Dated: September 22 2005

Mary Ann Whipple
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:	)	Case No.: 01-34801
	)	
Roland Edward Harrington, Jr.,	)	Chapter 7
Marie-Celine Evelyn Harrington,	)	
	)	Adv. Pro. No. 04-3493
Debtors.	)	
	)	Hon. Mary Ann Whipple
Roland Edward Harrington, Jr., et al.,	)	
	)	
Plaintiffs,	)	
v.	)	
	)	
U.S. Bank National Association, et al.	)	
	)	
Defendants.	)	

MEMORANDUM OF DECISION AND ORDER ON MOTION FOR DEFAULT JUDGMENT

This adversary proceeding is before the court on Plaintiffs' Motion for Default Judgment [Doc. # 13]. Plaintiffs are Debtors in an underlying Chapter 7 case in this court [Case No. 01-34801]. On December 29, 2004, they filed a Complaint alleging that Defendants U.S. Bank National Association ("U.S. Bank") and Fairbanks Capital Corp. ("Fairbanks") violated the discharge injunction imposed under 11 U.S.C. § 524(a). Plaintiffs seek an order finding Defendants in civil contempt and imposing appropriate

sanctions. On April 21, 2005, the Clerk issued an alias summons and notice of pre-trial conference [Doc. #8]. The return on service [Doc. # 9] shows that Plaintiffs served the summons and Complaint on Defendants by regular first class mail. The court takes judicial notice of the fact that Fairbanks is not an insured depository institution as defined in § 3 of the Federal Deposit Insurance Act. *See* FDIC, Bank Find, http://www2.fdic.gov/idasp/main_bankfind.asp; Fed. R. Bankr. P. 9017; Fed. R. Evid. 201(b)(2). Thus, the return on service shows that the summons and Complaint were properly served on Fairbanks under Fed. R. Bankr. P. 7004(3) . Although U.S. Bank is an insured depository institution requiring service by certified mail under Fed. R. Bankr. P. 7004(h), for the reasons set forth in this opinion, judgment will be entered in its favor. The alias summons required an answer or other response to the Complaint to be filed by May 23, 2005.

On May 31, 2005, the court held a pre-trial scheduling conference. Plaintiffs and their counsel appeared in person. There was no appearance by or on behalf of Defendants. [Doc. # 10]. No answer or other response to the Complaint had been served and filed as of the date of the pretrial conference. Plaintiffs were ordered to file a motion for default judgment ("Motion"), [Doc. # 11], and did so on June 16, 2005. [Doc. #9]. The Motion was served by first class mail on Defendants. Accordingly, the court scheduled an evidentiary hearing on the Motion as to both liability and damages pursuant to Fed. R. Civ. P. 55,[1] made applicable to this proceeding by Fed. R. Bankr. P. 7055, and notice of this hearing was also properly served on Defendants. [Doc. ##14, 15]. There was again no appearance at the hearing by or on behalf of Defendants and they did not file any response to the motion.

All of the facts alleged in the Complaint are taken as true as against Fairbanks as a result of its default. However, Plaintiffs also testified and exhibits were presented and admitted at the hearing. Based on its observations of Plaintiffs as they testified and the content and coherence of their testimony, the court finds their testimony to be credible.

The court has jurisdiction over Plaintiff's Chapter 7 case and this adversary proceeding, 28 U.S.C. § 1334, and this matter is a core proceeding that this court may hear and determine, 28 U.S.C. § 157(b)(1) and (b)(2)(O). For the reasons that follow, Plaintiffs' Motion will be granted with respect to Fairbanks and

[1] Rule 55 provides in relevant part: "If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper. . . ."

judgment will be entered accordingly. But Plaintiffs' Motion will be denied with respect to U.S. Bank and judgment will be entered in favor of U.S. Bank.

FINDINGS OF FACT

The court finds that notice of this action and the deadlines and hearings herein, including specifically service of the alias summons and Complaint pursuant to Fed. R. Bankr. P. 7004(b)(3), has been duly and properly been served upon Fairbanks. The court further finds that Defendants have failed to appear, plead, or otherwise defend this action as required, at least of Fairbanks, by the applicable rules of procedure.

Plaintiffs filed a joint petition under Chapter 7 of the Bankruptcy Code on August 1, 2001. Before filing their petition, Plaintiffs owned a home located in Russels Point, Ohio, on which U.S. Bank held first and second mortgages. Unable to make payments on their loans with U.S. Bank, Plaintiffs moved from the home after winterizing and closing it and turning over keys to the home to U.S. Bank. U.S. Bank proceeded to foreclose upon the home and the property was sold at a sheriff's sale before or shortly after Plaintiff's filed their petition. In their petition, Plaintiffs listed U.S. Bank as an unsecured creditor in an unknown amount for any deficiency judgment obtained on the first and second mortgage loans. Plaintiffs listed both U.S. Bank and Equicredit Corp., which apparently serviced the loans, in their matrix for noticing purposes and both were served with notice of Plaintiffs' bankruptcy and of the deadlines for filing a complaint objecting to discharge or to determine dischargeability of any debt owed to it. [*See* Case No. 01-34801, Doc. # 2]. No complaint was filed and Plaintiffs received a discharge under 11 U.S.C. § 727 on November 19, 2001. Both U.S. Bank and Equicredit were served with notice of Plaintiffs' discharge on November 23, 2001.[2] [*See id*, Doc. # 9]. The bankruptcy estate was a no asset estate and the case was closed on March 19, 2002.

In September, 2002, Plaintiffs began receiving harassing telephone calls about the loans from agents of Fairbanks (now known as Select Portfolio Servicing) at both their home and their workplaces. During these calls, Fairbanks threatened to have Plaintiffs' wages garnished, told Plaintiffs that they still owed on their second mortgage debt notwithstanding their Chapter 7 discharge, and told Plaintiffs that Fairbanks was a Utah corporation and did not have to observe "Ohio" bankruptcy law. These telephone calls were made at least several times per week and, at times, several calls were made in one day. Several times Plaintiffs

[2] The court takes judicial notice of the contents of its case docket and the Debtors' schedules. Fed. R. Bankr. P. 9017; Fed. R. Evid. 201(b)(2); *In re Calder*, 907 F.2d 953, 955 n.2 (10th Cir. 1990).

found Mrs. Harrington's elderly mother, who lived with them, in tears after receiving an abusive telephone call from Fairbanks while Plaintiffs were gone. Mrs. Harrington testified that the calls were so frequent and harassing that eventually she herself became nauseated when she heard the telephone ring. She also testified that she was limited in the number of phone calls she could receive at work and was reprimanded because of the frequent calls she received there from Fairbanks. Although Plaintiffs repeatedly told Fairbanks' agents during these calls that their personal liability on the first and second mortgage loans was discharged in their bankruptcy case, the telephone calls nevertheless continued. Plaintiffs' counsel also called Fairbanks and similarly informed it of Plaintiffs' Chapter 7 discharge. The calls continued after subsiding for only a few weeks.

Fairbanks also repeatedly sent letters to Plaintiffs in an attempt to collect on the mortgage debt. [*See*, *e.g.*, Exs. 1, 2, 8]. In addition, Fairbanks continued to report to credit reporting agencies active foreclosure proceedings through April, 2003, with respect to the first mortgage, notwithstanding the fact that Plaintiffs' home had been foreclosed in 2000 and had been sold at sheriff's sale before or shortly after Plaintiffs had filed their bankruptcy petition. [*See* Pl. Ex. 3, p. 6; Ex. 4, p. 3].[3] As of May, 2003, Fairbanks reported that the first mortgage was foreclosed in April, 2003, and that a zero balance was owed as of that time. [*Id.*] As of September, 2004, Fairbanks still reported the second mortgage as an open account that is "at least 120 days or more than four payments past due" with a balance owed of $22,103. [Pl. Ex. 5, p. 22; Ex. 3, p. 5]. It further reports that account as being "transferred to recovery." [*Id.*]. In an attempt to bring the collection activities of Fairbanks to an end, Plaintiffs' counsel sent two letters, dated March 11 and June 19, 2003, again informing Fairbanks of Plaintiffs' discharge of the debts and the fact that the property was foreclosed upon in 1999 and subsequently sold at a sheriff's sale. [Pl. Exs. 6 & 7]. Attached to both letters was a copy of the discharge order entered in the underlying Chapter 7 case, as well as an explanation of the debts that are discharged and the prohibition of collection activity as to those debts. [*Id.*].

Although it actually was the party that foreclosed upon Plaintiffs' home, Mr. Harrington testified that U.S. Bank never made a telephone call to Plaintiffs and there is no evidence that it engaged in any collection activities after Plaintiffs received their discharge. Plaintiffs admit that they are not sure how U.S.

---

[3] The earlier credit report indicates Fairbanks Capital Corp. as the creditor reporting the status of the first and second mortgage debt at issue in this case, while later credit reports indicate Select Portfolio Servicing as the reporting creditor. The address is reported as the same for both and Plaintiffs testified, and the court finds, that Select Portfolio Servicing is Fairbanks' successor and that Plaintiffs dealt with the same people regardless of the change in name.

Bank is related, if at all, to Fairbanks. And the record does not show whether Fairbanks acquired the loans or the servicing rights or was engaged by the holder as a third party debt collector. But Fairbanks' connection with and its relationships to the loans and to U.S. Bank are immaterial to deciding whether Fairbanks violated the discharge injunction issued in Plaintiffs' Chapter 7 case. These facts are immaterial to Fairbanks' liability because Plaintiffs and their lawyer repeatedly informed Fairbanks of the discharge.

Plaintiffs testified that, as a result of Fairbanks' collection activities and credit reporting, they sustained the following categories of damages. First, they testified that they were required to pay deposits on apartment rentals when others were offered apartments by the same landlords without requiring a deposit. They testified that recently a landlord would not even consider renting to them until their then current landlord wrote a favorable reference on their behalf and, even then, the landlord required a $300 deposit. [Ex. 12]. They also testified that because an active foreclosure was reported by Fairbanks, they were required to pay 15% to 16% on car loans when others were offered loans as low as 0% to 6%. They also testified that they were required to pay 20%-30% more for automobile insurance due to Fairbanks' reports to credit agencies. While Plaintiffs offered evidence that their credit reports affected the cost of their automobile insurance, [*see* Exs. 10 & 11] in addition to information regarding the mortgage debts reported by Fairbanks, the credit reports include several other negative items that occurred after Plaintiffs had received their discharge. [*See, e.g.,* Pl. Ex. 5, p. 9, 12].

Plaintiffs also offered testimony that Mr. Harrington lost income of $195 due to missing work for attendance at hearings on their complaint and Motion in this court, as well as testimony of incurring $205 in travel expenses to attend two hearings. In addition, Plaintiffs seek damages for emotional distress resulting from Fairbanks' collection tactics. Finally, Plaintiffs offered evidence of attorney fees in the total amount of $1,575 incurred by them in prosecuting this proceeding and in their attempt to have Fairbanks terminate its post-discharge collection activity before filing this adversary proceeding. [*See* Pl. Ex. 9].

LAW AND ANALYSIS

A Chapter 7 bankruptcy discharge "discharges the debtor from all debts that arose before the date of the order for relief under this chapter. . . ." 11 U.S.C. § 727(b). In order to effectuate the "fresh start" intended by the grant of a discharge in bankruptcy, Congress provided that a discharge "operates as an injunction against . . . an act, to collect, recover or offset any such debt [discharged under section 727] as a personal liability of the debtor, whether or not discharge of such debt is waived." 11 U.S.C. § 524(a)(2). "The discharge injunction is broad in scope and was intended to preclude virtually all actions to collect."

In re Lafferty, 229 B.R. 707, 712 (Bankr. N.D. Ohio 1998). In the Sixth Circuit, the only avenue for redress of violations of the discharge injunction is invocation of the court's inherent and statutory power under 11 U.S.C. § 105(a) to hold parties in contempt. *In re Perviz,* 302 B.R. 357, 370 (Bankr. N.D. Ohio 2003); *cf. Pertuso v. Ford Motor Credit Co.*, 233 F.3d 417, 421-22 (6th Cir. 2000)(finding no implied right of action for statutory damages under § 524). Recognizing that a contemnor's conduct is likely to have caused the debtor to incur damages, courts generally permit, as a sanction for such conduct, an award of damages to the debtor, including attorney fees and, where there has been shown a willful violation that amounts to a clear disregard and disrespect of the bankruptcy laws, punitive damages. *In re Chambers*, 324 B.R. 326, 329 (Bankr. N.D. Ohio 2005); *Perviz*, 302 B.R. at 371-73; *see also McMahan & Co. v. Po Folks, Inc.*, 206 F.3d 627, 634 (6th Cir. 2000)(stating that "the primary purpose of a civil contempt order is to compel obedience to a court order and compensate for injuries caused by non-compliance").

Plaintiffs have failed to prove any violation of the discharge injunction by U.S. Bank. Plaintiffs admit that U.S. Bank itself engaged in no post-discharge collection activity. Plaintiffs' testimony and documentary evidence indicates collection activity by Fairbanks only. Plaintiffs have failed to show a relationship between U.S. Bank and Fairbanks sufficient to impose liability on U.S. Bank for the collection activity of Fairbanks. As such, judgment will be entered on the Complaint in favor of U.S. Bank and against Plaintiff.

Plaintiffs have, however, proven multiple violations of the discharge injunction by Fairbanks, including the frequent, harassing telephone calls to both Plaintiffs both at home and at work, as well as the letters sent to Plaintiffs in an attempt to collect on the mortgage debt. The calls and letters continued, notwithstanding that Fairbanks was notified numerous times by both Plaintiffs and their lawyer of the Chapter 7 discharge. The number and content of the telephone calls and communications Fairbanks initiated with Plaintiffs after its agents were informed of Plaintiffs' discharge shows that these violations were willful and were intended to coerce and harass Plaintiffs into payment of a debt in intentional disregard of the discharge of the debt.

The court further finds that Fairbanks intended to coerce and harass Plaintiffs into payment of the discharged debt by continuing to report inaccurately an active foreclosure well after foreclosure proceedings had concluded and continuing to report the second mortgage debt as an active, but delinquent, account. Such ongoing false credit reporting also constitutes a willful violation of the discharge injunction.

The evidence at the hearing established that Plaintiffs are entitled to $2,400 in actual damages,

including damages of $1,000 each for emotional distress, $195 in lost wages and $205 in travel expenses to attend hearings in this case. Plaintiffs did not prove that the rent deposits required of them by landlords, the higher auto loan interest rates, and higher auto insurance rates were caused by Fairbanks' credit reporting rather than by the fact of their bankruptcy itself together with the negative items that occurred after they received their discharge that appeared on their credit reports as reported by creditors other than Fairbanks. The court also finds that Plaintiffs are entitled to attorney fees in the amount of $1,575.

The court finds Fairbanks' willful and repeated violations as evidencing a total disregard and disrespect for the bankruptcy laws and this court's discharge order. In at least one conversation, Fairbanks' agent disavowed any obligation to comply with "Ohio" bankruptcy laws. As such, and given Fairbanks' repeated and multifarious violations over an extended period of time, as well as the embarrassment accompanying the repeated calls to Plaintiffs' places of employment, and its upsetting discussions with Mrs. Harrington's mother, the court imposes, as an additional sanction, punitive damages in the amount of $10,000. *Cf. Perviz,* 302 B.R. at 374 (awarding $8,000 or four times the amount of compensatory damages).

Finally, the court will require Fairbanks to take all steps necessary to correct the inaccurate reports previously provided to any credit agency, and in particular to Experian and Equifax. Specifically, it shall properly report the date that foreclosure proceedings were concluded as to both the first and second mortgages and that the account reflecting the second mortgage debt is a closed account with zero balance due from Plaintiffs as of the date of discharge.

For the foregoing reasons, good cause appearing, Plaintiffs' Motion shall be granted in part and denied in part. A separate final judgment will be entered effecting this order and decision.

IT IS THEREFORE ORDERED Plaintiffs' Motion for Default Judgment [Doc. #13] be, and hereby is, **GRANTED** as to Fairbanks Capital Corp. (nka Select Portfolio Servicing) and **DENIED** as to U.S. Bank National Association.