IT IS SO ORDERED.

Kay Woods

Honorable Kay Woods
United States Bankruptcy Judge

Dated: March 11, 2009
03:59:57 PM

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:	*	
	*	
MICHELE DELMONT, *et al.*,	*	
	*	**CASE NUMBER 96-42960**
Debtors.	*	
	*	
* * * * * * * * * * * * * * * * * *	*	
	*	
MICHELE DELMONT	*	
***fka* MICHELE IMBURGIA,**	*	**ADVERSARY NUMBER 07-4074**
	*	
Plaintiff,	*	
	*	
vs.	*	
	*	
FIRST INDIANA BANK, et al.,	*	**HONORABLE KAY WOODS**
	*	
Defendants.	*	
	*	

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MEMORANDUM OPINION REGARDING CROSS MOTIONS FOR SUMMARY JUDGMENT
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Before the Court are (i) Plaintiff's Motion for Partial Summary Judgment Against Defendant M&I Marshall & Ilsley Bank ("Delmont's Motion for Summary Judgment") (Doc. # 80) filed by

Plaintiff/Debtor Michele Delmont *fka* Michele Imburgia ("Delmont") on December 5, 2008; and (ii) Motion for Summary Judgment of Defendant First Indiana Bank ("FIB's Motion for Summary Judgment") (Doc. # 81) filed by First Indiana Bank by its successor in interest M&I Marshall & Ilsley Bank ("FIB") on December 5, 2008. On December 31, 2008, Delmont filed Plaintiff Michelle Delmont's Memorandum in Opposition to the Motion for Summary Judgment of Defendant First Indiana Bank ("Delmont's Response") (Doc. # 88), and FIB filed Defendant, First Indiana Bank, By Its Successor In Interest Marshall & Ilsley Bank's Response [sic] Plaintiff's Motion for Partial Summary Judgment Against Defendant (Doc. # 80) ("FIB's Response") (Doc. # 89).

The issue before the Court in both Delmont's Motion for Summary Judgment and FIB's Motion for Summary Judgment is whether FIB's actions constitute violations of the discharge injunction. For the reasons given below (i) FIB's Motion for Summary Judgment is granted in part and denied in part, and (ii) Delmont's Motion for Summary Judgment is denied.

This Court has jurisdiction pursuant to 28 U.S.C. § 1334 and the general order of reference (General Order No. 84) entered in 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)(2)(O). The following constitutes the Court's findings of fact and conclusions of law pursuant to FED. R. BANKR. P. 7052.

I. FACTUAL AND PROCEDURAL BACKGROUND

The parties submitted Joint Stipulation of Facts ("Stipulation") (Doc. # 77). The Stipulation states that the parties "agree that no genuine issues of fact exist as to the findings" in the Stipulation, "and, therefore, stipulate to the following facts for use in the dispositive motions filed in this case." (Stip. at 1.) Unless otherwise noted, the following facts are taken from the Stipulation.

On September 20, 1995, Delmont borrowed $18,100.00 from FIB ("FIB Loan"). The FIB Loan was evidenced by a promissory note. To secure repayment of the FIB Loan, Delmont executed and delivered to FIB a mortgage ("1995 Mortgage") on her residence at 910 S. Union St., Salem, Ohio 44460 ("Salem Property"). Although the 1995 Mortgage states on page one that the Salem Property is located in Mahoning County, the legal description states that the Salem Property is located in Columbiana County. The Salem Property is, in fact, located in Columbiana County, but the 1995 Mortgage was filed and recorded only in the Mahoning County Recorder's Office.

Delmont filed a voluntary chapter 7 petition on December 31, 1996. Delmont originally scheduled the FIB Loan as a secured claim, but changed the classification to an unsecured priority claim when she amended her schedules on April 22, 1997. FIB did not file an adversary proceeding regarding its mortgage lien on the Salem Property or file a proof of claim in Delmont's chapter 7 bankruptcy case. The Chapter 7 Trustee did not file an adversary

proceeding to avoid the mortgage lien of FIB and did not administer the Salem Property for the benefit of the unsecured creditors. Delmont was granted a discharge on May 22, 1997. The final order was entered and the case was closed on May 29, 1997. The docket reflects that FIB was served with notice of Delmont's discharge.

More than six years after Delmont's discharge, on July 1, 2003, FIB entered into a sale agreement with Blue View Corporation ("Blue View"), pursuant to which FIB sold the FIB Loan to Blue View. FIB executed an assignment of mortgage ("First Assignment") to Blue View, which was dated and notarized June 27, 2003.

On October 11, 2005, Blue View filed a mortgage ("2005 Mortgage") with the Columbiana County Recorder's Office. The 2005 Mortgage states that it secures the FIB Loan with the Salem Property. Except for the cover page attached to the 2005 Mortgage, the only difference between the 1995 Mortgage and the 2005 Mortgage is that the word "Columbiana" is handwritten where the word "Mahoning" was previously typed in the description of the Salem Property on page one. The signatures on the 2005 Mortgage are the signatures from the 1995 Mortgage.

On March 6, 2006, Blue View filed the First Assignment in the Columbiana County Recorder's Office. Although the First Assignment is dated and notarized June 27, 2003, it specifically references the 2005 Mortgage.

In April 2006, Delmont attempted to sell the Salem Property. Preliminary title work uncovered the 2005 Mortgage and

the First Assignment. On April 11, 2006, the title agency sent a fax to Blue View detailing Delmont's bankruptcy discharge, the discharge order, and defects in the First Assignment. The fax states that the First Assignment "appears to have been altered after the notarization. . . . It appears that dates and mortgage references were erased and re-entered." (Stip. Ex. J at 3.) Despite knowledge of the 2005 Mortgage, Delmont sold the Salem Property to Steve and Sherri Rothwell ("Rothwells") on May 19, 2006.

On August 25, 2006, FIB executed a second assignment of mortgage to Blue View ("Second Assignment"). The Second Assignment assigned the 2005 Mortgage to Blue View. On September 5, 2006, Blue View filed and recorded the Second Assignment in the Columbiana County Recorder's Office.

On October 16, 2006, Blue View filed Complaint for Money Foreclosure, and Other Equitable Relief in Columbiana (Ohio) Court of Common Pleas ("State Foreclosure Case") against the Rothwells (i) claiming the 2005 Mortgage as the first and best mortgage lien on the Salem Property; and (ii) demanding foreclosure on the Salem Property to satisfy the 2005 Mortgage. On December 27, 2006, the Rothwells filed a third party complaint against Delmont in the State Foreclosure Case asserting various breaches of the general warranty deed.

On May 11, 2007, Delmont filed Motion to Reopen Bankruptcy Case to prosecute an action for willful violation of the discharge injunction. On May 30, 2007, this Court granted the Motion to

Reopen Bankruptcy Case.

On June 12, 2007, Delmont commenced the instant adversary proceeding by filing the Complaint (Doc. # 1). Count I of the Complaint requests injunctive relief against Blue View and FIB to prevent them from (i) further prosecution of the State Foreclosure Case and (ii) taking any further action against Delmont, property of Delmont, or any property that formerly belonged to Delmont to collect on a discharged debt. Count II requests that Blue View be ordered to release the 2005 Mortgage. Count III requests compensatory damages for FIB's and Blue View's actions that violated the discharge injunction. Count IV requests punitive damages for FIB's and Blue View's actions that violated the discharge injunction.

For the reasons given below, (i) FIB's Motion for Summary Judgment is granted with respect to Counts I and II, (ii) FIB's Motion for Summary Judgment is denied with respect to Counts III and IV, and (iii) Delmont's Motion for Summary Judgment is denied.

II. STANDARD FOR REVIEW

The procedure for granting summary judgment is found in FED. R. CIV. P. 56(c), made applicable to this proceeding through FED. R. BANKR. P. 7056, which provides in part:

> The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.

FED. R. CIV. P. 56(c) (West 2008). Summary judgment is proper if

there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.*; see also *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). A fact is material if it could affect the determination of the underlying action. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *see also Tennessee Department of Mental Health & Retardation v. Paul B.*, 88 F.3d 1466, 1472 (6th Cir. 1996). An issue of material fact is genuine if a rational fact-finder could find in favor of either party on the issue. *Anderson*, 477 U.S. at 248-49; *see also SPC Plastics Corp. v. Griffith* (*In re Structurlite Plastics Corp.*), 224 B.R. 27 (B.A.P. 6th Cir. 1998). Thus, summary judgment is inappropriate "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248 (1986).

With cross motions for summary judgment the court must evaluate each party's motion on its own merits. *B.F. Goodrich Co. v. U.S. Filter Corp.*, 245 F.3d 587, 592 (6th Cir. 2001). In a motion for summary judgment, the movant bears the initial burden of establishing the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323; *see also Abdulnour v. Campbell Soup Supply Co., LLC*, 502 F.3d 496, 501 (6th Cir. 2007). The burden then shifts to the nonmoving party to demonstrate the existence of a genuine dispute. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 590 (1992). The evidence must be viewed in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59

(1970). However, the mere existence of a scintilla of evidence in support of the non-movant's position is insufficient. *Anderson*, 477 U.S. at 252.

III. ANALYSIS

The Court will address each party's motion for summary judgment separately.

A. FIB's Motion for Summary Judgment

FIB's Motion for Summary Judgment requests judgment in FIB's favor on all counts in the Complaint. In Delmont's Response, Delmont argues that (i) FIB's actions violated the discharge injunction and (ii) violations of the discharge injunction are properly before the Court in Counts III and IV of the Complaint. Delmont does not specifically argue against summary judgment on Counts I and II.

1. Count I: Injunctive Relief

Count I of the Complaint requests injunctive relief to prevent FIB from (i) further prosecution of the State Foreclosure Case, and (ii) taking any further action against Delmont, property of Delmont, or any property that formerly belonged to Delmont to collect on a discharged debt. FIB asserts that it has no interest in the FIB Loan to foreclose upon, and, therefore, the requested relief against FIB is moot.

FIB is not a party to the State Foreclosure Case. As a

result, FIB cannot further prosecute that case.[1] Therefore, Delmont's request to enjoin FIB from further prosecution of the State Foreclosure Case is moot.

With regard to Delmont's personal liability, the discharge injunction in 11 U.S.C. § 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." 11 U.S.C. § 524(a)(2) (West 2008). Thus, the discharge injunction already prevents FIB from taking any action, directly or indirectly, against Delmont to collect on a discharged debt. The Court can and will enforce the discharge injunction, but the Court has not found, and Delmont has not provided, any basis for the Court to enter a second injunction covering the same subject.

With regard to Delmont's property and formerly owned property, Delmont has provided no rationale for the imposition of an injunction to protect all of Delmont's currently owned property and formerly owned property. The discharge injunction extends to property of the debtor, but only to the extent specified in § 524(a)(3). Section 524(a)(3) enjoins collection or recovery from "property of the debtor of the kind specified in section 541(a)(2)," which deals with community property. 11 U.S.C. § 524(a)(3) (West 2008). Section 105 of the Bankruptcy Code authorizes the Court to

[1] On July 28, 2008, Blue View dismissed, without prejudice, the State Foreclosure Case. (Stip. ¶ 42.)

"issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of" the Bankruptcy Code. 11 U.S.C. § 105 (West 2008). Section 524 details the breadth of the injunction to which a debtor is entitled upon receiving a discharge in bankruptcy. There is no basis in § 105 or elsewhere in the Bankruptcy Code for imposition of an additional or expanded injunction protecting Delmont's property and formerly owned property.

Moreover, a valid but unperfected lien that is not avoided survives a bankruptcy discharge. *Cortez v. Am. Wheel, Inc. (In re Cortez)*, 191 B.R. 174, 177 (B.A.P. 9th Cir. 1995). Although a debtor is no longer personally liable for a debt after receiving a discharge, the discharge does not protect the debtor's property against *in rem* actions. *Id.* at 178; *see also Johnson v. Home State Bank*, 501 U.S. 78, 82-83 (1991). Therefore, although the discharge relieves Delmont of her personal liability, the discharge injunction does not protect her property and formerly owned property from *in rem* actions. As a result, the requested injunction is overly broad.

FIB's arguments with regard to Count I are well taken, and as a result, the Court will grant FIB's Motion for Summary Judgment with respect to Count I.

2. Count II: Release of 2005 Mortgage

In Count II of the Complaint, Delmont requests that Blue View be ordered to release the 2005 Mortgage and be enjoined from refiling the 2005 Mortgage.

Delmont seeks no relief from FIB in Count II. As a result, the Court will grant FIB's Motion for Summary Judgment with respect to Count II.

3. Counts III and IV: Compensatory & Punitive Damages

Counts III and IV of the Complaint assert that FIB violated the discharge injunction by (i) selling the FIB Loan, (ii) making the First Assignment, and (iii) making the Second Assignment. Delmont further asserts that FIB should be held in contempt for these violations, and Delmont should be awarded compensatory and punitive damages.

FIB's Motion for Summary Judgment argues: (i) Delmont has no private right of action under § 524 for a violation of the discharge injunction; (ii) FIB's actions did not violate the discharge injunction; (iii) Delmont has failed to show any damages as a result of the alleged violations; and (iv) FIB has not acted with the sort of conduct that could warrant imposition of punitive damages.

Delmont's Response asserts: (i) FIB's actions were violations of the discharge injunction; (ii) FIB's actions enabled Blue View to take actions that violated the discharge injunction; and (iii) although there is no private right of action for a violation of § 524, violations of the discharge injunction are punishable by contempt of court sanctions, which include compensatory and punitive damages.

a. No Private Cause of Action

FIB correctly cites *Pertuso v. Ford Motor Credit Co.*, 233 F.3d 417 (6th Cir. 2000), for the proposition that § 524 provides no private cause of action in the Sixth Circuit. Delmont, however, also correctly notes that, although there is no private right of action for a violation of § 524, violations of the discharge injunction are punishable by contempt of court sanctions, which can include compensatory and punitive damages. *See Motichko v. Premium Asset Recovery Corp. (In re Motichko)*, 395 B.R. 25 (Bankr. N.D. Ohio 2008).

Debtors may commence adversary proceedings to bring violations of the discharge injunction to the court's attention. *Id.* at 29. Moreover, violations of the discharge injunction are punishable by contempt of court sanctions, which can include compensatory and punitive damages. *Id.* at 29 - 30. Therefore, Delmont may bring a contempt of court action against FIB for FIB's alleged violations of the discharge injunction. And, if successful, Delmont has the possibility of recovering compensatory and/or punitive damages as sanctions.

b. Discharge Injunction Violations

FIB argues that, as a matter of law, its actions did not violate the discharge injunction because it did not attempt to collect on the debt from Delmont. Delmont counters that FIB participated in Blue View's attempts to collect by selling the FIB Loan and executing the First Assignment and Second Assignment.

The parties have stipulated to most of the relevant facts;

however, there are a few glaring omissions. The parties stipulate that the 2005 Mortgage is an altered version of the 1995 Mortgage, but the parties do not identify who altered the 1995 Mortgage to create the 2005 Mortgage. The parties stipulate that the First Assignment is dated and was notarized on June 27, 2003, but the parties fail to explain how the First Assignment can reference the 2005 Mortgage, which was filed more than two years after the First Assignment was dated and notarized. The parties stipulate that FIB executed the Second Assignment, but they do not explain why the Second Assignment was necessary. Taking the stipulated facts as true and viewing the remaining evidence in the light most favorable to Delmont, the Court finds that there are genuine issues of material fact that preclude summary judgment in favor of FIB on Counts III and IV.

Section 524(a)(2) of the Bankruptcy Code provides 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." 11 U.S.C. § 524(a)(2) (West 2008).

Delmont alleges the following acts by FIB violated the discharge injunction: (i) selling the FIB Loan; (ii) executing the First Assignment to Blue View; and (iii) executing the Second Assignment to Blue View.

FIB argues that the sale of the FIB Loan and the assignments of the mortgage do not violate the discharge injunction

because FIB was simply selling whatever interest it had in the FIB Loan and 1995 Mortgage to a sophisticated purchaser who did its own due diligence. Further, FIB asserts that it transferred the entire FIB Loan file to Blue View and, thus, Blue View was put on notice of Delmont's bankruptcy discharge.

i. Sale of FIB Loan

The sale of the FIB Loan to Blue View may be a violation of the discharge injunction. Whether the sale of a discharged debt violates the discharge injunction depends upon whether the debt is secured or unsecured. *In re Lafferty*, 229 B.R. 707 (Bankr. N.D. Ohio 1998), held that the sale of an unsecured discharged debt was a violation of the discharge injunction because (i) the seller failed to separate discharged debts from other uncollectible debts, and (ii) the only reason for the sale was to enable the purchaser to collect on the discharged debt from the debtor personally. In contrast, sale of a secured debt after the underlying personal liability of the debtor has been discharged is not a violation of the discharge injunction because the debt can be collected through an action against property and not against the debtor personally. *See Keller v. CIT Group (In re Keller)*, 229 B.R. 900 (Bankr. S.D. Ohio 1998) (allowing post-discharge modification of a mortgage because it would not result in personal liability to the debtor). *Keller* dealt with a properly filed mortgage lien where the legal description included only one of the two parcels the parties intended to be covered by the mortgage. As a result, the creditor

sought to reform a valid mortgage to include the second parcel. The court held that reformation is an *in rem* proceeding that may be brought after discharge because reformation will not result in personal liability to the debtor; it will simply allow a valid lien to be enforced. *Id.* at 903.

The instant case, however, is distinguishable from both *Lafferty* and *Keller* because it is unclear whether there is, in fact, a valid - although not perfected - mortgage lien on the Salem Property. Therefore, it is unclear whether FIB sold an <u>unsecured</u> discharged debt that could only be collected against Delmont personally or a <u>secured</u> debt that could be collected against the Salem Property. First, the 2005 Mortgage is not and cannot be a valid lien because Delmont never signed the 2005 Mortgage. Second, the 1995 Mortgage is ambiguous because it states that the property is located in Mahoning County in one place and in Columbiana County in another. At a minimum, the holder of the 1995 Mortgage would have needed to seek judicial reformation to resolve the ambiguity in the 1995 Mortgage. A reformation action would have (i) enabled a state court to determine whether the 1995 Mortgage was invalid or merely not perfected and (ii) allowed Delmont to raise any and all defenses to reformation - including prejudice as a result of delay. However, the 1995 Mortgage was not reformed; it was unilaterally altered.

Neither FIB or Blue View were entitled to unilaterally alter the 1995 Mortgage to create and then record the 2005 Mortgage.

FIB fails to establish that it did not alter the 1995 Mortgage. As a consequence, the Court finds there are genuine issues of material fact that preclude summary judgment in favor of FIB.

ii. First Assignment

The First Assignment may be a violation of the discharge injunction. Generally, an assignment of mortgage is not a violation of the discharge injunction because it simply transfers a creditor's equitable interest in property. *See Rogan v. Bank One (In re Cook)*, 457 F.3d 561, 568 (6th Cir. 2006) (stating that the transfer of a mortgage post-petition is not a violation of the automatic stay because it is simply a transfer of the creditor's equitable interest in the property). However, the date inconsistencies in the First Assignment, coupled with the alteration of the 1995 Mortgage, make it appear that FIB's transfer was not limited to its equitable interest in the 1995 Mortgage. As a result, FIB's execution of the First Assignment may be a violation of the discharge injunction.

In support of its Motion for Summary Judgment, FIB supplied Affidavit in Support of Defendant, First Indiana Bank's Motion for Summary Judgment ("Affidavit"). The Affidavit states, "Based upon the loan account records from FIB, <u>it does not appear</u> that FIB altered the Mortgage prior to conveying it to Blue View Corporation in 2003." (Aff. ¶ 11 (emphasis added).) However, also attached to FIB's Motion for Summary Judgment as Exhibit A-4 is the First Assignment, which is dated and notarized June 27, 2003, yet references the 2005 Mortgage filed on October 11, 2005. FIB's

exhibits contradict each other and, as a result, FIB fails to establish that it did not alter the 1995 Mortgage and subsequent First Assignment. As a consequence, the Court finds there is a genuine issue of material fact that precludes summary judgment in favor of FIB.

iii. Second Assignment

The Second Assignment is possibly a violation of the discharge injunction. FIB states that the Second Assignment was executed and delivered to Blue View at Blue View's request, and, therefore, FIB did nothing wrong. FIB further argues that, because the Second Assignment was executed after Delmont transferred the Salem Property, FIB's actions could not have been an attempt to collect against Delmont. Delmont contends that the Second Assignment transfers more than FIB was granted in the 1995 Mortgage and, thus, FIB participated in Blue View's attempt to collect on the discharged debt.

Viewing the facts in a light favorable to Delmont, FIB's argument cannot prevail on summary judgment. When FIB executed the Second Assignment, FIB knew or should have known that it was erroneous and inaccurate. The Second Assignment assigns the 2005 Mortgage that was recorded in the Columbiana County Recorder's Office. FIB had no interest in the 2005 Mortgage to assign because the 2005 Mortgage is not the mortgage executed by Delmont. Because it is unclear whether FIB executed the Second Assignment (i) intentionally and in furtherance of Blue View's fraudulent actions,

(ii) recklessly, or (iii) as a result of simple negligence, these questions raise genuine issues of material fact.

Simply put, because of the uncertainty regarding who altered the 1995 Mortgage, the date discrepancies in the First Assignment, and the timing of and reason for the Second Assignment, the Court finds there are genuine issues of material fact that preclude summary judgment in favor of FIB on Counts III and IV.

c. No Damages

FIB asserts that Delmont has failed to show that FIB's actions caused Delmont any damages. Delmont argues that Blue View's actions violated the discharge injunction and caused Delmont damages, and Blue View could not have taken such actions without the active participation of FIB.

Those who violate the discharge injunction may be held in contempt of court and sanctioned. *Chambers v. GreenPoint Credit (In re Chambers)*, 324 B.R. 326, 329 (Bankr. N.D. Ohio 2005). Moreover, because a violation of the discharge injunction is likely to cause a debtor damages, courts generally permit, as a sanction, an award of damages to the debtor including attorney fees. *Id.* Delmont has alleged actual damages of costs, expenses, and attorney fees resulting from the combined actions of FIB and Blue View. As a result, in the event that Delmont is able to show that FIB's actions violated the discharge injunction, Delmont could recover actual damages including attorney fees. Therefore, because there are factual issues regarding FIB's liability, FIB is not entitled to

judgment as a matter of law on the issue of damages.

d. Punitive Damages

FIB argues that: (i) as a matter of law, Delmont has failed to assert a cause of action against FIB that warrants imposition of punitive damages; and (ii) FIB's conduct does not support an award of punitive damages. Delmont counters that punitive damages are recoverable as a sanction for FIB's willful violations of the discharge injunction.

Punitive damages are used to punish a party for its wrongful conduct and to deter future similar conduct. *In re Perviz*, 302 B.R. 357, 372 (Bankr. N.D. Ohio 2003). Bankruptcy courts have the inherent authority to punish parties for contemptuous violations of the discharge injunction through the imposition of punitive damages. *Id.* However, in considering violations of the discharge injunction, punitive damages have been properly limited to circumstances where there is a complete and utter disrespect for the bankruptcy laws. *Id. Compare Arnold v. Stevenson Fed. Credit Union (In re Arnold)*, 206 B.R. 560 (Bankr. N.D. Ala 1997) (holding that punitive damages were appropriate when the creditor acted with a clear disregard and disrespect for the bankruptcy laws, and with a malicious intent), *with In re Borowski*, 216 B.R. 922 (Bankr. E.D. Mich. 1998) (holding that punitive damages were not appropriate because there was no malevolent intent).

In the instant case, Delmont has asserted a claim that could result in punitive damages. Moreover, if the Court finds that

FIB's actions show a clear disregard and disrespect for the bankruptcy laws along with a malicious intent, FIB could be subject to punitive damages. Therefore, when the evidence is viewed in the light most favorable to Delmont, FIB could be subject to punitive damages. As a result, there is a genuine issue of material fact that precludes judgment as a matter of law in favor of FIB.

B. Delmont's Motion for Summary Judgment

Delmont's Motion for Summary Judgment requests an order granting partial summary judgment on Count III and Count IV of the Complaint because, as a matter of law, FIB's actions violated the discharge injunction. Delmont contends that (i) the post-discharge recording of the 2005 Mortgage; (ii) FIB's sale of the FIB Loan; (iii) FIB's execution of the First Assignment; and (iv) FIB's execution of the Second Assignment are all willful violations of the discharge injunction that entitle her to compensatory and punitive damages.

FIB' Response argues that (i) any actions that violated the discharge injunction were taken by Blue View and (ii) sale of the FIB Loan, execution of the First Assignment, and execution of the Second Assignment are not violations of the discharge injunction.

As discussed above, although most relevant facts have been stipulated to, the Court finds that omissions from the Stipulation reveal genuine issues of material fact. Taking the stipulated facts

as true and viewing the remaining evidence in the light most favorable to FIB, there are genuine issues of material fact regarding who altered the 1995 Mortgage, the date discrepancies in the First Assignment, and the timing of and reason for the Second Assignment that preclude summary judgment in favor of Delmont.

1. Recording of the 2005 Mortgage

Delmont argues that *Funket v. Beacon Consumer Disc. Co. (In re Funket)*, 27 B.R. 640 (Bankr. M.D. Pa. 1982), establishes that recording a mortgage post-discharge is a violation of the discharge injunction. FIB counters that *Funket* is not applicable to this case because there is clear Ohio law that controls.

The recording of a mortgage is not, per se, a violation of the discharge injunction. *See In re Landmark*, 48 B.R. 626 (Bankr. D. Minn. 1985). *Funket* is distinguishable from the instant case because the Pennsylvania bankruptcy court found that the creditor, who had failed to perfect its mortgage lien, had "nothing more than an unsecured, personal obligation," and, therefore, the obligation was extinguished when the discharge was entered. *Funket*, 27 B.R. at 642. In Ohio, however, perfection of a mortgage lien is not necessary to create a valid and enforceable lien between the parties. *See Stewart v. Hopkins*, 30 Ohio St. 502 (1876) (syllabus ¶ 6); *see also ABN AMRO Mortgage Group, Inc. V. Jackson*, 824 N.E.2d 600, 605 (Ohio Ct. App. 2005). And, as discussed above, a lien that is not avoided survives a bankruptcy discharge. *Cortez v. Am. Wheel, Inc. (In re Cortez)*, 191 B.R. 174, 177 (B.A.P. 9th Cir.

1995). Moreover, a discharge does not protect a debtor's property against *in rem* actions. *Id.* at 178; *see also Johnson v. Home State Bank*, 501 U.S. 78, 82-83 (1991).

After Delmont was granted a discharge, FIB retained whatever mortgage lien it had on the Salem Property before Delmont's discharge. As a result, re-recording a lien that survived discharge would not be a violation of the discharge injunction. In the instant case, however, the 1995 Mortgage was not re-recorded; the 2005 Mortgage was recorded. As set forth above, it is unclear what role, if any, FIB played in creating and/or recording the 2005 Mortgage. Viewing the evidence in the light most favorable to FIB, the Court finds there is a genuine issue of material fact that precludes summary judgment.

2. The Sale of the FIB Loan and the First Assignment

Delmont argues that FIB violated the discharge injunction by selling the FIB Loan and executing the First Assignment because the only reason for FIB's actions was to allow Blue View to attempt to collect on the debt personally from Delmont.

FIB argues that sale of the FIB Loan and execution of the First Assignment did not violate the discharge injunction because FIB simply transferred its remaining mortgage interest to Blue View.

Generally, assignment of a mortgage is not a violation of the discharge injunction because it is only a transfer of a creditor's equitable interest in the mortgage. *See Rogan v. Bank One (In re Cook)*, 457 F.3d 561, 568 (6th Cir. 2006) (stating that

the transfer of a mortgage post-petition is not a violation of the automatic stay because it is simply a transfer of the creditor's equitable interest in the property). However, sale of an unsecured debt solely for the purpose of collecting personally against the debtor violates the discharge injunction. *See In re Lafferty*, 229 B.R. 707 (Bankr. N.D. Ohio 1998). It is unclear whether FIB simply (i) transferred to Blue View its equitable interest in the 1995 Mortgage or (ii) sold Blue View the FIB Loan as an unsecured debt so it could collect against Delmont personally. As a consequence, the Court finds there is a genuine issue of material fact that precludes judgment as a matter of law in favor of Delmont.

3. Second Assignment

Delmont argues that the second assignment is a violation of the discharge injunction because it was a necessary step in Blue View's foreclosure action against the Rothwells.

FIB contends that executing the Second Assignment did not violate the discharge injunction because the Second Assignment was executed more than three months after Delmont sold the Salem Property to the Rothwells. As a result, FIB argues that the Second Assignment cannot be an act to collect against Delmont.

Viewing the evidence in the light most favorable to FIB, there are not enough facts to establish that FIB's execution of the Second Assignment was an attempt to collect against Delmont personally. As a result, Delmont's Motion for Summary Judgment is denied.

IV. CONCLUSION

The issue before the Court is whether FIB violated the discharge injunction by (i) selling the FIB Loan, (ii) making the First Assignment, and/or (iii) executing the Second Assignment. The Court finds there are genuine issues of material fact that preclude summary judgment in favor of either party on Counts III and IV.

Therefore, FIB's Motion for Summary Judgment is granted with respect to Counts I and II, and denied with respect to Counts III and IV. Delmont's Motion for Summary Judgment is denied. An appropriate order will follow.

# # #

IT IS SO ORDERED.

Kay Woods

Honorable Kay Woods
United States Bankruptcy Judge

Dated: March 11, 2009
03:59:57 PM

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:	*	
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MICHELE DELMONT, *et al.*,	*	
	*	**CASE NUMBER 96-42960**
Debtors.	*	
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	*	
MICHELE DELMONT	*	
***fka* MICHELE IMBURGIA,**	*	**ADVERSARY NUMBER 07-4074**
	*	
Plaintiff,	*	
	*	
vs.	*	
	*	
FIRST INDIANA BANK, et al.,	*	**HONORABLE KAY WOODS**
	*	
Defendants.	*	
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ORDER (i) GRANTING, IN PART, AND DENYING, IN PART, MOTION FOR SUMMARY JUDGMENT OF FIRST INDIANA BANK, AND (ii) DENYING MOTION FOR SUMMARY JUDGMENT OF MICHELLE DELMONT

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On December 5, 2008, Plaintiff/Debtor Michele Delmont *fka* Michele Imburgia filed Plaintiff's Motion for Partial Summary

Judgment Against Defendant M&I Marshall & Ilsley Bank ("Delmont's Motion for Summary Judgment"). On December 5, 2008, First Indiana Bank by its successor in interest M&I Marshall & Ilsley Bank filed Motion for Summary Judgment of Defendant First Indiana Bank ("FIB's Motion for Summary Judgment").

For the reasons set forth in the Court's Memorandum Opinion Regarding Cross Motions for Summary Judgment entered this date, the Court hereby:

1. Grants FIB's Motion for Summary Judgment with respect to Counts I and II;
2. Denies FIB's Motion for Summary Judgment with respect to Counts III and IV; and
3. Denies Delmont's Motion for Summary Judgment.

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