit Union, with
23 their respective retirement accounts deposited with that credit union. American Partners
24 Federal Credit Union entered into an arrangement with the Debtor, David Dewaine Morgan,
25 who was president of Credit Union Financial Services, to provide investment and financial

1 advice and products to American Partners Federal Credit Union's members. The Debtor
2 maintained an office at American Partners Federal Credit Union and held himself out as an
3 affiliate of that credit union. American Partners Federal Credit Union referred its members to
4 Mr. Morgan for investment advice, and in that capacity, the members aver that although
5 Mr. Morgan advised them that their investments were low risk and expected to yield a 10%
6 annual return, in fact, the investments he recommended were high risk, unregistered securities.
7 According to the Movants, they sustained combined losses approaching \$2,000,000.00 due to
8 these investments. Each Movant's respective Adversary Proceeding seeks a determination
9 that the obligation owed them by Mr. Morgan is nondischargeable under 11 U.S.C.
10 § 523(a)(2)(A) or (4), based upon fraud, false pretenses, false representation, and defalcation
11 while acting in a fiduciary capacity. The court has scheduled two-a-day trials on the Adversary
12 Proceedings for May 9, May 10, May 16, May 17, May 23, May 24, and May 31, 2005.

13 On January 24, 2005, the Movants each filed a Complaint against the American
14 Partners Federal Credit Union, its President and Chief Executive Officer, Dorinda M.
15 Simpson, and its Vice-President and Retirement Specialist, Ann Boone, in the General Court
16 of Justice, Superior Court Division, for Guilford County, North Carolina. The North Carolina
17 Lawsuits allege the following claims against the Credit Union, Simpson, and Boone: (1) breach
18 of fiduciary duty; (2) fraudulent and/or negligent misrepresentation; (3) violation of the North
19 Carolina Investment Advisers Act; (4) negligence; (5) civil conspiracy; (6) fraudulent
20 concealment; (7) constructive trust; and (8) violation of the North Carolina Unfair and
21 Deceptive Practices Act. The Movants seek compensatory damages, treble damages, and
22 punitive damages against the defendants in the North Carolina Lawsuits.

23 The Movants filed the present Motion seeking to modify the discharge injunction
24 or, alternatively, the automatic stay, to allow them to add the Debtor, David Dewaine Morgan,
25 as a party defendant to the North Carolina Lawsuits. The Movants argue that the Debtor is a

1 necessary party, because a majority of the claims asserted against American Partners Federal
2 Credit Union, Simpson, and Boone are based upon Mr. Morgan's investment advice.
3 Accordingly, the Movants argue that because the same evidence that is relevant in the
4 Adversary Proceedings before me is also relevant in the North Carolina Lawsuits, it would
5 serve judicial economy to try all of the matters in one forum.

6 In support of their judicial economy argument, the Movants aver that even though
7 the Adversary Proceedings do not presently contain allegations that the Debtor violated the
8 North Carolina Investment Advisers Act or the North Carolina Unfair and Deceptive Practices
9 Act, they are prepared to seek leave of the bankruptcy court to amend the complaints in the
10 Adversary Proceedings to include those claims if they are not allowed to join the Debtor as a
11 party to the North Carolina Lawsuits. Moreover, because the addition of these new claims
12 may create alleged problems with both personal and subject matter jurisdiction before the
13 bankruptcy court, the Movants seek to consolidate all matters into the North Carolina claims.
14 Additionally, the Movants argue that any findings made in the North Carolina Lawsuits would
15 govern the determination of discharge, and the trials of the Adversary Proceedings would not
16 be necessary. Finally, the Movants argue that it is more convenient for the Debtor to travel to
17 North Carolina to defend the North Carolina Lawsuits than it is for the Movants and the
18 respective litigants in the North Carolina Lawsuits who will be witnesses to all travel to
19 Knoxville to testify in the fourteen Adversary Proceedings.

20 The Debtor filed his Response to Plaintiffs' Amended Joint Motion for Relief on
21 February 14, 2005, in opposition to the Motion. The Debtor argues that the scope of the
22 allegations made in the North Carolina Lawsuits is greater than the scope of the Adversary
23 Proceedings and that the state court lawsuits are based upon different legal theories, primarily,
24 with respect to violations of the North Carolina Investments Advisers Act and the North
25 Carolina Unfair and Deceptive Practices Act. He also argues that he is not a necessary party

1 to the North Carolina Lawsuits, which “attack the Credit Union for its hiring practices more so
2 than for the actual advice given.” Additionally, the Debtor argues that he would be prejudiced
3 by granting the Motion because the North Carolina Lawsuits are to be tried before a jury,
4 which could allow emotion be a part of their findings, since some of the Movants are elderly
5 and of limited financial means. Finally, the Debtor states that he wants resolution of the claims
6 against him as expeditiously as possible, and that the May 2005 trial dates in the Adversary
7 Proceedings would provide him with a final determination as to the dischargeability of his
8 debts, whereas the North Carolina Lawsuits could proceed for some time before final
9 adjudication.

10 At the outset, as I advised counsel during argument, the court finds that the
11 automatic stay of 11 U.S.C. § 362(a) that was imposed upon the filing of the Debtors’
12 Voluntary Petition on December 23, 2003, has no application to the present Motion. Pursuant
13 to 11 U.S.C. § 362(c), the stay of any act under § 362(a), other than the stay of an act against
14 property of the estate, terminates “if the case is a case under chapter 7 . . . [at] the time the
15 discharge is granted or denied.” 11 U.S.C. § 362(c)(2)(C). Here, the Debtors received their
16 discharge on August 23, 2004, and the automatic stay therefore has no further application.

17 One of the primary goals of the Bankruptcy Code is to relieve an honest but
18 unfortunate debtor of his indebtedness so that he may make a fresh start. *In re Williams*,
19 291 B.R. 445, 446 (Bankr. E.D. Tenn. 2003) (quoting *In re Krohn*, 886 F.2d 123, 125 (6th
20 Cir. 1989) (citing *Local Loan Co. v. Hunt*, 54 S. Ct. 695, 699 (1934))). This is accomplished
21 through the discharge. *Williams*, 291 B.R. at 446 (“A discharge in bankruptcy does not
22 extinguish the debt itself, but merely releases the debtor from personal liability for the debt.”)
23 (quoting *Houston v. Edgeworth (In re Edgeworth)*, 993 F.2d 51, 53 (5th Cir. 1993)). In a
24 Chapter 7 case, once a discharge is granted, the debtor is no longer liable for any prepetition
25 debts “[e]xcept as provided in section 523 of this title[.]” 11 U.S.C. § 727(b).

1 Once a discharge order is entered, and the automatic stay terminates pursuant to
2 11 U.S.C. § 362(c)(2)(C), it is replaced by the “discharge injunction,” which “operates as an
3 injunction against the commencement or continuation of an action, the employment of process,
4 or an act, to collect, recover or offset any such debt as a personal liability of the debtor . . . [.]”
5 11 U.S.C. § 524(a)(2). Accordingly, by virtue of § 524(a)’s permanent injunction, creditors
6 may not attempt to collect a discharged prepetition debt. *See In re Leonard*, 307 B.R. 611,
7 613 (Bankr. E.D. Tenn. 2004) (“Section 524(a) was designed to ‘ensure that once a debt is
8 discharged, the debtor will not be pressured in any way to repay it.’”) (quoting *Stoneking v.*
9 *Histed (In re Stoneking)*, 222 B.R. 650, 652 (Bankr. M.D. Fla. 1998) (quoting H.R. REP.,
10 No. 595, 95th Cong., 1st Sess. 364 (1977)). On the other hand, “[t]he discharge injunction
11 applies only to dischargeable debts.” *Payne v. United States (In re Payne)*, 306 B.R. 230,
12 233 (Bankr. N.D. Ill. 2004). Furthermore, “the protections offered under § 524(a) are
13 dependent upon an application of § 727(b) to identify those debts that are actually discharged
14 and . . . subject to the 524(a) protections. . . . Thus, for so long as there remains a possibility
15 that a particular debt could be declared non-dischargeable under the provisions of § 523, the
16 permanent applicability of the § 524(a) protections to such debt cannot be determined.” *In re*
17 *Schultz*, 251 B.R. 823, 830 (Bankr. E.D. Tex. 2000). Additionally, there is no violation of the
18 discharge injunction when a party seeks a judgment against a debtor for the purposes of
19 establishing the liability of a third party. *In re Patterson*, 297 B.R. 110, 113-14 (Bankr. E.D.
20 Tenn. 2003). Nonetheless, a party may not execute upon a judgment obtained against a
21 discharged debtor unless the debt itself has been found to be nondischargeable. *See In re*
22 *Hiles*, No. 02-81018, 2002 Bankr. LEXIS 912, at *11 (Bankr. C.D. Ill. Aug. 15, 2002).

23 It is within the court’s authority to modify the discharge injunction. *See, e.g.,*
24 *Hendrix v. Page (In re Hendrix)*, 986 F.2d 195, 198 (7th Cir. 1993) (“[A]lthough the
25 Bankruptcy Code does not expressly authorize the modification of a discharge, . . . any court

1 that issues an injunction can modify it for good cause on the motion of a person adversely
2 affected by it.”); *Schultz*, 251 B.R. at 826-27 (“[A] bankruptcy court’s ability to modify the
3 § 524 injunction is consistent with the Code’s policy of maintaining control over the bankruptcy
4 discharge and avoiding misinterpretation and abuse in other courts.”). “Determining whether
5 relief from the permanent injunction is warranted under appropriate circumstances should be
6 analyzed pursuant to a cause standard.” *In re Fucilo*, No. 00-36261, 2002 Bankr. LEXIS
7 475, at *26 (Bankr. S.D.N.Y. Jan. 24, 2002).

8 [The] framework for determining whether cause exists, thereby
9 requiring a court to examine certain factors, includ[es] (1) whether
10 relief would result in partial or complete resolution of the issues, (2) the
11 lack of any connection to or interference with the bankruptcy case,
12 (3) whether a specialized tribunal with the necessary expertise has
13 been established to hear the cause of action, (4) whether the litigation
14 would prejudice the interests of other creditors (5) the interests of
15 judicial economy and expeditious and economical resolution of the
16 litigation, (6) whether the parties are ready for trial in the other
17 proceeding, and (7) the impact of the stay on the parties and balance
18 of harms.

19 *Fucilo*, 2002 Bankr. LEXIS 475, at *27.

20 Applying these factors to the Motion presently before me, I find that cause exists
21 to modify the discharge injunction imposed by § 524(a)(2) to allow the Movants to name the
22 Debtor, Mr. Morgan, as a defendant to each of the thirteen North Carolina Lawsuits and to
23 prosecute their claims against him to judgment. The North Carolina claims are based upon the
24 same facts as are the Adversary Proceedings and the claims are primarily based upon North
25 Carolina law. American Partners Federal Credit Union, Simpson, and Boone are factual

1 witnesses to the Adversary Proceedings here in the bankruptcy court, as is the Debtor to the
2 North Carolina Lawsuits. It would be an exercise in judicial economy to consolidate all
3 matters against all defendants stemming from the same set of facts.

4 Furthermore, allowing the North Carolina Lawsuits to proceed to judgment against
5 Mr. Morgan would alleviate the necessity for trying the Adversary Proceedings in this court,
6 based upon the doctrine of collateral estoppel. *See, e.g., Kuykendall v. Lawson (In re*
7 *Lawson)*, 228 B.R. 195, 199 n.7 (Bankr. E.D. Tenn. 1998). Conversely, a trial of the
8 Adversary Proceedings here against Mr. Morgan does nothing to obviate the North Carolina
9 Lawsuits against American Partners Federal Credit Union, Simpson, and Boone. The Plaintiffs
10 would therefore be required to prosecute essentially the same actions twice at considerably
11 greater expense.

12 In summary, I will grant the Movants' the relief requested and will also enter an
13 order in each of the fourteen pending adversary proceedings staying the prosecution of the
14 Movants' nondischargeability claims pending resolution of the North Carolina State Court
15 actions.

16 This Memorandum constitutes findings of fact and conclusions of law as required
17 by Rule 52(a) of the Federal Rules of Civil Procedure. I will not ask the court reporter to
18 transcribe my opinion. If she does so at the request of any party, counsel will be served, of
19 course, with a copy after I have had an opportunity to review the Memorandum and make any
20 corrections and additions. An Order consistent with my ruling will be entered tomorrow.

21 FILED: February 25, 2005

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s/ Richard Stair, Jr.
RICHARD STAIR, JR.
U.S. BANKRUPTCY JUDGE

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE
EASTERN DISTRICT OF TENNESSEE**

In re

Case No. 03-36950

DAVID DEWAINÉ MORGAN
f/d/b/a CREDIT UNION FINANCIAL
SERVICES (CUFS)
TAMARA SMITH MORGAN

Debtors

ORDER

This contested matter came on for hearing on the Plaintiffs' Amended Joint Motion for Order Granting Relief From Discharge Injunction or, in the Alternative, Relief From Automatic Stay filed January 31, 2005, by the Movants, Alice Bray, Roger Brown, Jerry Chilton, Joseph Cogdell, Katherine Cogdell, Judy Ellison, Ronnie Herbin, Lyndon Hiatt, Thomas Hooper, Artres Johnson, Mildred Jones, James Mills, John Price, and Margaret Tickle. For the reasons stated in the memorandum dictated from the bench on February 22, 2005, the court directs the following:

1. The discharge injunction imposed by 11 U.S.C. § 524(a)(2) is MODIFIED to allow the Movants to join the Debtor, David Dewaine Morgan, as a party defendant to actions filed by the Movants in the General Court of Justice, Superior Court Division, for Guilford County, North Carolina, docket numbers 05 CVS 3401 through 05 CVS 3413, and to proceed to judgment against David Dewaine Morgan but no further, pending a determination by this court that any resulting judgment is nondischargeable.

2. Continued prosecution of the Movants' actions seeking a determination that their claims against David Dewaine Morgan are nondischargeable will be STAYED by a separate order

entered in each of the fourteen (14) adversary proceedings presently before this court pending resolution of the Guilford County, North Carolina actions filed by the respective Movants.

SO ORDERED.

ENTER: February 23, 2005

BY THE COURT

s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE