UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

In re:

Thomas O'Brien &
Debra O'Brien,

Debtors.

Case No.: 98-17122

Chapter 7

Thomas O'Brien &
Debra O'Brien,

Plaintiffs,

- v -

JRD Ltd.,

Defendant.

Adv. Pro. No.: 00-90300

APPEARANCES:

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Attorneys for the Debtors
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Of Counsel

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Paula Nadeau Berube, Esq.
Of Counsel

Hon. Robert E. Littlefield, Jr., United States Bankruptcy Judge

Memorandum, Decision & Order

Before the court is the damages phase of an 11 U.S.C. § 524 cause of action. The court has core jurisdiction pursuant to 28 U.S.C. §§ 157(a)(2)(A) and (I) and 1334(b).

Facts

On July 25, 2001, this court issued a written decision finding JRD, Ltd. ("Defendant") violated the discharge injunction[1] when it obtained a city court judgment against Thomas and Debra O'Brien ("Debtors") after finding the judgment was based upon a discharged debt. *In re O'Brien*, Case No. 98-17122 (Bankr. N.D.N.Y. July 25, 2001). Familiarity with the underlying facts is presumed but a brief summary of the salient ones may be helpful.

On April 17, 1997, the Debtors entered a Stock Purchase Agreement ("Agreement") with John, Anita and Jessica Duncan ("Duncans") where the Debtors agreed to purchase the Duncans' shares of a corporation known as Syd & Dusty's Outfitters, Inc. The Defendant is a corporation wholly owned by John C. Duncan and Mr. Duncan is its president. The Debtors could not fulfill the terms of the Agreement, and on October 26, 1998, the Duncans received a default judgment in the Warren County Supreme Court for the amount due on the agreement.

On October 30, 1998 the Debtors filed their Chapter 7 petition. The Duncans were duly listed on the petition and had notice of the bankruptcy proceeding. On December 16, 1998, they, with the advice of counsel Paula Nadeau Berube., Esq., of Bartlett, Pontiff, Stewart & Rhodes, P.C., stipulated to vacate the October 26th judgment as a preference.

On March 4, 1999, the Debtors received their discharge. On April 17, 2000, Niagara Mohawk Power Corporation obtained a judgment against the Defendant for $3,208.40 for utility services provided to Syd & Dusty's Outfitters while the company was owned by the Debtors. The Defendant satisfied this judgment and, in turn, commenced an action against the Debtors in Glens Falls City Court. The Defendant sought to recover the $3,000, relying upon an

[1]11 U.S.C. § 524.

indemnification provision of the Agreement.

On July 21, 2000, the Debtors' attorney sent a letter to the Defendant, copying the city court, advising of the discharge and requesting that the action be discontinued. However, the Debtors' attorney did not appear on the return date and, on August 2, 2000, a default judgment was entered which the Defendant refused to vacate.

On August 23, 2000, the Debtors made a letter request to reopen the judgment in city court; the request was denied due to a procedural defect. Thereafter, they made a motion to open the default. Both parties appeared, through their attorneys, and the motion was orally argued. Both parties also submitted memoranda of law. The Debtors withdrew the motion to open the default. Instead, they requested and received an order of this court reopening their Chapter 7 case. They amended the petition to include the Defendant, separate and apart from its president and sole shareholder, and filed the current adversary proceeding.

In its July 2001 decision, this court found that the debt was discharged and that 11 U.S.C. § 523(a)(3) was not available to the Defendant because John Duncan had notice of the filing. The court further found that the default judgment was void because it was obtained in violation of the discharge injunction. The court scheduled an evidentiary hearing to determine damages, if any, because of the violation. Upon request of the parties, the court permitted the matter to be handled by written submissions.

Argument

The only damages claimed by the Debtors are for attorney's fees; their counsel has submitted a fee application that details the cost of the services rendered. The Defendant argues that the fees should be disallowed in their entirety because the attorney time is directly traceable

to the Debtors' negligence in failing to properly prepare their schedules and list their debts.

Discussion

The Defendant asserts that any award of attorney's fees is inappropriate because there has been no demonstration that it acted in bad faith. *In re Dabrowski,* 2001 WL 32728; *In re Watkins*, 240 B.R. 668, 680 (Bankr. E.D.N.Y. 1999). However, the court is not convinced that such a showing is necessary. Rather, this court finds the analysis articulated in *In re Cherry*, 247 B.R. 176 (Bankr. E.D. Va. 2000), to be informative. In *Cherry*, the court found, "[t]he discharge injunction put in place pursuant to 11 U.S.C. § 524(a) is an order of the Bankruptcy Court whose violation is punishable by the imposition of civil sanctions" and "[t]hese sanctions may include actual damages, attorney's fees and, when appropriate, punitive damages." *Id.* at 186 (citations omitted). This court agrees and finds that awarding attorney's fees in this situation is appropriate.

Now, the court must determine the proper amount of fees to be awarded. This court's most recent written decision regarding damages for violation of the automatic stay occurred in the case, *In re Alberto*, Case No. 98-14005 (Bankr. N.D.N.Y. Oct. 2000), *rev'd on other grounds*, 271 B.R. 223 (N.D.N.Y 2001). While *Alberto* dealt with 11 U.S.C. § 362(h), the court recognized that the standard for damages under §§ 105, 362, and 524 are similar and once a party proves that they have been damaged then they must demonstrate the amount of damages with "reasonable certainty." *Matthews v. United States,* 184 B.R. 594, 600 (Bankr. S.D. Ala. 1995) (citations omitted). The Debtors' attorney's fee application sufficiently details the work performed and the cost of that work. However, after reviewing all the submissions this court determines that only a portion of the requested fees should be granted.

The Defendant contends the fees should be substantially reduced because they are directly traceable to the Debtors' failure to properly schedule it. That argument has some merit but the court finds the Debtors' attorney's failure to appear at the city court hearing, resulting in the default judgment, to be more disturbing. There is a strong possibility that if the Debtors' attorney had appeared at that hearing and argued that the debt had been discharged then there would not have been any additional time or effort put forth on either parties behalf. Accordingly, after reviewing the fee request, the court grants $870 in fees. This amount includes the bills from November 14, 2000 to December 13, 2000 except for a $300 charge on November 15, 2000, for arguing the motion to vacate the default judgment in city court. Since the court finds all charges attributable to the default judgment and the efforts to undo it should not have been necessary, it would be inequitable for the Defendant to have to pay for them.

Conclusion

For all of these reasons the Debtors are awarded $870 in damages for the Defendant's violation of the discharge injunction.

Date:
Albany, New York

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Hon. Robert E. Littlefield, Jr.
United States Bankruptcy Judge