Bankruptcy Newsletter
March, 2017

**Attorney Fees and Punitive Damages Granted to Tenant Debtor against spiteful Landlord**

In the case of *In re Baxter*, 74 Collier Bankr. Cas.2d 901, a debtor tenant fell behind on her monthly rent payments. She was a recipient of Section 8 funding. The lease agreement between the tenant and landlord in the event of litigation, contained a provision that awarded the prevailing party reasonable attorney fees. After failing to pay her rent for two consecutive months, her landlord filed a lawsuit for each violation of the rental agreement and was granted money damages and a right to repossess the apartment. The debtor tenant filed for Chapter 7 bankruptcy on October 18, 2013. On October 21, 2013 the landlord filed petition for warrants of restitution on of possession of the Property, because the debtor had not yet complied with the district courts judgments against her. The landlord was not yet aware of debtor's bankruptcy filing, but became aware of the bankruptcy when he received Notice of Meeting of Creditors. On October 29, 2013 the District Court entered orders directing the sheriff to evict debtor. This order was declined by the sheriff once he learned of the debtor's bankruptcy. Consequently, the landlord filed a Motion for Stay for Relief from Stay to Permit Execution of Possession Order. The debtor failed to answer and the Order was issued on December 16, 2013. With a scheduled eviction for January, 9, 2014, the debtor/single mother was distraught but her eviction was legal under the law. Additionally, due to her legal problems, debtor fell out of compliance with the requirements of her Section 8 housing and lost her funding.

Finally, the debtor was granted a Chapter 7 discharge which include all debts owing to her former landlord. However, on February 7, 2014 the former landlord filed suit for breach of contracts on money that was discharged in the debtors Chapter 7. Reaching her breaking point, the debtor obtained legal assistance from a local non-profit and reopened her bankruptcy to defend the Post-Discharge Lawsuit. Two conclusions of law were made: i) the landlord did not violate the automatic stay; but ii) the landlord did violate the discharge injunction ans was found liable for damages, punitive damages, and attorney fees.

The automatic stay was not violated because the post-petition action to recover possession of the apartment was within the broad exception of 362(b)(22) which permits the continuation of an eviction proceeding when a landlord has obtained a judgement for possession, unless the debtor fails to comply with 362(l) which the debtor did not.

The landlord was found to have violated section 524(a)(2) which prohibits the commencement or continuation of an action...to collect, recover or offset any [discharged] debt as a personal liability of the debtor." Because the landlord attempted to collect debt post discharge he opened himself up to damages. The Court awarded $1,000 in damages, $5,000 in punitive damages, and attorney fees. The court would have awarded damages for emotional distress for civil contempt, but these damages were not available in the Fourth Circuit, the Sixth Circuit does not permit emotional distress damages in bankruptcy either. However, there is a potential cause of action under tort law.

**Procedural end run around 523(a)(8)'s exceptions to discharge of student loans shot down**

Discharging student loan debt in bankruptcy is extremely difficult if not impossible. Nonetheless, debtors continue to take shots at perceived weak points in the law. Recently, a law school graduate attempted to discharge a loan she obtained for the specific purpose of preparing for the California bar examination. The debtor attempted this action not on the merits of the facts, but rather on a procedural technicality. In the case of In re Brown, 539 B.R. 853 (2015), the debtor actually received a discharge for a debt listing "Citibank N.Y. State" as a creditor but otherwise gave no other details. The discharge was granted on December 29, 2014. On December 12, 2014, the debtor (Brown), filed an adversary proceeding. Brown, based her argument in this proceeding under the belief that section 523(a)(8)'s nondischargeability provisions were not applicable to her loan, i.e. her loan was not an "educational loan". Citibank never responded or otherwise participated in the adversary hearing. Brown then brought a motion for default judgment. Several hearings were held and the court asked Brown to provide additional information on the loan before analyzing her claim.
Under 523 (a)(8), the following claims are excepted from discharge: i) any educational benefit…made under any program funded by a governmental unit or nonprofit; ii) obligations to repay funds used as an educational benefit; iii) educational loans that qualify as such under the Internal Revenue Code.

Although the court asked for specific information about the loan, Brown provide none and merely made a blanket statement that the loan was not from a governmental unit or nonprofit. The court rejected this reiteration of the statute finding that she did not "prove" her claim and was not entitled to judgment based on this provision. As to the second exception, the court relied on *In re Corbin*, 506 B.R. 287 (2014), and In re Skipworth, Bankr. N.D.Ala. (2010) to determine the status of the loan type. Citing to Corbin, the court held that the trend in the Ninth Circuit and elsewhere is to interpret 523(a)(8)(ii) broadly. The court in Corbin concluded the following: "it appears that almost any obligation incurred for the purpose of paying an education-related expense is excepted from discharge". Looking to Skipworth, the facts were nearly identical to those in Brown, with the exception that the debtor took his loan while enrolled in law school as opposed to the debtor Brown who took her loan out after she had graduated. This difference was not considered to be a material difference, as a result her loan was excepted from discharge under this provision as well. The third exception to discharge under 523(a)(8)(iii) was found not to apply based on the fact that the IRS code has language regarding "eligible student", and because Brown was not a student at the time she took the loan.

In conclusion the court found that the loan was excepted from discharge under 523(a)(8), even though the debtor fulfilled the procedural requirements of FRCP 55(a). The court rejected this argument stating that a two-step approach is required for a nondischargeability proceeding: 1) entry of the party's default and 2) entry of a default judgment. The Court then set forth the seven factors allowed for consideration in the Ninth Circuit for reviewing a motion for default: 1) prejudice to the plaintiff, 2) merits of plaintiff's substantive claims, 3) sufficiency of the complaint, 4) sum of money in the action, 5) possible dispute of material facts, 6) default due to excusable neglect, 7) strong policy of FRCP favoring decisions based on the merits. The court here placed great weight on the second, third, and fourth factors. Ultimately the court decided that her loan was excepted from discharge, and the motion for default judgment was denied because her complaint was insufficient as a matter of law.