IN THE SUPREME COURT OF THE STATE OF NEVADA

KIRK JASTER,
Appellant,
vs.
BRIAN HOLTHUS AND JOLLEY, URGA, WIRTH & WOODBURY,
Respondents.

No. 39394

FILED

AUG 19 2003

ORDER OF AFFIRMANCE

This appeal arises out of a malpractice action against attorney Brian Holthus and the law firm Jolley, Urga, Wirth & Woodbury. In May 1991, Kirk Jaster obtained a judgment for $343,066.00 against Robert Schmidt in Arizona. In September 1991, Jaster domesticated the judgment in Nevada. One month later, Schmidt filed bankruptcy, and any further action on the judgment was automatically stayed. The judgment was discharged in bankruptcy on October 14, 1993.

Jaster then retained respondents, Brian Holthus and the law firm Jolley, Urga, Wirth & Woodbury, to seek revocation of the discharge, which they successfully did on October 20, 1997. On August 20, 1998, Holthus renewed the judgment on Jaster's behalf and filed it with the Clark County recorder, enabling Jaster to obtain a lien against Schmidt's real property.

The judgment was renewed approximately six years and eleven months after the date of the original domestication of the judgment and ten months after the revocation of Schmidt's bankruptcy discharge. Collection efforts on the judgment failed, however, and Jaster sued respondents for malpractice, alleging that because respondents had failed

to timely renew the judgment within the six-year period required by NRS 11.190, the judgment had expired, and Jaster could no longer collect on it.[1]

Respondents filed a motion for summary judgment alleging the judgment had been properly renewed and, as a matter of law, no malpractice was committed. The district court granted respondents' motion for summary judgment, determining that the judgment was void during the period in which it was discharged, and that because it was void, no action could be taken to renew the judgment prior to the revocation of the discharge. Jaster now appeals the district court's order granting respondents' motion for summary judgment. For the following reasons, we affirm the order of the district court.

This court reviews de novo an order granting summary judgment.[2] "Summary judgment is only appropriate when, after a review of the record viewed in a light most favorable to the non-moving party, there remain no genuine issues of material fact and the moving party is entitled to judgment as a matter of law."[3] Here, the parties agree that there are no issues of material fact, and the only question is one of law.

The first issue we must address is whether 11 U.S.C. § 524(a)[4] voids a liability that has been discharged or merely bars its recovery. The

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[1]The previous collection efforts failed due to a lack of assets, not as a result of any finding that the judgment expired.

[2]Pegasus v. Reno Newspapers, Inc., 118 Nev. ___, ___, 57 P.3d 82, 87 (2002).

[3]Harrington v. Syufy Enters., 113 Nev. 246, 248, 931 P.2d 1378, 1379 (1997).

[4]11 U.S.C. § 524(a) (2000) provides, in pertinent part:

(a) A discharge in a case under this title –

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trial court determined that the discharge of Jaster's judgment in bankruptcy voided the judgment, thereby tolling the statute of limitations on its renewal until the discharge was revoked. Jaster argues that the district court erred by so concluding because: (1) 11 U.S.C. § 727(d) (2000) provides that a discharge is subject to revocation[5]; and (2) the Ninth Circuit Court of Appeals has held that 11 U.S.C. § 524 does not ab initio void a liability, but merely bars its legal recovery.[6] Jaster further argues that renewing a judgment is not the commencement or continuation of an action or an attempt to collect the debt but merely a ministerial act to maintain the status quo, and, therefore, was not barred by 11 U.S.C. § 524(a)(2).

Courts are split on the issue of whether 11 U.S.C. § 524(a) voids the underlying debt or provides a legal bar to the recovery of the debt.[7] This court construes a statute first by looking to the plain language

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> (1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section 727, 944, 1141, 1228, or 1328 of this title, whether or not discharge of such debt is waived;
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> (2) 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 . . . .

[5]In re Emery, 132 F.3d 892, 895 (2nd Cir. 1998).

[6]In re American Hardwoods, Inc., 885 F.2d 621, 626 (9th Cir. 1989).

[7]Compare In re Munoz, 287 B.R. 546, 556 (B.A.P. 9th Cir. 2003) (recognizing that 11 U.S.C. 524(a)(1) makes judgments void ab initio,

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of the statute to give effect to the legislature's intent.[8] If the language is ambiguous, we may then consider reason and public policy to adduce the legislature's intent.[9]

We conclude that the language of 11 U.S.C. § 524(a) is clear. The statute both voids the judgment of personal liability and operates as a legal bar to its recovery. Once a judgment is discharged, the judgment is voided, but the underlying debt is not, as creditors may pursue other persons or entities that are liable on the same underlying debt,[10] and the discharge may be revoked if shown that it was fraudulently obtained.[11]

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which reflects Congressional intent to allow a debtor "to ignore a creditor's subsequent action on a discharged debt in a nonbankruptcy court"); In re Birney, 200 F.3d 225, 228 (4th Cir. 1999) (holding that the discharge in bankruptcy extinguished the underlying personal debt); and In re Presley, 288 B.R. 732, 736 (Bankr. W.D. Va. 2003) (noting that the personal liability of a debtor is void upon discharge); with In re American Hardwoods, Inc., 885 F.2d at 626 (stating that "[a] discharge under section 524(a)(2) does not void ab initio a liability" but, like a permanent injunction, "constructs a legal bar to its recovery"); In re Keeler, 257 B.R. 442, 445 (Bankr. D. Md. 2001) (stating that "[t]he discharge granted by the bankruptcy court does not extinguish the indebtedness or cause it to be satisfied"); and In re Dabrowski, 257 B.R. 394, 413, 415 (Bankr. S.D. N.Y. 2001) (holding that while a landlord could not seek recovery of the discharged retroactive rent from the debtor, the landlord could proceed in rem to recover possession of the rented premises because the discharge did not extinguish the underlying debt).

[8]A.F. Constr. Co. v. Virgin River Casino, 118 Nev. ___, ___, 56 P.3d 887, 890 (2002).

[9]Id.

[10]11 U.S.C. § 524(e) provides, in pertinent part, that the "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt."

[11]11 U.S.C. § 727(d)(1).

Because the judgment is void upon discharge, renewal of the judgment would be futile. The law does not require performance of a futile act.[12] Moreover, although the act of renewal does not, by itself, subject the debtor to recovery proceedings, it prolongs the ability to execute on the judgment, and, therefore, indirectly seeks to "collect, recover or offset" the debt, as proscribed by 11 U.S.C. § 524(a)(2). This result would be in accord with the policy behind bankruptcy to afford the debtor a fresh start.[13] Furthermore, an attempt to renew the discharged judgment might have subjected the respondents to sanctions and civil contempt for flouting the proscriptions of 11 U.S.C. § 524(a).[14] We conclude, therefore, that the district court did not err by determining that 11 U.S.C. § 524(a) precluded respondents from renewing the judgment while it was discharged, and that they did not commit malpractice by failing to do a purposeless ministerial act.

The next issue is whether the district court erred by concluding that 11 U.S.C. § 108(c)[15] tolled the statute of limitations on the

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[12]Alldredge v. Archie, 93 Nev. 537, 543, 569 P.2d 940, 944 (1977).

[13]Green v. Welsh, 956 F.2d 30, 33 (2nd Cir. 1992) (explaining that section 524 was meant "'to insure that once a debt is discharged, the debtor will not be pressured in any way to repay it'" (quoting S. Rep. No. 989, at 80-81 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5866)).

[14]In re Brantley, 116 B.R. 443, 447-48 (Bankr. D. Md. 1990) (holding a creditor and her attorney jointly and severally liable for the amount collected on a discharged judgment because the creditor and her attorney were aware that the judgment had been discharged); In re Olson, 38 B.R. 515, 518 (Bankr. N.D. Iowa 1984) (stating that "[i]t is well settled that a willful violation of § 524 may constitute contempt").

[15]11 U.S.C. § 108(c) (2000) provides:

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judgment during the time the judgment was void. Jaster contends that 11 U.S.C. § 108(c)(2) only provides a thirty-day saving provision upon the revocation of a discharge, but does not otherwise toll the limitation period on a judgment while the judgment is discharged. Therefore, he alleges that the respondents committed malpractice by failing to renew the judgment within thirty days after the discharge was revoked.

11 U.S.C. § 108(c) does not, by itself, stay the running of a statute of limitations period but incorporates a state's suspension of deadlines. The purpose of the thirty-day savings provision is to protect the claims of creditors who could not pursue their claims because of the discharge in the event that state law does not toll the statute of limitations. Here, however, NRS 17.150(2) tolled the limitations period

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> (c) Except as provided in section 524 of this title, if applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor, or against an individual with respect to which such individual is protected under section 1201 or 1301 of this title, and such period has not expired before the date of the filing of the petition, then such period does not expire until the later of –
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> (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or
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> (2) 30 days after notice of the termination or expiration of the stay under section 362, 922, 1201, or 1301 of this title, as the case many be, with respect to such claim.

while the judgment was discharged.[16]

Next, we take this opportunity to distinguish O'Lane v. Spinney[17] from the case at hand. The holding in O'Lane applied to a judgment that had been stayed, not to one that had been discharged. In O'Lane, we held that the automatic stay provision of 11 U.S.C. § 362 did not toll the running of the statute of limitations on a judgment and that the ministerial act of renewal did not violate the stay provision because it was not an attempt to ""create, perfect, or enforce" a lien against property of the [debtor's] estate,'" and section 362 did not "explicitly prohibit acts to extend, continue, or renew otherwise valid statutory liens.'"[18] We further concluded that 11 U.S.C. § 108(c)(1) did not toll the expiration of the judgment while the judgment was stayed, and even if 11 U.S.C. § 108(c)(2) allowed the creditor an additional thirty days after the stay was lifted to renew her judgment, she failed to do so within the thirty days.[19] Here, in contrast, the judgment was discharged, not merely stayed. The ninety-day window of opportunity to renew the judgment provided by NRS 17.214 did not arrive until after the judgment was discharged. Hence, the judgment could not have been renewed when the time was ripe to do so because there was no longer a judgment to renew. Unlike the stay in O'Lane, the

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[16]NRS 17.150(2) provides, in relevant part, that "[t]he time during which the execution of the judgment is suspended by appeal, action of the court or defendant must not be counted in computing the time of expiration."

[17]110 Nev. 496, 874 P.2d 754 (1994).

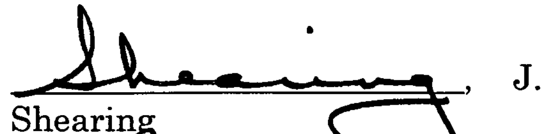
[18]Id. at 499, 874 P.2d at 756 (quoting In re Morton, 866 F.2d 561, 564 (1989) (quoting 11 U.S.C. § 362(a)(4))).

[19]Id. at 498-99, 874 P.2d at 755-56.

discharge tolled the statute of limitations and the time in which Jaster was required to renew the judgment.

Finally, while Jaster's suggestion that respondents should have resolved the doubt as to the renewal requirement on the judgment by seeking clarification from the bankruptcy court may have been the most prudent course of action, the failure to do so does not rise to the level of malpractice. Respondents are not held to the most prudent course of action, but to the prudence and diligence of lawyers of ordinary skill.[20] An ordinary prudent lawyer would rely on the language of 11 U.S.C. § 524(a) to conclude that the judgment was void, that renewal would be futile and that clarification from the bankruptcy court was not necessary.

For the foregoing reasons, we ORDER the judgment of the district court AFFIRMED.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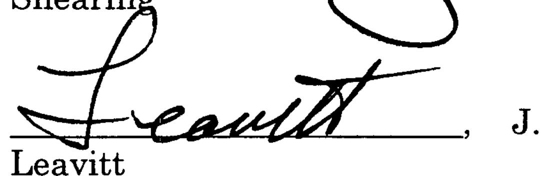
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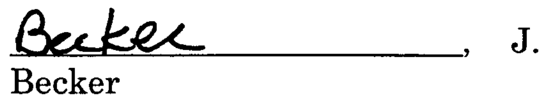
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cc: Hon. Allan R. Earl, District Judge
Johnson Flora, PLLC
Potter Law Offices
Jones Vargas/Las Vegas
Clark County Clerk

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[20]Day v. Zubel, 112 Nev. 972, 976, 922 P.2d 536, 538 (1996).