

IT IS SO ORDERED.

Dated: September 11, 2015  
11:44:06 AM

  
*Kay Woods*  
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Kay Woods  
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO

IN RE:

JAMES A. KIRIAZIS and  
SHELLEY A. KIRIAZIS,

Debtors.

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CASE NUMBER 11-43413

CHAPTER 13

HONORABLE KAY WOODS

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ORDER DENYING MOTION OF SPECIALIZED LOAN  
SERVICING LLC TO REOPEN CASE  
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Apparently not satisfied with the final order of this Court finding Specialized Loan Servicing LLC ("SLS") to have committed a willful violation of the discharge injunction, SLS has filed Motion of Specialized Loan Servicing LLC to Reopen Case ("SLS's Motion to Reopen") (Doc. 39). SLS seeks an order reopening this bankruptcy case "for the limited purpose of allowing [SLS] to file a motion seeking an order setting aside or alternatively amending prior entry of hearing, and to implement the relief requested

therein.” (SLS’s Mot. to Reopen at 1.) SLS’s Motion to Reopen is premised solely on the assertion that counsel for SLS never meant or intended to admit that SLS had committed a willful violation of the discharge injunction.<sup>1</sup> As set forth herein, this assertion does not constitute cause to reopen the Debtors’ bankruptcy case.

Some background is in order. Debtors James A. Kiriazis and Shelley A. Kiriazis filed a voluntary petition pursuant to chapter 13 of the Bankruptcy Code on November 30, 2011. They completed their chapter 13 plan and received a discharge on August 8, 2014. On March 13, 2015, the Debtors filed Motion to Reopen (“Debtors’ Motion to Reopen”) (Doc. 23) their chapter 13 case, which had been filed “to address a creditor violation” of the discharge injunction. (Debtors’ Mot. to Reopen at 1.) On the same date, the Court granted the Debtors’ Motion to Reopen (Doc. 24).

On March 25, 2015, the Debtors filed Motion for an Order to Appear and Show Cause (“Show Cause Motion”) (Doc. 26). The pertinent allegations in the Show Cause Motion are: (i) SLS filed its Response to Notice of Final Cure Payment (“Response to Cure Notice”) (doc. 8/5/2015) indicating that it agreed that the Debtors had paid in full the amount required to cure the pre-petition

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<sup>1</sup> Without waiting to see if the case would be reopened, SLS filed Motion of Specialized Loan Servicing LLC Seeking an Order Setting Aside or Alternatively Amending Prior Entry of Hearing (“Motion to Set Aside”) (Doc. 40). In the Motion to Set Aside, SLS contends, “It was not the intent of Counsel to suggest or represent an admission of the underlying allegation of a willful and knowing violation of the discharge in this matter.” (Mot. to Set Aside at 2.)

default and that the Debtors had paid all post-petition amounts due to the secured creditor; (ii) subsequent to entry of the discharge order, on September 8, 2014, SLS sent the Debtors the first post-discharge statement and included an unitemized amount of \$2,384.01, stating that such amount was past due; (iii) Mr. Kiriazis made multiple telephone calls to SLS regarding the asserted past due amount and was told that the charges represented the accumulation of fees during the bankruptcy; (iv) on October 15, 2014, Bruce R. Epstein, Esq., counsel for the Debtors, wrote to Attorney John R. Callison, the person who signed the Response to Cure Notice, requesting an explanation for the demand for the asserted past due fees; (v) on February 12, 2015, SLS finally responded with a breakdown of the asserted unpaid fees, indicating the charges were for the fees incurred from December 23, 2011 through August 12, 2014; (vi) SLS concluded that the all the asserted unpaid fees were due and payable to SLS and that SLS had found no errors; (vii) despite SLS's self-serving statement of no errors, the breakdown of asserted unpaid fees included arithmetic errors and amounts that were included in the proof of claim filed by SLS. (Debtors' Mot. to Reopen at 2-3.)

And Court entered Order to Appear and Show Cause ("Show Cause Order") (Doc. 27) on March 26, 2015, which directed a representative of SLS to appear before the Court on April 30, 2015 to show cause why (i) SLS should not be found to have committed a

willful violation of the discharge injunction in 11 U.S.C. § 524; and (ii) the “Debtors should not be entitled to recover from [SLS] costs and attorneys’ fees and, where appropriate, punitive damages for [SLS’s] claimed violations.” (Show Cause Order at 1.) The Court held a hearing on the Show Cause Order on May 21, 2015.<sup>2</sup> After the hearing, on May 22, 2015, the Court entered Order Finding that Specialized Loan Servicing LLC Wilfully (sic) Violated the Discharge Injunction in 11 U.S.C. § 524 (“Violation Order”) (Doc. 32). The Violation Order included the following findings:

Alison A. Gill, Esq. appeared as a representative of SLS and admitted that the conduct of SLS was knowing and constituted a willful violation of § 524. . . . The Court found on the record that SLS had committed a willful violation of the discharge injunction and further indicated that, based on the representations of Mr. Epstein, this case would be appropriate for an award of punitive damages.

Violation Order at 2.

It is this finding to which SLS, through Ms. Gill, now objects and seeks to have “set aside.” As set forth below, there are many reasons why the relief sought by SLS is inappropriate.

First, in seeking to set aside the Violation Order, SLS is asking the Court to vacate or, alternatively, to amend the Violation Order to remove the finding regarding the willful violation of the discharge injunction. The Violation Order did

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<sup>2</sup> The hearing on the Show Cause Order was continued by agreed order to May 21, 2015 (Doc. 30).

not completely resolve the Court's Show Cause Order because it contemplated that the parties would agree on the amount of damages to be awarded to the Debtors.<sup>3</sup> SLS and the Debtors submitted Agreed Order Resolving Motion for An Order to Appear and Show Cause ("Agreed Order")<sup>4</sup> (Doc. 36.) for the Court's signature, which provided for SLS to pay the Debtors \$6,000.00 no later than August 14, 2015. Taken together, the Violation Order and the Agreed Order constitute a final and binding order of the Court. The Agreed Order was entered on July 20, 2015. The case was closed on August 27, 2015. SLS's Motion to Reopen was filed on September 4, 2015 – 46 days after entry of the Agreed Order and 8 days after the case was closed. Because entry of the Agreed Order resulted in a final and appealable order, if SLS took issue with the Violation Order, the procedurally correct method would have been to file an appeal.

Although the bankruptcy court in this case originally found [the creditor] in contempt on March 16, 2011, that order was not final until the sanctions were imposed on July 18, 2011. . . . Consequently, the July 18, 2011 order imposing sanctions against [the creditor] completely resolved the contempt issues between the parties and made the order of contempt, as

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<sup>3</sup> Because the parties indicated that they were close to agreeing to a monetary damages award for the Debtors, the Court provided the parties with a 30-day period to reach an agreement or request an evidentiary hearing to determine damages.

<sup>4</sup> The Court added text to correct the Agreed Order, as follows: "On May 22, 2015, the Court entered Order Finding that Specialized Loan Servicing LLC Willfully Violated the Discharge Injunction in 11 U.S.C. Section 524 (Doc. 32). The only open issue was damages, which the Court permitted the parties to consensually resolve. There is no 'pending Motion.' This Agreed Order fully resolves the Order to Appear and Show Cause (Doc. 27)." (Agreed Order at 1.)

well as the imposition of sanctions, final and appealable. *U.S. Abatement Corp. [v. Mobil Exploration & Producing U.S., Inc. (In re U.S. Abatement Corp.)]*, 39 F. 3d [563] at 567 [(5th Cir. B.A.P. 1994); *Official Comm. Of Subordinated Bondholders v. Integrated Res., Inc. (In re Integrated Res., Inc.)*, 3 F. 3d 49, 53 (2nd Cir. 1993)]. The notice of appeal filed by [the creditor] on July 26, 2011, was, therefore, timely.

*In re Martin*, 474 B.R. 789, 2012 WL 907090 at \*1 (6th Cir. B.A.P. 2012). In the current factual situation, however, SLS failed to file any appeal. SLS cannot accomplish through SLS's Motion to Reopen and the Motion to Set Aside what it should have sought by taking an appeal. SLS had the opportunity to appeal the Violation Order and the Agreed Order, but it chose not to do so. This alternative path SLS has chosen to take is procedurally incorrect and cannot – and will not – be countenanced.

Second, although Ms. Gill asserts in the Motion to Set Aside that she did not “intend” to make an admission regarding the willful violation, she expressly made such admission. The Court found that SLS had willfully violated the discharge injunction based on the following exchange between Ms. Gill and the Court:

Alison Gill: Good morning, Your Honor. Alison Gill on behalf of SLS.

Court: You're here on an Order to Appear and Show Cause as a representative of Specialized Loan Servicing LLC, is that correct?

Alison Gill: That's correct, Your Honor.

Court: And the Court issued the Order to Appear and Show Cause based upon a Motion that was filed by Debtors' Counsel for Specialized Loan Servicing to show cause why

it should not be found to have committed a willful violation of the discharge injunction.

AG: Yes, Your Honor.

Court: Have you reviewed Mr. Epstein's motion and the attachments thereto?

AG: Yes.

Court: And, based upon those, it appears there's definitely a violation and that there was a knowing violation, which would make it a willful violation. So what is the position of your client?

AG: Your Honor, I don't disagree with the Court's characterization. When we received this file, we contacted Mr. Epstein on April 16 and indicated the same to him – that it was an unfortunate result of an error system that was relied upon which automatically issued that first statement after the discharge date was uploaded and that statement included fees that it should not have. And the follow up was not as consistent with the discharge as it should have been. Unfortunately, once the discharge order is uploaded, the loan goes back into a non-bankruptcy status and the personnel looking at it did not understand the full context, but we have maintained to him that we believe it was an error and we believe it does constitute a discharge claim. Your Honor, I believe the reason that we are not resolved and here today is based on the sanctions that Mr. Epstein's clients are seeking.

Court: Oh, you cannot resolve an Order to Appear and Show Cause. You would have to have appeared no matter what. You are here because the Court ordered a representative of your client to appear.

AG: Yes. I'm sorry, I misstated. I didn't mean to suggest that we wouldn't appear. I meant to emphasize why it's not resolved yet.

Hrg. Trans. May 21, 2015, 10:41:19 - 10:43:50 a.m. (emphasis

added). As a consequence, it is clear that the finding of a willful violation is fully supported by the record.

Even if Ms. Gill only meant to suggest a reason why the parties had not yet agreed to an amount of sanctions, Ms. Gills' subjective intention would not and could not negate the finding that the conduct of SLS constituted a willful violation of the discharge injunction. Ms. Gill's assertion that the actions by SLS were an error does not affect the knowing nature of such actions. At most, her explanation would have impacted the amount, if any, punitive damages that would be awarded.<sup>5</sup>

It is well settled law that a finding of willfulness is supported if the creditor (i) knew that the discharge injunction was invoked and (ii) intended the actions that violated the discharge injunction.

Bankruptcy Courts are empowered to award debtors actual damages and sanctions for violation of the discharge injunction of 11 U.S.C. Section 524(a) pursuant to their statutory contempt powers deriving from 11 U.S.C. Section 105. A creditor may be held liable for contempt pursuant to Section 105(a) for willfully violating the permanent injunction of 11 U.S.C. Section 524. Conduct is willful regarding a discharge violation if the creditor: "1) knew that the discharge injunction was involved and 2) intended the actions which violated the discharge injunction."

The subjective beliefs or intent of the creditor are irrelevant. Receipt of notice of a debtors discharge is sufficient to establish the knowledge element of the two-part test.

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<sup>5</sup> Because the parties resolved the issue of damages by agreement, this issue was never before the Court.

*In re Thompson*, 456 B.R. 121, 137 (Bankr. M.D. Fla. 2010) (internal citations omitted). See *In re Haemmerle*, 529 B.R. 17, 26 (Bankr. E.D.N.Y. 2015) (“A discharge injunction violation may be punished as a civil contempt of court, and requires a two part inquiry: ‘(1) did the party know of the lawful order of the court, and (2) did the defendant comply with it.’”)

In the present case there is no dispute that SLS knew about the discharge order and invocation of the discharge injunction. Thus, the knowledge element is firmly established. There is also no dispute that personnel of SLS intended the actions that violated the discharge injunction, despite Ms. Gill’s characterization of such actions as an “error.” Thus, the second element is also clearly established.

As SLS acknowledges, whether to reopen a bankruptcy case is within the sound discretion of the bankruptcy court. (SLS’s Mot. to Reopen at 1.) “A case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause.” 11 U.S.C. § 350(b) (2015). Here, SLS does not assert that it seeks to reopen the Debtors’ case to administer assets or to accord relief to the Debtors. Thus, in order to reopen the case, SLS must establish “cause” for the Court to do so.

The Court certainly has the discretion to deny reopening a case when the stated purpose for doing so is a useless act. Having

sat on its rights in not appealing the Violation Order and the Agreed Order, SLS is not entitled to a "second bite at the apple." SLS cannot accomplish the result of an appeal through the process of reopening the case and seeking to have the Court "set aside" the Violation Order. Because the Court's finding of willfulness on the part of SLS is fully supported by the record, there is no legal or factual basis to set aside or amend the Violation Order. Accordingly, the "limited purpose" for SLS's Motion to Reopen does not establish "cause" to reopen this case. As a consequence, this Court hereby denies SLS's Motion to Reopen.

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