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U.S. Bankruptcy Appellate Panel
of the Tenth Circuit
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Barbara A. Schermerhorn
Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE PATRICIA CULLEY, also known as Patricia Castleberry, Debtor.	BAP No. NM-05-105
PATRICIA CULLEY, Plaintiff – Appellee, v. GLEN CASTLEBERRY, Defendant – Appellant, and ALLSUP'S CONVENIENCE STORES, INC., Defendant.	Bankr. No. 7-01-18446-SA Adv. No. 03-1371-S Chapter 7 ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court
for the District of New Mexico

Before CORNISH, NUGENT, and THURMAN, Bankruptcy Judges.

NUGENT, Bankruptcy Judge.

Appellant Glen Castleberry ("Glen") appeals from a judgment entered by the United States Bankruptcy Court for the District of New Mexico in favor of debtor Patricia Culley ("Patricia" or Appellee), finding that Glen willfully violated the discharge injunction and awarding Patricia actual damages, attorney's

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

fees, and punitive damages. Glen argues that the bankruptcy court erred for the following reasons: (i) it should have applied the Rooker-Feldman doctrine and dismissed Patricia's adversary proceeding for lack of subject matter jurisdiction; (ii) punitive damages should not have been awarded and certainly not in such excessive amount; and (iii) defendant Allsup's Convenience Stores, Inc. ("Allsup"), rather than Glen, should have been ordered to repay to Patricia the amount of garnished wages that it withheld. For the following reasons, we AFFIRM.

I. Appellate Jurisdiction

This Court has jurisdiction over this appeal. The bankruptcy court's judgment disposed of the adversary proceeding on the merits and is a final order subject to appeal under 28 U.S.C. § 158(a)(1).[1] The Appellant timely filed his notice of appeal.[2] The parties have consented to this Court's jurisdiction because they have not elected to have the appeal heard by the United States District Court for the District of New Mexico.[3]

II. Factual Background

Glen and Patricia were divorced in 1999. Under their marital settlement agreement ("MSA"), Patricia was responsible for certain credit card debt. On December 21, 2001, Patricia filed her Chapter 7 bankruptcy petition. Prior to the

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[1] On October 27, 2005, this Court entered an Order to Show Cause Why Appeal Should Not Be Considered for Dismissal as Interlocutory because the order being appealed, entitled "Partial Judgment," provides that the bankruptcy court will "enter a final judgment to include Plaintiff's attorney's fees pursuant to the Memorandum Opinion." This Court concluded that the attorney's fees that remain outstanding are separate from the merits of the order being appealed, and that the order appealed is a final order. Cf. Lampkin v. Int'l Union, United Auto., Aerospace and Agric. Implement Workers of Am. (UAW), 154 F.3d 1136, 1141 (10th Cir. 1998) (when attorney's fees are "inseparable from the 'merits' of plaintiff's claim," the order is not final until attorney's fees are resolved).

[2] Fed. R. Bankr. P. 8002(a).

[3] 28 U.S.C. §158(b)-(c); Fed. R. Bankr. P. 8001(e).

first meeting of creditors on February 2, 2002, Patricia advised Glen that she had filed bankruptcy. She did not, however, list Glen as a creditor and he did not receive written notice of the case. Patricia received a discharge on April 30, 2002.

After the discharge was entered, Glen sought and obtained a writ of garnishment in Eddy County, New Mexico District Court ("state court") in an attempt to force Patricia to pay off the balance of the credit card debt. In his handwritten praecipe for garnishment, Glen advised the state court that Patricia had declared bankruptcy, but had neither listed him as a creditor nor given him or the credit card company notice thereof.

On June 26, 2002, a hearing was held in state court with both Glen and Patricia present without counsel. On January 22, 2003, the state court entered an Order Regarding Enforcement (the "January 22, 2003, Order") requiring Patricia to reimburse Glen for payments he had made on the credit card account and to make necessary monthly payments to satisfy the debt.

After entry of the January 22, 2003, Order, Glen filed another motion seeking enforcement of the MSA. The state court entered a subsequent order dated June 5, 2003 (the "June 5, 2003, Order"), requiring Patricia to immediately pay the balance of the credit card debt to Glen in a lump sum and to reimburse him for payments he had made.

On November 17, 2003, Patricia filed her Complaint of Violation of Permanent Stay against Glen in the bankruptcy court. After a trial on Patricia's complaint, on October 14, 2005, the bankruptcy court granted her judgment, finding that her prepetition debt to Glen had been discharged in her Chapter 7 bankruptcy and that the state court garnishment orders obtained by Glen were void. The bankruptcy court also found that Glen willfully violated the discharge injunction by his actions in seeking to enforce the discharged prepetition debt, and awarded actual damages of $658.15, attorney's fees in an amount yet to be

determined, and punitive damages of $10,000. Glen appealed from this judgment. We heard oral argument on June 13, 2006, and we AFFIRM.[4]

III. Discussion

A. Standard of Review

Glen's argument on appeal that the bankruptcy court should have applied the Rooker-Feldman doctrine and dismissed Patricia's complaint presents a legal question that we review de novo.[5] Whether Glen's actions violated the discharge injunction is also a question of law subject to de novo review.[6] The bankruptcy court's factual finding that a creditor's action constituted a willful violation of the discharge is accorded more deference and we review it only for clear error.[7] We review an award of sanctions for violation of the discharge injunction for abuse of discretion, and do not disturb the bankruptcy court's decision in the absence of a definite and firm conviction that the bankruptcy court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances.[8] When we apply the "abuse of discretion" standard, we defer to the trial court's judgment because of its first-hand ability to view the witness or evidence and assess credibility and probative value.[9] A de novo standard of review, however, applies when passing on a determination of the constitutionality of punitive

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4 Appellee's counsel did not appear for oral argument.

5 See Mo's Express, LLC v. Sopkin, 441 F.3d 1229, 1233 (10th Cir. 2006).

6 See In re Edwards, 214 B.R. 613, 618 (9th Cir. BAP 1997).

7 In re McHenry, 179 B.R. 165, 167 (9th Cir. BAP 1995); In re Roberts, 175 B.R. 339, 343 (9th Cir. BAP 1994).

8 Edwards, 214 B.R. at 618.

9 United States v. Ortiz, 804 F.2d 1161, 1164 n.2 (10th Cir. 1986); see also Moothart v. Bell, 21 F.3d 1499, 1504 (10th Cir.1994) (quoting and applying this standard); McEwen v. City of Norman, 926 F.2d 1539, 1553 (10th Cir. 1991) (same).

damages awards.[10]

B. Subject Matter Jurisdiction and the Rooker-Feldman Doctrine

Glen claims the bankruptcy court committed reversible error in refusing to apply the Rooker-Feldman doctrine. He argues that the bankruptcy court should have applied the doctrine and dismissed Patricia's adversary proceeding for lack of subject matter jurisdiction. He asserts that the state court had concurrent jurisdiction to determine the nondischargeability of this § 523(a)(15)[11] debt and urges this Court to rule in accord with In re Toussaint[12] and In re Candidus,[13] which stand for the proposition that once a state court exercises its concurrent jurisdiction and determines that a debt is nondischargeable, the Rooker-Feldman doctrine would prevents this Court from reviewing that determination.

The Rooker-Feldman doctrine springs from the United States Supreme Court's decisions in Rooker v. Fidelity Trust Co.[14] and District of Columbia Court of Appeals v. Feldman.[15] Succinctly stated, the doctrine precludes federal district courts from exercising appellate jurisdiction over actually-decided claims in state courts.[16] It also precludes federal courts from adjudicating claims inextricably intertwined with previously-entered state court judgments.[17] The Supreme Court recently clarified the doctrine in Exxon-Mobil Corporation v. Saudi Basic

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[10] Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 436 (2001).

[11] Unless otherwise noted, all statutory references are to Title 11 of the United States Code.

[12] 259 B.R. 96 (Bankr. E.D.N.C. 2000).

[13] 327 B.R. 112 (Bankr. E.D.N.Y. 2005).

[14] 263 U.S. 413 (1923).

[15] 460 U.S. 462 (1983).

[16] Mo's Express, LLC v. Sopkin, 441 F.3d 1229, 1233 (10th Cir. 2006).

[17] Id.

Industries Corporation, limiting its application to "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the [federal] district court proceedings commenced and inviting [federal] district court review and rejection of those judgments."[18]

Glen's reliance on the doctrine as it was applied by the Toussaint and Candidus courts is badly misplaced here. In those cases, the state court judgments arose in matters of which both the state courts and federal courts had concurrent jurisdiction. Those courts properly held that Rooker-Feldman barred the bankruptcy courts from acting as appellate entities in revisiting the dischargeability of the debts. This case is different. Here, the bankruptcy court correctly concluded that § 523(c) accorded it exclusive jurisdiction to determine the dischargeability of debts described in § 523(a)(2), (4), (6), and (15), and that the deadline for these actions had passed.

Section 727(b) discharges the debtor "from all debts that arose before the date of the order for relief," except as provided for in § 523.[19] Section 524(a) "operates as an injunction against the commencement or continuation of an action . . . to collect, recover or offset any such debt [discharged under § 727] as a personal liability of the debtor . . . ."[20] Thus, unless Patricia's debt to Glen was excepted from her discharge under § 523, Glen was enjoined from commencing or continuing an action to collect it under § 524(a)(2).

As it applied when Patricia's Chapter 7 case was filed, § 523(a)(15) excepted from discharge non-support obligations arising out of property divisions or settlements entered in domestic court proceedings under certain circumstances. Section 523(c)(1) granted the bankruptcy court exclusive jurisdiction to determine

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18 544 U.S. 280, 284 (2005).

19 11 U.S.C. § 727(b) (2005).

20 11 U.S.C. § 524(a)(2) (2005).

the dischargeability of these debts. Section 523(c)(1) stated:

> Except as provided in subsection (a)(3)(B) of this section, the debtor shall be discharged from a debt of a kind specified in paragraph (2), (4), (6), or (15) of subsection (a) of this section, unless, on request of the creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge under paragraph (2), (4), (6), or (15), as the case may be, of subsection (a) of this section.[21]

Glen's debt is one to a former spouse incurred in the course of a divorce and thus fits under § 523(a)(15). The state court did not have concurrent jurisdiction to determine the dischargeability of this debt. The record suggests that Glen was aware of Patricia's bankruptcy case at the time of her first meeting of creditors and therefore he had ample time under Federal Rule of Bankruptcy Procedure 4007(c) to file a complaint to determine the dischargeability of this debt. This he did not do, choosing instead to proceed in state court post-discharge. Patricia's complaint does not attack the state court's judgment, but instead seeks redress from Glen for attempting to collect a debt discharged in her case. Therefore, only the bankruptcy court had jurisdiction to determine the dischargeability of that debt. Rooker-Feldman does not apply here.

C. Punitive Damages Award

Glen questions the bankruptcy court's award of punitive damages, arguing that his actions were not "reprehensible." He argues reasonable reliance on the state court's orders. He also urges that the punitive damage award is excessive because it is 15.2 times the actual damage award, in violation of his Fifth Amendment due process rights.[22] We review the award of punitive damages for an abuse of discretion, while considering its constitutionality de novo.

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[21] Section 523(c) was amended in 2005, and no longer includes (a)(15) as a debt for which the bankruptcy court retains exclusive jurisdiction to determine dischargeability.

[22] We note that Glen does not allege that the actual damages award violates his due process rights.

1. *Were Glen's actions the type of conduct that authorizes a bankruptcy court to award punitive damages*?

The bankruptcy court concluded that punitive damages were appropriate in this case. Glen objects that, as a matter of policy, punitive damages should not be awarded against a party that has relied upon a judgment or court order, even one that was entered in error or is void. Glen claims his actions fall short of the level of reprehensibility sufficient to support a punitive damage award.

As we held in Diviney v. Nationsbank of Tx. (In re Diviney),[23] courts in the Tenth Circuit employ two different tests to determine if punitive damages are appropriate. If the violation is willful or in reckless disregard of the law, punitive damages are proper. A creditor may be assessed punitive damages if it knew of the federally protected right and acted intentionally or with reckless disregard of that right. A second, slightly different test considers (i) the defendant's conduct, (ii) the defendant's ability to pay, (iii) the motives for the defendant's actions, and (iv) any provocation by the debtor.[24]

Glen argues that because he was a pro se litigant, he should be able to safely rely upon the judgment or orders of the state court. This argument is untenable because Glen's pro se status is questionable for several reasons. The attachments to Glen's May 20, 2002, Motion to Enforce state that his lawyer sent Patricia a letter and requested attorney's fees. His May 31, 2002, Motion for Order to Show Cause also references the attorney letter and asks the court to order payments to his attorney. The form of the January 22, 2003, Order was prepared by a law firm. At oral argument, Glen's counsel denied that his law firm represented Glen in the state proceedings, but did concede that his office prepared the January 22, 2003, Order. Finally, Glen's March 21, 2003, Motion to Enforce

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[23] 225 B.R. 762, 766-77 (10th Cir. BAP 1998).

[24] Id. at 777.

includes a prayer for attorney's fees, and the June 5, 2003, Order contains a waiver of attorney's fees. All of this casts considerable doubt on Glen's alleged "pro se" status and supports the bankruptcy court's findings on that point.

Glen's "reliance" argument fails because his state of mind is not relevant to whether his actions violated the discharge injunction. By filing the collection action, he violated the discharge injunction. Further, the evidence suggests that Glen did not rely on the state court judge. Rather, it appears the state court judge relied on Glen's assertion that his debt was not discharged in Patricia's bankruptcy. Finally, the record easily supports the bankruptcy court's finding that Glen's conduct was willful because he filed the collection action knowing Patricia had filed bankruptcy. "Willful" connotes conduct that was "volitional and deliberate" as opposed to unintentional or accidental.[25] Glen knew of the bankruptcy since February 2002. He filed the collection action against Patricia on May 20, 2002. He compounded his actions by filing five more motions, scheduling hearings, submitting orders, garnishing Patricia, and refusing to release the garnishment despite warnings from her attorney that failure to do so was a violation of the discharge injunction. Even if his state of mind mattered, Glen's statement that "this isn't about money" amply supports the bankruptcy court's finding that he brought the collection actions in bad faith to intimidate or harass Patricia.

The record fully supports the bankruptcy court's factual finding that Glen's conduct was willful. Nor would pro se status exempt Glen from compliance with relevant rules of procedural and substantive law.[26] Pro se litigants must follow

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[25] Id., at 774.

[26] In re Enron Corp., 341 B.R. 141, 146-47 (Bankr. S.D.N.Y. 2006).

the same rules of bankruptcy procedure as govern other litigants.[27] Once Glen decided to represent himself, he undertook the responsibility to comply with relevant rules of procedural and substantive law, and he accordingly will not be graced with any special treatment as a reward for his decision to represent himself.[28] Upon receiving notice of Patricia's bankruptcy, his duty was to stop pursuing his debt outside of the bankruptcy proceedings. Instead, Glen violated the discharge injunction. The bankruptcy court's decisions were well within the bounds of permissible choice and therefore deserve this Court's approval.

2. *Was the punitive damage award excessive*?

"[I]t is well established that there are procedural and substantive constitutional limitations on [punitive damage] awards[,]" and that due process "prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor."[29] In analyzing the constitutionality of punitive damages, the Supreme Court has instructed courts to look to 1) the degree of reprehensibility of the defendant's action; 2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damage award; and 3) the difference between the punitive damage award and the civil penalties authorized or imposed in comparable cases.[30] With respect to the second factor, the ratio of actual or compensatory damages to punitive damages, the Supreme Court has recently held that "in practice, few awards exceeding a single-digit ratio between punitive and

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[27] Nielsen v. Price, 17 F.3d 1276 (10th Cir. 1994).

[28] In re de Kleinman, 136 B.R. 69, 71 (Bankr. S.D.N.Y. 1991); Faretta v. California, 422 U.S. 806, 834 n.46 (1975).

[29] State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416 (2003). We note that the constitutional limitations discussed in Campbell and other recent decisions address due process under the Fourteenth Amendment, which applies only to the states. Like this Court in Diviney, we assume that these limits are applicable herein under §362(h) through the Due Process Clause of the Fifth Amendment, which applies in the federal context.

[30] BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 574-75 (1996).

compensatory damages, to a significant degree, will satisfy due process."[31] The Supreme Court has also explicitly stated that "courts of appeals should apply a de novo standard of review when passing on district courts' determinations of the constitutionality of punitive damages awards."[32]

In fixing the punitive damages at $10,000, the bankruptcy court expressed its intent that the award be sufficient to deter Glen from continuing to violate the discharge injunction. The bankruptcy court considered the following factors in assessing the amount of punitive damages to award: (i) Glen's actual knowledge, or at a minimum, reckless disregard, of Patricia's discharge rights, (ii) the nature of his conduct (i.e., the considerable amount of time, effort and expense that Glen incurred prior to this litigation in order to violate Patricia's discharge), (iii) his ability to pay (based on Patricia's testimony regarding his assets), (iv) motive (Glen undertook collection actions in bad faith to intimidate or harass Patricia), and (v) lack of provocation by Patricia.

Glen claims that the bankruptcy court's award of punitive damages, which amounts to approximately 15.2 times the actual damage award of $658.18, violates his constitutional rights.[33] First, Glen urges this Court to ignore the attorney's fees awarded in comparing Patricia's actual damages to the punitive damages awarded since the bankruptcy court has not awarded a specific amount therefor. As such, Glen argues that it would be pure speculation to consider attorney's fees in any ratio comparison of actual damages to punitive damages. Second, Glen argues that the record does not support a finding that he could pay a punitive damage award of $10,000. Third, he asserts that the bankruptcy court

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[31] Campbell, 538 U.S. at 425.

[32] Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 436 (2001).

[33] Appellant's Brief at 35.

improperly considered evidence of domestic violence. Finally, Glen claims that his motives were pure as he simply desired to collect the debt Patricia owed him.

In connection with considering attorney's fees as part of the basis for punitive damage calculations, we have previously held that the costs of litigation to vindicate rights may be considered when determining the constitutional limits on the size of a punitive damage award.[34] In Diviney, the bankruptcy court awarded $2,850 for actual damages, $40,000 for punitive damages, and an undetermined amount for attorney's fees. The bankruptcy court later awarded $15,000 for attorney's fees, which brought actual damages to $17,850. This Court viewed the punitive damage award as constituting only about 2.25 times the debtor's actual damages.

Here, as in Diviney, the bankruptcy court awarded a fixed punitive damage award even though it had not yet determined the amount of attorney's fees to award the debtor. Patricia has submitted an application for compensation requesting $19,488.73 for attorney's fees and $428.83 for expenses to which Glen has objected. The bankruptcy court has not yet ruled on this issue. Presumably, the bankruptcy court was satisfied that, once attorney's fees were added, Patricia's actual to punitive damage ratio would not exceed a single-digit ratio. While this Court cannot opine on what might be an appropriate attorney's fees and costs award in this case, the fact that this adversary proceeding went to trial and was subsequently appealed suggests that Patricia's attorney's fees will be substantial, thereby yielding an actual to punitive damage ratio at a constitutionally acceptable level.[35]

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[34] Diviney v. Nationsbank of Tx. (In re Diviney), 225 B.R. 762, 777 (10th Cir. BAP 1998) (citing Cont'l Trend Res., Inc. v. OXY USA Inc., 101 F.3d 634, 642 (10th Cir. 1996)).

[35] If Patricia's fees and expenses of nearly $20,000 are allowed, her punitive damages would be approximately half of her actual damages.

As for the alleged errors in the bankruptcy court's analysis, Glen essentially claims that the bankruptcy court's findings of fact were against the weight of the evidence and that the bankruptcy court did not accord the proper weight to the evidence. Glen urges us to reverse based on his interpretation of the evidence. That we cannot do. We must accept the bankruptcy court's determination unless "'that determination either (1) is completely devoid of minimum evidentiary support displaying some hue of credibility, or (2) bears no rational relationship to the supportive evidentiary data.'"[36]

With respect to Glen's ability to pay punitive damages, there was evidence that Glen has the ability to pay a $10,000 punitive damage award. Patricia testified Glen owns a house with a fair market value of $90,000, a vehicle (a Ford Ranger or Suburban), and musical equipment (guitars and 2 PA systems).[37] He also earns royalties from Broadcast Music International and affords to play golf every day.[38] Glen offered nothing to contradict this evidence.

The bankruptcy court held that testimony regarding domestic violence was relevant to motive.[39] The decision to admit or exclude evidence is reviewed solely for an abuse of discretion.[40] The bankruptcy court's decision to admit evidence of domestic violence does not appear to be an abuse of its discretion.

The bankruptcy court found Patricia's testimony regarding motive more credible than Glen's. Glen's statement, "it's not about the money," supports the

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[36] Gillman v. Scientific Research Prods. Inc. (In re Mama D'Angelo, Inc.), 55 F.3d 552, 555 (10th Cir. 1995) (quoting Krasnov v. Dinan, 465 F.2d 1298, 1302 (3d Cir. 1972)).

[37] Transcript of Proceedings Held on August 31, 2004, at 67-69, in Appellant's Appendix ("App.") at 205.

[38] Id. at 68, in App. at 205.

[39] Id. at 40-41, in App. at 198.

[40] Mason v. Ok. Tpk. Auth., 182 F.3d 1212, 1215 (10th Cir. 1999).

bankruptcy court's conclusion that Glen undertook his collection actions in an attempt to intimidate or harass Patricia rather than in any bona fide attempt to collect a debt.

For the foregoing reasons, we conclude that the bankruptcy court's punitive damage award is not excessive, passes constitutional muster, and should be affirmed.

D. Double Recovery

Finally, Glen claims that the bankruptcy court committed reversible error in ordering Glen, rather than Allsup, to pay the amount of garnished wages withheld by Allsup, which it yet retains. Glen argues that the manner in which the bankruptcy court entered its decision will allow double recovery by Patricia. This is true only as to the wages, and then only if a court orders Allsup to refund the wages that it garnished to Patricia. Having no record as to that point, this Court makes no order concerning this issue.[41]

IV. Conclusion

Finding neither clear error, legal error, nor an abuse of discretion, we AFFIRM the decision of the bankruptcy court.

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[41] Scott v. Hern, 216 F.3d 897, 912 (10th Cir. 2000) (Where the record is insufficient to permit review, appeals court must affirm.).