

UNITED STATES BANKRUPTCY COURT
DISTRICT OF CONNECTICUT

 IN RE:)
)
 FRANCES ROSE FITCH,)
)
 DEBTOR.)
)

 FRANCES ROSE FITCH,)
)
 MOVANT)
)
 vs.)
)
 NATIONAL FINANCIAL)
 SYSTEMS, INC. and FIRST USA BANK,)
)
 RESPONDENTS.)

CASE NO. 02-34541 (LMW)
 CHAPTER 7
 DOC. I.D. NO. 18

APPEARANCES

Joseph Marotti, Esq. Attorney for Debtor
 Kolb & Associates, P.C.
 49 High Street
 East Haven, CT 06512

National Financial Systems, Inc. Respondent
 Attn: President
 600 W. John Street
 P.O. Box 9046
 Hicksville, NY 11801

First USA Bank Respondent
 Attn: President
 P.O. Box 85068
 Louisville, KY 40285-5068

**MEMORANDUM OF DECISION
AND ORDER RE: MOTION FOR CONTEMPT**

Lorraine Murphy Weil, United States Bankruptcy Judge

The matter before the court is the above-captioned debtor's (the "Debtor") Motion for Contempt (Doc. I.D. No. 18, the "Motion")¹ pursuant to which the Debtor seeks damages, attorney's fees and a cease and desist order against the above-captioned respondents for an alleged violation of the discharge injunction set forth in Bankruptcy Code § 524(a)(2). The court has jurisdiction over this matter as a core proceeding, pursuant to 28 U.S.C. §§ 1334 and 157(b), and that certain Order dated September 21, 1984 of the District Court (Daly, C.J.).² For the reasons set forth below, the respondents are held jointly and severally liable to the Debtor in the amount of \$2,490.00 as a sanction for their civil contempt.

I. BACKGROUND

The Debtor commenced this chapter 7 case by the filing of a voluntary petition on September 18, 2002. (Doc. I.D. No. 1.) Together with the petition, the Debtor filed a complete set of schedules and a statement of financial affairs (included in Doc. I.D. No. 1 (as amended by Doc. I.D. No. 4), collectively, the "Schedules"). According to the Schedules, as of the petition date, the Debtor owned no real property, had personal property valued at \$1,200.00, had no secured debt and had unsecured, nonpriority debt of \$49,450.61, all of which was comprised of credit card debt. (*See* Schedules.) The Debtor listed two debts (collectively, the "Debt") owed to First USA Bank ("First

¹ References to the docket of this chapter 7 case appear in the following form: "Doc. I.D. No. ____." References to the audio record of hearings in this case appear in the following form: "__/__/05 Oral Record."

² That order referred to the "Bankruptcy Judges for this District" *inter alia* "all proceedings . . . arising in . . . a case under Title 11, U.S.C. . . ."

USA”): \$1,020.44 and \$371.94. (*See Schedules.*) As of the petition date, the Debtor was widowed, had no dependants, had been employed as a cashier at Auto Tote for one year and had net monthly income of \$2,511.54. First USA received notice of the bankruptcy filing electronically, with receipt confirmed, on September 24, 2002. (Doc. I.D. No. 3.)

Pursuant to that certain Notice of Chapter 7 Bankruptcy Case, Meeting of Creditors, & Deadlines (Doc. I.D. No. 2), December 24, 2002 was established as the bar date (the “Bar Date”) for filing complaints objecting to discharge or seeking a determination of nondischargeability.³ On October 29, 2002, the Chapter 7 trustee filed that certain Trustee’s Report of No Distribution (Doc. I.D. No. 5) stating that no assets were available in the Debtor’s estate for distribution to creditors. The Debtor received her chapter 7 discharge on December 31, 2002. (Doc. I.D. No. 6.) Notice of the bankruptcy discharge granted to the Debtor was sent electronically to First USA, with receipt confirmed, on January 2, 2003. (Doc. I.D. No. 7.) A final decree (Doc. I.D. No. 8) issued and the bankruptcy case was closed on January 15, 2003.

On April 6, 2004, the Debtor filed a motion to reopen the chapter 7 case in order to permit the Debtor to take action against First USA and National Financial Systems, Inc. (“NFSI”) for acting in violation of the discharge injunction imposed by Bankruptcy Code § 524(a). (Doc. I.D. No. 17)⁴

³ First USA also received timely notice of the Bar Date. (Doc. I.D. No. 3.)

⁴ Although the Debtor attempted to obtain entry of that order by this court’s “Short Calendar/Bar Date” procedure (by which uncontested orders are entered without a hearing after notice and an opportunity to object) (the “Bar Date Procedure”), the Debtor’s failure to follow that procedure necessitated court proceedings. (*See Case Doc. I.D. Nos. 17, 19, 20, 22, 27, 28, 30, 31, 32.*) A previous motion to reopen (Doc. I.D. No. 9) also had been denied for failure to follow the Bar Date Procedure. (Doc. I.D. No. 13.)

An order reopening this case was entered on September 22, 2004. (Doc. I.D. No. 32.) No trustee was appointed in the reopened case. (*Id.*)

The Motion alleges that First USA continued its efforts through a collection agency, NFSI, to collect on the Debt, despite the discharge of the Debt and despite at least two letters from the Debtor's counsel that the Debt had been discharged (with copies of the relevant documents). Nevertheless, First USA (through NFSI) persisted with its collection efforts. As a result, the Debtor filed the Motion. A hearing on the Motion was held on December 1, 2004, at which hearing counsel for the Debtor appeared. Representatives of First USA and NFSI did not appear at the hearing. The court instructed the Debtor's counsel to prepare and file affidavits with respect to attorney's fees and harm, if any, to the Debtor. Those affidavits (Doc. I.D. No. 41) were filed on December 29, 2004. Continued hearings on the Motion were held on November 10, 2004, July 13, 2005, and August 10, 2005 for procedural reasons. (*See Case Docket.*)⁵ Neither First USA nor NFSI appeared at the August 10, 2005 hearing.

II. DISCUSSION

A. Civil Contempt Sanctions Pursuant to 11 U.S.C. 524(a)(2)

Section 524(a)(2) provides in pertinent part that “[a] discharge in a case under this title ... operates as an injunction against the commencement or continuation of an action, the employment

⁵ By an order scheduling a status conference, this court raised the issue of the sufficiency of service upon First USA and NFSI with respect to the Motion and the hearing thereon. (Doc. I.D. No. 42.) At that status conference, the court advised counsel for the Debtor that both First USA and NFSI must be served with “attention lines” in accordance with Rule 7004(b)(3) of the Federal Rules of Bankruptcy Procedure (made applicable by Rule 9014 of the Federal Rules of Bankruptcy Procedure). (7/13/05 Audio Record at 1:23:01-1:25:14.) As a result, service in respect of the August 10, 2005 hearing (and of the Motion) on both First USA and NFSI was properly made by first-class mail on July 18, 2005. (Doc. I.D. No. 44.)

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” 11 U.S.C.A. § 524(a)(2) (West 2006). “It is undisputed that violations of this discharge injunction may constitute a contempt of court.” *In re Egbarin*, 286 B.R. 45, 47 (Bankr. D. Conn. 1999) (Krechevsky, J.). “A court may hold a party in civil contempt for failure to comply with an order where (1) the order is clear and unambiguous, (2) proof of noncompliance is clear and convincing, and (3) the party has not been reasonably diligent in attempting to accomplish what was ordered.” *Id.* at 48, citing *EEOC v. Local 580*, 925 F.2d 588, 594 (2d Cir.1991).

Civil contempt is an appropriate sanction when a court finds that a “specific and definite” court order has been violated “and that the offending party had knowledge of the court’s order.” *In re Lohnes*, 26 B.R. 593, 596 (Bankr. D.Conn. 1983 (Shiff, J.), citing *Fidelity Mortgage Investors v. Camelia Builders, Inc.*, 550 F.2d 47, 51 (2d. Cir. 1976) (citations omitted), *cert. denied*, 429 U.S. 1093 (1977). “A bankruptcy court has the inherent power, under 11 U.S.C. § 105,⁶ to hold parties in civil contempt for violation of its own orders ... [where] the contemnor has not diligently attempted to comply in a reasonable manner.” *In re Masterwear Corp.*, 229 B.R. 301, 310 (Bankr. S.D.N.Y. 1999), citing *King v. Allied Vision, Ltd.*, 65 F.3d 1051, 1058 (2d Cir.1995).

As noted above, the Debtor received her chapter 7 discharge on December 31, 2002. It is undisputed that the Debt was pre-petition debt which was discharged in this case, with sufficient notice to First USA. Despite this clear and unambiguous notice that the Debt was discharged, First USA, through its collection agency, NFSI, continued its attempts to collect on the Debt through

⁶ Pursuant to 11 U.S.C. § 105(a), the bankruptcy court “may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.” 11 U.S.C.A. § 105(a) (West 2006).

letters and phone calls to the Debtor. In response to each collection letter, counsel for the Debtor responded by mail to NFSI advising that entity that it was attempting to collect a debt which was previously discharged in bankruptcy. (Doc. I.D. No. 41, Aff. of Debtor, ¶¶ 7-8.)⁷ Therefore, the court holds that the order (*i.e.*, the discharge) was clear and unambiguous, proof of First USA's and NFSI's noncompliance is clear and convincing, and neither First USA nor NFSI has diligently attempted to comply in a reasonable manner. Consequently, the Motion for Contempt will be granted, and First USA and NFSI are found to have committed a civil contempt.

B. Civil Contempt Damages

Section 524(a)(2) does not expressly provide for the recovery of actual damages, attorneys' fees, or punitive damages in the event that a party violates the discharge injunction. "However, bankruptcy courts have found that violation of the injunction is punishable by contempt ...[and] [a] finding of civil contempt can entitle the aggrieved party to be compensated for all expenses, including attorneys' fees." *In re Cruz*, 254 B.R. 801, 816 (Bankr. S.D.N.Y. 2000) (internal quotations omitted).

"Actual loss is the measure of compensatory fines for civil contempt ... [and] [t]he imposition of costs and attorney's fees is an appropriate sanction for civil contempt under the Code." *In re Barrup*, 51 B.R. 318, 319 (Bankr. D.Vt. 1985), citing *United States v. United Mine Workers of America*, 330 U.S. 258, 303-04 (1947). Attorneys' fees must be reasonable, and the bankruptcy

⁷ As noted above, First USA received electronic notice of the bankruptcy filing and the Bar Date and of the bankruptcy discharge granted to the Debtor. NFSI may not have been similarly notified, but (as noted above), NFSI subsequently was notified of the discharge in writing by the Debtor's counsel yet persisted in its collection efforts.

court may also make an award, “by way of a compensatory fine, for damages sustained by the debtor.” *Id.* at 319-20.

“The burden of proof to show entitlement to the fees requested is on the applicant.” *In re Chas A. Stevens & Co.*, 109 B.R. 853, 854 (Bankr. N.D. Ill. 1990). “To meet this burden, the applicant must support its request for fees and expenses with specific, detailed and itemized documentation.” *In re The Bennett Funding Group, Inc.*, 213 B.R. 234, 244 (Bankr. N.D.N.Y. 1997). “In cases where the time entry is too vague or insufficient to allow for a fair evaluation of the work done and the reasonableness and necessity for such work, the court should disallow compensation for such services.” *Id.*

“As a general rule, attorney’s fees are determined by first calculating the lodestar, defined as the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate.” *In re Raytech Corp.*, 241 B.R. 785, 788 (D. Conn. 1999) (citation and internal quotation marks omitted). That “lodestar figure” is subject to upward or downward adjustment by application of (*inter alia*) certain considerations identified in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974).⁸ See *In re Kero-Sun, Inc.*, 59 B.R. 630, 631 (Bankr. D. Conn. 1986) (Krechevsky, J.)⁹ An award of punitive damages is also within the discretion of the court.

⁸ The twelve factors (the Johnson factors) are: (1) the time and labor required; (2) the novelty and difficulty of the issues; (3) the skill necessary to perform the services properly; (4) the preclusion of other employment; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation and ability of the applicant; (10) the “undesirability” of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Johnson*, 488 F.2d at 717-719.

⁹ The *Johnson* factors parallel certain factors set forth in Section 330(a)(3). *Bachman v. Laughlin (In re McKeeman)*, 236 B.R. 667, 671 (B.A.P. 8th Cir. 1999).

“Although a bankruptcy court may, in its discretion, punish parties for contempt for violation of a discharge order, punitive damages are generally awarded [only] in response to egregious credit misconduct.” *Rey v. Laureda (In re Rey)*, 324 B.R. 449, 458 (Bankr. E.D.N.Y. 2005).

1. Damages Other Than Fees and Costs

By affidavit, the Debtor states that because of NFSI’s attempts to collect the Debt on behalf of First USA, she has become nervous and upset, but she fails to elaborate. (Doc. I.D. No. 41, Aff. of Debtor, ¶ 9.) The court finds that the Debtor has not shown actual loss for which she needs to be compensated. Nor has the Debtor shown that the alleged conduct rises to the level of egregious misconduct on the part of First USA or NFSI. The Debtor alleges only that NFSI has attempted, by unsolicited letters and phone calls, to collect the Debt that had been previously discharged. (*Id.* at ¶ 6-8.) The court, in its discretion, will not award compensatory or punitive damages (other than attorney’s fees and costs).

2. Fees and Costs

In response to two collection letters, the Debtor’s attorney sent correspondence to NFSI informing that entity that it was attempting to collect a debt that had been discharged in bankruptcy. In addition, the Debtor’s attorney filed various motions with the court, and attended hearings. The Debtor’s attorney subsequently filed an affidavit of attorney’s fees with this court, citing time spent on this matter as follows: 9.4 hours at \$275/hr.; 3.0 hours at \$135/hr.; and 1.0 hours of clerical fees at \$100/hr, totaling \$3090.00. Costs included the April 2, 2004 case reopening fee of \$155.00. and postage for motions, notices and certifications to all parties of \$9.60, for a total of \$3,254.60. (Doc. I.D. No. 41, Aff. of Attorney’s Fees, ¶¶ 5-6.)

Because three court appearances were directly related to counsel's failure to serve notice on the parties and/or failure to follow the Bar Date Procedure, at the August 10, 2005 hearing the court disallowed three court appearances and instructed counsel that he would be paid only for his attendance at the August 10, 2005 hearing. The court also disallowed the clerical fees as "overhead." (8/10/05 Audio Record at 1:30:30 to 1:32:15.) Furthermore, the court will allow fees with respect to the reopening of the case only as if the order reopening the case had been entered pursuant to the Bar Date Procedure (properly complied with). No fees will be awarded for the duplicate attempt to use that procedure. Likewise, no fees will be allowed for the duplicate filings of motions for contempt.¹⁰ Because the court cannot distinguish postage connected to compensable services from that connected to noncompensable services, postage charges will be disallowed. As explained above, one hour at \$135.00 per hour will be allowed for the August 10, 2005 hearing. Giving effect to all of the foregoing, the court finds reasonable fees to be \$2,335.00 plus costs in the amount of \$155.00 for a total of \$2,490.00 and that amount is awarded to the Debtor as a sanction for civil contempt.

¹⁰ An earlier motion (Doc. I.D. No. 12) was denied because the first motion to reopen was denied for the procedural reasons described above. (Doc. I.D. No. 14.)

III. CONCLUSION

For the reasons set forth above, First USA and NFSI shall pay to the Debtor \$2,490.00 as a sanction for their civil contempt. The foregoing award constitutes the joint and several obligation of First USA and NFSI.

It is **SO ORDERED**.

Dated: January 6, 2006

BY THE COURT


Lorraine Murphy Weil
United States Bankruptcy Judge