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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

FILED
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U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
CLEVELAND

In re:) Case No. 94-14704
)
WILLIAM D. CAMPBELL,) Chapter 13
)
Debtor.) Judge Pat E. Morgenstern-Clarren
)
) **MEMORANDUM OF OPINION**

The debtor William Campbell filed a motion to show cause why Robert Weltman, Weltman, Weinberg & Reis Co., LPA, and The Cadle Company should not be held in contempt for violating the discharge injunction set out in 11 U.S.C. § 524(a)(2). (Docket 89). He asks for actual damages, including attorney fees, and punitive damages. The respondents acknowledge a minor violation of the discharge injunction, but argue that it does not rise to a level that warrants sanctions.

JURISDICTION

Jurisdiction exists under 28 U.S.C. § 1334 and General Order No. 84 entered by the United States District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C. § 157(b)(2).

FACTS¹

The debtor filed this chapter 13 case in 1994. Weltman, Weinberg & Reis Co., LPA (the firm) represented The Cadle Company (Cadle) in a state court foreclosure lawsuit that was pending at the time of the bankruptcy filing. The debtor scheduled Cadle as a creditor and provided for the debt in his chapter 13 plan. On June 18, 1999, the court issued an order finding

¹ The court held an evidentiary hearing on June 21, 2004. The debtor and Alan Hochheiser, a partner in Weltman, Weinberg & Reis Co., LPA, testified.

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that the debtor had met all requirements under his confirmed chapter 13 plan and was discharged from all debts provided by the plan. (Debtor Exh. H). The order states in part that “[a]ll creditors are prohibited from attempting to collect any debt that has been discharged in this case.”

In January 2002, Robert Weltman, a named partner at the firm, got a phone call from Craig Syby of Tower City Title. Mr. Syby made an inquiry in connection with the debtor’s application to refinance his house. Mr. Weltman confirmed the conversation in writing by letter dated January 14, 2002 (the letter). The letter states:

Re: The Cadle Company, Assignee of the FDIC, Receiver For First Bank National Association vs. William D. Campbell, et al.
Cuyahoga County Common Pleas Court, Case No. 242701 (Foreclosure)
Our File No. 00851055

Dear Mr. Syby:

This letter confirms our telephone conversation that the undersigned represents the creditor noted above as the Plaintiff in the foreclosure filed and pending against the property at 11429 Melba, Cleveland, Ohio, along with the judgment lien filed thereon. The balance for a release of the lien and dismissal of the foreclosure is \$11,272.01, plus interest at the rate of 10% per annum from October 8, 1992. Upon receipt of a check for this amount the lien will be released and the mortgage dismissed of record.

Sincerely,
/s/ Robert B. Weltman

(Debtor Exh. L).

The debt owed by the debtor to Cadle had been discharged more than two years before Mr. Weltman sent this letter. At the hearing, the firm offered this explanation for the error: the firm had a collection file, a foreclosure file, and a bankruptcy file relating to the debtor. After the debtor received his discharge, the firm closed and purged the collection and bankruptcy files, but did not close the foreclosure file. When Mr. Weltman looked on the firm computer to respond to Mr. Syby’s inquiry, he found the open foreclosure file and provided the information listed there. The firm did not provide a satisfactory explanation for why the foreclosure file was not closed. It

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agrees that the file should have been closed or marked in some other fashion to show that the debt underlying the judgment lien was discharged. In an unrelated move, the firm improved its computer system about 1-1/2 years ago so that bankruptcy discharge information is properly linked to all files.

Despite the debtor's contention that this incorrect information derailed his financing, he did not contact Tower City Title, Mr. Weltman or the firm to discuss the error or his attempt to refinance his house. The first contact he made was almost a year later, when he filed a *pro se* multi-defendant lawsuit in the United States District Court for the Northern District of Ohio seeking \$5 million compensatory damages and \$10 million punitive damages arising out of the alleged violation of the discharge injunction and other causes of action. *See Campbell v. Weltman, et al.*, case no. 1:02CV2448. At some point after that, the firm released the judgment lien and dismissed the foreclosure action.

The district court referred the debtor's lawsuit to this court as related to his bankruptcy case. This court granted judgment in favor of several defendants and dismissed the complaint without prejudice as against others based on *Pertuso v. Ford Motor Credit Co.*, 233 F.3d 417 (6th Cir. 2001) (holding that there is no private right of action for violating a § 524 discharge injunction). *See Campbell v. Weltman, et al.*, Adv. Pro. 03-1012. The court gave the debtor permission to file contempt proceedings for the alleged violation of the discharge order, as contemplated by *Pertuso*. The debtor retained counsel and filed the motion that is now before the court.

THE POSITIONS OF THE PARTIES

The debtor contends that the letter violated the discharge injunction. He asks for unspecified damages for harm done to his credit rating, damages to compensate for his recent

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inability in the last year to consolidate and refinance his debt, and \$6,000.00 in attorney fees.

The respondents acknowledge that the letter was a “minor” violation of the discharge injunction. They argue that *Pertuso* bars the debtor from collecting damages even if the debtor had proven such, which the respondents deny. They further contend that the violation was so small that it would not be appropriate to impose any sanction, particularly given the debtor’s failure to try to resolve the problem without court intervention.

DISCUSSION

Bankruptcy code § 524(a)(2) states 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 debt as a personal liability of the debtor, whether or not discharge of such debt is waived[.]

11 U.S.C. § 524(a)(2). The Sixth Circuit held in *Pertuso v. Ford Motor Credit Co.* that “the traditional remedy for violation of an injunction lies in contempt proceedings” *Pertuso*, 233 F.3d at 421. “The bankruptcy court’s contempt powers flow from Bankruptcy Code § 105(a) and the inherent power of a court to enforce compliance with its lawful orders.” *In re Walker*, 257 B.R. 493, 496 ((Bankr. N.D. Ohio 2001).

The issues in this case are: (1) whether the respondents’ actions constitute contempt; and if so, (2) what the consequence should be. *Id.* The debtor has the burden of proving by clear and convincing evidence that “the respondents ‘violated a definite and specific order of the court requiring [them] to perform or refrain from performing a particular act or acts with knowledge of the court’s order’” *Id.* at 497 (quoting *Rolex Watch U.S.A., Inc. v. Crowley*, 74 F.3d 716, 720 (6th Cir. 1996). The respondents may defend by proving in detail that they were unable to comply with the court order. *Id.*

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Did the respondents act in contempt of court?

The evidence against Cadle must be analyzed separately from the evidence relating to the other respondents. There was no evidence that Cadle itself took any action in violation of the discharge injunction or that it authorized or knew anything at all about the actions taken by the firm and Mr. Weltman based on the judgment lien in Cadle's name. The debtor did not, therefore, prove that Cadle violated the discharge injunction.

The situation is different with Mr. Weltman and the firm. They knew about the discharge injunction because they received notice of it and acted to close and purge two of their three internal files. They acknowledge that their communication with Tower City Title violated the injunction. The debtor, therefore, proved that they are in civil contempt of court through their actions.

What sanction, if any, should be imposed for the contempt?

A court may impose a fine as a sanction for civil contempt. "One kind [of fine] is intended to compensate for damages caused by the contemnor's noncompliance [with the court order] . . . [and] must be based on evidence of actual loss." *In re Walker*, 257 B.R. at 498. The debtor failed to prove that he suffered any damages as a result of Mr. Weltman's and the firm's act. There was no convincing evidence that Tower City (or any proposed lender) declined to go forward with the debtor's 2002 request to refinance because of the letter. If the letter had posed such a problem, it could easily have been resolved by giving Tower City the discharge order and/or contacting Mr. Weltman to have him correct his mistake. Similarly, there was no evidence that the debtor's current financial troubles were caused by the letter. The debtor testified that in the last year he again tried to refinance to save his house from foreclosure by a different creditor, but was unable to do so. The debtor did not prove any connection between this

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problem and the letter. The other damage claim is for attorney fees incurred in connection with this motion. The debtor testified that he has paid counsel \$3,500.00 and owes another \$2,500.00. Well before counsel entered his appearance in August 2003, however, the firm and Mr. Weltman had already released the offending lien and dismissed the foreclosure suit. Under these circumstances, it is not appropriate to award attorney fees.

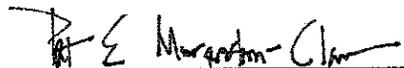
CONCLUSION

The debtor proved that Robert Weltman and Weltman, Weinberg & Reis Co., LPA acted in civil contempt of court when they violated the discharge injunction. The debtor did not prove that any sanction should be imposed for the contempt because the firm remedied the problem upon being given notice, had already improved its computer system to prevent similar problems from occurring in the future, and the debtor did not make any effort to resolve the problem before seeking court intervention. The debtor did not prove that The Cadle Company acted in civil contempt of court.

A separate order will be entered reflecting this decision.

Date:

6 July 2004



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

To be served by clerk's office email and the Bankruptcy Noticing Center on:

A. Clifford Thornton, Jr., Esq.
Harry Greenfield, Esq.

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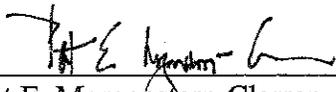
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Debtor.) Judge Pat E. Morgenstern-Clarren
)
) **ORDER**

For the reasons stated in the memorandum of opinion issued this same date, the debtor's motion to hold The Cadle Company, Robert Weltman, and Weltman, Weinberg & Reis Co., LPA in contempt is denied in part and granted in part. The part of the motion seeking to hold The Cadle Company in contempt is denied. The part of the motion seeking to hold Robert Weltman and Weltman, Weinberg & Reis Co., LPA in contempt is granted, but no sanctions are awarded.

IT IS SO ORDERED.

Date: 6 July 2004



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

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