UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:	)	CHAPTER 7
PATRICK WILSON & EDITH WILSON,	)	CASE NO. 01-60160
Debtors.	)	JUDGE RUSS KENDIG
	)	**MEMORANDUM OPINION**

This matter came before the court on the motion for contempt filed by Patrick and Edith Wilson (hereafter "Debtors"), the response thereto filed by Vanderbilt Mortgage and Finance Inc. (hereafter "Creditor"), the motion to compel enforcement of verbal settlement agreement filed by Creditor, and the objection thereto filed by Debtors. The court held two hearings on the matter at which James F. Ciccolini (hereafter "Ciccolini"), counsel for Debtors, and Douglas E. Curtis (hereafter "Curtis"), counsel for Creditor, testified.

The court has jurisdiction over these matters pursuant to 28 U.S.C. § 1334(a) and the general order of reference entered in this district on July 16, 1984. The following constitute the court's findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052.

Facts and Arguments

Debtors commenced their Chapter 7 proceeding on January 17, 2001. On Schedule D, Debtors listed a secured debt owed to Creditor in the amount of $29,310.00 for a manufactured home that they valued at $17,310.00. Debtors claimed a joint exemption of $10,000.00 in Schedule C for the manufactured home. In the Statement of Intention, Debtors stated that they would reaffirm the debt to Creditor.

Debtors' meeting of creditors was held on April 3, 2001. After the meeting had been concluded, Ciccolini informed Debtors' trustee that the information contained in Schedule D was

erroneous and that Debtors' debt to Creditor was unsecured.[1] Ciccolini further informed the trustee that given the value of the manufactured home, he believed it had no nonexempt equity. The trustee expressed his appreciation for Ciccolini's honesty and stated that he also believed no nonexempt equity existed.[2] The trustee filed a report of no distribution on April 10, 2001. Debtors received a discharge of their debts on May 16, 2001. Debtors' case was closed on May 23, 2001.

On June 25, 2002, Debtors moved to reopen their case citing Creditor's violation of the 11 U.S.C. § 362 automatic stay as grounds.[3] Specifically, Debtors alleged that Creditor recorded a lien on Debtors' manufactured home on July 25, 2001. Further, Debtors alleged that Creditor sent them collection letters and a letter regarding the maintenance of insurance on their manufactured home.[4] Additionally, Ciccolini alleged that he contacted Creditor numerous times,

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[1]Debtors did not amend Schedule D or Schedule F to reflect the correction until July 29, 2002, the day of the first postdischarge hearing in this matter. They never amended the Statement of Intention.

[2]At the second hearing in front of the court, the matter of Debtors' disclosure to trustee at the meeting of creditors of the nature of the debt to Creditor became an issue. At that time, Ciccolini offered to obtain a tape recording of that meeting. The court requested that Ciccolini file a copy of the tape with the court and serve a notice upon Curtis. A copy of the tape was filed on November 6, 2002. The court's knowledge of that hearing is based upon the tape recording provided by Ciccolini.

[3]Shortly thereafter, on July 16, 2002, the trustee moved to reopen Debtors' case citing his belief that Debtors had failed to disclose the manufactured home as a free and clear asset as grounds.

[4]The collection letters Creditor sent to Debtors were attached to Debtors' motion for contempt. There are five letters. Three of them appear to be copies of the same letter. The fourth is identical to the first three except for the certified mail number in the right hand corner. They each contain the following language in bold capital letters in the first paragraph:

> **PLEASE BE ADVISED THAT THIS LETTER CONSTITUTES NEITHER A DEMAND FOR PAYMENT OF THE CAPTIONED DEBT NOR A NOTICE OF PERSONAL LIABILITY TO ANY RECIPIENT HEREOF WHO MIGHT HAVE RECEIVED A DISCHARGE OF SUCH DEBT IN ACCORDANCE WITH APPLICABLE BANKRUPTCY LAWS OR WHO MIGHT BE SUBJECT TO THE AUTOMATIC STAY OF SECTION 362 OF THE UNITED STATES BANKRUPTCY CODE. THIS LETTER IS BEING**

including one occasion on which he faxed Creditor a copy of the certificate of title showing the home was owned free and clear, to notify Creditor of Debtors' bankruptcy filing and violation of the automatic stay. Debtors requested damages and attorney fees for Creditor's alleged violation of the automatic stay.

In its response, Creditor alleged that Debtors paid off the previous loan on their manufactured home through a refinancing conducted by Creditor on June 10, 1997. At that time, Creditor alleged that it was to receive a copy of the certificate of title from the previous lienholder, however, the previous lienholder sent the title to Debtors in error. When Creditor contacted the previous lienholder and Debtors about the whereabouts of the certificate of title, both denied having possession of the title. Debtors began making their loan payments, and Creditor commenced a search for the title. Creditor alleged that when Debtors filed bankruptcy, their stated intention of reaffirmation confused Creditor's title department. Creditor's title department believed that the statement of intention, rather than a signed reaffirmation agreement, was sufficient for Debtors to have reaffirmed their debt with Creditor, so Creditor noted the debt in its computer system as an active loan and the title was processed as a lost title. Creditor alleged that this resulted in computer generated notices being sent to Debtors. Creditor further alleged that after Ciccolini informed Creditor of the error, the matter was turned over to Curtis for review. Creditor admitted that it may have committed a technical violation of the automatic stay but argued that Debtors' misrepresentation of the debt in their schedules, as well as their concealment of the whereabouts of the title, mitigated against finding Creditor in contempt.

In its motion to enforce verbal settlement agreement, Creditor alleged that Curtis and Ciccolini arrived at a resolution of Debtors' motion for contempt. Specifically, Curtis alleged that Ciccolini stated that Debtors would withdraw their motion for contempt if Creditor released its lien on Debtors' manufactured home. Curtis contended that Creditor accepted the offer and in reliance on that acceptance requested the replacement title be pulled from storage and the lien released. The lien was released on July 11, 2002. Creditor argued that the settlement agreement is a valid and enforceable contract and should be enforced as any other contract would be under state law. Creditor argued that Trustee's reopening of the case caused Debtors to rescind their settlement offer in retaliation against Creditor. Curtis alleged that he informed Ciccolini that

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SENT TO ANY SUCH PARTIES MERELY TO COMPLY WITH APPLICABLE STATE LAW GOVERNING FORECLOSURE OF LEINS [sic] PURSUANT TO CONTRACTUAL RIGHTS.

The fifth is a letter requesting insurance information on Debtors' manufactured home. Also attached is a copy of an Ohio Certificate of Title which indicates SPFS Bank of America released a lien on the manufactured home on December 30, 1997. Finally, Debtors attached a printout, presumably from the Ohio Bureau of Motor Vehicles, that shows Creditor placed a lien on Debtors' manufactured home on July 25, 2001.

Creditor had already released the lien on Debtors' manufactured home. Curtis argued that because Creditor accepted and complied with the terms of the settlement in reliance upon Debtors' agreement, the court should enforce the settlement terms.

Debtors responded by denying that they had reached an agreement with Creditor regarding a settlement of their contempt motion, a fact which Ciccolini vehemently reiterated during his testimony at the second hearing. Debtors renewed their demand for contempt sanctions and requested $10,000.00 in compensation.

Law and Analysis

I. Motion for contempt

At the time of Debtors' bankruptcy filing, Debtors' debt to Creditor was an unsecured, nonpriority debt that was discharged pursuant to 11 U.S.C. § 727(b): "a discharge . . . discharges the debtor from all debts that arose before the date of the order for relief." 11 U.S.C. § 727(b). Section 524(a)(2), otherwise known as the discharge injunction, was to protect Debtors from any attempt to "collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived." 11 U.S.C. § 524(a)(2).[5] Therefore, Creditor's postdischarge contact with Debtors should be analyzed under discharge injunction analysis.

In order for a court to find a violation of the discharge injunction, the court must find that the alleged violator acted willfully; the creditor must have known or been on notice of the discharge injunction and the action taken intended. In re Lafferty, 229 B.R. 707, 713 (Bankr. N.D. Ohio 1998) (citing In re Hill, 222 B.R. 119, 123 (Bankr. N.D. Ohio 1998)) (other citations omitted).

In the present case, the court cannot find that Creditor acted willfully. First, before they even filed for bankruptcy protection, Debtors failed to cooperate with Creditor when it inquired as to the whereabouts of the title to their manufactured home. Had Debtors acknowledged receipt of the title and forwarded it to Creditor in a timely manner, the confusion over the nature

[5]Debtors frame the issue as being one of a violation of the automatic stay rather than a violation of the discharge injunction. The matter may be better analyzed as being one of a violation of the discharge injunction depending upon the timing of various events. *See* Summers v. Anderson (In re Summers), 213 B.R. 825 (Bankr. N.D. Ohio 1996) (creditor who attempted garnishment postpetition violated discharge injunction); Braun v. Champion Credit Union (In re Braun), 152 B.R. 466 (N.D. Ohio 1993) (creditor who first sued after discharge granted violated discharge injunction). Any change in framing and difference in applicable code section is not prejudicial to Debtors or Creditor.

of the debt as secured versus unsecured could have been avoided. Second, Debtors' actions upon filing bankruptcy contributed to the confusion which lead to Creditor's contacts. Had Debtors properly listed the debt, or even promptly amended their schedules once the error was discovered, Creditor would have been put on sufficient notice as to describe Creditor's actions as willful. But that did not happen. Debtors' actions and inaction mitigate against finding Creditor at fault. Further, Creditor's letters to Debtors included language, albeit boilerplate, that informed Debtors it was not attempting to collect on a discharged debt; it was only attempting to enforce its security interest. But for the previous lienholder's error and Debtors' failure to cooperate, Creditor would have possessed a valid security interest and these letters would have been appropriate. It is unreasonable and inequitable to hold Creditor accountable without attributing any blame to Debtors. The unclean hands of Debtors created the misunderstanding and negates any willfulness of Creditor.

The court finds that Creditor did not willfully violate the discharge injunction under 11 U.S.C. § 524(a)(2), and therefore, Debtors' motion for contempt is not well taken.

II. Motion to enforce settlement

In response to Debtors' motion for contempt, Curtis filed a motion to enforce a verbal settlement agreement he allegedly entered into with Ciccolini over the telephone to settle the motion for contempt. "It is well settled that courts retain the inherent power to enforce agreements entered into in settlement of litigation pending before them." Brock v. Scheuner Corp., 841 F.2d 151, 154 (6th Cir. 1988) (quoting Aro Corp. v. Allied Witan Co., 531 F.2d 1368, 1371 (6th Cir.) (citations omitted)). "A federal court possesses this power 'even if that agreement has not been reduced to writing.'" Brock, 841 F.2d at 154 (quoting Bowater N. Am. Corp. v. Murray Mach., 773 F.2d 71, 77 (6th Cir. 1985)).

Settlement agreements are to be reviewed in accordance with state law. In re Unit, Inc., 45 B.R. 425 (Bankr. S.D. Ohio 1984) (applying state contract law in determining whether alleged settlement agreement was binding on the parties). "[A]n oral settlement agreement requires no more formality and not [sic] greater particularity than appears in the law for the formation of a binding contract." Noroski v. Fallet, 2 Ohio St.3d 77, 79 (1982) (citing Spercel v. Sterling Indus., 31 Ohio St.2d 36 (1972)). "The law is clear that to constitute a valid [agreement], there must be a meeting of the minds of the parties, and there must be an offer on the one side and an acceptance on the other," id., and the agreement must be proven by clear and convincing evidence. Anschutz v. Radiology Assocs. of Mansfield, Inc., 827 F.Supp. 1338 (N.D. Ohio 1993) (finding application of clear and convincing standard appropriate where dispute exists as to existence of a settlement).

In the present case, Curtis has failed to prove by clear and convincing evidence that a settlement agreement was reached between himself and Ciccolini on behalf of their clients. At

the second hearing of this matter, Ciccolini testified that he had engaged in telephone conversations with Ciccolini in an attempt to resolve the matter, however, he testified that counsel never reached an agreement. Curtis' impression of the conversations was that Ciccolini had extended an offer that if Creditor released the lien, Debtors would withdraw their motion for contempt. Curtis testified that Creditor's release of the lien deemed the offer accepted and the contract binding. The court interprets counsels' conversations differently. They amounted to an exploration of settlement parameters on Debtors' part and wishful thinking on Creditor's part. The testimony of both counsel at the hearing did not establish, through clear and convincing evidence, that the parties entered into a verbal settlement agreement.

Creditor's motion to enforce settlement agreement is not well taken.

Conclusion

Debtors filed a motion to hold Creditor in contempt for postdischarge contact that Debtors alleged was in violation of the discharge injunction under 11 U.S.C. § 524(a)(2). Debtors' actions, both prepetition and postpetition, mitigate Creditor's actions, and therefore, Creditor did not willfully violate the discharge injunction.

In response, Creditor filed a motion to enforce a verbal settlement of the motion for contempt. Based on the conflicting testimony given by Ciccolini and Curtis at trial, the court cannot find that Creditor met its burden of proof by clear and convincing evidence.

An order consistent with this opinion shall be entered forthwith.

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RUSS KENDIG
U.S. BANKRUPTCY JUDGE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this _____ day of February 2003, the above Memorandum Opinion and accompanying Order was sent via regular U.S. mail to:

James F. Ciccolini
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Deputy Clerk

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:	)	
	)	
PATRICK WILSON &	)	CHAPTER 7
EDITH WILSON,	)	
	)	CASE NO. 01-60160
Debtors.	)	
	)	JUDGE RUSS KENDIG
	)	
	)	**ORDER**

Debtors Patrick and Edith Wilson filed a motion for contempt against Creditor Vanderbilt Mortgage and Finance Inc. Creditor filed a motion to enforce verbal settlement agreement in response.

For the reasons set forth in the accompanying memorandum opinion, the court hereby **DENIES** Debtors' motion for contempt and hereby **DENIES** Creditor's motion to enforce verbal settlement agreement.

Trustee Michael V. Demczyk is hereby **ORDERED** to inform the court within **45 days** whether Debtors' case can be closed.

It is so ordered.

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RUSS KENDIG
U.S. BANKRUPTCY JUDGE