

**UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF OHIO**

In Re	)	
	)	<b>JUDGE RICHARD L. SPEER</b>
Timothy/Heather Kastor	)	
	)	Case No. 04-3421
Debtor(s)	)	
	)	(Related Case: 03-34269)
Timothy/Heather Kastor	)	
	)	
Plaintiff(s)	)	
	)	
v.	)	
	)	
Citi Cards, et al.	)	
	)	
Defendant(s)	)	

**MEMORANDUM OPINION AND DECISION**

This cause comes before the Court as an action by the Plaintiffs/Debtors, Timothy and Heather Kastor, for violation of the discharge injunction under 11 U.S.C. § 524. Defendants, Citi Card, Inc., Credigy Receivables, Inc., and Credigy Associates, Inc., have briefed the Court on the issues involved, as well as filed various pleadings and motions in response. Presently before the Court is Citi Card’s Motion for Dismissal, Credigy Receivables’ Motion for Judgment on the Pleadings, and the Plaintiffs’ Motion for Default Judgment. After considering the Parties’ arguments, the Court, for reasons set forth herein, finds that Citi Card’s Motion for Dismissal and Credigy Receivables’ Motion for Judgment on the Pleadings have merit. Accordingly, this matter will be Dismissed.

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**FACTS**

The facts pertinent to the present action are, for the most part, undisputed by the Parties. On June 2, 2003, the Plaintiffs, Timothy and Heather Kastor, voluntarily filed for bankruptcy under Chapter 7 of the Bankruptcy Code. (Case No. 03-34269). Defendant, Citi Card, was listed on Schedule F of the Plaintiffs' petition as an unsecured creditor with a balance owed in the amount of \$2458.00. Notice of the § 341 Creditor's Meeting was mailed to Citi Card. However, no response, appearance, or objection to the discharge was made by Citi Card. This Court subsequently entered an order for discharge for the Plaintiffs in October 2003, and the case was closed.

Close to a year later the Plaintiffs applied for credit, but were denied due to what appeared to be an outstanding balance owed to the Defendant, Credigy Associates, Inc. From the facts presented to this Court, it appears that the debt owing to Citi Card, originally listed on Schedule F of the Plaintiffs' bankruptcy petition, was sold by Citi Card to an intermediary some two years prior to the Plaintiffs' filing. (Defendant's Ex. B). This debt was then resold by the intermediary to Credigy Associates, Inc., who then placed the debt with First National Collection Bureau (First National) for collection.<sup>1</sup> (Plaintiffs' Ex. C). Upon applying for credit, Plaintiffs were informed that they would remain ineligible for credit until the debt was reflected as paid in First National's records.

Plaintiffs immediately informed First National Collection Bureau, Inc. that no outstanding amount should be reflected in First National's records since Citi Card was included in the bankruptcy petition, notice had been properly given, and the debt was properly discharged. Apparently Plaintiffs met with little success, as a month later the Plaintiffs contacted First National once more and repeated their request that

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<sup>1</sup>

It should be noted that First National is not a Defendant in this action, being listed in the Plaintiffs' complaint as simply as a "c/o".

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its records be updated to reflect the discharge, and cease its collection efforts. According to the Plaintiffs, First National has continued to report a balance owed, undertaken efforts to collect the debt by through a collection letter, and added interest and fees. (Plaintiffs' Ex. C). However, since the filing of this action, no further affirmative acts to collect upon this debt have been taken.

Plaintiffs brought this adversary proceeding seeking to enjoin the Parties from further collection actions, to reflect the balance owed to Credigy Associates as discharged, and to recover compensatory and punitive damages from Defendants, Citi Cards, Credigy Associates, Inc., and Credigy Receivables, Inc.

**DISCUSSION**

Plaintiffs, Timothy and Heather Kastor, contend that, following their discharge in bankruptcy, Defendants, Citi Card, Credigy Receivables, Inc., and Credigy Associates, Inc. continued to attempt to collect upon a credit card account in disregard of the discharge injunction created by 11 U.S.C. § 524(a). In response to the Plaintiffs' actions, Defendants filed motions for dismissal and judgment on the pleadings, raising primarily two grounds: (1) failure to state a claim for relief under 12(b)(6); and (2) insufficiency of service of process under 12(b)(5). As the underlying action involves in this case involves an alleged violation of the discharge injunction under § 524, adjudication of this matter is deemed a core proceeding for which this Court has been conferred by Congress with the jurisdictional authority to enter final orders. 28 U.S.C. § 157(b)(1); *In re Latanowich*, 207 B.R. 326, 332-33 (Bankr. D. Mass. 1997).

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**A. FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED**

Rule 12(b)(6) provides that a defendant may file a motion to dismiss the plaintiff's complaint for "failure to state a claim upon which relief can be granted." FED.R.CIV.P.12(b)(6). When considering such a motion, the court may only evaluate whether the plaintiff's complaint sets forth allegations sufficient to make out the elements of a cause of action, but may use other sources in order "to clarify allegations in the complaint whose meaning is unclear." *Windsor v. The Tennessean*, 719 F.2d 155, 158 (6<sup>th</sup> Cir. 1983); *Pegram v. Herdrich*, 530 U.S. 211, 203 n.10, 120 S. Ct. 2143, 2155 n.10, 147 L. Ed. 2d 164 (2000).

Under Rule 12(b)(6), the plaintiff's complaint must be construed liberally, and all factual allegations and permissible inferences therein must be accepted. *Gazette v. City of Pontiac*, 41 F.3d 1061, 1064 (6<sup>th</sup> Cir. 1994). It must be noted though, that this standard of review requires "more than the bare assertion of legal conclusions." *Owner-Operator Indep. Drivers Assoc. v. Artic Express*, 238 F.Supp.2d 963, 967 (S.D. Ohio 2003). The complaint must give the defendant "fair notice of what the claim is and the grounds upon which it rests" and "contain either direct or inferential allegations with respect to all the material elements necessary to sustain a recovery under some viable legal theory." *Gazette*, 41 F.3d at 1064. Finally, the complaint may be dismissed pursuant to Rule 12(b)(6) if it becomes obvious that relief cannot be granted under any set of facts that could be proven consistent with the allegations made. *Hishon v. King & Spaulding*, 467 U.S. 69, 73, 104 S. Ct. 2229, 2232, 81 L. Ed. 2d 59 (1984).

The first point raised by the Defendants, Citi Card and Credigy Receivables, in support of their 12(b)(6) Motion is that the Plaintiffs' complaint wrongly asserts a private right of action under § 524(a).

Section 524(a)(2) provides that a discharge "operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such

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debt as a personal liability of the debtor, whether or not discharge of such debt is waived[.]” 11 U.S.C § 524(a)(2). Essentially, § 524(a) acts to enjoin creditors from undertaking any action to collect upon any debt which arose before the commencement of the bankruptcy case once the order of discharge has been granted to the debtors.

The Sixth Circuit Court of Appeals observed in *Petruso v. Ford Motor Credit Co.*, that while § 362(h) of the Bankruptcy Code, which provides for an automatic stay at the time of filing, specifically authorizes the awarding of damages when a creditor has “willfully” violated the automatic stay, Congress did not provide a comparable provision within § 524. In interpreting this dissimilarity, the Sixth Circuit held that the language of § 524 does not impliedly create a private cause of action. *Petruso v. Ford Motor Credit Co.*, 233 F.3d 417, 422 (6<sup>th</sup> Cir. 2000). The Court then went on further to state that a contempt proceeding constitutes the proper remedy for an individual injured as a result of a violation of the discharge injunction. *Id.* at 421.

Although there is some ambiguity as to the nature of the action and the relief sought in this matter, the Plaintiffs’ action most resembles that of a private right of action. While seeking injunctive relief, the main point of the Complaint centers on damages, both compensatory and punitive. And while damages may and often are awarded in a contempt action, they are normally limited to that needed to bring a party into compliance with the court’s order. *In re Galleria Enterprises of Maryland, Ltd.*, 102 B.R. 472, 475 (Bankr.D.Md. 1989), *citing* Ron Weiss, *Contempt Power of the Bankruptcy Court*, 6 Bankr. Dev. J. 205, 210-211 (1989). Here, however, the damages sought go way beyond this, with the Plaintiffs demanding compensatory damages of \$45,000.00, as well as punitive damages of approximately \$500,000.00 for what was only one affirmative violation of the discharge order: the single dunning letter sent to the Debtors.

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In addition to the necessity of dismissing the Plaintiffs' complaint as improperly asserting a private right of action under § 524(a)(2), their Complaint also fails to make any reference to a violation of the discharge injunction on the part of Citi Card, intentional or otherwise. Instead, the Complaint only makes several factual references to Citi Card, such as it being listed on schedule F of the Plaintiffs' bankruptcy petition, receiving notice of the 341 meeting, and failing to respond or object to the discharge. Even less was alleged concerning the Defendant, Credigy Receivables. Yet, none of these actions constitute, together or alone, a violation of the discharge injunction. Thus, even accepting the Plaintiffs' allegations as true, as required by Rule 12(b)(6), they fail to allege a breach of § 524. *See In re Perviz* at 370.

**B. INSUFFICIENCY OF SERVICE OF PROCESS**

Defendants, Citi Card and Credigy Receivables, further contend that the Plaintiffs' complaint should be dismissed for insufficiency of service under Rule 12(b)(5), as made applicable by Bankruptcy Rule 7012(b). They contend that service of process was not perfected in accordance with the requirements of Rule 7004(b)(3) of the Federal Bankruptcy Code, and therefore this Court lacks the personal jurisdiction required to continue this action.

When insufficiency of service of process under 12(b)(5) is raised, the party on whose behalf service is made has the burden of establishing the validity of process. The non-movant must demonstrate that the procedure employed satisfies the relevant portions of Rule 4 of the Federal Rules of Civil Procedure, as well as any other applicable provision of law. *Wilson v. Prudential Fin.*, 332 F. Supp. 2d. 83, 87 (D.C. 2004).

Adversary Proceedings are governed by Part VII of the Federal Rules of Bankruptcy Procedure. Rules 7000 *et seq.* Rule 7004 of the Rules of Bankruptcy Procedure specifically outlines the requirements

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for proper service of parties subject to an adversary proceeding. Applicable in this matter, Rule 7004(b)(3) which provides:

Except as provided in subdivision (h), in addition to the methods of service authorized by *Rule 4(e)-(j) F.R.Civ.P.*, service may be made within the United States by first class mail postage prepaid as follows:

(3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association, by mailing a copy of the summons and complaint *to the attention of* an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive Service of Process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the Defendant.”

FED.R.BANKR. P. 7004(b)(3) (emphasis added). Rule 7004(b)(3) also authorizes the requirements for proper service of process upon corporations and associations as outlined by Rule 4(h) of the Federal Rules of Civil Procedure. In part, this Rules states:

Service Upon Corporations and Associations. Unless otherwise provided by federal law, service upon a domestic or foreign corporation or upon a partnership or other unincorporated association that is subject to suit under a common name, and from which a waiver of service has not been obtained and filed, shall be effected:

(1) in a judicial district of the United States in the manner prescribed for individuals by subdivision (e)(1), or by delivering a copy of the summons and of the complaint *to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process* and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant . . . .”

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FED.R.CIV.P. 4 (emphasis added). *See also In re Kleather*, 208 B.R. 406, 412 (Bankr. S.D.Ohio 1997). In looking to the Plaintiffs' Certificate of Service, it is clearly evident that service was facially defective under these Rules.

Service was not addressed to an officer, managing or general agent, or a listed agent of the respective corporations as required, but was rather simply addressed to the Parties' respective mailing locations. Furthermore, besides this defect, it appears from the Certificate of Service that the Defendant, Credigy Associates, was not sent notice to its home business address. Although defective service of process is not necessarily fatal to an action, here such errors, when combined with the vagueness of the pleadings, lead to the conclusion that dismissal of the Plaintiffs' Complaint is necessary to clear upon matters that could arise if a judgment were issued in this matter.

In reaching the conclusions found herein, the Court has considered all of the evidence, exhibits and arguments of counsel, regardless of whether or not they are specifically referred to in this Opinion.

Accordingly, it is

**ORDERED** that this entire matter (Case No. 04-3421), be, and is hereby, **DISMISSED**; and that the Plaintiffs' Motion for Default Judgment, be, and is hereby, **DENIED**.

Dated:

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Richard L. Speer  
United States  
Bankruptcy Judge