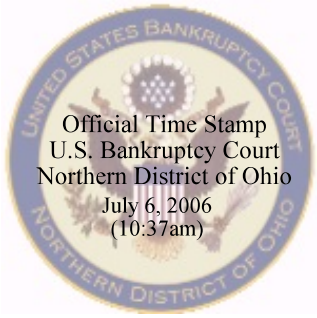
THIS OPINION NOT INTENDED FOR PUBLICATION



UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	Case No. 01-11026
	)	
ROY HENRY SCHRAMM and DALPHA LOUISE SCHRAMM,	)	Chapter 13
	)	
Debtors.	)	Judge Pat E. Morgenstern-Clarren
_____	)	
	)	
ROY HENRY SCHRAMM, et al.,	)	Adversary Proceeding No. 05-1613
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
TMS MORTGAGE, INC.,	)	**MEMORANDUM OF OPINION**
	)	
Defendant.	)	

The defendant TMS Mortgage, Inc. dba The Money Store kna HomeEq Servicing Corp. moves to dismiss count 3 of the complaint in which the debtor-plaintiffs seek damages for alleged violations of the Fair Debt Collection Practices Act, count 1 in which they seek a declaratory judgment as to amounts due to TMS post-discharge, and count 2 asking for damages for violation of the bankruptcy code's automatic stay provisions and discharge injunction.[1] For the reasons that follow, the motion is granted as to the Fair Debtor Collection Practices Act claim and denied as to the other claims.

[1] Docket 6, 18. The debtor's opposition is at docket 8, 15.

THE ALLEGATIONS MADE BY THE DEBTORS IN THEIR COMPLAINT[2]

Pre-discharge allegations

The defendant TMS Mortgage, Inc. dba The Money Store kna HomeEq Servicing Corp. (TMS) is in the business of sub-prime mortgage loan servicing. Prepetition, the debtors borrowed money as evidenced by a note secured by a mortgage on their home.[3] TMS serviced the loan after it went into default.

The debtors filed their chapter 13 case on February 9, 2001. TMS does not contest that it had appropriate notice of the chapter 13 case and all related filings. The debtors' confirmed plan is not attached to any of the pleadings; the parties, however, appear to agree it provided that the arrearage owed on the note would be paid through the plan while the debtors would make postpetition payments directly to the lender. The plan also contains this provision:

> Pursuant to 11 U.S.C. § 1322(e) and applicable non-bankruptcy law, arrearage claims of secured creditors set forth in Article 3 of this Plan shall be disallowed to the extent they include attorney's fees and costs, including such fees and costs which arise in proceedings related to the default by Debtor[s] of any provision of this Plan.

On January 31, 2002, TMS filed a motion for relief from stay alleging that the debtors failed to make certain postpetition payments. The court entered an order granting the motion without opposition. On August 25, 2003, the debtors moved to vacate that order, alleging that they had entered into a side agreement with TMS–not known to their attorneys or approved by

---

[2] Docket 1.

[3] Although TMS refers to the debt as "its" debt in the briefs, the court notes that it is not at all clear from the record who originated this loan or owns the note in question. *See, for example,* docket 5, 13, 18, and 19. That issue is, however, beyond the scope of this opinion which must accept as true all well-pleaded allegations in the complaint.

the court–in which the parties agreed to resolve the default by the debtors making a lump sum payment followed by nine payments higher than they would otherwise have been required to make. The debtors made the agreed payments, but when they sought to reduce the monthly payment to the regular amount, TMS demanded additional sums which the debtors believed represented attempts to collect attorney fees, without which TMS threatened to foreclose on its mortgage interest. The debtors stated that as a result of making the payments under the private agreement, they had actually overpaid TMS by $3,882.74.

TMS did not oppose the motion and the court granted it on October 1, 2003, ordering the stay reinstated, directing TMS to apply $3,882.74 of the monies paid postpetition to satisfy the postpetition arrearage (thus bringing the debtors current), and ordering the debtors to resume regular payments to TMS as of the August 2003 payment. TMS did not appeal from that order and it is a final order.

The debtors made all remaining payments due directly to TMS and also those due to the chapter 13 trustee, thus successfully completing their chapter 13 plan. They received a discharge on May 17, 2005.

Post-discharge Allegations

Since receiving their discharge in May 2005, the debtors have continued to make all payments due to TMS. In June 2005, one month after the debtors received their discharge, TMS sent them an invoice stating that they owed $7,014.67, including $5,203.60 in "advances or attorney outsourcing fees." The debtors then requested a payoff quotation in an effort to refinance their home. TMS sent a quotation stating that they owed $5,203.60 in "advances" plus $3,045.00 in "attorney outsourcing fees."

By letter dated September 2, 2005, TMS sent the debtors a letter stating;

> If your Account is not brought current within thirty-five (35) days of the date of this letter, which is 10/07/2005, [TMS] will, without further demand, accelerate the maturity date of the Account and declare the total balance immediately due and payable. As a consequence, [TMS] may refer your Account to an attorney for foreclosure and all fees associated with foreclosure and Property preservation may be added to the total amount required to bring the Account current.

The debtors allege that some or all of the charges categorized as "advances," "attorney outsourcing fees" or "late charges, periodic adjustments to the monthly payment amount (if applicable) and other expenses associated with collection" were specifically disallowed by prior order of the court, are not allowable in this jurisdiction, or are overstated. They claim that they:

> have had to endure substantial frustration, anxiety, and mental distress in relation to their seeming inability to extricate themselves from [TMS's] persistent attempts to collect unlawful fees and costs and over the concern that they may lose their home despite their good faith efforts to honor the terms of their mortgage loan.

Relief Sought in the Complaint

The debtors' complaint seeking declaratory relief and damages has five counts:

Count 1 seeking a declaration of the amount necessary to pay the note in full through December 31, 2005;

Count 2 alleging that TMS violated the automatic stay, the discharge order, the confirmation order, and other orders of this court;

Count 3 alleging that TMS violated the Fair Debt Collection Practices Act (FDCPA);

Count 4 alleging that TMS violated 11 U.S.C. §§ 105 and 506, together with violations of federal rule of bankruptcy procedure 2016; and

Count 5 alleging that TMS violated 11 U.S.C. § 506 by charging attorney fees in violation of Ohio law.

TMS did not answer any of the counts, instead filing a motion to dismiss that seems to address only counts 1, 2, and 3.

THE POSITIONS OF THE PARTIES

TMS acknowledges that the court has jurisdiction over the issue of "what amounts of the claim were paid and were allowed through the conclusion of the bankruptcy." TMS, however, moves to dismiss these "claims" for lack of subject matter jurisdiction:

> (1) payments made and received from the completion of the bankruptcy through December 31, 2005; (2) whether correspondence sent after the discharge and completion of the bankruptcy fall under the F.D.C.P.A.; and (3) and [sic] whether the correspondence sent after the completion of the bankruptcy violated the F.D.C.P.A.[4]

The motion does not directly link these statements to any particular count and the court interprets this to be a motion to dismiss counts 1 and 3. Additionally, TMS moves to dismiss portions of count 2 for failure to state a claim upon which relief may be granted.

DISCUSSION[5]

I.

Standard for Motion to Dismiss under 12(b)(1)

TMS moves to dismiss count 3 relating to the Fair Debt Collection Practices Act (FDCPA) and count 1 seeking a declaration as to the amount owed to TMS as of December 31, 2005 on the ground that the court lacks subject matter jurisdiction over those claims. *See* FED. R.

---

[4] TMS motion at 7.

[5] The debtors filed their chapter 13 case before the effective date of the Bankruptcy Abuse Prevention and Consumer Protection Act. All references in this opinion are to the version of the bankruptcy code in effect when the case was filed.

CIV. P. 12(b)(1) (made applicable by FED. R. BANKR. P. 7012(b)). TMS argues that the FDCPA claim is not a core proceeding and is not related to the bankruptcy. This motion questions the facial sufficiency of the complaint for jurisdictional purposes. *See Ohio Nat'l Life Ins. Co. v. United States,* 922 F.2d 320, 325 (6th Cir. 1990) (noting that a facial attack on subject matter jurisdiction questions the sufficiency of the pleading while a factual attack questions the factual basis for jurisdiction).

The debtors have the burden of proving that the court has jurisdiction over their claim. *Moir v. Greater Cleveland Reg'l Transit Auth.*, 895 F.2d 266, 269 (6th Cir. 1990). All well-pleaded allegations in the complaint must be assumed to be true for these purposes. *See Michigan Southern R.R. Co. v. Branch & St. Joseph Counties Rail Users Assoc., Inc.*, 287 F.3d 568, 573 (6th Cir. 2002). The debtors contend that jurisdiction exists for both counts because the FDCPA claim invokes a substantive right created by the bankruptcy code, thus falling within the definition of a core proceeding, and/or because it is inextricably bound up with the allegations that TMS violated the discharge injunction.

II.

All federal courts, including bankruptcy courts, are courts of limited jurisdiction. *See Celotex Corp. v. Edwards*, 514 U.S. 300, 307 (1995). In the case of bankruptcy courts, the jurisdiction flows from 28 U.S.C. §§ 1334 and 157. Section 1334 gives the district court "original and exclusive jurisdiction of all cases under title 11" and "original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. §§ 1334(a) and (b). Section 157 permits the district court to refer that jurisdiction to the bankruptcy court, which the judges in the Northern District of Ohio have done.

See 28 U.S.C. § 157(a). To come within the jurisdictional grant of § 1334, "a proceeding need only be 'related to' a case under title 11." *Sanders Confectionery Prods., Inc. v. Heller Fin. Inc.,* 973 F.2d 474, 482 (6th Cir. 1992).

A civil proceeding is related to a bankruptcy case if "the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy." *Lindsey v. O'Brien, Tanski, Tanzer and Young Health Care Providers of Connecticut (In re Dow Corning Corp.*), 86 F.3d 482, 489 (6th Cir. 1996) (quoting *Pacor, Inc. v. Higgins,* 743 F.2d 984, 994 (3d Cir. 1984)). Related to jurisdiction exists "if the outcome could alter the debtor's rights, liabilities, options or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankruptcy estate." *Id.*

The *Pacor* and *Dow Corning* decisions analyze the jurisdictional issue in the context of pre-confirmation proceedings. The Sixth Circuit Bankruptcy Appellate Panel recently noted that the *Pacor* test can be difficult to apply in the post-confirmation context. *Thickstun Bros. Equip. Co. v. Encompass Servs. Corp. (In re Thickstun Bros. Equip. Co.)*, __ B.R.__ , 2006 WL 1506712 (BAP 6th Cir. June 2, 2006). In that situation, the BAP looked to the refinement adopted by the Third Circuit, which is to ask if there is "a close nexus to the bankruptcy plan or proceeding sufficient to uphold bankruptcy court jurisdiction." *Id.* at *4 (quoting *Binder v. Price Waterhouse & Co. (In re Resorts Int'l, Inc.)*, 372 F.3d 154 at 166-67 (3d Cir. 2004)). The BAP noted further that "'[m]atters that affect the interpretation, implementation, consummation, execution, or administration the confirmed plan will typically have the requisite close nexus'." *Id.*

The result is the same here whether applying the *Pacor* test or the *Resorts* refinement: the FDCPA claim does not come within the court's related to jurisdiction. Any recovery under that claim will go to the debtors, not to the estate, so it will not have an impact on estate administration. Additionally, the FDCPA claim is not a matter that affects the interpretation, implementation, consummation, execution, or administration of the debtors' confirmed plan. It is, instead, an independent cause of action. Other courts have reached the same conclusion. *See Csondor v. Weinstein, Treiger & Riley, P.S. (In re Csondor)*, 309 B.R. 124 (Bankr. E.D. Pa. 2004); *Gates v. Didonato (In re Gates)*, 2004 WL 3237345 (Bankr. E.D. Va. October 20, 2004); *Steele v. Ocwen Federal Bank (In re Steele)*, 258 B.R. 319 (Bankr. N.H. 2001); *Goldstein v. Marine Midland Bank, N.A. (In re Goldstein)*, 201 B.R. 1 (Bankr. Me. 1996). Because the court does not have subject matter jurisdiction over the FDCPA claim, count 3 will be dismissed without prejudice to the debtors' ability to file it in a court of competent jurisdiction.

As an alternative argument in support of jurisdiction, the debtors allege that their FDCPA claims are inextricably intertwined with claims over which the court does have jurisdiction (as discussed below). Although not expressly identified as the doctrine of supplemental jurisdiction, this is the most likely basis for the argument. When a district court has original jurisdiction over a claim, it has supplemental jurisdiction "over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy[.]" 28 U.S.C. § 1367(a). The court may decline to exercise that jurisdiction in its discretion. 28 U.S.C. § 1367(c).

There is no Sixth Circuit law directly addressing whether bankruptcy courts have supplemental jurisdiction, and conflicting authority exists elsewhere. *Compare, for example,*

Walker v. Cadle Co. (In re Walker), 51 F.3d 562, 570 (5th Cir. 1995) (holding that the district court's supplemental jurisdiction over third-party claims does not extend to the bankruptcy court) *with Klein v. Civale & Trovato, Inc. (In re Lionel Corp.)*, 29 F.3d 88, 92 (2d Cir. 1994) (bankruptcy court could exercise supplemental jurisdiction) and *Davis v. Courington (In re Davis)* 177 B.R. 907, 912 (BAP 9th Cir. 1995) (same). As neither party briefed this issue–and given its constitutional implications–the court declines to address it at this stage. The court does hold that even if it has supplemental jurisdiction over the FDCPA claims, it does not view this as an appropriate case in which to exercise it and declines to do so.

III.

TMS's brief also refers to dismissing count 1 for lack of subject matter jurisdiction. There, the debtors seek a declaration as to the amount owed by them to TMS as of December 31, 2005. Assuming all well-pleaded allegations in the complaint to be true, as this court must, the debtors allege that TMS violated the bankruptcy code's discharge injunction by trying to collect amounts post-discharge for attorney fees and costs (through and including December 31, 2005) that were discharged through their chapter 13 plan. The discharge injunction is created by bankruptcy code § 524 and a claim that a creditor violated the injunction is not only related to but actually "arises in" the debtors' chapter 13 case. *See* 11 U.S.C. § 524. The court clearly has subject matter jurisdiction over this claim.

A point of clarification. TMS states that the court may not enter a final judgment on such an issue but must instead propose findings of fact and conclusions of law to the district court.[6] This is an incorrect statement of the law. The first question is always whether the court has

[6] Docket 6 at 4.

jurisdiction to hear the matter. If jurisdiction exists, the next question is the extent of that jurisdiction, as bankruptcy courts have authority in some matters to enter final orders and in others to propose findings of fact and conclusions of law to the district court.

Bankruptcy courts have authority to enter final orders in core proceedings arising in a case under title 11. 28 U.S.C. §§ 157(a) and (b). A core proceeding "either invokes a substantive right created by federal bankruptcy law or one which could not exist outside of the bankruptcy." *Sanders Confectionery Prods., Inc. v. Heller Fin., Inc.*, 973 F.2d 474, 483 (6th Cir.1992). The discharge injunction is a substantive right created by the bankruptcy code to protect the debtor who has earned a discharge. The courts are in agreement that a claim alleging violation of the discharge injunction is a core proceeding.[7] *See, for example, Chambers v. Greenpoint Credit (In re Chambers)*, 324 B.R. 326, 329 (Bankr. N.D. Ohio 2005); *In re Perviz*, 302 B.R. 357, 365 (Bankr. N.D. Ohio 2003); *In re Ketelsen*, 282 B.R. 208, 209 (Bankr. E.D. Tenn. 2001); *In re Lafferty*, 229 B.R. 707, 709 (Bankr. N.D. Ohio 1998). Indeed, TMS has cited no case to the contrary.

IV.

TMS's brief also refers to facts that form a part of counts 4, and 5, although it does not clearly state that it is moving to dismiss those counts or the basis on which such a dismissal might be sought. It is up to the movant to explain clearly and completely the basis on which it moves to dismiss a claim (not a sentence of a claim). The motion fails to do that and the court

[7] There is no private right of action under 11 U.S.C. § 524 for violation of the discharge injunction. *See Pertuso v. Ford Motor Credit Co.*, 233 F.3d 417 (6th Cir. 2000). As the debtors acknowledge in a later motion, their cause of action is more accurately stated as one for contempt based on TMS's alleged violation of a court order. *Id.* (Docket 32 at 8).

declines to supply the missing legal argument and analysis. Because TMS's argument on these counts is not fully developed, to the extent that the motion to dismiss is intended to include counts 4 and 5, it is denied.

V.

Standard for Motion to Dismiss under 12(b)(6)

TMS moves to dismiss parts of count 2 for failure to state a claim upon which relief may be granted. *See* FED. R. CIV. P. 12(b)(6) (made applicable by FED. R. BANKR. P. 7012(b)). In considering a motion to dismiss under this rule, "[t]he court must construe the complaint in the light most favorable to the plaintiff[s], accept all the factual allegations as true, and determine whether the plaintiffs can prove a set of facts in support of their claims that would entitle [them] to relief." *Bovee v. Coopers & Lybrand C.P.A.*, 272 F.3d 356, 360 (6th Cir. 2001). For the complaint to be dismissed, it must appear beyond doubt that the debtors "would not be able to recover under any set of facts that could be presented consistent with the allegations of the complaint." *Glassner v. R.J. Reynolds Tobacco Co.,* 223 F.3d 343, 346 (6th Cir. 2000). To survive a rule 12(b)(6) motion, the complaint "'must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory'." *Lewis v. ACB Bus. Servs., Inc.*, 135 F.3d 389, 406 (6th Cir. 1998) (quoting *Sogevalor v. Penn. Cent. Corp.*, 771 F. Supp. 890, 893 (S.D. Ohio 1991)).

Again accepting the allegations in the complaint as true, the debtors claim that TMS improperly and silently added attorney fees and charges to the debtors' account during the chapter 13 case, essentially waiting until the bankruptcy case was completed and closed before sending a notice one month later that the debtors, far from being current, actually owed several

thousand dollars in such charges. In count 2, the debtors allege this conduct amounts to a violation of the automatic stay (for the charges made during the chapter 13 case), the discharge injunction (for charges imposed post-discharge that TMS accrued pre-discharge), the confirmation order, and other orders of this court.

TMS requests dismissal of count 2 as it relates to the discharge order and the automatic stay. TMS argues that it could not have violated the discharge order as a matter of law because long-term debt is not discharged in a chapter 13. Thus, it argues, the discharge order does not apply to the TMS debt based solely on the express language of 11 U.S.C. § 1328(a)(1). TMS argues further that the automatic stay imposed by 11 U.S.C. § 362 terminated when the debtors received their discharge and the claims here all relate to time frames when the stay was no longer in effect. As a result, TMS contends, the debtors have not stated a claim upon which relief may be granted for violation of the discharge or the automatic stay. The debtors respond that the discharge limitation of § 1328(a)(1) only applies to the long-term portion of the debt and "that other portions [of the debt] are subject to the discharge upon completion of the plan, particularly where the bankruptcy court has expressly disallowed them."[8] They do not address the automatic stay argument.

Bankruptcy code § 1328 provides that after a debtor completes all payments under the plan, the court shall issue a discharge of all debts provided for in the plan or disallowed under § 502, except (among other things) long-term obligations provided for under § 1322(b)(5). *See* 11 U.S.C. § 1328(a)(1). Generally, a debtor must pay each debt in full within the plan's three to five year lifespan. Section 1322(b)(5) creates an exception and permits a debtor to cure a default

[8] Debtors' brief at 12, docket 15.

and maintain payments on a secured claim on which the last payment is due after the date on which the final plan payment is due. The classic example of such a long-term debt is a note secured by a mortgage on the debtor's home, such as the one here.

In count 2 the debtors allege that TMS attempted to collect fees and charges which were disallowed prior to the completion of their plan and that these amounts were discharged. As § 1328(a) provides for the discharge of debts which have been disallowed, the complaint clearly states a claim for violation of the discharge and TMS is not entitled to dismissal of the court 2 discharge claim.

Rather than focusing on this aspect of the debtors' discharge claim, the parties' briefing addresses the issue of whether a chapter 13 discharge can apply to any portion of a long-term debt which has been dealt with under § 1322(b)(5). It is, however, neither necessary nor appropriate to decide that issue at this point in the proceeding as decisions regarding the discharge of long-term debt often focus on the particular facts involved. *See, for example*, *In re Venuto*, __B.R.__ , 2006 WL 1545538 (Bankr. E.D. Pa. June 6, 2006) (noting that the applicability of discharge depends on whether the debtor actually effected a cure under § 1322(b)(5)).

TMS also requests dismissal of count 2 as it relates to violation of the automatic stay. The automatic stay as to any act (other than one against property of the estate) continued in effect in the debtors' case until the discharge was granted. *See* 11 U.S.C. § 362(c)(2). TMS's dismissal request is based on its own factual assertion that the "[d]ebtors' allegations all relate to claims that occurred after they received a discharge[.]"[9] As a result, TMS argues, that there could be no

[9] Motion at 7, docket 6.

automatic stay violation because the stay had terminated. This is a fact-based argument which does not provide a basis for dismissal under rule 12(b)(6). By its terms, § 362 operates as a stay of "any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case[.]" 11 U.S.C. § 362(a)(6). Although the complaint is not carefully worded on this issue, it includes factual allegations regarding the pre-discharge imposition of fees and charges to the debtors' account which, if substantiated, would support a claim for violation of the automatic stay. *See* 11 U.S.C. § 362(h).

CONCLUSION

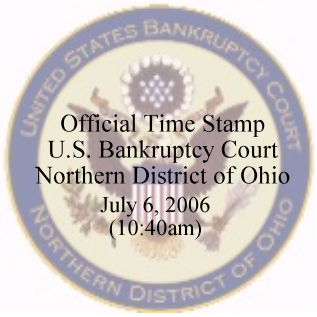
For the reasons stated, the motion of TMS to dismiss is granted as to count 3 only.[10] A separate order will be entered reflecting this decision.

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

[10] The court notes that TMS's brief cites 4th, 5th, and 7th circuit cases as well as bankruptcy courts sitting in Florida, Oregon, and Illinois, when there is law from the Sixth Circuit Court of Appeals and lower courts in this circuit on many of these points. It would be helpful if in the future the briefs focus on Sixth Circuit law or at least include it.

THIS OPINION NOT INTENDED FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION



In re:	)	Case No. 01-11026
	)	
ROY HENRY SCHRAMM and DALPHA LOUISE SCHRAMM,	)	Chapter 13
	)	
Debtors.	)	Judge Pat E. Morgenstern-Clarren
_____	)	
	)	
ROY HENRY SCHRAMM, et al.,	)	Adversary Proceeding No. 05-1613
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
TMS MORTGAGE, INC.,	)	**ORDER**
	)	
Defendant.	)	

For the reasons stated in the memorandum of opinion entered this same date, TMS' s motion to dismiss is granted as to count 3 only and denied as to all remaining counts. (Docket 6). TMS is to file its answer to the remaining counts within the time provided by the federal rules of bankruptcy procedure.

IT IS SO ORDERED.

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge