SO ORDERED.
SIGNED this 22nd day of June, 2018

Suzanne H. Bauknight
UNITED STATES BANKRUPTCY JUDGE

THIS ORDER HAS BEEN ENTERED ON THE DOCKET.
PLEASE SEE DOCKET FOR ENTRY DATE.

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

In re

CLARENCE E. DANIELS
aka G&C MECHANIX, G.P.
aka KNOX FIRE SPRINKLERS

Debtor

Case No. 3:15-bk-31179-SHB
Chapter 7

MEMORANDUM AND ORDER ON MOTION FOR CIVIL CONTEMPT OF BANKRUPTCY COURT AND ALL AVAILABLE SANCTIONS FOR VIOLATION OF DISCHARGE INJUNCTION

Pursuant to the Order entered January 26, 2018 [Doc. 92], after notice and a hearing held January 25, 2018, the Court granted the Motion for Civil Contempt of Bankruptcy Court and All Available Sanctions for Violation of Discharge Injunction ("Motion for Contempt") filed by Debtor on December 8, 2017 [Doc. 81] and found Chattanooga Fire Protection, Inc. ("CFP") and its attorney, Curtis L. Bowe, III, each in contempt for violating the discharge injunction of 11 U.S.C. § 524(a).[1] On May 21, 2018, the Court held an evidentiary hearing on damages, at which

[1] Mr. Bowe was not present at the January 25 hearing, and the motion for contempt was granted. Following notice and a hearing held on March 8 on a motion filed by CFP and Mr. Bowe on January 31, 2018, requesting that the Court

three exhibits were entered into evidence along with the testimony of Gary Daniels, Debtor, and Mr. Bowe.

On July 10, 2012, Mr. Bowe, on behalf of CFP, filed a complaint in the Hamilton County Circuit Court against a number of defendants, including Debtor and Gary Daniels, for allegedly violating a noncompete agreement. This case was later transferred from Hamilton County Circuit Court to Knox County Circuit Court. On April 14, 2014, Debtor filed a Chapter 7 voluntary petition for bankruptcy, and discharge was entered on July 30, 2015. The filing of the bankruptcy petition brought the pending state court action to a halt pursuant to the automatic stay provisions of 11 U.S.C. § 362(a). On July 31, 2015,[2] this Court granted CFP's motion for relief from the automatic stay, authorizing CFP to "proceed with its action against Debtors pending in the Knox County Circuit Court." [Doc. 47.] Subsequently, CFP, through Mr. Bowe as counsel, filed a motion to set the state court proceeding for trial. In response, Debtor moved for dismissal of the state court lawsuit, prompting Mr. Bowe and CFP to move for clarification from this Court concerning their permission to pursue the state claim.

Following a hearing on March 24, 2016, at which Mr. Bowe advised the Court that CFP was not seeking monetary damages in the state court, an Order was entered on March 24, 2016, stating that Debtor had received a discharge on July 30, 2015; stay relief was granted on July 31, 2015; that the automatic stay was not in effect; and that Debtor's bankruptcy case "ha[d] no bearing on any action pending in the state court." [Doc. 57.] Mr. Bowe, on behalf of CFP, continued to pursue the claim against Debtor in Knox County Circuit Court. Multiple pleadings

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set aside the contempt finding and/or alter or amend the order, the Court denied the motion after delivering findings of fact and conclusions of law orally from the bench. [*See* Doc. 124.]

[2] The motion for stay relief was originally denied by an order entered July 30, 2015 [Doc. 45]; however, the Court's July 31 Order vacates the previous denial and grants stay relief.

were filed by both parties in the state court litigation, and the case trudged along, with no further objection or motion by either party before this Court, eventually culminating in the filing of the Motion for Contempt some twenty-two months after CFP first violated the discharge injunction by seeking to set a trial date in February 2016.

Clearly, by continuing to pursue the state court litigation (i.e., by seeking a trial date and responding to Debtor's motion to dismiss), Mr. Bowe and CFP violated the discharge injunction. 11 U.S.C. § 524(a)(2) ("A discharge in a case under this title . . . 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."). Although CFP's state court litigation was predicated on alleged "intentional interference with a business relationship and/or economic advantage based on fraudulent conduct," Mr. Bowe and CFP admit that CFP's claim nevertheless sought to "liquidate the present unliquidated claims" after the bankruptcy discharge. *See* Response in Opposition to Motion for Civil Contempt [Doc. 86] at 10-12. Such conduct directly contravenes the Bankruptcy Code's purpose for the discharge injunction. *Cf. In re Humbert*, 567 B.R. 512, 515 (Bankr. N.D. Ohio 2017) (holding that under § 524, "[t]he debtor must prove that the creditor's action violated the discharge injunction and that the creditor had specific knowledge of the bankruptcy discharge").

Because "there is no statutory private right of action for damages under 11 U.S.C. § 524 or 11 U.S.C. § 105 for violation of the discharge injunction[,] violation of the discharge injunction . . . expose[s] a creditor to potential contempt of court [when] '[a] creditor who undertakes to collect a discharged debt from a debtor violates the discharge injunction and is in contempt of the court that issued the discharge order.'" *Botson v. Citizens Banking Co. (In re*

Botson), 531 B.R. 719, 724 (Bankr. N.D. Ohio 2015) (citations omitted). Here, for their violation of the discharge injunction and the failure of Mr. Bowe or a representative of CFP to appear at the January 26, 2018 hearing, the Court's contempt finding was appropriate. *CFE Racing Products, Inc. v. BMF Wheels, Inc.*, 793 F.3d 571, 598 (6th Cir. 2015). Mr. Bowe and CFP's failure to appear at the hearing resulted in a default; however, the act of continuing to pursue a claim for monetary damages in the state court litigation after discharge also supports a finding of contempt on the merits.

Having found Mr. Bowe and CFP in contempt, the Court's statutory discretion authorizes it to consider the evidence provided at the May 21, 2018 hearing and to impose the damages and/or sanctions it deems appropriate. *See* 11 U.S.C. § 105(a) (allowing the Court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title"). At the May 21 hearing, Mr. Bowe did not dispute that he had violated the discharge injunction by his "misunderstanding of the law" and that, because of this misunderstanding, he filed a motion in February 2016 to set trial in the Knox County Circuit Court with the intention of obtaining a money judgment that he then planned to ask the state court to find nondischargeable. That is, Mr. Bowe misunderstood the concurrent jurisdiction of the state court with the bankruptcy court concerning nondischargeability and the interplay of 11 U.S.C. § 523(a) and (c) and Federal Rule of Bankruptcy Procedure 4007(c), which precluded any nondischargeability action by CFP beyond the deadline in Rule 4007(c). The Court finds that the acts of seeking a trial date and responding in opposition to Debtor's motion to dismiss were core violations of the discharge injunction under § 524, making sanctions appropriate. *See In re Perviz*, 302 B.R. 357, 370 (Bankr. N.D. Ohio 2003) (holding that violation of a discharge injunction is subject to sanctions at the court's discretion).

Bankruptcy law may be complex, but it has long been held that "ignorance of the law is no excuse." *Shevlin-Carpenter Co. v. Minnesota*, 30 S. Ct. 663, 666 (1910); *see also* Oliver Wendell Holmes, Jr., *The Common Law* 47-48 (Mark DeWolfe Howe ed., Little Brown & Co. 1963) (1881). This "nonexcuse" cuts both ways in the instant case. As previously discussed, Mr. Bowe acknowledged a misunderstanding of the Bankruptcy Code as it concerns § 523 and nondischargeability. On the other hand, by failing to alert the Court at an earlier time to CFP's and Mr. Bowe's contemptuous pursuit of the state court litigation, Debtor and his counsel failed to mitigate damages. In fact, Debtor's counsel continued to litigate the state court claim, aggregating fees of $250.00 and $300.00 per hour, respectively.[3] Services performed by Debtor's counsel included corresponding with Mr. Bowe, appearing in the Knox County Circuit Court, and filing a series of motions and dismissal orders, all of which resulted in cumulative fees and expenses of $56,225.00 now owed by Debtor to Debtor's counsel. *See* Exs. 1; 2. Thus, Debtor's fresh start is greatly limited because of Debtor's counsel's failure to take the appropriate action to stop CFP's continued pursuit of the state court case by expeditiously bringing it to this Court's attention. Had Debtor's counsel notified the Court of Mr. Bowe's contempt at the earliest opportunity, virtually all of the fees and other damages incurred by Debtor through the state proceeding could have been eliminated. *Cf. Mitchell v. Anderson (In re Mitchell)*, 545 B.R. 209, 227-28 (Bankr. N.D. Ohio 2016) ("While not condoning [the] vexatious conduct in pursuit of these prepetition claims, the Court notes that the debtor had ample opportunity to limit her damages by timely asserting the protection of the discharge injunction . . . ."); *Duling v. First Fed. Bank of the Midwest (In re Duling)*, 360 B.R. 643, 647 (Bankr. N.D. Ohio 2006) ("[W]hether it is the automatic stay of § 362(a) or the discharge injunction of §

[3] Mr. Roger Hyman charged an hourly rate of $300.00 per hour. Ms. Mital Patel charged an hourly rate of $250.00 per hour. These rates are higher than rates routinely approved by the Court in bankruptcy cases.

524(a), it is inherently improper for a debtor or their attorney to view violations thereof as a profit-making endeavor.").

The purpose of the May 21 evidentiary hearing was for Debtor to put on evidence of his losses sustained as a result of the violation of the discharge injunction, but the evidence of actual damages was scant. During the May 21 hearing, not only did Debtor's counsel spend a substantial amount of time discussing the state court litigation *pre-petition*, they failed to present any specific evidence, documentary or otherwise, to establish mileage expenses, parking expenses, or any actual damages that Debtor incurred. The only evidence introduced to indicate an actual loss by Debtor — beyond emotional suffering — was that he had previously paid $5,000.00 to his attorneys for services in the state court action. Debtor's counsel, however, introduced no physical copy of a check, invoice, or other "best evidence" to indicate that such an amount had actually been paid, when it had been paid, or the dates of service for which it was paid. Only Debtor's testimony identified the $5,000.00 amount paid to his attorneys. Debtor's counsel later circled back during closing argument and detailed the various expenses supposedly incurred by Debtor, but such cannot be considered as evidence. *See In re Consol. Distribs. Inc.*, No. 13-40350 (NHL), 2013 WL 3929851, at *6 (Bankr. E.D.N.Y. July 23, 2013) ("The introduction of new evidence during closing argument is contrary to established rules of trial procedure.").

Still, Mr. Bowe and CFP's pursuit of the state court claim constituted a violation of the discharge injunction for which sanctions should issue. Mr. Bowe admitted this error several times during the evidentiary hearing and accepted full responsibility for the violation so that contempt damages actually incurred and adequately proven are appropriate.[4] Given the

[4] Debtor has requested punitive damages for the willful violation of the discharge injunction, but "[p]unitive damages are not appropriate in a civil contempt proceeding for violation of a discharge injunction." *In re Humbert*, 567 B.R.

circumstances of the state court litigation, however, based on the failure of Debtor to mitigate damages and the entirety of evidence introduced at trial, and in keeping with the "broad discretion . . . invested in the court [to] select[] [an] appropriate sanction," *Frambes v. Nuvell Nat'l Auto Fin., LLC (In re Frambes)*, 454 B.R. 437, 442 (Bankr. E.D. Ky. 2011) (quoting *Motichko v. Premium Asset Recovery Corp. (In re Motichko)*, 395 B.R. 25, 30 (Bankr. N.D. Ohio 2008)). the Court finds appropriate a sanction of $3,500.00 to be paid directly to Debtor by Curtis Bowe, III. Mr. Bowe shall also file a certification under penalty of perjury and in compliance with E.D. Tenn. LBR 5005-4(i)(2) evidencing payment no later than July 6, 2018.

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512, 521 (Bankr. N.D. Ohio 2017) (citing *Cox v. Zale Delaware, Inc.*, 239 F.3d 910, 916-17 (7th Cir. 2001)); *see also In re Holley*, 473 B.R. 212, 216 (Bankr. E.D. Mich. 2012) (finding that bankruptcy courts lack jurisdiction to award punitive damages for violation of the discharge injunction because under the law of contempt, punitive damages may be awarded only for criminal contempt, which is not within the bankruptcy court's power).