

1 of the filing of the adversary proceeding without first having
2 sought to reopen the underlying bankruptcy case, the Court issued
3 its Order to Show Cause whether debtor is required to seek
4 reopening of the case before filing the adversary proceeding.
5 Debtor filed her response to the OSC, and the Court has heard
6 oral argument from her counsel. The matter was thereafter taken
7 under submission.

8 The caption of debtor's adversary filing reads:

9 Adversary Proceeding Seeking Injunctive,
10 Declaratory, and Monetary Relief for
11 Violations of the California Rosenthal Act;
12 Invasion of Privacy; Tort In Se; Violation of
Automatic Stay; Violation of the Discharge
Injunction

13 Below the caption is a statement of debtor's demand. It states:

14 Demand: \$16,948.00, Attorney Fees
15 and Costs, Punitive Damages,
16 Injunctive Relief, Declaratory
Relief.
Jury Trial Demanded

17 The first cause of action set out in the adversary complaint
18 seeks penalties under California state law, section 1788.17 of
19 the Rosenthal Fair Debt Collection Practices Act (RFDCPA). The
20 second cause of action seeks penalties under § 1788.14 of the
21 same state law Act. The third claimed a violation of a right to
22 privacy and seclusion, although no source for the asserted rights
23 was identified. The fourth alleged a "tort in se" based upon the
24 alleged violation of a statutory duty. The fifth alleged
25 violations of the automatic stay of § 362, and the sixth alleged
26 violation of the discharge injunction of 11 U.S.C. § 524.

1 The thrust of debtor's argument is that this Court has
2 subject matter jurisdiction over the adversary without having to
3 reopen the underlying bankruptcy. In the Court's view, debtor
4 attempts to paint with too-broad a brush. The Court agrees that
5 In re Menk, 241 B.R. 896 (9th Cir. BAP 1999) says that for
6 certain kinds of claims that arise under the Bankruptcy Code
7 there need not be an open bankruptcy case. 241 B.R. at 904-06.
8 Menk also makes clear that if the basis of subject matter
9 jurisdiction is "arising in" or "related to", then there must be
10 an open case. Menk, supra.

11 As can be seen from even a cursory review of debtor's
12 complaint, the only cause of action that arises under the
13 Bankruptcy Code is the one for violation of the automatic stay,
14 brought under 11 U.S.C. § 362(k). As debtor's counsel is well
15 aware, the discharge injunction of 11 U.S.C. § 524 does not give
16 rise to any private right of action. In re Walls, 276 F.3d 502
17 (9th Cir. 2002). As made clear in Walls, the remedy for
18 violation of a discharge lies in the discretion of the Court
19 because it is the Court's order that is being violated. Debtor
20 has no independent right to enforce the injunction. She may, of
21 course, bring any alleged violation to the attention of the Court
22 by way of application for an order to show cause why a person or
23 entity should not be held in contempt for violation of the
24 court's injunction. But debtor has no right to directly sue to
25 enforce it.

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1 It is of interest that some of the conduct debtor complains
2 of to support various claims allegedly occurred prepetition
3 which, unless formally abandoned, would make them unadministered
4 assets of the bankruptcy estate. If they are such, debtor would
5 have no standing to assert them in her own name, the case would
6 need to be reopened and the trustee reappointed to administer any
7 such claim.

8 For purposes of the instant matter, debtor has set out a
9 claim for violation of the automatic stay which she has a right
10 to assert on her own behalf pursuant to 11 U.S.C. § 362(k).
11 According to Menk and its progeny, the underlying case need not
12 be reopened for purposes of a court exercising subject matter
13 jurisdiction over the claim. But that really begs the issue.
14 The issue is what procedural requirements must the debtor comply
15 with before the Court should entertain the merits of her claim.
16 For example, may the court refuse to address her complaint until
17 she has paid a filing fee or obtained a waiver? What if she has
18 failed to comply with a myriad of other procedural requirements?
19 The Court would still have subject matter jurisdiction over the
20 claim, but debtor would not be entitled to proceed until she
21 complies.

22 Of import to this court's analysis is 11 U.S.C. § 350(b),
23 which provides: "(b) A case may be reopened in the court in which
24 such case was closed to administer assets, to accord relief to
25 the debtor, or for other cause." The Court recognizes that other
26 courts, including Menk, have held that failure to reopen does not

1 divest a court of subject matter jurisdiction it otherwise has.
2 But that is not the same thing as saying no underlying case needs
3 to be reopened "to accord relief to the debtor". To the
4 contrary, it seems clear that Congress contemplated that a case
5 would be reopened "to accord relief to the debtor". To ignore
6 the language of § 350(b) in a context like this would render it
7 surplusage, which courts are discouraged from doing. It may well
8 be, as Menk, and others have pointed out, that the act of
9 reopening is largely ministerial and of no substantive import,
10 but that does not make it procedurally or administratively
11 irrelevant, as recognized in Menk. 241 B.R. at 910, 917. Another
12 effect of compliance with § 350(b) is that it fixes the venue of
13 a proceeding to "the court in which such case was closed. . . ."

14 The Court's reading of Menk and its progeny (and some of its
15 antecedents), and of § 350(b), is further buttressed by Rule
16 5010, Federal Rules of Bankruptcy Procedure, in terms of the
17 procedural expectations and requirements of Congress. It reads:

18 A case may be reopened on motion of the
19 debtor or other party in interest pursuant to
20 § 350(b) of the Code. In a chapter 7, 12, or
21 case a trustee shall not be appointed by
22 the United States trustee unless the court
determines that a trustee is necessary to
protect the interests of creditors and the
debtor or to insure efficient administration
of the case.

23 Debtor would have the Court read § 350(b) and Rule 5010 to say
24 "You can do it if you want to, but you don't have to." But in so
25 arguing, debtor confuses the concept of subject matter
26 jurisdiction with procedural requirements for how one may invoke

1 that jurisdiction. Procedural requirements neither grant nor
2 divest the court of subject matter jurisdiction, but they may
3 prevent acceptance for filing of defective pleadings, incomplete
4 pleadings, pleadings for which a fee is required but unpaid, and
5 so on. Contrary to debtor's argument, that is not invocation of
6 a rule to alter a substantive right.

7 The Court also considers Rule 5005, Fed.R.Bankr.P.
8 informative. In pertinent part, it reads:

9 (a)

10 (1) Place of Filing. The . . .
11 complaints . . . and other papers required to
12 be filed by these rules . . . shall be filed
with the clerk in the district where the case
under the Code is pending.

13 Rule 5005 is consistent with § 350(b) both in the sense of venue,
14 but also as illustrative of the expectation that there will be a
15 pending case when a complaint is filed.

16 Debtor has proffered a shopping list of arguments why she
17 thinks requiring reopening of an underlying case is a meaningless
18 act. This Court disagrees. While reopenings are often granted,
19 especially if consideration is limited to the act of reopening
20 rather than the merits of the underlying claim, as Menk
21 recognizes, the Court has discretion whether to reopen. 241 B.R.
22 at 915. Debtor's argument would eviscerate § 350(b) and Rule
23 5010, among other provisions.

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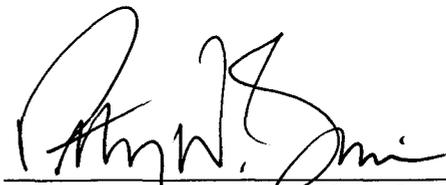
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Conclusion

For the foregoing reasons, the Court finds and concludes that the Bankruptcy Code, in § 350(b), and the Bankruptcy Rules, in Rules 5010 and 5005, contemplate that there exist a pending case when an adversary case is filed with the court. If the underlying case has been previously closed, the case must be reopened before the court will accept and allow to proceed an adversary complaint. That is not because failure to reopen somehow deprives a court of subject matter jurisdiction. Rather, an adversary filed with no pending case is procedurally defective, and shall be treated accordingly. Therefore, the Clerk of Court is directed to reject for filing, and to return to debtor the adversary complaint in this matter until such time as the underlying bankruptcy case has been reopened.

IT IS SO ORDERED.

DATE: MAR 10 2008



PETER W. BOWIE, Chief Judge
United States Bankruptcy Court