No. _____

In The
Supreme Court of the United States

MICHAEL EISENBERG,

Petitioner,

v.

SHIRLEY SWAIN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLOMBIA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The undisputed facts and circumstances demonstrate that the lower courts' decisions lack both factual and legal sufficiency – simply put, pursuant to *Bingham v. Goldberg, Marchesano, Kohlman, Inc.*, they are wrong. The lower (local) courts have demonstrated a failure to understand and properly implement federal bankruptcy law.

I. Whether a local court can order release of core bankruptcy funds when it does not assume concurrent jurisdiction per 28 U.S.C. § 1334 (b)

II. Whether a local court can create *ad hoc* federal bankruptcy law by misapplying federal bankruptcy laws when it (finally) carries out its concurrent jurisdiction per 28 U.S.C. § 1334(b).

III. Whether a local court's orders (and subsequent orders) are void *ib abnito* when premised on a failure to assume jurisdiction based on 28 U.S.C. § 1334(b) or fails to execute federal bankruptcy laws based on law and fact.

PARTIES TO THE PROCEEDING

All parties are contained in the case caption.

STATEMENT OF RELATED CASES

There are no Related Cases.

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The Court of Appeals for the District of Columbia affirmed the Superior Court for the District of Columbia's Order. The Order is available at: Appendix 1a.

The Superior Court for the District of Columbia denied Petitioner's Motion to Reopen and Dismiss Respondent's Bankruptcy Discharge based on Respondent's fraudulent acts. The Decision is available at: Appendix 23a.

STATEMENT OF JURISDICTION

Petitioner petitions this Court, pursuant to its rules, from the District of Columbia's Court of Appeals July 30, 2020, denial of discretionary review. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

STATUTES AT ISSUE

11 U.S.C. § 362: Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities …

11 U.S.C. § 523(a)(2)(A) **(a)** A discharge under section 727, 1141, 1192 [1] 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt **(2)**for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by **(A)** false pretenses, a false

representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;

11 U.S.C. § 523(a)(3)(B) **(3)** neither listed nor scheduled under section 521(a)(1) of this title, with the name, if known to the debtor, of the creditor to whom such debt is owed, in time to permit **(B)** if such debt is of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim and timely request for a determination of dischargeability of such debt under one of such paragraphs, unless such creditor had notice or actual knowledge of the case in time for such timely filing and request;

11 U.S.C. § 727(a)(2) :The court shall grant the debtor a discharge, unless—(2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed—property of the debtor, within one year before the date of the filing of the petition; or property of the estate, after the date of the filing of the petition.

28 U.S.C. § 455 Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

28 U.S.C. § 1334(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

28 U.S.C. § 1334(b) Except as provided in subsection (e)(2), and notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

28 U.S.C. § 1334(e)(2). The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction. **(2)** over all claims or causes of action that involve construction of section 327 of title 11, United States Code, or rules relating to disclosure requirements under section 327.

STATEMENT OF THE CASE

The lower local courts have misapplied and misinterpreted federal bankruptcy law. They first declined to assume available concurrent jurisdiction as it related to federal bankruptcy funds leaving Petitioner to petition the Federal Bankruptcy Courts (BC) for relief. The BC noted that Petitioner did not get proper notice of Respondent's bankruptcy and deemed the debt she owed Petitioner may not actually be discharged. But it declined to intervene as it found the local court had concurrent jurisdiction and would have more familiarity with the matter.

Upon Petitioner's return of the matter to District of Columbia Superior Court, Judge Pan (the third judge in this matter), found Respondent's discharge valid. Her Order erred in both finding that Respondent had provided proper notice to Petitioner and that she had not committed fraud; both by converting money not her own (under Virginia law) and swearing formal documentation to the BC that

failed to identify the proper debtor and how she obtained money not her own. The District of Columbia Court of Appeals (DCCA) further erred by upholding SCDC's decision given mistake and error of both fact and law.

ARGUMENT

A. As a matter of federal bankruptcy law, the lower courts' Orders Must be overturned.

i. The lower courts' decisions to discharge the debt was clearly erroneous.

In the March 1, 2019, Order, SCDC discharged the debt owed to the Petitioner by the Respondent. While the Judge was insistent this was a "run of the mill my-client-didn't-pay-me-case", that is not true. This is not a contract matter, rather it is a Bankruptcy matter. The issue is whether the underlying judgment was discharged given the accusations Respondent committed a felony by larceny and a felony by fraud. These acts occurred in Virginia where she has maintained a residence and received and converted these moneys. Further, Respondent committed Fraud by False Filings with BC.

SCDC fails to provide any statute, regulation or case law to support the Order: The Judge presumably and incorrectly based her decision on the local laws for the District of Columbia.[1] But, the law for the State of Virginia would apply since the nucleus of facts occurred in Virginia: Respondent, a resident of Virginia, received, converted and filed fraudulent

[1] Or her own predications given she acknowledged Petitioner's arguments: "I understand your argument." Eisenberg, February 25, 2019, Trans. pg. 16, ln 10.

documents in a Virginia federal bankruptcy court to keep moneys not her own.

Last, Respondent admitted that she had no legal basis to keep the money.

a. Federal Bankruptcy Law prohibits the discharge of debt obtained through Fraud.

11 U.S.C. § 727(a)(2),

> The court shall grant the debtor a discharge, unless—(2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed—property of the debtor, within one year before the date of the filing of the petition; or property of the estate, after the date of the filing of the petition.

Besides the language of 11 U.S.C. § 727(a)(2), 11 U.S.C. § 523(a)(2)(A) states that even if Respondent were to qualify to have her bankruptcy processed, she could be disqualified from having Petitioner's moneys discharged "(2) for money, property, services...to the extent obtained by – (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition." The facts of this case clearly demonstrate that Respondent had Petitioner's money and actively concealed and

converted Petitioner's property to herself rather than transfer these moneys, $7,000.00, to Petitioner. By Virginia State Law[2], Respondent has admitted that she committed fraud via larceny, i.e., conversion.

According to *In re Phillips*, 2017 WL 1900220, the claimant must (1) identify which property the debtor concealed or transferred (*sub judice*, the contingency fee [and outstanding retainer] following the settlement of Respondent's EEOC case), and (2) show it was actually the Respondent, and not some third party, who was responsible for concealing or transferring the creditor's property (*sub judice*, Respondent has always maintained that she had Petitioner's moneys [as provided to her by the Government and as previously agreed to by the Parties] until she *used them as her own*).[3] Given that both requirements are satisfied by Respondent's actions, her bankruptcy claim to discharge Petitioner's fees must be dismissed.

The Bankruptcy Appellate Panel of the Eighth Circuit has articulated four factors to consider when applying the combination of statutory language to determine whether there is evidence of fraud in a bankruptcy case. In *In re Grimlie*, the Panel held that "(1) the act complained of occurred within one year prior to the petition date; (2) the act was that of the debtor; (3) it consisted of a transfer, removal, destruction or concealment of the debtor's property; and (4) it was done with an intent to hinder, delay, or defraud either a creditor or an officer of the estate." *In re Grimlie,* 439 B.R. 710, 716 (B.A.P. 8th Cir. 2010).

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[2] See further discussion in subsection 1, *infra*.

[3] See *Eisenberg*, September 22, 2015, Order.

Furthermore, "[t]he elements of false oath under § 727(a)(4)(A) are: the '(1) Debtor made a statement under oath; (2) the statement was false; (3) Debtor knew the statement was false; (4) Debtor made the statement with fraudulent intent; and (5) the statement related materially to the Debtor's bankruptcy case.'" *In re Freese,* 460 B.R. 733, 738 (B.A.P. 8th Cir. 2011).

1. Respondent obtained Petitioner's money with Fraud by Larceny under Virginia State Law.

Virginia sovereignty, not D.C. local law, is the proper legal standard for fraud based on the traditional "choice of law" rules. *Drs. Groover, Christie & Merritt, P.C. v. Burke*, 917 A.2d 1110, 1117 (D.C. 2007). The location of Respondent's actions all occurred in Virginia. Respondent was a resident of Virginia, obtained the money at her residence, and converted the money in Virginia.

Virginia case law provides:

> In *United Leasing Corp. v. Thrift Ins. Corp.*, 247 Va. 299, 305, 440 S.E.2d 902, 905, 10 Va. Law Rep. 1015 (1994) (quoting *Universal C.I.T. Credit Corp. v. Kaplan*, 198 Va. 67, 75, 92 S.E.2d 359, 365 (1956)), [the Supreme Court of Virginia] stated that the tort of conversion "encompasses 'any wrongful exercise or assumption of authority . . . over another's goods, depriving him of their possession; [and any] act of

> dominion wrongfully exerted over property in denial of the owner's right, or inconsistent with it.'

PGI, Inc. v. Rathe Prods., Inc., 576 S.E.2d 438, 443, 265 Va. 334, 344, 2003 Va. LEXIS 35, *14-15 (Va. Feb. 28, 2003). The following took place in the State of Virginia where Respondent resides. Respondent received the money in dispute. The money Respondent received was already agreed upon by the parties to be Petitioner's money. Respondent knew this when she received it. She knew this when she converted these moneys for her own use. Respondent knew this would deprive Petitioner of his property. These actions violate Virginia's Fraud by Larceny through Conversion laws.

Any doubt she did not commit a felony by fraud through conversion is removed by Respondent's own admission. "the defendant acknowledged that she received the settlement proceeds (including the $7,000 due to the plaintiff) and deposited these funds into her bank account" and did not provide Petitioner moneys they had agreed to were already his. See *Eisenberg September 22, 2015, Order Granting Petitioner's Motion for Summary Judgment* at 2. There is no doubt she committed a felony.

The Bankruptcy code prohibits the discharge of funds obtained by fraud. Respondent obtained the $7000 (the money she had agreed with Petitioner was his before she received it) by fraud. Respondent admitted the funds were Petitioner's money. Thus, this amount cannot be discharged through a Bankruptcy action. The Bankruptcy Discharge must

be dismissed, and the funds immediately returned to Petitioner with interest.

2. Respondent obtained Petitioner's money with Fraud by false filings in federal court.

Respondent asserted to BC in pleadings under oath before her discharge were felonious in two aspects.

First, Respondent identified in her Chapter 7 application that Accounts Receivable not Petitioner was the proper creditor. This statement is false. The appropriate creditor has always been Petitioner – never his collection agency, Accounts Receivable. See *In re Swain* under 11 U.S.C. § 521(a)(1)(A). Even Judge Paul M. Black was perplexed as to why Respondent, who was represented by counsel, did not properly notify Petitioner "well known to the debtor, especially given the garnishment order and her previous Chapter 13 filing in which she specifically listed Eisenberg by name." *In re Swain*, No. 16-70898, 2018 Bankr. LEXIS 2027 (Bankr. W.D. Va. July 5, 2018).

Second, that Respondent had Petitioner's money. Respondent failed to inform BC that the fees owed to Petitioner were fraudulently transferred to herself. See discussion in subsection, *supra*. Petitioner had continuously reminded her that the money was his, i.e., Respondent knew she was keeping money not her own. She admitted as much before the lower court. See *Eisenberg,* September 22, 2015, Order.

The Bankruptcy code prohibits the discharge of funds obtained by fraud. As argued, Respondent failed to identify truthfully how she obtained Petitioner's $7,000. Thus, her Bankruptcy discharge for the entire $7,800[4] should be dismissed, and the funds immediately returned to Petitioner with interest.

b. By failing to Answer the Court's December 4, 2018, Order, Respondent conceded this debt was not discharged.

The lower court docket appears void of Respondent filing a substantive response to the Court's December 4, 2018, Order to file her opening brief on the discharge-of-debt issue. Based on this failure alone, the lower court should have treated the matter as conceded by Respondent. [5] Since Respondent did not discharge her debt to Petitioner through her Bankruptcy, she still owes these funds to Petitioner.

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[4] Granted, the $7,000 is the money Appellant has alleged Appellee defrauded him. But, the $800 is still part of Appellee's Chapter 7 debt that Appellant is attempting to dismiss. And since, as discussed in § i.2, they are part of Appellee's alleged fraudulent Bankruptcy Court filings, are also recoupable by Appellant.

[5] Although there appears to be no controlling law on a party's failure to respond to a court's order, we have seen in cases like *District of Columbia v. Houston*, 842 A.2d 667 (D.C. 2004) and *Perry v. Sera*, 623 A.2d 1210 (D.C. 1993) where the Court will treat a party's failure to respond as concession to the issue being raised by the opposing party.

c. Respondent concedes that Judge Pan has no legal basis to justify the discharge of this money.

Petitioner had received from Judge Pan's chambers a copy of a letter Respondent addressed to Judge Pan. This letter appears not to have been filed by Respondent with the Clerk of Court – the docket is void of such filing and there was no certificate of service included with the letter (or filing fee). (Petitioner was never given an opportunity to respond to this filing.). Assuming *arguendo* that the letter was provided to the Court's docket as "filed" (something Petitioner does not concede as true), her letter is void of any law that would justify her discharging this debt. **Respondent NEVER denied that this sum is not Petitioner's money.** Respondent does reference the sanctions matter before the lower court; but as articulated in Petitioner's January 10, 2019, Brief and January 24, 2019, Reply Brief, the sanctions are inappropriate. Further, even if sanctions are ordered, it does not relieve Respondent of the responsibility of providing Petitioner with his funds.

ii. <u>Judge Pan exceeded her authority when she overturned Judge Dixon's final decision.</u>

Judge Pan overturned Judge Dixon's final decision in her March 1, 2019 Order: "…that the judgment in favor of plaintiff that previously was entered in this case on September 22, 2015, is hereby vacated." Decision 10. This is not within her power. One trial judge cannot overrule another after a final order has been given. *Christopher v. Aguigui*, 841 A.2d 310, 314 (D.C. 2003). Judgment was made against Respondent. She had to provide Petitioner his

money. The Order was issued by Judge Dixon on September 22, 2015, not Judge Pan.

This case was reopened for the limited purpose of determining if this debt was discharged through the Federal Bankruptcy process. While the debt may be discharged through Bankruptcy proceedings, Bankruptcy proceedings did not overturn Judge Dixon's findings. Per *Christopher*, it was not within her power to overrule Judge Dixon's September 22, 2015, Order as explicitly done almost four years later in her March 1, 2019 Order. Judge Pan's overreach only highlights her bias against Petitioner.[6]

B. Judge Pan's Sanctions Must Be Overturned as They Are Not Based In (Federal Bankruptcy) Law and Fact.

i. Standards of Law - Imposition of Civil Sanctions

Under SCDC Rule 70(e), "The court may also hold the disobedient party in contempt." But this is not an absolute if the Order is Void, e.g., per SCDC Rule 60(e). Indeed, our Court of Appeals opined:

> It is true that "[v]oidness of a court order is an absolute defense" to a contempt charge, and that disobedience of a void order may not be punished as contempt. See *In re Banks*, 306 A.2d 270, 273 (D.C. 1973) (stating that a void order "could be disobeyed with impunity"). But a court order is void "only if the court that entered it had no jurisdiction over the parties or the

[6] See discussion in I.C, *infra*.

> subject matter, or if the court's action was otherwise so arbitrary as to violate due process of law."

Shewarega v. Yegzaw, 947 A.2d 47, 51 (D.C. 2008) (Some internal citations omitted.)

ii. Argument

a. Petitioner is not in Civil Contempt of the lower court's February 23, 2017, Order as the Order was Void as a matter of law.

The lower court has the power to hold a party in contempt for defying a court order. See SCDC Rule 70. After the charged party has had an opportunity to respond in writing, the lower court can levy a fine against the accused party if it finds he defied an order of the lower court. But that power is not absolute. As discussed in detail below, Petitioner cannot be held in contempt for *allegedly* violating the lower court's February 23, 2017, Order as it was VOID *ib abnito*. Further, Petitioner cannot be held in contempt of court for allegedly violating an Order that was neither sufficiently clear nor unambiguous. Last, Petitioner cannot be held in contempt for behavior that was open but never deceptive nor dishonest.

On or about September 22, 2015, the lower court issued an opinion that Respondent owed Petitioner $7,800. To date, Respondent has not willingly made any payment of Petitioner's money. On or about April 26, 2016, Petitioner requested a garnishment to collect money owed to him; the lower court Ordered that said garnishment be Granted. On or about October 17, 2016, Mr. Ester Moses contacted

Petitioner advising him to stop the garnishment [7] because Respondent had successfully [8] obtained a Chapter 7 Bankruptcy discharge of her debt to Petitioner.[9] *Eisenberg*, November 25, 2018, Order, at 50.

Petitioner moved to have the Garnishment stopped. Judge Irving Ordered the Garnishment to be stopped. See *Eisenberg*, November 10, 2016, Order. The Order was void regarding returning any of the Garnished money. Inexplicably, the Clerk of Court ordered the garnished money be returned to Respondent. See *Eisenberg*, November 17, 2016, Order.

Petitioner moved for a stay pending the action of resolution in BC. Judge Pan denied the Motion. Judge Pan essentially opined that Respondent should not have to wait for her money pending the Bankruptcy matter. But she failed to provide any legal basis to support her *opinion*. See *Eisenberg*, February 23, 2017, Order. The lower court further declined to entertain the Bankruptcy issue and relinquished jurisdiction of that issue to BC. Id.

If this case was solely within the local jurisdiction of the lower court and Petitioner did not comply with the lower court's February 23, 2017, Order to relinquish the contested moneys to Respondent **then** Petitioner may likely be held in

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[7] Unbeknownst to Petitioner, Respondent and Mr. Moses had not properly discharged the debt; in other words, as discussed by BC, the debt was not actually discharged.

[8] Albeit improperly if not illegally. See V.A.i.a., *supra*.

[9] Note that Respondent first filed her Chapter 7 petition on or about July 5, 2016. Attachment B at 1.

contempt for violating the lower court's Order. But, as discussed in more detail below, the lower court at the time chose to relinquish its jurisdiction over the disputed money[10] as it pertained to the bankruptcy issue and send it to BC. *Id*. Furthermore, the lower court remained silent on any justification based on controlling federal bankruptcy law to support its order to release the garnished funds. Lastly, the lower court remained silent as to **when** the garnished money must be returned. Thus, Petitioner acted accordingly in taking the matter to BC and maintaining his funds in his trust account the money that at its "core" related to the bankruptcy issue.

1. Judge Pan did not have (as she never assumed) substantive jurisdiction over Petitioner. Federal Bankruptcy Law has exclusive jurisdiction over the money garnished by the lower court for which she initially declined to assume jurisdiction.

Judge Pan's inference that her court had jurisdiction over the money simply because it has personal jurisdiction over Petitioner is incorrect. See *Eisenberg*, March 1, 2019, Order at 5. Although Judge Pan could exert personal jurisdiction over Petitioner, she did not assume, as she believed she did not have, substantive jurisdiction when she made her February 23, 2017, Order to return the Garnished funds as they were solely controlled by Federal Bankruptcy Law: Recall, she had declined to assume substantive

[10] Note: At all times relevant, the disputed funds were held in Petitioner's trust account.

jurisdiction over the bankruptcy issue when she made her vague Order to "release" said funds.

A court must have both personal and substantive jurisdiction over a party in order for it to have jurisdiction. *Slater v. Biehl*, 793 A.2d 1268, 1271 (D.C. 2002). At this point, the lower court did not have substantive jurisdiction to base on Order that Petitioner allegedly violated.

There is an automatic stay of orders from other jurisdictions regarding proceedings to obtain control of the debtor's estate in Federal Bankruptcy matters. 11 U.S.C. § 362 (LexisNexis, Lexis Advance through PL 115-281, approved 12/1/18). "A garnishment, attachment or supplemental proceeding against the bankruptcy trustee cannot be maintained without relief from stay and/or prior leave of the appointing bankruptcy court. Because this was not granted, the [state] action was void and could not give rise to a lien in the Bank's favor…" *Shuford v. Citizens S. Bank (In re Yatko)*, 416 B.R. 193, 201 (Bankr. W.D.N.C. 2008).

> [R]ead broadly [the state court judgment granting a lien against the Bankruptcy estate, e.g., the debtor's monies] could also be considered to be an encroachment on the exclusive federal subject matter over the bankruptcy estate and over decisions such as 'who gets what monies out of an estate' and 'when they get it.' Id at 200. Further, the state court judgment "… runs afoul of 28 U.S.C. § 959."

Id. at 201.

Conversely, it can be argued that it would encroach upon the exclusive jurisdiction of BC to make any order about related money not in its possession (through an appointed "trustee"). The question begs did Respondent and her attorney, Mr. Moses, correctly list this money as an asset when initiating her Chapter 7 Discharge. Or, at a minimum, update the trustee regarding these funds when Mr. Moses contacted Petitioner about the Chapter 7 Discharge. The record is void of Respondent or her counsel doing either.

- *The Money of which the Order to Release the Funds At Issue is at its "core" controlled by Federal law and can only be controlled on a basis of Federal law.*

Petitioner does not dispute that the lower court had the authority to extinguish the garnishment (versus the "garnished funds"). The September 22, 2015, Summary Judgment Order issued by Judge Dixon (retired) related to Petitioner's collections case against Respondent. This leads to an important distinction. The question at hand does not relate to the validity of the garnishment order. Instead, what is at issue is the *money* collected via the garnishment ("garnished money") of Respondent's wages.

Petitioner's garnishment of Respondent's wages was related to Respondent's failure to list Petitioner as a creditor as part of her Chapter 7 bankruptcy case in 2016. The money collected via the garnishment is related to her attempt to discharge this debt. Thus, this money part of the "core" bankruptcy proceedings is controlled by federal law. In other words, the lower court, at a minimum, did

not have exclusive jurisdiction over the money in question.[11]

- *The Core Jurisdiction of the Garnished Money Is Governed by Federal Law.*

11 U.S.C. § 362 controls in this matter. Defined *supra*.

The 11th Circuit examined a similar issue in *In re Brickell*, involving creditors' rights to a garnishment order following a discharge of a Chapter 7 bankruptcy proceeding. The court held that the federal court had jurisdiction over "all core proceedings…in a case under title 11." *In re Brickell*, 142 Fed. Appx. 385, 389 (11th Cir. 2005) (citing 28 U.S.C. § 157(b)(1). The court goes on to define "core proceedings" as "not limited to, matters concerning the administration of the bankruptcy estate, the allowance or disallowance of claims against the estate, proceedings affecting the adjustment of the debtor-creditor relationship, and determinations of the validity, extent, or priority of liens against the estate." *Id.;* see also *Block v. Ocobee Reg'l Med. Ctr., Inc.*, 2018 U.S. Dist. LEXIS 74119.

The 11th Circuit went on to examine how to correctly determine whether a matter is "related to" a bankruptcy case. "'An action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate.'" *In re Brickell*, 142 Fed. Appx. at

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[11] Judge Pan could have exerted jurisdiction over the money but chose not to. See fn 13, *infra*.

389 (11th Cir. 2005) (quoting *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984)). The federal court concluded that it had jurisdiction over the money obtained from the state/local garnishment[12] because the garnishment had a direct impact on how the proceeds of the bankrupt estate would be distributed. *In re Brickell*, 385 at 389. Therefore the garnishment was "clearly 'related to' the bankruptcy case." *Id.* (citing 28 U.S.C. § 1334(b)).

Under this same principle, the Bankruptcy Court for the Northern District of Alabama decided *HOC, Inc. v. McAllister*. The court held that BC lacked subject-matter jurisdiction over the proceedings because the garnishment at issue was unrelated to the bankruptcy matter. *HOC, Inc. v. McAllister*, 216 B.R. 957, 965 (N.D. Ala. 1998) (citing 28 U.S.C. § 157(c)(1). The same is therefore true conversely, where the garnished money at issue is related to the bankruptcy proceeding, federal

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[12] According to the Eleventh Circuit, Brickell's ex-husband filed for Chapter 7 bankruptcy and Brickell (i.e., the now ex-wife) hired a law firm to represent her in the matter. Approximately six months later, "the bankruptcy court granted the firm's request for leave to withdraw as [the ex-wife's] counsel." *In re Brickell*, 385 at 387. Two years later, "the firm obtained a state-court judgment against [the ex-wife] for unpaid legal fees…. The firm then filed a *writ* of garnishment in state court against the trustee [of the husband's bankrupt estate], seeking to collect any disbursements that [the ex-wife] was due from the bankruptcy estate. The state court issued a final garnishment judgment in favor of the firm. The firm served the garnishment judgment on the trustee." *Id.* The Eleventh Circuit held that the state court garnishment judgment obtained by the law firm, which had represented the ex-wife in the ex-husband's Chapter 7 bankruptcy proceedings, **was enforceable in bankruptcy court**. *Id.* at 391.

bankruptcy law has controlling subject-matter jurisdiction over the money.

Directly on point is *Shuford v. Citizens S. Bank (In re Yatko)*, 416 B.R. 193 (Bankr. W.D.N.C. 2008). The Creditor Bank sought a lien under state law against money that was part of a bankruptcy estate. The court in *Shuford* found even if the lien had been executed correctly, such state action would intrude into the exclusive jurisdiction of Federal Bankruptcy Law and could not stand. Interestingly, the *Shuford* Court found:

> From the [Bank-Creditor's] perspective, the [lien] was simply a cautious attempt to achieve a legitimate state law result, attachment of a judgment debtor's property, without offending these federal principles. I am sure this is true. However, at least on a technical basis, I agree with Shuford that the [lien] crossed the line into a protected area.

Shuford at 199. The *Shuford* Court further found that not only is the determination of the funds the sole discretion of the BC's trustee but that enforcing the lien would violate the automatic stay Federal Bankruptcy Laws have over a "…debtor's bankruptcy case (28 U.S.C. § 1334(a)) and his property (28 U.S.C. § 1334(e)) to the U.S. District Courts." *Id*. The lien ["…could also be considered to be an encroachment on the exclusive federal subject matter over the bankruptcy estate and over decisions such as 'who gets what monies out of an estate' and 'when they get it.'" *Id.* at 200.

- *Discussion*

In the present case, Petitioner obtained a summary judgment order by the lower court confirming that Respondent owed Petitioner $7,800. The garnished money collected by Petitioner out of Respondent's wages is directly "related to" Respondent's bankruptcy proceedings because Respondent started a second bankruptcy **after** the garnishment was executed. The debt and the garnished funds, as ruled *In re Swain*, was part of Respondent's alleged and poorly, if not illegally prepared, Chapter 7 filings. Respondent was trying to discharge her debt as evidenced by the letter her Chapter 7 Bankruptcy attorney sent Petitioner. The lower court stopped the garnishment pending the outcome of Respondent's second bankruptcy case. **But as with the liens in *Shuford* directly related to the respective bankruptcy proceedings, the money obtained via the garnishment directly relates to the outcome of Respondent's bankruptcy proceeding.**

Recall, the lower court originally declined to rule on the bankruptcy issue in its September 22, 2015, Order. It appears that Judge Irving recognized [13] that the lower court did not have jurisdiction over the garnished money as he made no mention of the garnished funds in his Order. Yet, the Court Clerk inexplicably issued an Order to return the garnished money.

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[13] Note: The court could have but did not assume jurisdiction over the Bankruptcy matter. See *In re Swain, Bankr. W.D. Va. Case No. 16-70898*, *In re Strano*, 248 B.R. 493, 496 (Bankr. D.N.J. 2000), § 523(a)(3)(B).

Immediately afterward, Petitioner mistakenly believed the lower court still had jurisdiction over the money and filed his January 27, 2017, motion to Stay with the lower court. This action alone does not create substantive jurisdiction in this court. As discussed above, federal bankruptcy law governs the funds at issue recovered by the garnishment. Later Judge Pan insisted the lower court did not have substantive jurisdiction in this matter (although the parties and lower court later learned it could have concurrent jurisdiction over the funds on the basis of federal law – see fn. 13). Thus, it refused to take jurisdiction over the federal issue. This included the "core" federal matter of the garnished funds. Therefore, any order by the lower court to return the garnished funds would be void *ib abnito*.

A court order is void "if the court that entered it had no jurisdiction over the parties or the subject matter, or if the court's action was otherwise so arbitrary as to violate due process of law." *Shewarega v. Yegzaw*, 947 A.2d 47, 51 (2008) citing *Kammerman*, 543 A.2d at 799 (internal citations omitted); see also *In re Marshall, 445 A.2d 5, 7 (D.C. 1982)* ("The court had jurisdiction of the party and of the subject-matter. Hence, however defective or erroneous the proceedings, the judgment was not void, and could, at most, be voidable.") (quoting *Hunter v. United States*, 48 App.D.C. 19,23 (1918)). Without subject-matter jurisdiction[14], the lower court could not have issued the November 17, 2016, and February 23, 2017,

[14] See fn 15, *infra*.

Orders to return the trust money covered by the Bankruptcy.[15]

In the hearing before the lower court on December 3, 2018, Judge Pan claimed that Petitioner should have sought relief from the lower court in the form of a motion for reconsideration or notice of disagreement, rather than simply "defying" the order. However, in the February 23, 2017, Order, Judge Pan concluded that BC was, in fact, the better place for matters related to the bankruptcy. *Id.* Given the direct connection, *supra*, between the garnished money and the bankruptcy issues, in this case, it follows that Petitioner then took this case to BC for adjudication there. While it may appear to Judge Pan

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[15] Local Rule 60 provides additional relief from the Court's February 23, 2017, Order. Local Rule 60 provides that relief from a court order can only be given "on motion and just terms" if the judgment is void. As summarized above, *supra*, the Order was void based on the Court's lack of subject-matter jurisdiction. It is therefore entirely "just" for Petitioner to treat the Order as void.

Recall that in the same February 23, 2017, Order, the lower court determined that it "[was] not in a position to evaluate the merits of Petitioner's motion to dismiss Respondent's bankruptcy." *Eisenberg*, February 23, 2017 "Order Denying Motion To Stay." Respectfully, the lower court's Orders are silent as to a time to comply in returning the garnished money. The alleged violation became more technical than willful given Rule 60 only requires that a party act in a reasonable amount of time, limited to a year in other situations not related to this matter. It would have been reasonable for Petitioner to file a Rule 60 Motion given the history of this case from Respondent's failure to properly notify Respondent of her Chapter 7 to Petitioner's attempting to follow the lower court's directive by going to BC.

Petitioner did not file Rule 60 Motion based on the perceived temperament of Judge Pan toward Petitioner (but would be willing to cure this technical defect if suggested by this Court).

that Petitioner's actions were *made with impunity* concerning her Order (despite being open and notorious), Petitioner cannot be held in contempt as a matter of law for not complying with an order that is void given Judge Pan's February 23, 2017, Order signaling her lack of jurisdiction over the federal matter – the "core" of which is the disputed funds.

Also, as a matter of law, Petitioner cannot be held in contempt for not complying with an order that is vague as a matter of law.

C. <u>While ignoring federal law (and pertinent facts), Judge Pan's conduct fell well below the standards of Code of Judicial Conduct creating bias so publicly prejudicial to Petitioner that her Orders must be overturned.</u>

As both a matter of law and fact, the aforementioned Orders are without merit and should be overturned simply on the intrinsic matters alone. But more troubling, has been Judge Pan's behavior surrounding this case. Her behavior during the proceedings, decision and subsequent actions violated multiple rules of the 2018 CJC. This includes Rules 1.2, 2.2, 2.5, 2.6, 2.9(A)&(B), 3E(1). Contrary to Rule 1.2 and 2.2, Judge Pan's actions do not promote public confidence in the judiciary as an impartial and fair arbiter. This Court has held in prior decision that a Judge's violation of the CJC alone provides that grounds that Judge Pan's decisions, orders, etc., should be overturned. See *Scott v. United States,* 559 A.2d 745, 749 (D.C. 1989) and *In re M.C., 8 A.3d 1215 (D.C. 2010).* Pursuant to 28 U.S.C. § 455, Judge Pan should have recused herself upon receiving the *ex parte* communication let alone anytime thereafter

given the above facts, law and arguments. Judge Pan was so openly biased against Petitioner *to undermine the public confidence in the judiciary* that her Orders must be overturned.

i. Standard of Law.

"In order not to undermine the public confidence in the judiciary, the requirement of impartiality pertains not only to actual impartiality, but also to the appearance of impartiality." See *In re J.A.*, 601 A.2d 69 (D.C. 1991) referencing *Scott*; see also *Liljeberg v. Health Servs. Acquisition Corp.,* 486 U.S. 847, 869-870 (1988). Judge Pan's actions permeated bias against Petitioner during the course of these proceedings that no objective public observer could observe the appearance of impartiality by Judge Pan against Petitioner.

As discussed above and below, Judge Pan's *conduct clearly demonstrated a significant level of bias reflecting personal distaste towards* Petitioner. "The court must apply the tests of *Scott* and *Liljeberg* to determine whether the trial was fatally tainted." *In re J.A.*, 601 A.2d 69, 78 (D.C. 1991). The Court's standard of review is objective. "Referring to the [CJC], …. the test is whether the impartiality of the judge might reasonably be questioned. *Scott*, 559 A.2d at 748-49." *Id.*

> In applying the test . . . the court must not lose sight of the fact that the issue is not whether there was sufficient evidence to affirm the trial judge's finding of abuse; far more is at stake. *Scott*, supra, 559 A.2d at 750 ("the traditional harmless error rule . . .

> presumes the existence of an impartial judge," and its use "would be inconsistent with the goal of Canon 3 (C)(1) to prevent even the appearance of impropriety."). Id. at 751 ("a defendant is not required to show prejudice from a violation of the standard set by Canon 3 (C)(1) as would affect the outcome of the trial in order to be entitled to the extraordinary writ of mandamus.") (footnote omitted). As the Supreme Court observed in *Liljeberg*, 486 U.S. at 864, "the problem is that people who have not served on the bench are often all too willing to indulge suspicions and doubts concerning the integrity of judges." If there is an appearance of impropriety, the *Liljeberg* harmless error test requires, in the context of the entire proceedings, consideration of three factors: (1) the risk of injustice to the parties in the particular case, (2) the risk that the denial of relief will produce injustice in other cases, and (3) the risk of undermining the public's confidence in the judicial process.

Id. ref *Liljebeig*, 486 U.S. at 864; see *Belton v. United States*, 581 A.2d 1205, 2015 (D.C. 1990); *Scott*, 559 A.2d at 752-3.

ii. Judge Pan's Violation of the (2018) Code of Judicial Conduct

SCDC Rule 2.9(B) states "If a judge inadvertently receives an unauthorized *ex parte* communication bearing upon the substance of a matter, the judge shall make provision promptly to notify the parties of the substance of the communication and provide the parties with an opportunity to respond." On or about November 29, 2019, Judge Pan received a seven-page handwritten letter from Respondent. *Eisenberg,* Docket 2. Respondent included with this letter 110 pages of annotated (and in some cases incomplete) documents. *Id*. Pan's Chambers provided a copy to Petitioner. Contrary to both Rule 2.6 and his Due Process Rights, Petitioner was not afforded the opportunity to respond to this *ex parte* communication.

Judge Pan was clearly influenced by Respondent's *ex parte* communication. At the December 3, 2019, hearing[16], she calmly explained to Respondent that the incorrect or misleading statements Respondent made were wrong. See *Eisenberg*, Trans., pgs. 11-22. But, in clear response to the communication and despite Respondent's courtroom antics, Judge Pan was set to sanction Petitioner:

> [RESPONDENT]: (Laughter.)
>
> [PETITIONER]: Your Honor, I don't appreciate the side comments from [RESPONDENT] --
>
> THE COURT: I don't appreciate you defying an order,

[16] *Eisenberg*, Trans., pg. 7, ln 11 – 12

> a direct order from my Court saying you could not do what you did.
>
> And then you don't file a motion to reconsider, you just defy the order and you come back and say that you were just following the rules that you are of without asking for the Court's authorization.
>
> I don't think that's appropriate, and I'm wondering why you shouldn't be held in contempt of court for defying my order

Id. at 27, lns 24-25, and 28, lns 1-12.

At this hearing, Judge Pan asked Petitioner why should she not file a bar complaint against him for, in her opinion, defying her court order. She is inviting Petitioner to violate his Rules of RPC. It would appear to violate SCDC Rule 8.3(a) (Reporting Professional Misconduct) for an attorney to interfere with another from filing a bar complaint (versus filing an order for contempt or sanctions). Judge Pan, as both an attorney and judge, knows that Petitioner cannot respond substantively – to do so, would likely guarantee a disciplinary action against Petitioner.[17] Judge Pan acted contrary to RPC and CJC. Thus, Judge Pan should have recused herself prior to ordering the discharge of debt or ordering Petitioner to be sanctioned. And by failing to do so, exposed herself to further violation of RPC and CJC.

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[17] This is not to say Judge Pan, let alone any judge, does not have the responsibility to report to the appropriate party if she believes an attorney has acted in violation of RPC. See Rule 21.5. But, a judge's actions, rulings and orders must be based on both fact and law. As discussed throughout this brief, Judge Pan's judicial proceedings were based on neither.

During the course of the trial, Petitioner objected to the lower court allowing Respondent to make improper filings. Judge Pan allowed Respondent to (indirectly) file with the Clerk of Court without having to pay the mandatory filing fees. To the outside observer, this was patently unfair. To both Petitioner and the public, it was confusing: Respondent filed documents out of time without leave to file out of time (let alone failing to file Motions for Leave to File out of time): Her allowing Respondent to file (indirectly), not pay filings fees and *ex parte* communication, signals to the public an unfairness and lack of impartiality required per *Scott* and *Liljeberg* **especially as the record is void of allowing Petitioner a right to respond to Respondent's ex parte communication.**

Judge Pan violated CJC Rule 2.5. She apparently failed to read Petitioner's October 14, 2018, Brief that promulgated this last set of legal proceedings. As discussed above, she would have known from the start that Petitioner was the first to inform the court that the moneys in dispute were held in Petitioner's trust account while he openly pursued a legal remedy first in BC then back to the lower court.

Judge Pan violated CJC Rule 2.5. In her March 3, 2019, Decision, the February 25, 2019, and previous Orders, it is clear that she failed to garner the basic command of bankruptcy laws. In dialogue with Petitioner, Judge Pan stated that she "understood" the argument. See fn 1, *supra*. But this statement, her decision and her earlier comment that *Respondent*

should not have to wait for her funds[18], clearly shows she did not understand the basic concepts of bankruptcy law.

Judge Pan should have known that there was an automatic stay regarding civil matters involving moneys that are "core" to bankruptcy proceedings.[19] Further, Judge Pan should have known she did not have authority over the funds when she made her February 23, 2017, Order. This, in combination of an expected command of the RPC[20], would have led her not only to dismiss Respondent's bankruptcy claim as it related to the money she owes Petitioner but to never have filed a complaint against Petitioner with Office of Disciplinary Counsel.

Judge Pan violated RPC Rule XI, § 17. This rule makes it clear that Office of Disciplinary Counsel proceedings are confidential except as the "Court may otherwise order[.]" The "Court" in this context is the Court of Appeals, not the Superior Court. Yet, she took it upon herself, with no authority from this Court, to publicize her complaint by sharing it with Respondent. This is a clear violation of Rule XI, § 17

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[18] See *Eisenberg*, February 23, 2017 Order.

[19] This is not to say that she could not have adjudicated the bankruptcy matter **IF** she reopened the bankruptcy matter under § 523(a)(3)(B). See § 523(a)(3)(B) and fn 13, *supra*. But she specifically declined to do so.

[20] Judge Florence Pan is a licensed attorney (See https://join.dcbar.org/eweb/DynamicPage.aspx?Site=dcbar&WebCode=FindMemberResults last viewed on September 11, 2019, an Associate judge in the SCDC and a nominee as a Judge for the U.S. District Court for the District of Columbia (See Wikipedia: Florence Y. Pan, https://en.wikipedia.org/wiki/Florence_Y._Pan, last viewed on September 12, 2019).

and all-to-obvious attempt to publicly embarrass Petitioner.

iii. Discussion

There is significant risk that the denial of relief will produce injustice in other cases. Victims of financial fraud will question if they can actually get relief from the courts or at least a fair and impartial hearing. Factors that should never play into a court proceeding is bias of the judge against one of parties.[21] Judge Pan is a licensed attorney, a judge in SCDC and a one-time judicial candidate for the U.S. District Court for the District of Columbia[22] – she should know the nuances between federal and state laws and that judicial decisions and orders should be based on both law and facts – never on personal biases. The public and attorneys in our Court will question whether anyone can get justice before a court where a judge's personal distaste[23] for that party is the deciding factor in their judicial actions. This only bolsters "Big Firms" perception that it is not worthwhile to take on low income clients and punishes the solo or small firm practitioner for being an advocate for those without means to retain the "Big Firms."

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[21] Whether this bias is due to a personal dislike of Petitioner, a dislike of the situation or a dislike because Judge Pan observes a white male collecting from an allegedly poor black female (a violation of CJC Rule 2.3) is immaterial. The bias, as discussed herein, is real.

[22] See fn 20, *supra*.

[23] See fn 21, *supra*.

iv. Judge Pan Violated Court Rules 1.8, 5.2 and 49.1 by publishing Respondent's Personal Identification Information making her beholden to Respondent.

Judge Pan has placed herself in conflict of interest with Respondent; the appearance of which should have triggered her recusal in this matter. In Judge Pan's November 29, 2019, Order, she violated Rules 1.8, 5.2 and 49.1 of the District of Columbia's Superior Court's Civil Rules. Respondent submitted an *ex parte* filing requesting that she be allowed to appear by telephone at the next hearing. In that filing were several instances of the Respondent's date of birth and other personal identification information. Judge Pan received the filing and submitted it with her Order without making any redactions. This made the Respondent's date of birth a public filing. They appear on pages 36, 38, 72, and 74 of the filing. SCDC Rules 1.8, 5.2 and 49.1 specifically prohibit filings that contain an individual's date of birth. The Rules clearly state that that kind of information must be redacted unless the Court specifically orders otherwise. Judge Pan is charged with knowing and enforcing these rules, and she failed to do so. Judge Pan violated both Rules when she failed to redact the Respondent's date of birth as part of her Order. In addition, Judge Pan attached confidential documents and made them part of a public record before they were supposed to be made public. This error places her in direct conflict with Respondent as Judge Pan becomes beholden to Respondent by violating her legal interests.

D. Federal Bankruptcy Law dictates Respondent and her Bankruptcy Counsel should be joined to this matter.

Judge Pan erred as a matter of law by not allowing Petitioner to join Mr. Moses as a defendant in this matter. Based on the aforementioned facts and argument, it is all-too-apparent that Respondent and Mr. Moses (collectively "Party") conspired to defraud Petitioner of moneys that they knew or should have known were not dischargeable through bankruptcy: This is reflected in Ms. Swain's recent (lack of substantive) responses, Judge Paul M. Black in *In re Swain*, No. 16-70898, 2018 Bankr. LEXIS 2027 (Bankr. W.D. Va. July 5, 2018) comment that Plaintiff was not properly notified despite the fact that "[Defendant] and her counsel [Mr. Moses] [knew] how and where to notify [Plaintiff]," Mr. Moses' October 17, 2016, letter requesting "that [Plaintiff] immediately dismiss the pending garnishment issued by the Superior Court of the District of Columbia" despite Judge Black's aforementioned comment, and the money to be discharged by Ms. Swain was not the kind of funds dischargeable under Bankruptcy Law.

Pursuant to SCDC Rule 20(2):

Defendants Persons—and any property subject to process in rem—may be joined in one action as defendants if:

> (A) any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and

> (B) any question of law or fact common to all defendants will arise in the action.

As discussed herein, Mr. Moses has been identified as a co-conspirator and also a separate Defendant in this matter. As it would be in the interest of justice to allow Petitioner leave to file an Amended Complaint itself, this Court should have joined Mr. Moses in this matter. Recall, in the course of these proceedings, Mr. Moses allegedly 1.) filed false documentation regarding his client's, Respondent, Second Bankruptcy Matter; 2.) failed to appropriately inform Petitioner of his bankruptcy filing for Ms. Swain; and 3.) sent false information to Petitioner that the debt his client owed him had actually been discharged.

Judge Pan's Order again misapprehends the intricacies of federal bankruptcy law with local law in DC. "The additional claims that plaintiff now seeks to make are based on new allegations and would more properly be raised by filing a new case, in which plaintiff would file a new complaint and serve the defendants with process." *Eisenberg,* March 1, 2019, Order. The Party's conspiracy to commit fraud upon Petitioner and BC is directly related to the "limited purpose of deciding whether defendant's debt should be discharged [under federal bankruptcy law]." The Party's alleged fraudulently acts **is** directly intertwined with the federal bankruptcy discharge since the Party's committed fraud, as discussed herein, in order to obtain the discharge.

CONCLUSION

The lower courts' orders and findings are clearly erroneous for the reasons set forth above. Further and more disturbing is Judge Pan's clear bias against Petitioner and her violation of the CJC and RPC. It is so great that the public perception of fairness and impartiality is greatly in doubt. Judge Pan's violation of CJC gives grounds to overturn her flawed rulings and orders.

This matter should be remanded consistent with the arguments in this brief, vacate the order below, remove all sanctions and contempt orders against Petitioner, Order to Join Mr. Moses as a co-conspirator, Order the parties to post bond pending the proceedings and a new briefing schedule issued before a judge unrelated to the parties.

For the reasons set forth above, this matter should be overturned and found in favor of Petitioner.

Respectfully submitted,

/s/ Michael D.J. Eisenberg
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APPENDIX

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ENTERED: July 30, 2020

DISTRICT OF COLOMBIA
COURT OF APPEALS

No. 19-CV-189

MICHAEL D.J. EISENBERG,

Appellant,

CAB-6509-12

v.

SHIRLEY SWAIN,

Appellee.

On Appeal from the Superior Court of the
District of Columbia
Civil Division

BEFORE: Fisher, Easterly, and Deahl, Associate Judges.

J U D G M E N T

This case was submitted to the court on the transcript of record and the briefs filed, and without presentation of oral argument. On consideration whereof, and for the reasons set forth in the opinion filed this date, it is now hereby

ORDERED and ADJUDGED that the Superior Court's judgment is affirmed.

For the Court:

Julio A. Castillo
Clerk of the Court

Dated: July 30, 2020.

Opinion by Associate Judge Deahl.

Notice: This opinion is subject to formal revision before publication in the Atlantic and Maryland Reporters. Users are requested to notify the Clerk of the Court of any formal errors so that corrections may be made before the bound volumes go to press.

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 19-CV-189

MICHAEL D.J. EISENBERG, APPELLANT,

V.

SHIRLEY SWAIN, APPELLEE.

Appeal from the Superior Court
of the District of Columbia
(CAB-6509-12)

(Hon. Florence Y. Pan, Trial Judge)

(Submitted April 23, 2020 Decided July 30, 2020)

Michael D.J. Eisenberg, pro se.

Shirley Swain, *pro se.*

Before FISHER, EASTERLY, and DEAHL, *Associate Judges.*

DEAHL, *Associate Judge*: Michael D.J. Eisenberg was awarded $7,800 in unpaid attorney's fees against his former client, Shirley Swain. After garnishing $1,499 of Ms. Swain's wages, Mr. Eisenberg learned that she had received a discharge of debt through a Chapter 7 bankruptcy filing in the United States Bankruptcy Court for the Western District of Virginia. The Superior Court ordered Mr. Eisenberg to return the garnished wages to Ms. Swain until a decision was reached on whether his judgment against her was included in the bankruptcy discharge. Mr. Eisenberg did not comply. The Superior Court then issued an order that included three rulings: (1) it ruled that Ms. Swain's debt to Mr. Eisenberg had been discharged, (2) it held Mr. Eisenberg in contempt of court for his failure to return the garnished wages, and (3) it rejected Mr. Eisenberg's request to add Ms. Swain's bankruptcy attorney as a defendant in the underlying breach of contract case after Mr. Eisenberg alleged that Ms. Swain's attorney had conspired with her to defraud Mr. Eisenberg. Mr. Eisenberg now challenges each of those rulings. We detect no error and affirm.

I.

In April 2011, Shirley Swain retained Michael D.J. Eisenberg as her counsel in a matter against her employer, the Department of Veterans Affairs, before the Equal Employment Opportunity Commission. Ms. Swain agreed to pay Mr. Eisenberg a true retainer and a contingency fee in exchange for representation. In April 2012, Ms. Swain entered into a confidential settlement agreement with the Department of Veterans Affairs, pursuant to which they paid Mr. Eisenberg $48,000 and Ms. Swain $35,000.

After receiving his $48,000 payment from Ms. Swain's employer, Mr. Eisenberg maintained that he was still owed $7,800: $7,000 of Ms. Swain's $35,000 share of the settlement (reflecting a 20% portion of her award in contingency fees, in addition to the $48,000 he had already collected) along with an additional $800 in unpaid retainer. In July 2012, Mr. Eisenberg contacted Ms. Swain and requested the outstanding payment. According to Mr. Eisenberg, Ms. Swain acknowledged that she owed the money, but informed him that she had deposited the funds into her own bank account. In August 2012, Ms. Swain notified Mr. Eisenberg that she did not have the funds to pay him. Mr. Eisenberg promptly filed a lawsuit in Superior Court alleging breach of contract and quantum meruit and requesting damages in the amount of $7,800 plus interest. In response, Ms. Swain did not dispute that she owed Mr. Eisenberg $7,800, though she claimed that she was under the initial impression that all payments were satisfied by the $48,000 sum Mr. Eisenberg received from the settlement and the $2,200 she had already paid in retainer fees. In addition, Ms. Swain maintained that she was not able to pay Mr. Eisenberg $7,800 and that Mr. Eisenberg had repeatedly refused to enter into a payment plan.

While Mr. Eisenberg's motion for summary judgment was pending before the trial court, Ms. Swain filed for Chapter 13 bankruptcy in the United States Bankruptcy Court for the Western District of Virginia, and the Superior Court proceedings were stayed. In June 2015, Ms. Swain's Chapter 13 bankruptcy case was dismissed, and the trial court proceedings continued. In September 2015, Judge Dixon granted summary judgment for Mr. Eisenberg

on the basis that Ms. Swain did not contest that she owed the $7,800 and neither Mr. Eisenberg's refusal to accept a payment plan nor Ms. Swain's inability to pay the full amount was sufficient to create a material dispute of fact regarding the underlying contractual breach.

Mr. Eisenberg tried to collect the $7,800 judgment from Ms. Swain by hiring a collection agency called Accounts Receivable but was unsuccessful. In April 2016, Mr. Eisenberg obtained a writ of attachment allowing him to garnish Ms. Swain's wages directly from her employer.

In July 2016, Ms. Swain initiated a second bankruptcy proceeding in the United States Bankruptcy Court for the Western District of Virginia, this time under Chapter 7. Ms. Swain included the debt she owed to Mr. Eisenberg in her filings but listed the creditor as Accounts Receivable, Mr. Eisenberg's collection company, rather than Mr. Eisenberg himself. As a result, Mr. Eisenberg was not notified of Ms. Swain's bankruptcy filing until October 2016, when he received a letter from Ms. Swain's bankruptcy attorney asserting that Ms. Swain's debts had been discharged. By that time, Mr. Eisenberg had garnished a total of $1,499 in wages from Ms. Swain. After receiving notification of the bankruptcy discharge, Mr. Eisenberg filed a motion to stay garnishment in the Superior Court. In November 2016, the Superior Court granted Mr. Eisenberg's motion and vacated the writ of attachment. In an accompanying certificate issued by the clerk of the court, Mr. Eisenberg was instructed to return all funds he had obtained through garnishment to Ms. Swain.

In January 2017, Mr. Eisenberg filed a motion to stay the return of garnished funds. He argued that although the court "ordered the moneys be returned to Ms. Swain," he had not exhausted his legal remedies in bankruptcy court and the $1,499 should be kept in his trust account "in order to assure that the moneys are protected and the status quo is maintained." Judge Florence Y. Pan denied Mr. Eisenberg's motion and directed him to comply with the previous order by relinquishing the garnished funds. Specifically, Judge Pan found that Mr. Eisenberg was "not entitled to garnishment at [the] time, and it would be unjust to allow [Mr. Eisenberg] to retain [Ms. Swain]'s money pending the outcome of [Ms. Swain]'s bankruptcy matter."

Mr. Eisenberg still refused to return the garnished funds to Ms. Swain. In February 2018, Mr. Eisenberg brought a motion in bankruptcy court to reopen Ms. Swain's Chapter 7 case, arguing that his debt should not have been discharged because he was not listed as a creditor and thus he was not notified of his opportunity to dispute the discharge. The bankruptcy court concluded that the listing of Accounts Receivable as a creditor was not sufficient to apprise Mr. Eisenberg of the bankruptcy proceedings and that he was not provided with notice of his right to contest the discharge of the debt. It nonetheless declined to reopen the bankruptcy proceeding, finding that the Superior Court was better positioned to determine whether the debt at issue had been discharged.

In accordance with the bankruptcy court's order, Mr. Eisenberg filed a motion in Superior Court to reopen the breach of contract case for a

determination regarding the discharge of the debt. Judge Pan held a hearing on December 3, 2018. At this hearing, Judge Pan learned that in the nearly two years since Mr. Eisenberg had been ordered to return Ms. Swain's garnished wages, he had instead held the money in his trust account. Judge Pan asked for further briefing on the discharge of the debt and issued an order to show cause why Mr. Eisenberg should not be held in contempt for failing to comply with the court's February 23, 2017, order requiring him to return the $1,499 to Ms. Swain. Both parties submitted briefing on the discharge of the debt and the propriety of holding Mr. Eisenberg in contempt. In addition, Mr. Eisenberg filed a motion to join Ms. Swain's bankruptcy attorney, Easter P. Moses, as a defendant in the breach of contract case. Judge Pan held another hearing on February 25, 2019, and issued an oral ruling followed by a written order. Judge Pan found that Ms. Swain's debt to Mr. Eisenberg had been discharged, held Mr. Eisenberg in contempt for violating a court order, and denied Mr. Eisenberg's motion to join Mr. Moses as a defendant. Judge Pan issued sanctions for Mr. Eisenberg's contempt in the form of compensatory damages, ordering Mr. Eisenberg to pay Ms. Swain $978.22 in addition to the $1,499 in garnished wages, which he was instructed to return "forthwith."

II.

We begin with the core question at issue: whether Ms. Swain's $7,800 debt to Mr. Eisenberg was subject to the discharge order of the United States Bankruptcy Court for the Western District of Virginia. We agree with the trial court that it was.

When a discharge is issued in a Chapter 7 no-asset bankruptcy case, it encompasses "all debts that arose before the date of the order for relief." 11 U.S.C. § 727(b) (2018). This includes both scheduled and unscheduled debts unless the debt itself was incurred fraudulently or maliciously, per 11 U.S.C. § 523(a)(2), (4), or (6).[1] *See* 11 U.S.C. § 523(a)(3)(B); *Judd v. Wolfe*, 78 F.3d 110, 113–14 (3d Cir. 1996); *In re Rollison*, 579 B.R. 67, 72 (Bankr. W.D. Va. 2018). Because of the broad and retroactive language of § 727(b), "all of a debtor's prepetition debts—both those scheduled and those not scheduled—are discharged upon entry of the discharge order." *In re Rollison*, 579 B.R. at 71–72; *In re Davis*, No. 18-12412-JDL, 2019 WL 2511756, at *2 (Bankr. W.D. Okla. June 17, 2019) ("[A] debt which was not scheduled in a chapter 7 no-asset case is subject to the discharge order unless it is a debt of the kind specified in section 523(a)(2), (4), or (6).") (citing *Rollison*, 579 B.R. at 72). When a question arises *after* the issuance of a discharge regarding whether a particular unscheduled debt falls within a § 523(a) exemption, it does not require reopening the bankruptcy case. *Rollison*, 579 B.R. at 75. This is because "the relief sought from the court by the parties after the case has closed is not an order to discharge the debt, but rather a declaratory order that the debt was or was not already discharged." *In re Keenom*, 231 B.R. 116, 125 (Bankr. M.D. Ga. 1999). Seeing no need to reopen Ms. Swain's bankruptcy

[1] Specifically, 11 U.S.C. § 523(a) exempts from a § 727 discharge any debt incurred by "false pretenses, a false representation, or actual fraud," § 523(a)(2), incurred by "fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny," § 523(a)(4), or incurred "for willful and malicious injury by the debtor to another entity or to the property of another entity," § 523(a)(6).

proceeding to address the discharge of her debt to Mr. Eisenberg, the bankruptcy judge denied Mr. Eisenberg's motion to reopen and left the determination up to the Superior Court.

Although bankruptcy courts generally have exclusive jurisdiction over the discharge of scheduled debts, *see, e.g.*, *In re Smith*, 189 B.R. 240, 243 (Bankr. D.N.H. 1995), a debtor who fails to schedule a debt waives this exclusivity. *In re Rollison*, 579 B.R. at 72–73; *see also In re Keenom*, 231 B.R. at 126–27. By failing to properly list Mr. Eisenberg as a creditor, Ms. Swain "forfeit[ed] two benefits otherwise available to [her]: (i) the 60–day limitations period to file a complaint to determine dischargeability of a debt under Federal Rule of Bankruptcy Procedure 4007(c) and (ii) exclusive federal jurisdiction of dischargeability determinations pursuant to sections 523(a)(2), (4), or (6)." *In re Rollison*, 579 B.R. 72–73. Because Ms. Swain waived her right to an exclusive and expeditious determination by the bankruptcy court regarding the discharge of her debt to Mr. Eisenberg, the Superior Court had concurrent jurisdiction over the question. *See* 28 U.S.C. § 1334(b) (2018); *In re Massa*, 217 B.R. 412, 413 (Bankr. W.D.N.Y. 1998); *In re Hicks*, 184 B.R. 954, 962 (Bankr. C.D. Ca. 1995); *In re Franklin*, 179 B.R. 913, 924 (Bankr. E.D. Ca. 1995); *In re Mendiola*, 99 B.R. 864, 870 (Bankr. N.D. Ill. 1989).

Mr. Eisenberg argues that the money Ms. Swain owed him was obtained by "false pretenses, a false representation, or actual fraud," and was therefore not dischargeable under 11 U.S.C. § 523(a)(2)(A). To support this claim, the burden was on Mr. Eisenberg to prove the debt's fraudulent nature

in the trial court by a preponderance of the evidence[2] *Grogan v. Garner*, 498 U.S. 279, 287–88 (1991). A claim for false representation requires a showing that: "The debtor made a false representation; the debtor made the representation with the intent to deceive the creditor; the creditor relied on the representation; the creditor's reliance was reasonable; and the debtor's representation caused the creditor to sustain a loss." *In re Young*, 91 F.3d 1367, 1373 (10th Cir. 1996); *see also In re White*, 550 B.R. 615, 620 (Bankr. N.D. Ga. 2016); *In re Moody*, 203 B.R. 771, 773 (Bankr. M.D. Fla. 1996); *In re Druckemiller*, 177 B.R. 859, 860–61 (Bankr. N.D. Ohio 1994); *In re Carozza*, 167 B.R. 331, 336 (Bankr. E.D.N.Y. 1994). A claim for actual fraud is broader than a claim for false representation, but requires "something said, done, or omitted by a person with the design of perpetrating what [she] knows to be a cheat or deception." *In re Stentz*, 197 B.R. 966, 981 (Bankr. D. Nebr. 1996). Actual fraud, at its core, requires "moral turpitude or intentional wrong," and "if room exists for the court to infer honest intent, the issue of dischargeability must be decided in favor of the debtor." *In re Roberts*, 193 B.R. 828, 830 (Bankr. W.D. Mich. 1996); *see also In re Spar*, 176 B.R. 321, 327 (Bankr. S.D.N.Y. 1994) ("[F]raud implied in law

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[2] Mr. Eisenberg suggests that Judge Pan erroneously applied District of Columbia law in reviewing his claim and asserts that Virginia law governing fraud should control. Mr. Eisenberg, in accusing Ms. Swain of committing a felony under the laws of Virginia, appears to confuse federal bankruptcy law with state criminal law. The court below was not required to find that a crime had been committed under the laws of the District of Columbia, Virginia, or any other local jurisdiction; only that Mr. Eisenberg had met his burden of establishing fraud under the applicable bankruptcy statutes.

which may exist without imputation of bad faith or immorality, is insufficient.") (citation omitted).

Mr. Eisenberg asserts that Ms. Swain obtained the $7,800 owed to him by fraud because when Ms. Swain received her $35,000 settlement, she "actively concealed and converted [Mr. Eisenberg]'s property"—the $7,000 owed in contingency fees—"to herself rather than transfer these moneys." At the February 25, 2018 hearing, the trial court pressed Mr. Eisenberg on the factual basis for his belief that the disputed $7,000 was his "property," asking, "what makes you think that the [Department of Veterans Affairs] earmarked $7,800 of the settlement and told Ms. Swain, give this to Mr. Eisenberg?" Mr. Eisenberg responded that he did not know whether the money was in fact earmarked, he was simply making an allegation that it was. When the court followed up with Ms. Swain, she explained, "Your Honor, they sent me a check, to my PO box, $35,000 in an envelope, sealed up with my name on it, and that was it." Mr. Eisenberg did not provide the trial court with any evidence controverting this account. When asked why, under these circumstances, this was not "a run of the [mill], my-client-didn't-pay-me-case," Mr. Eisenberg responded only that both the Department of Veterans Affairs and Ms. Swain knew that "the money was [his]."

Mr. Eisenberg's bald assertion that Ms. Swain "actively concealed and converted" his property comes nowhere close to establishing either false representation or actual fraud by a preponderance of the evidence. Not only is his conclusion—that $7,000

of Ms. Swain's settlement check was his "property"[3] — unsupported by the evidence, it is contradicted by it. The facts below establish that Ms. Swain agreed to pay Mr. Eisenberg 20% of any award she received and that, upon receiving $35,000 in settlement funds, she failed to fulfill her obligation to pay him his share of that award.[4] As the trial court noted, this was the foundation for Mr. Eisenberg's initial breach of contract claim and, along with the outstanding retainer, the reason for the underlying $7,800 judgment. It is not, however, fraud. *See In re Robinson-Vinegar*, 561 B.R. 562, 567 (Bankr. N.D. Ga. 2016) ("[A]n inability to pay does not give rise to the inference that the Debtor intended not to repay the loans as an actual fraud."); *In re Guy*, 101 B.R. 961, 978 (Bankr. N.D. Ind. 1988) ("[A] mere breach of contract by the debtor without more, does not imply existence of actual fraud for purposes of the exception to discharge under § 523(a)(2)(A).").

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[3] Mr. Eisenberg's pleadings before the Superior Court and this court make allegations of fraud only as to the $7,000 in unpaid contingency fees, and not to the $800 of unpaid retainer. Mr. Eisenberg nonetheless concludes in a footnote of his appellate brief that because "the $800 is still part of Appellee's C7BC debt that Appellant is attempting to dismiss" and is part of "Appellee's alleged fraudulent BC filings," it is still recoupable. It is unclear upon what basis Mr. Eisenberg draws that conclusion. Ms. Swain's actions in initially obtaining the $7,800 and in failing to correctly identify Mr. Eisenberg as her creditor do not amount to fraud based on the record before us. We thus agree with the trial court's finding that the full $7,800 was discharged on October 6, 2016.

[4] The representation agreement between Mr. Eisenberg and Ms. Swain was not submitted to the trial court and is not a part of the record on appeal. The parties do not dispute the pertinent content of their agreement.

The $35,000 in settlement funds was paid directly to Ms. Swain under the terms of her settlement agreement with the Department of Veterans Affairs. It was her money. The fact that she owed $7,000 to Mr. Eisenberg pursuant to a separate representation agreement between the two of them does not alter this fact and Ms. Swain's mere knowledge of her obligation and subsequent failure to satisfy it does not meet the high scienter of actual fraud. Mr. Eisenberg did not allege or provide evidence of any specific representations, false or otherwise, made by Ms. Swain upon which he relied outside of her general agreement to pay him under the terms of their contract. And despite Mr. Eisenberg's repeated assertions to the contrary, nothing in the record suggests any intentionally deceptive or otherwise immoral conduct on the part of Ms. Swain. The record depicts Ms. Swain as a woman who, despite some confusion as to why her attorney continued to request money from her after initially receiving $48,000, and despite having limited money on hand, has consistently attempted to engage in good-faith efforts to fulfill her obligations to Mr. Eisenberg. The fact that Ms. Swain owed Mr. Eisenberg a debt she was ultimately unable to pay is precisely the circumstance a Chapter 7 discharge was designed to address.

III.

Mr. Eisenberg challenges Judge Pan's contempt ruling and associated sanctions. Mr. Eisenberg's actions in this litigation justified holding him in contempt. We affirm the trial court's judgment on this ground as well.

Mr. Eisenberg was ordered to return $1,499 to Ms. Swain on November 17, 2016. His motion to stay the return of these funds was denied on February 23, 2017. Despite twice receiving clear instruction from the court to return $1,499 to Ms. Swain, Mr. Eisenberg had not returned the funds when he appeared before the court on December 3, 2018, more than two years after the initial order, and nearly two years after his motion to stay return of the funds was denied. When questioned by the trial court on the reasons for his noncompliance, Mr. Eisenberg said only, "I believe the judgment was actually void given the history that we have gone through," adding later that he believed "federal law" superseded the Superior Court's authority and that Judge Pan had relinquished jurisdiction over the issue. When asked why, given these beliefs, he had not filed a motion to reconsider, Mr. Eisenberg responded that he "wasn't aware that was an option." At other points during this exchange, however, Mr. Eisenberg represented that he kept the funds in his trust account because "Ms. Swain had been resistant and deceptive, and [he] wanted to make sure [he] preserved [his] property" and that "those monies were [his], and . . . since they were in dispute . . . [he] left them in the trust account." These alternating and seemingly self-serving rationales left Judge Pan with the well-founded impression that after receiving a ruling he did not like, Mr. Eisenberg "just did what [he] wanted to do" and that his actions were "[n]ot in good faith." Judge Pan issued an order to show cause why Mr. Eisenberg should not be held in contempt and requested briefing from both parties.

At a second hearing, held on February 25, 2019, Judge Pan questioned Mr. Eisenberg and Ms. Swain

on their positions regarding contempt. In conjunction with this questioning, Judge Pan asked Ms. Swain to detail the expenses she had incurred as a result of not having the $1,499 returned to her. These included moving expenses after Ms. Swain was unable to pay her rent and had to relocate, as well as time spent litigating the issue in Superior Court. In a written order issued on March 1, 2019, Judge Pan held Mr. Eisenberg in contempt of court and ordered him to pay compensatory damages to Ms. Swain in the amount of $978.22.[5]

Superior Court judges have express authority to "punish for disobedience of an order or for contempt committed in the presence of the court." D.C. Code § 11- 944(a) (2012 Repl.) In addition to its statutorily derived authority, the court retains a well-established power to punish for contempt that is "inherent in the nature and constitution of a court . . . arising from the need to enforce compliance with the administration of the law." *Brooks v. United States*, 686 A.2d 214, 220 (D.C. 1996) (citation and quotation marks omitted). The decision whether to hold a party in civil contempt is confided to the sound discretion of the trial judge, and will be reversed on appeal only upon a clear showing of abuse of discretion. *In re T.S.*, 829 A.2d 937, 940 (D.C. 2003).

In challenging the trial court's contempt ruling, Mr. Eisenberg advances three arguments:

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[5] The precise accounting for this total was: a seven-day U-Haul rental at $29 each day, six hours spent writing briefs and preparing for the hearing on the order to show cause at Ms. Swain's previous hourly rate of $15.89 per hour, $500 as general compensation for the stress and inconvenience of moving, and an interest rate of 6%.

(1) that the Superior Court did not have substantive jurisdiction over the garnished funds, (2) that the underlying order was vague and ambiguous as to when the money had to be returned to Ms. Swain, and (3) that, for a variety of ill-supported reasons, his actions could not be deemed contemptuous. Each argument is meritless.

A.

Mr. Eisenberg claims that the Superior Court lacked substantive jurisdiction over the garnished wages, rendering the underlying order requiring him to return the money to Ms. Swain void. While it is true that "[v]oidness of a court order is an absolute defense to a contempt motion," an order is void for lack of jurisdiction only when the issuing court is "powerless to enter it." *Kammerman v. Kammerman*, 543 A.2d 794, 799 (D.C. 1988) (citation omitted). Mr. Eisenberg asserts that the Superior Court did not have substantive jurisdiction over the disputed funds because they were under the exclusive jurisdiction of the bankruptcy court. As explained in detail above, he is wrong about that. Because Mr. Eisenberg's debt was unscheduled, the funds at issue were subject to the concurrent jurisdiction of the Superior Court. *See, e.g.*, *In re Rollison*, 579 B.R. at 72–73.

Mr. Eisenberg also argues that any substantive jurisdiction the Superior Court may have had was nonetheless waived by Judge Pan's statement in the order that she was "not in a position to evaluate the merits of plaintiff's motion to dismiss defendant's bankruptcy." Mr. Eisenberg relies heavily on this statement, alleging in his brief that the Superior Court "at the time chose to relinquish its jurisdiction

over the disputed money as it pertained to the [federal bankruptcy law] issue and send it to [the bankruptcy court]." Mr. Eisenberg advances this interpretation despite the immediately preceding sentence in the order, which reads, "[Mr. Eisenberg] is not entitled to garnishment at this time, and it would be unjust to allow [Mr. Eisenberg] to retain defendant's money pending the outcome of [Ms. Swain]'s bankruptcy matter," and the immediately following sentence, which reads, "[t]he Court, therefore, denies plaintiff's motion to stay the order releasing garnishment." In the context of the order as a whole, Mr. Eisenberg's suggestion that Judge Pan expressly relinquished jurisdiction over the garnished funds is patently unreasonable.[6]

B.

We likewise reject Mr. Eisenberg's assertion that the order was vague because it did not list a date by which the funds had to be returned. Nothing in the record suggests a genuine confusion on Mr. Eisenberg's part about when the return of funds was

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[6] It is worth noting that in his motion to stay the return of garnished funds, Mr. Eisenberg represented to the court that he believed he could "Move the Bankruptcy Court to Dismiss Ms. Swain's bankruptcy thus requiring Ms. Swain to resume payments to Mr. Eisenberg." Given this representation by Mr. Eisenberg, the trial court was correct to conclude that it would not have jurisdiction over the precise bankruptcy issue. As discussed *supra*, the dismissal of a bankruptcy case is substantively distinct from a post-bankruptcy determination as to the dischargeability of a particular debt. Regardless of the theory Mr. Eisenberg intended to advance in support of his efforts to reopen a resolved bankruptcy court proceeding, the Superior Court retained its jurisdiction over funds garnished pursuant to a writ of attachment it issued for collection of a judgment it entered.

required. To the contrary, in Mr. Eisenberg's motion to stay the return of the garnished funds, he acknowledged that the court had "ordered the moneys be returned to Ms. Swain," but specifically requested that the order be stayed "pending the exhaustion of his legal remedies." In her order denying this motion, Judge Pan stated that it would be unjust to allow Mr. Eisenberg to keep the money "pending the outcome of defendant's bankruptcy matter" and ordered the funds returned. To the extent that there was any ambiguity in the initial order, it is clear from the ensuing litigation that the order contemplated the prompt return of the funds during the pendency of the bankruptcy matter. Under any interpretation of the language of the order, a delay of two years—during which time Mr. Eisenberg actively pursued his claims in both bankruptcy court and the Superior Court—is clearly not contemplated. Finally, "the proper response to a seemingly ambiguous court order is not to read it as one wishes." *Loewinger v. Stokes*, 977 A.2d 901, 907 (D.C. 2009). If a party subject to a court order genuinely does not understand its requirements, he may "apply to the court for construction or modification." *Id.* To fail to take such steps is "to act at one's peril as to what the court's ultimate interpretation of the order will be." *Id.* (quoting *D.D. v. M.T.*, 550 A.2d 37, 44 (D.C. 1988)).

C.

In addition to those two core arguments, Mr. Eisenberg advances a number of frivolous arguments: that his violation of the trial court's order was excused by the fact that he adhered to the Rules of

Professional Conduct by keeping the funds in his trust account rather than in a personal account; that his violation of the order was so public and open that it could not be deemed contemptuous (owing to a lack of deceit); and that Judge Pan was "so biased that it raises doubt to the public perception that [she] can be fair and impartial." On this last point, Mr. Eisenberg elaborates substantially, accusing Judge Pan at various points in his brief of violating Rules 1.2, 2.2, 2.5, 2.6, 2.9(A), and 2.9(B) of the Code of Judicial Conduct and Super. Ct. Civ. R. 5.2, and of exhibiting personal bias against him.[7] Although Mr. Eisenberg cites nothing from the record to support his claim of bias, he goes so far as to suggest it could be because Judge Pan "observes a white male collecting from an allegedly poor black female."

There is no evidence in the record of any misconduct or judicial violations on the part of Judge Pan, who exhibited patience and lenity in dealing with Mr. Eisenberg's protracted disregard of the court's orders. We remind Mr. Eisenberg that, although he is entitled to an impartial arbiter, he is not entitled to disobey court orders because he disagrees with them. His evident disappointment at having to return Ms. Swain's wages does not diminish the legality of the court's order; nor is it a justification for lobbing baseless accusations against a Superior Court judge.

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[7] Mr. Eisenberg also accuses Judge Pan of violating three rules that do not exist: Rule "3E(1)" of the Code of Judicial Conduct and Super. Ct. Civ. R. "1.8" and "49.1."

IV.

Mr. Eisenberg argues that the trial court erred in denying his motion to join Ms. Swain's bankruptcy attorney, Mr. Moses, in the underlying breach of contract action. According to Mr. Eisenberg, Mr. Moses should have been joined as a party because he and Ms. Swain "conspired to defraud [Mr. Eisenberg] of moneys they knew were not dischargeable through bankruptcy." Mr. Eisenberg does not assert that the trial court was required to join Mr. Moses under Super. Ct. Civ. R. 19, but that it erred in not joining him under Super. Ct. Civ. R. 20, governing permissive joinder. Rule 20 allows for the joinder of a defendant where any "right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences" and "any question of law or fact common to all defendants will arise in the action." Super. Ct. Civ. R. 20(a)(2). Superior Court Civil Rule 20 is largely identical to Rule 20 of the Federal Rules of Civil Procedure. *See* Super. Ct. Civ. R. 20 cmt.; Fed. R. Civ. P. 20. As with its federal counterpart, we will review rulings on permissive joinder only for an abuse of discretion. *See, e.g.*, *Mosley v. Gen. Motors Corp.*, 497 F.2d 1330, 1332 (8th Cir. 1974) ("[T]he scope of the civil action is made a matter for the discretion of the district court, and a determination on the question of joinder of parties will be reversed on appeal only upon a showing of abuse of that discretion.").

Mr. Eisenberg has not proffered any factual basis tying Mr. Moses to Mr. Eisenberg and Ms. Swain's initial representation agreement, to the settlement agreement, or any other set of events

relevant to the original contractual dispute in Superior Court. As the trial court noted, the contract dispute was already resolved in Superior Court with a full judgment in Mr. Eisenberg's favor and the case was reopened for the limited purpose of addressing the discharge of debt. If Mr. Eisenberg believes he has a non-frivolous claim against Mr. Moses arising out of the proceedings in bankruptcy court, the proper course of action is to initiate a separate lawsuit. It is no basis to join Mr. Moses in the breach of contract case against Ms. Swain.

V.

After concluding that Mr. Eisenberg willfully disobeyed a court order, Judge Pan indicated on the record that she would refer the matter to the Office of Disciplinary Counsel. In his briefing to this court, Mr. Eisenberg disputes Judge Pan's decision to submit a complaint to bar counsel, the propriety of her providing a copy of the complaint to Ms. Swain, and the merits of the complaint. Because the complaint is external to the proceedings in Superior Court and not directly appealable to this court, we decline to address Mr. Eisenberg's arguments.

We note, however, that Judge Pan was on firm ground when concluding that she was "obligated to refer this matter to the Disciplinary [Counsel] of the Bar." Under Rule 2.15(B) of the D.C. Code of Judicial Conduct, "A judge having knowledge that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question regarding the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall inform" Disciplinary Counsel. Mr. Eisenberg's willful and protracted

disobedience of the court's orders meets that standard.[8] *See* D.C. Rules of Prof'l Conduct R. 8.4 cmt. 2 ("failure to obey court orders" constitutes conduct that "seriously interferes with the administration of justice" per Rule 8.4(d)). Judge Pan was right to bring her well- founded concerns to Disciplinary Counsel's attention.

The Superior Court's judgment is

Affirmed.

[8] Mr. Eisenberg's concerning behavior has extended to his appellate briefing. As a small sample of his briefing tactics, Mr. Eisenberg's reply brief berates Ms. Swain, who filed a one-page pro se responsive brief, for misspelling his name as "Isenberg." He openly queries whether she is "simply being rude" or worse yet, whether she is "simply being sexist, racist, Anti-Semitic or in some combination," concluding that her infelicity "should not be tolerated in this Court." So heavily freighting a simple misspelling with discriminatory intent, while well short of contemptuous behavior, exceeds the bounds of zealous advocacy.

ENTERED: March 1, 2019

SUPERIOR COURT OF THE
DISTRICT OF COLOMBIA
CIVIL DIVISION

MICHAEL D.J. EISENBERG, Case No. 2012 CA 6509 B

v. Judge: Florence Y. Pan

SHIRLEY SWAIN,

ORDER

On February 25, 2019, this matter came before the Court for a hearing on (1) the Court's Order to Show Cause as to why plaintiff should not be held in contempt of court, issued on December 4, 2018; (2) whether defendant's debt to plaintiff is subject to the discharge order issued by the United States Bankruptcy Court for the Western District of Virginia; and (3) plaintiffs Motion for Leave to Join Necessary Party and Amend Complaint.[1]

After reviewing the briefs filed by both parties and giving plaintiff an opportunity to be heard, the

[1] The parties filed the following pleadings: defendant's Brief Concerning Civil Contempt ("Def. Br."), filed on December 26, 2018; plaintiff's Response to the Discharge of Debt Issue ("Pl. Resp."), filed on January 7, 2019; plaintiff's Brief Concerning Civil Contempt ("Pl. Br."), filed on January 10, 2019; defendant's Replies ("Def. Replies"), filed on January 17, 2019, and January 31, 2019; plaintiff's Reply ("Pl. Reply"), filed on January 24, 2019; and plaintiff's Motion for Leave to Join Necessary Party and Amend Complaint ("Pl. Mot."), filed on February 11, 2019.

Court held plaintiff in contempt of court. The Court also ruled that defendant's debt to plaintiff is subject to the discharge order of the Bankruptcy Court and therefore is discharged. Finally, the Court denied plaintiffs Motion for Leave to Join Necessary Party and Amend Complaint. The Court issues this written Order as a supplement to its oral ruling.

PROCEDURAL HISTORY

On August 10, 2012, plaintiff filed a complaint, alleging breach of contract. *See generally* Compl. Plaintiff alleged that defendant failed to pay him $7,800 in legal fees for services that he had performed on her behalf. *See id.* 16-18.

On September 22, 2015, the Court granted plaintiff's motion for summary judgment, and held that defendant was required to pay plaintiff$ 7,800 for the legal services provided. *See* Order (Dixon, J.), dated September 22, 2015, at 5. On April 8, 2016, plaintiff filed a writ of garnishment against defendant, pursuant to which the Court authorized him to garnish defendant's wages. The sum of $1,499 was garnished, which plaintiff has kept in his escrow account. *See generally* Pl. Mot. to Stay, dated January 27, 2017.

On July 5, 2016, defendant filed a Chapter 7 bankruptcy case in the United States Bankruptcy Court for the Western District of Virginia. On October 6, 2016, defendant's debts were discharged and the case was closed. Plaintiff filed a motion to extinguish the garnishment on November 3, 2016, upon learning about defendant's bankruptcy petition. The Court (Irving, J.) granted plaintiff's motion to extinguish the garnishment on November 10, 2016. On November

17, 2016, the Clerk of the Court issued a certificate requiring plaintiff to release all funds held pursuant to the vacated writ of attachment. On January 27, 2017, plaintiff filed a motion to stay release of garnishment funds. On February 23, 2017, this Court denied plaintiff's motion, thereby ordering plaintiff to release the garnished funds to defendant. *See generally* Order, dated February 23, 2017.

On February 23, 2018, plaintiff filed a motion in the United States Bankruptcy Court for the Western District of Virginia to reopen the bankruptcy case, asserting that defendant's debt of $7,800 to plaintiff had not been properly discharged. Plaintiff asserted that he had not been given notice of the bankruptcy petition, and therefore did not have an opportunity to contest the discharge of defendant's debt to him. *See generally* Pl. Mot., dated February 23, 2018; Order of the Bankruptcy Court, dated July 5, 2018 ("Bankruptcy Order"). The Bankruptcy Court found that defendant failed to list plaintiff as a creditor, instead listing "Accounts Receivable," the collections agency that plaintiff retained to collect the judgment from defendant. *See* Bankruptcy Order at 5. The Bankruptcy Court also found that defendant failed to provide actual notice to plaintiff of her bankruptcy petition; and that plaintiff was not given notice of the petition in time to file a nondischargeability action. *See id.* Rather than reopen the bankruptcy case to consider whether defendant's debt to plaintiff should be discharged, the Bankruptcy Court held that this Court should determine whether the debt is subject to the Bankruptcy Court's discharge order.

See id. at 7. The Bankruptcy Court ruled as follows:

> The Debtor failed to give notice to Eisenberg of his right to determine the dischargeability of his claim, and Eisenberg can ask the District of Columbia Superior Court to determine the dischargeability of his debt. Indeed, that court is already familiar with this action and Eisenberg's allegations against the Debtor. There is no need to start afresh in this Court. Because the District of Columbia Superior Court can determine this action without intruding on the exclusive jurisdiction of the Bankruptcy Court, the Court does not find that sufficient grounds exist to reopen this case
>
> *Id.*

On October 14, 2018, plaintiff filed a motion in this Court to reopen the instant case. The parties appeared for a motion hearing on December 3, 2018, and the Court reopened the case to address the issue of the dischargeability of the debt. At the hearing, defendant represented that plaintiff had disobeyed the Court's February 23, 2017, Order by failing to release the garnished funds of $1,499 to defendant. Plaintiff conceded that he had not released the funds, but stated that he had a good faith reason to believe that the Court's order was invalid. The Court issued an Order to Show Cause on December 4, 2018, requiring plaintiff to show cause as to why he should not be held in contempt of court for his failure to

comply with the Court's February 23, 2017, Order. The Court held a hearing on the outstanding issues in the case on February 25, 2019.

ANALYSIS

I. Contempt of Court

Plaintiff argues that the Court's Order to release the garnished funds was void because the Court did not have jurisdiction over the disputed money. *See* Pl. Br. at 18-19. Plaintiff argues that (1) the Court "relinquished" its jurisdiction over the garnished money; (2) the Court "remained silent on any justification based on federal bankruptcy law to support its order to release the garnished funds"; (3) and the Court remained silent as to when the garnished money must be returned. *See id.* at 15; *see also Kammerman v. Kammerman,* 543 A.2d 794, 799 (D.C. 1988) ("[A] judgment may be held void only if the court that entered it had no jurisdiction over the parties or the subject matter ... or if the court's action was otherwise so arbitrary as to violate due process of law ....")(internal citations omitted).

But even if the Court's order was not valid, defendant was obligated to obey the order until it was overturned on appeal or vacated. *See Baker v. United States,* 891 A.2d 208,212 (D.C. 2006) ("Compliance with court orders is required until they are reversed on appeal or are later modified [E]ven assuming for the sake of argument that the trial court's no-contact order was invalid, [plaintiffs] conviction for contempt must be upheld for his failure to comply with that order.") (internal citations and quotations omitted); *see also In re Marshall,* 445 A.2d 5, 6-7 (D.C. 1982) ("[A]ppellant had an obligation either to comply with

the court order or to seek to have the order vacated It is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decisions are to be respected, and disobedience of them is contempt of its lawful authority, to be punished."). Moreover, one who follows his own interpretation of a court order does so at his own peril. *See Loewinger v. Stokes,* 977 A.2d 901, 915-16 (D.C. 2009) ("[O]ne who elects to follow his own interpretation of a court order and to ignore available means of obtaining judicial clarification may be found to have acted at his own peril").Thus, plaintiff's argument that the Court's Order was void does not excuse his failure to comply with the Order.

In any event, plaintiff's jurisdictional argument is unconvincing on the merits. Plaintiff filed the motion to stay the release of funds in this Court, thereby conceding and submitting to the Court's jurisdiction over him and over the funds. *Cf Beckwith v. Beckwith,* 355 A.2d 537, 540 (D.C. 1975) ("It is well settled that availing oneself of the jurisdiction of a court by filing a voluntary claim subjects the claimant to personal jurisdiction."). Moreover, the Court unquestionably had jurisdiction to order the release of funds that had been obtained through a writ of garnishment issued by this Court, based on a judgment entered by this Court. Plaintiff's assertion of an allegedly "good faith" challenge to the Court's jurisdiction rings hollow, given the context in which it is made: plaintiff disobeyed the Court's order, apparently because he did not like the ruling; he failed to file a motion to reconsider, which would have allowed him to assert any allegedly "good faith"

arguments to challenge the validity of the order; he never informed the Court that he had defied the order; and it was only when defendant informed the Court of plaintiff's defiance of the order, a year and ten months after the order was issued, that plaintiff made the unsupportable, *post hoc* argument that the Court did not have jurisdiction to rule on the motion that he himself filed. Notably, the Court never would have learned of the plaintiff's flagrant non-compliance with the Court's Order, had the bankruptcy court not made the unusual ruling that this Court should address the dischargeability of defendant's debt.

Accordingly, the Court finds by clear and convincing evidence that plaintiff was subject to the Court's order of February 23, 2017, which denied his request for a stay of the release of garnished funds; and that plaintiff willfully violated the order. *See Loewinger,* 977 A.2d at 916 ("To support a finding of civil contempt, a complainant must prove [by clear and convincing evidence] that the alleged contemnor (i) was subject to the terms of a court order and (ii) violated the order ....")(internal citations omitted). Further, the Court finds that plaintiff has no viable defense to avoid a finding of civil contempt. *See id.* ("The law [] recognizes only two defenses in civil contempt proceedings: substantial compliance with the court order and an inability to do that which the court commanded."). The Court therefore finds plaintiff in contempt of court.

Sanctions for contempt of court may include imprisonment, fines, or compensatory relief to the complainant. *See generally D.D. v. M.T,* 550 A.2d 37, 43 (D.C. 1988). The sanctions imposed "should be

related to the Court's interest in ensuring compliance with the underlying court order," and the Court "may ... compensate the complainant for losses sustained" *Loewinger,* 977 A.2d at 923. The Court credits the representations made by defendant regarding her damages, including (1) her inability to pay her rent as a result of plaintiffs withholding of the garnished wages, which required her to move to a new residence; (2) her moving expenses, including a U-Haul truck rental; and (3) six hours spent by defendant writing briefs and appearing for the show cause hearing. The Court also finds that defendant is entitled to interest on the money withheld.

Defendant represented that in order to move because she did not have the money that was withheld, she rented a U-Haul truck at a rate of $29 per day, for seven days, totaling $203. Defendant further represented that she spent approximately six hours preparing for the hearing on the Order to Show Cause, filing her brief, and appearing at the hearing by phone; and that her hourly wage at her last place of employment was $15.89 per hour. This equals $95.34 for her time spent preparing for and participating in the hearing. The Court further awarded defendant $500 as compensatory damages for the inconvenience and stress of moving because she did not receive the funds. Finally, the Court will award interest at a rate of 6%. As noted at the hearing, this rate may be somewhat higher than the market rate, but estimates the amount that would apply if the interest had been compounded, but at a lower rate. At the hearing, however, the Court miscalculated the interest that is due because it erroneously considered only the time period between February of 2018 and the present, instead of the

period between February 2017 - when the order actually was issued - and the present. The proper interest calculation for two years, at an annual rate of 6%, is $179.88. The sum of all of these compensatory damages is $978.22.

Accordingly, plaintiff is ordered to pay $978.22 to defendant as compensatory damages, as a sanction for his contempt of court; and plaintiff is ordered to release the garnished funds of $1,499 to defendant forthwith.

II. Discharge of Debt

With respect to the issue of defendant's debt, the Bankruptcy Court held that defendant's debt to plaintiff had not been discharged through her Chapter 7 bankruptcy proceeding, because defendant did not provide plaintiff notice of her bankruptcy petition and an opportunity to challenge the dischargeability of the debt. The Bankruptcy Court declined to reopen the bankruptcy case to determine whether the debt should be discharged, instead holding that this Court is in a better position to make that decision. *See* Bankruptcy Order at 5. The Bankruptcy Court noted that "In essence[,] 'a debt which was not scheduled in a chapter 7 no-asset case is subject to the discharge order unless it is a debt of the kind specified in Section 523(a)(2), (4), or (6).'" Bankruptcy Order at 6 (citing *In re Rollinson,* 579 B.R. 67, 72 (Bankr. W.D. Va. 2018); *In re Brown,* No. 04-00291, 2010 WL 7275603, at *1 (Bankr. W.D. Va. Nov. 12, 2010)). This Court thus interprets its task as determining whether the debt is "subject to the discharge order," in light of plaintiffs claim that the

exception to dischargeability provided in 11 U.S.C.S. § 523(a)(2)(A) applies.[2]

To sustain an objection to the dischargeability of a debt under 11 U.S.C.S. § 523(a)(2)(A), the objecting party must prove, by preponderance of the evidence, five elements: (1) misrepresentation, fraudulent omission or deceptive conduct by the debtor; (2) knowledge of the falsity or deceptiveness of her statement or conduct; (3) an intent to deceive; (4) justifiable reliance by the creditor on the debtor's statement or conduct; and (5) damage to the creditor proximately caused by its reliance on the debtor's statement or conduct. *Jones v. Holland (In re Holland),* No. 12-00496, 2013 Bankr. LEXIS 2065, at *9 (Bankr. D.C. May 21, 2013). In establishing the last element (proximate cause), the creditor is "required to establish that [he] sustained a loss as a proximate result of a materially-false representation

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[2] The Court believes that it has jurisdiction to determine whether the judgment issued in this Court is "subject to" the order of discharge issued by the bankruptcy court, because the facts that determine whether the debt is subject to the discharge order are unrelated to the bankruptcy itself, and the order of discharge already has been issued by the bankruptcy court. In the event that there is a jurisdictional problem with the Court's consideration of the dischargeability issue, however, the Court alternatively addresses this question as a matter of equity. Because the Bankruptcy Court declined to address the issue of dischargeability and deferred to this Court, it would be unfair for this Court to also decline to address the issue for lack of jurisdiction, because that would leave the parties with no forum to resolve the question of dischargeability. If it is later determined that this Court had no jurisdiction to resolve a bankruptcy issue, the alternative, equitable ground nevertheless allows the Court to vacate the judgment that was entered by this Court, based on the particular facts of this case, as a matter of equity.

by the debtor. A causal relationship must be established between the misrepresentation and the loss suffered." *In re Dixie-Shamrock Oil & Gas, Inc.,* 53 B.R. 262, 267 (Bankr. Md. Tenn. 1985).

Plaintiff argues that defendant committed fraud by concealing and converting plaintiffs property to herself. *See generally* Pl. Resp. According to plaintiff, when the agency gave defendant her share of the settlement money, the agency knew that defendant owed plaintiff money for legal fees. Thus, plaintiff argues, $7,800 *of the settlement* rightfully belonged to plaintiff, and defendant committed fraud by failing to transfer that money to plaintiff. *See id.* at 2, 4; representations made at 2/25/19 hearing. But the undisputed facts do not support a finding that defendant made a misrepresentation or engaged in deceptive conduct. The parties appear to agree that when defendant's case was settled, plaintiff received $48,000 directly from the defendant's agency, and defendant received $35,000. Although defendant still owed plaintiff $7,800 in legal fees, she did not pay him. Defendant's failure to pay plaintiff what she owed him was a breach of the contract between the parties, but it was not fraud. Even if the agency that made the payment to defendant knew that defendant owed money to plaintiff, there is no indication that the agency ear-marked any portion of the settlement money for plaintiff -- *i.e.,* no portion of the money paid to defendant ever belonged to plaintiff, and there was no conversion or theft of plaintiffs money. Rather, there was a settlement payment to defendant, who failed to use that money (which belonged to her) to pay a debt owed. Because defendant did not intend to deceive or defraud plaintiff, and did not steal money from plaintiff, her debt to plaintiff in the amount of

$7,800 is subject to the bankruptcy court's discharge order.

III. Plaintiff's Motion for Leave to Join Necessary Party and Amend Complaint

Plaintiff claims that defendant and Easter Moses, defendant's Chapter 7 bankruptcy counsel, "conspired to defraud" plaintiff of the money that "they knew or should have known were not dischargeable through bankruptcy," because defendant did not properly notify plaintiff of her bankruptcy proceeding, even though defendant and Mr. Moses knew how and where to notify plaintiff. *See* Pl. Mot. at 1. Based on these allegations, plaintiff moves to: (1) amend the complaint to add Mr. Moses as a party; (2) amend the complaint to add a count of conspiracy by defendant and Mr. Moses; and (3) amend the complaint to add the following counts: (a) Count III (Conspiracy to Commit Negligent Misrepresentation); (b) Count IV (Conspiracy to Commit Fraudulent Misrepresentation); (c) Count V (Negligent Misrepresentation), against Mr. Moses; and (d) Count VI (Fraudulent Misrepresentation), against Mr. Moses. *See generally id.*

This closed case was re-opened on December 3, 2018, for the limited purpose of deciding whether defendant's debt should be discharged. The additional claims that plaintiff now seeks to make are based on new allegations, and would more properly be raised by filing a new case, in which plaintiff would file a new complaint and serve the defendants with process. The Motion for Leave to Join Necessary Party and Amend Complaint is therefore denied.

Accordingly, it is this 1st day of March, 2019, hereby

ORDERED that plaintiff is held in contempt of court; and it is further

ORDERED that plaintiff shall pay $978.22 to defendant in compensatory damages as a sanction for his contempt of court by sending a check in that amount to defendant by March 8, 2019; and it is further

ORDERED that plaintiff release the garnished funds of $1,499 held in plaintiffs escrow account to defendant forthwith; and it is further

ORDERED that defendant's debt of $7,800 to plaintiff is subject to the Bankruptcy Court's discharge order and is discharged; and it is further

ORDERED that the judgment in favor of plaintiff that previously was entered in this case on September 22, 2015, is hereby vacated; and it is further

ORDERED that plaintiffs Motion for Leave to Join Necessary Party and Amend Complaint is **DENIED;** and it is further

ORDERED that all future events scheduled in this matter are vacated, and the case is closed.

SO ORDERED.

Judge Florence Y. Pan
Superior Court of the District of Columbia

Copies to:

Michael Eisenberg, Esq.
Plaintiff

Shirley Swain
P.O. Box 6386
Roanoke, VA 24017
Pro Se Defendant

ENTERED: September 25, 2020

DISTRICT OF COLOMBIA
COURT OF APPEALS

No. 19-CV-189

MICHAEL D.J. EISENBERG,

Appellant,

CAB6509-12

v.

SHIRLEY SWAIN,

Appellee,

BEFORE: Blackburne-Rigsby, Chief Judge; Glickman, Fisher, * Thompson, Beckwith, Easterly, * and Deahl, * Associate Judges.

O R D E R

On consideration of appellant's petition for rehearing or rehearing *en banc*, and it appearing that no judge of this court has called for a vote on the petition for rehearing *en banc*, it is

ORDERED by the merits division* that appellant's petition for rehearing is denied. It is

FURTHER ORDERED that appellant's petition for rehearing *en banc* is denied.

PER CURIAM

Associate Judge McLeese did not participate in this case.

Copies to:

Honorable Florence Pan

Director, Civil Division

No. 19-CV-189

Copies e-served to:

Michael D.J. Eisenberg

Shirley Swain

pii

ENTERED: May 28, 2020

DISTRICT OF COLOMBIA
COURT OF APPEALS

No. 20-CV-202

MICHAEL D.J. EISENBERG,

Appellant,

CAB6509-12

v.

SHIRLEY SWAIN,

Appellee.

O R D E R

On consideration of the notice of appeal and this court's March 9, 2020, order, it has been determined that this case is not appropriate for appellate mediation, it is

ORDERED that appellant shall, within 20 days from the date of this order, complete and file with this court a single copy of the attached statement regarding transcripts. Where transcript(s) necessary for this appeal have been ordered and completed for non-appeal purposes, appellant must advise the Court Reporting and Recording Division to forward said transcript(s) for inclusion in the record on appeal. If partial transcript(s) are being ordered, appellant must file a statement of issues to be presented before this court within 10 days from the date of this order. *See* D.C. App. R. 10(b)(3)(A). It is

FURTHER ORDERED that appellant's failure to respond to any order of this court shall subject this appeal to dismissal without further notice for lack of prosecution. *See* D.C. App. R. 13(a).

Julio A. Castillo
Clerk of the District of
Columbia Court of Appeals

Copies e-served to;

Shirley Swain
P.O. Box 6386
Roanoke, VA 24017

No. 20-CV-202

Copies mailed to:

Director, Court Reporting and Recording Division
Michael D.J. Eisenberg
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Washington, DC 20005

elp/ta

ENTERED: March 11, 2020

DISTRICT OF COLOMBIA
COURT OF APPEALS

No. 19-CV-189

MICHAEL D.J. EISENBERG,

Appellant,

CAB6509-12

v.

SHIRLEY SWAIN,

Appellee,

O R D E R

On consideration of appellant's motion requesting leave to present oral argument, and it appearing that this matter is scheduled on the Summary Calendar of April 23, 2020, it is

ORDERED on behalf of the merits division assigned to consider this matter that the motion is denied and this matter shall be submitted for decision on April 23, 2020, without oral argument by either party, on the record and briefs alone.

FOR THE COURT:

JULIO A. CASTILLO
Clerk of the Court

Copies e-served to:

Michael D.J. Eisenberg, Esquire

Shirley Swain

aj

ENTERED: November 19, 2019

DISTRICT OF COLOMBIA
COURT OF APPEALS

No. 19-CV-189

MICHAEL D.J. EISENBERG,

Appellant,

CAB6509-12

v.

SHIRLEY SWAIN,

Appellee.

O R D E R

On consideration of appellant's motion for leave to file the lodged amended brief and joint appendix, and appellant's motion to seal, construed as appellant's motion to file the identified documents as part of a sealed appendix, and it appearing that a motion to supplement the record is pending before the trial court, it is

ORDERED that appellant's motion for leave is granted and the Clerk shall file appellant's lodged amended brief and joint appendix. It is

FURTHER ORDERED that appellant's motion to file the identified documents as part of a sealed appendix is hereby held in abeyance pending further order of this court. It is

FURTHER ORDERED that appellant shall, within 20 days from the date of this order, advise this court with a status of the motion pending in the trial court.

BY THE COURT:

ANNA BLACKBURNE-RIGSBY
Chief Judge

No. 19-CV-189

Copies e-served to:

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Suite 700
Washington, DC 20005

Copies mailed to:

Shirley Swain
P.O. Box 6386
Roanoke, VA 24017

Honorable Florence Pan

clp

ENTERED: September 19, 2019

DISTRICT OF COLOMBIA
COURT OF APPEALS

No. 19-CV-189

MICHAEL D.J. EISENBERG,

Appellant,

2012 CAB 6509

v.

SHIRLEY SWAIN,

Appellee.

BEFORE: Glickman and Fisher, Associate Judges, and Nebeker, Senior Judge.

O R D E R

On consideration of appellant's motions for leave to file the lodged brief that exceeds the page limitations, it is

ORDERED that appellant's motions are denied. Appellant shall, within 30 days from the date of this order, file his brief and joint appendix that conform to the page limitations and other requirements of D.C. App. R. 28, 31, and 32.

PER CURIAM

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Roanoke, VA 24017

cml

ENTERED: July 25, 2019

DISTRICT OF COLOMBIA
COURT OF APPEALS

No. 19-CV-189

MICHAEL D.J. EISENBERG,

Appellant,

CAB6509-12

v.

SHIRLEY SWAIN,

Appellee.

O R D E R

On consideration of appellant's unopposed motion for an extension of time within which to file the brief and appendix, it is

ORDERED that appellant's motion is granted and appellant's brief and appendix shall be filed on or before August 22, 2019.

FOR THE COURT
Julio A. Castillo

JULIO A. CASTILLO
CLERK OF THE COURT

Copies e-served to:

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elp

ENTERED: June 13, 2019

DISTRICT OF COLOMBIA
COURT OF APPEALS

No. 19-CV-189

MICHAEL D.J. EISENBERG,

Appellant,

CAB6509-12

v.

SHIRLEY SWAIN,

Appellee.

O R D E R

It appearing that the complete record on appeal has been filed with this court, it is

ORDERED that appellant's brief and appendix including the documents required by D.C. App. R. 30(a)(1), shall be filed within 40 days from the date of this order, and appellee's brief shall be filed within 30 days thereafter. See D.C. App. R. 31.

FOR THE COURT
Julia A. Castillo

JULIO A. CASTILLO
CLERK OF THE COURT

Copies e-served to:

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700 12th Street, NW
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Washington, DC 20005

No. 19-CV-189

Copies mailed to:

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Roanoke, VA 24017

elp

ENTERED: May 21, 2019

DISTRICT OF COLOMBIA
COURT OF APPEALS

No. 19-CV-189

MICHAEL D.J. EISENBERG,

Appellant,

2012 CAB 6509

v.

SHIRLEY SWAIN,

Appellee.

BEFORE: Fisher, Thompson, and Easterly, Associate Judges.

O R D E R

On consideration of appellant's motion and amended motion to stay the March 1, 2019, order and the opposition thereto, it is

ORDERED that appellant's motions to stay the March 1, 2019, order are denied. *See Barry v. Washington Post Co.*, 529 A.2d 319, 321 (D.C. 1987) (explaining that to prevail on a motion for stay the movant must demonstrate that he is likely to succeed on the merits of the appeal; irreparable harm will result if the stay is denied; the opposing party will not be harmed by the stay; and the public interest favors the granting of a stay).

PER CURIAM

Copies mailed to:

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QMU-Civil Division

Shirley Swain
P.O. Box 6386
Roanoke, VA 24017

Copy e-served to:

Michael D.J. Eisenberg, Esquire

cml