

IT IS SO ORDERED.



Dated: September 14, 2007
03:18:52 PM

Honorable Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:	*	
	*	
MICHELE IMBURGIA, <i>et al.</i>	*	
	*	CASE NUMBER 96-42960
	*	
Debtors.	*	
	*	

	*	
MICHELE DELMONT, f/k/a	*	
Michele Imburgia,	*	ADVERSARY NUMBER 07-4074
	*	
	*	
Plaintiff,	*	
	*	
vs.	*	
	*	
FIRST INDIANA BANK, <i>et al.</i> ,	*	
	*	HONORABLE KAY WOODS
Defendants.	*	
	*	

M E M O R A N D U M O P I N I O N

Not Intended for National Publication

The following order is not intended for national publication and carries limited precedential value. The availability of this opinion by any source other than www.ohnbuscourts.gov is not the result of direct submission by this Court. The opinion is

available through electronic citation at www.ohnb.uscourts.gov pursuant to the E-Government Act of 2002 (Pub. L. No. 107-347).

Before the Court is Defendant, [sic] First Indiana Bank's Motion to Dismiss ("Motion to Dismiss") this adversary proceeding filed July 13, 2007 (Doc. #31). On June 12, 2007, Debtor Michele Delmont ("Debtor")¹ filed a Complaint ("Complaint") against Defendants First Indiana Bank ("FIB"), Blue View Corp. ("Blue View"), and Scott Rudolph (collectively "Defendants"). The Complaint alleges that Defendants violated the discharge injunction of 11 U.S.C. § 524. On August 8, 2007, Debtor untimely² filed Objection of Michele Delmont to the Motion of Defendant First Indiana Bank to Dismiss (Doc. # 35). Without seeking or obtaining leave of this Court, as required by subsection 6B of the Case Management Order, on August 20, 2007, FIB filed Defendant, [sic] First Indiana Bank's Reply to Plaintiff's Objection to Motion to Dismiss Adversary Proceeding (Doc. # 36).

This Court has jurisdiction³ pursuant to 28 U.S.C. § 1334 and the general order of reference (General Order No. 84) entered in

¹On December 31, 1996, Debtor filed a voluntary joint chapter 7 petition with her then husband, Christopher Imburgia, under her married name, Michele Imburgia. Debtor has since finalized her divorce and resumed the name Michele Delmont. References to Debtor by name herein are to "Delmont."

²The Adversary Case Management Initial Order ("Case Management Order"), dated June 13, 2007 (Doc. # 13), applicable to this case, requires that any reply to a dispositive motion be filed within twenty (20) days after the motion is filed. (Adv. Case Mgt. Initial Order at 6.)

³This Court's jurisdiction extends to Debtor's underlying chapter 7 case, which was re-opened by order dated May 30, 2007, as well as this adversary proceeding.

this district pursuant to 28 U.S.C. § 157(a). Venue in this Court is proper pursuant to 28 U.S.C. §§ 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. §§ 157(b)(1) and (b)(2)(A), (I), and (O). The following constitutes the Court's findings of fact and conclusions of law pursuant to FED. R. BANKR. P. 7052.

I. STANDARD FOR REVIEW

A party may bring a motion to dismiss for failure to state a claim pursuant to FED. R. CIV. P. 12(b)(6), which is incorporated into the Bankruptcy Rules pursuant to FED. R. BANKR. P. 7012.⁴ The purpose of a motion to dismiss is to test whether a cognizable claim has been pled in the complaint. Thus, the Court's task under Rule 12(b)(6) is to determine the sufficiency, and not the merits, of the complaint and whether plaintiffs are entitled to offer evidence to support the claims stated in the complaint. See *Allard v. Weitzman (In re DeLorean Motor Co.)*, 991 F.2d 1236 (6th Cir. 1993); *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

In determining whether to grant a motion to dismiss, the Court must analyze the complaint. To withstand dismissal, the complaint must provide: (i) the defendant with notice of the claim and (ii) "direct or inferential allegations respecting all material elements to sustain a recovery under some viable legal theory." See FED. R. CIV. P. 8(a); *Saltire Indus., Inc. v. Waller, Lansden, Dortch &*

⁴The court's dismissal of meritless claims precludes the waste of judicial resources. *Neitzke v. Williams*, 490 U.S. 319, 326-27 (1989).

Davis, PLLC, 491 F.3d 522 (6th Cir. 2007). "The complaint need not specify all the particularities of the claim, and if the complaint is merely vague or ambiguous, a motion under Fed. R. Civ. P. 12(e) for a more definite statement is the proper avenue rather than a motion pursuant to Fed. R. Civ. P. 12(b)(6)." *Aldridge v. United States*, 282 F. Supp. 2d 802, 803 (W.D. Tenn. 2003) (citing 5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1356 (2d ed. 1990)); see also *United States v. Baxter Int'l, Inc.*, 345 F.3d. 866, 881 (11th Cir. 2003) ("Because the Federal Rules embody the concept of liberalized 'notice pleading,' a complaint need contain only a statement calculated to 'give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.' . . . [T]he threshold of sufficiency to which a complaint is held at the motion-to-dismiss stage is 'exceedingly low.'" (citations omitted).

In determining the sufficiency of a complaint, the Court must construe the allegations within the complaint in the light most favorable to the plaintiff, accept the allegations set forth as averred, and resolve any ambiguities in favor of the plaintiff. *Jackson v. Richards Med. Co.*, 961 F.2d 575, 577-78 (6th Cir. 1992); *Aldridge*, 282 F. Supp. 2d at 803. A Court, in determining a motion to dismiss, must presume that the factual allegations of the complaint are true. *Jenkins v. McKeithen*, 395 U.S. 411 (1969) ("For the purposes of a motion to dismiss, the material allegations

of the complaint are taken as admitted."). "Hence, a judge may not grant a Rule 12(b)(6) motion based on a disbelief of a complaint's factual allegations." *Columbia Natural Res., Inc. v. Tatum*, 58 F.3d 1101, 1109 (6th Cir. 1995) (citations omitted). Nevertheless, the Court is not required to accept sweeping unwarranted averments of fact or conclusions of law or unwarranted deduction. See *Official Comm. of Unsecured Creditors v. Austin Fin. Servs., Inc. (In re KDI Holdings, Inc.)*, 277 B.R. 493, 502 (Bankr. S.D.N.Y. 1999); *Lewis v. ABC Bus. Servs., Inc.*, 135 F.3d 389, 405-06 (6th Cir. 1998).

In summary, the standard for granting a motion to dismiss at the pleading stage is difficult to meet - such motions are disfavored and rarely granted.

II. LAW

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 (West 2006). Section 524 of the Bankruptcy Code provides that a discharge operates as an injunction against any action to collect a debt as a personal liability of the debtor. Specifically, subsections (a)(1) and (a)(2) state, in pertinent part:

(a) A discharge in a case under this title -

(1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section 727 . . . of this title, whether or not discharge of such debt is waived; [and]

(2) operates as an injunction against commencement or continuation of an action, the employment of process, or any act, to collect, recover or offset any such debt as a personal liability of the debtor, or from property of the debtor, whether or not discharge of such debt is waived;

11 U.S.C. § 524(a)(1) and (2) (West 2006). The purpose of the discharge injunction in § 524 is to effectuate the post-discharge "fresh start" intended by Congress in enacting the Bankruptcy Code.

Although no private right of action exists within the statute, the Sixth Circuit Court of Appeals and a majority of other circuits have held violations of § 524 are punishable by and through sanctions for contempt of court, including the award of compensatory damages and attorney's fees to the debtor. See *Pertuso v. Ford Motor Credit Co.*, 233 F.3d 417 (6th Cir. 2000); See also *In re Hill*, 222 B.R. 119 (Bankr. N.D. Ohio 1998) ("There is nothing in section 524 . . . which prescribes a remedy for breach of the 524(a)(2) injunction [, but] the courts that have considered the question have held that an injured debtor is entitled to recover damages in a contempt action."); see also *In re Perviz*, 302 B.R. 357 (Bankr. N.D. Ohio 2003) ("The rule in the Sixth Circuit is that a debtor injured by a violation of [§ 524] has no right to statutory damages. Instead . . . a debtor's sole avenue of recourse . . . is to bring an action against the creditor for contempt.").

III. ANALYSIS

A. Background

On December 31, 1996, Debtor filed a voluntary joint petition pursuant to chapter 7 of title 11, along with Christopher Imburgia (who was then her husband) (Main Case Doc. # 1). An order granting Debtors a discharge of their debts was entered on May 22, 1997 (Main Case Doc. # 16). The case was closed, and final decree entered, on May 29, 1997 (Main Case Doc. # 18).

The Complaint alleges that Defendants have violated the discharge injunction of § 524 of the Bankruptcy Code. Specifically, Debtor alleges that Defendants acted to collect on a discharged debt by: (i) altering the original mortgage and filing the Altered Mortgage in the Columbiana County Recorder's Office⁵; (ii) FIB assigning the Altered Mortgage - twice - to Blue View; (iii) refusing to release the Altered Mortgage; (iv) sending notices of intent to foreclose and payment statements to Debtor after the debt was discharged; and (v) filing a foreclosure complaint (the "Foreclosure Complaint") in Columbiana County Court

⁵Debtor granted a mortgage to FIB on or about September 20, 1995, on property located at 910 S. Union St., Salem, OH 44460 (the "Property"), as security for a loan of \$18,100. (Compl. ¶¶ 18-19.) The Property is located in Columbiana County; however, the mortgage was incorrectly recorded in the Mahoning County Recorder's Office. (Compl. ¶¶ 21, 51-52; Compl. Ex. C.) Debtor alleges that the mortgage was altered to include a handwritten "Columbiana" in the space formerly containing a typewritten "Mahoning" and filed with the Columbiana County Recorder's Office in 2003. (Compl. ¶¶ 24-25; Compl. Ex. D.) The mortgage with handwritten "Columbiana" and filed in the Columbiana County Recorders Office is referred to throughout this opinion as the "Altered Mortgage."

of Common Pleas⁶ against the current owners of the Property⁷. (See generally Compl.)

B. The Motion to Dismiss

In order to survive the Motion to Dismiss, the Complaint must provide FIB with notice of a cognizable claim asserted against it for violation of the discharge injunction in 11 U.S.C. § 524. The Complaint, therefore, must contain facts alleging each material element of violation of the discharge injunction, *i.e.* contempt of court. Accordingly, in ruling on the Motion to Dismiss, this Court must examine Debtor's Complaint, assuming all factual allegations to be true, to determine whether it avers that (i) Debtor received a discharge; (ii) FIB received notice of the discharge; and (iii) FIB intended the acts that violated the discharge injunction.⁸ *In re Hill*, 222 B.R. at 122; *In re Perviz*, 302 B.R. at 370. As discussed below, the Complaint contains sufficient allegations to withstand the Motion to Dismiss.

⁶Case No. 06 CV 0903, commenced October 16, 2006.

⁷Debtor sold the Property on or about May 19, 2006, to Steve and Sherri Rothwell (the "Rothwells"). (Compl. ¶ 43.) The Rothwells are named Defendants in the Foreclosure Complaint. (See Compl. Ex. O.) Debtor has been included in the Foreclosure Complaint as third-party defendant. (See Compl. ¶ 49; See also Compl. Ex. P.)

⁸There is some debate whether a creditor must have intended that its act violate the discharge injunction, or if it is sufficient that such creditor intended to do the act that ultimately resulted in the violation of § 524. This Court agrees with the reasoning of Judge Snow's decision in *In re Hill* that the creditor need only have intended to commit the act that violates the discharge injunction. See *In re Hill*, 222 B.R. at 122-23.

The Complaint establishes that Debtor received a discharge in her underlying chapter 7 case on May 22, 1997. (See Compl. ¶¶ 8-17.) The Complaint also alleges Debtor filed her voluntary petition under chapter 7 of the Code on December 31, 1996, and properly scheduled FIB's claim as required by FED. R. BANKR. P. 1007(b)(1)⁹. (Compl. ¶¶ 9-14.) Paragraph fifteen of the Complaint specifically avers, "[b]oth Debtors recieved their discharge pursuant to section 727 of the Bankruptcy Code" and refers to "Bankruptcy Case Docket Item no. 16; entered May 22, 1997." (Compl. ¶ 15 n.4.) Similarly, the Complaint explicitly avers FIB received notice of Delmont's discharge: "The certificate of service filed . . . recites that [FIB] was served on May 24, 1997 [sic] with a copy of the Discharge of Debtor" (Compl. ¶ 16 n.5.) Delmont's Complaint, therefore, sufficiently alleges discharge of her debts, as well as notice to FIB.

Although the Complaint does not detail which of the Defendants altered the mortgage and recorded the Altered Mortgage (Compl. ¶¶ 23-28), Exhibit E shows that FIB took action in June 2003 to assign a certain mortgage purportedly executed by Debtor on June 27, 2003. (Compl. Ex. E.) Since Debtor claims that the only mortgage she ever executed and delivered to FIB was dated in 1995 (Compl. ¶ 23), the fact that FIB assigned a later dated mortgage is

⁹Bankruptcy Rule 1007, in effect as of the date of Debtors' filing, reads in pertinent part: "(b)(1) the debtor . . . shall file schedules of assets and liabilities," FED. R. BANKR. P. 1007 (West 1995).

sufficient to allege that FIB intentionally altered or participated in altering the original mortgage. Accordingly the Court finds the Complaint has sufficiently averred FIB acted intentionally to violate the discharge injunction in § 524.¹⁰

Thus, while it may be true, as stated in the Motion to Dismiss, that "Plaintiff's entire complaint primarily prays for relief against Blue View[,]" it is not true that "Plaintiff fails to establish any set of facts that supports or establishes a legal claim as to FIB." (Mot. to Dismiss at 8.) Those acts which, of necessity, must have been performed prior to Blue View's recording of the Altered Mortgage can fairly be attributed to FIB, the original holder of the mortgage, for purposes of ruling on the Motion to Dismiss.

IV. Conclusion

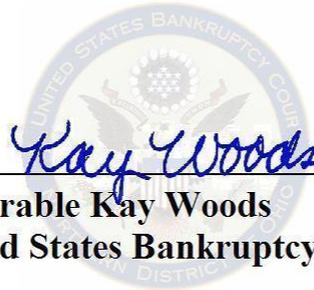
FIB and Debtor each extensively argue the merits of the case, which the Court will not address. As set forth above, a motion to dismiss for failure to state a claim does not go to the merits of the claim, but rather whether a cognizable claim has been pled in the complaint. The Court finds, for purposes of the Motion to Dismiss, that Debtor has alleged sufficient facts within the

¹⁰This determination is made solely for purposes of ruling on the Motion to Dismiss. It remains Debtor's burden to prove FIB participated in conduct violative of § 524.

Complaint to assert a claim for violation by FIB of the discharge injunction in 11 U.S.C. § 524. Therefore, the Motion to Dismiss is denied.

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IT IS SO ORDERED.



Dated: September 14, 2007
02:09:41 PM

Honorable Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

MICHELE IMBURGIA, *et al.*,

Debtors.

MICHELE DELMONT, f/k/a
Michele Imburgia,

Plaintiff,

vs.

FIRST INDIANA BANK, *et al.*,

Defendants.

CASE NUMBER 96-42960

ADVERSARY NUMBER 07-4074

HONORABLE KAY WOODS

ORDER

For the reasons set forth in the Court's Memorandum Opinion entered this date, Defendant, [sic] First Indiana Bank's Motion to Dismiss this adversary proceeding is denied.

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