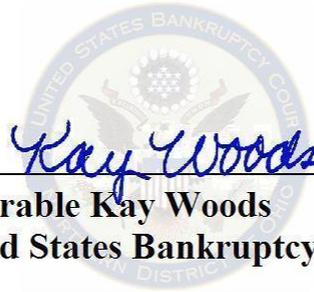


IT IS SO ORDERED.



Dated: September 04, 2009  
09:38:20 AM

Honorable Kay Woods  
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO

IN RE:

MELISSA GIGLIO  
aka MELISSA CANDELLA,  
  
Debtor.

CASE NUMBER 08-42141

MELISSA GIGLIO,  
  
Plaintiff,

ADVERSARY NUMBER 09-4105

v.

FORD MOTOR CREDIT COMPANY LLC,  
  
Defendant.

HONORABLE KAY WOODS

\*\*\*\*\*  
MEMORANDUM OPINION REGARDING MOTION TO DISMISS  
\*\*\*\*\*

This cause is before the Court on Motion to Dismiss Pursuant to Federal Rule of Bankruptcy Procedure 7012(b) and Federal Rule of Civil Procedure 12(b)(1)&(6) ("Motion to Dismiss") filed by

Defendant Ford Motor Credit Company LLC FKA Ford Motor Credit Company ("Ford") on August 7, 2009. On August 27, 2009, Plaintiff/Debtor Melissa Giglio aka Melissa Candella ("Debtor") filed Memorandum in Opposition ("Memo in Opposition") (Doc. # 11), which opposes the Motion to Dismiss.

Debtor filed a voluntary petition for relief under chapter 7 of Title 11 of the United States Code ("Bankruptcy Code") on July 23, 2008. The first meeting of creditors pursuant to 11 U.S.C. § 341 was scheduled for and held on September 16, 2008. Debtor was granted a discharge on November 25, 2008 ("Discharge Date") (Doc. # 31).

On June 3, 2009, Debtor filed Complaint Seeking Declaratory Judgment and Damages in Core and Non-Core Adversary Proceeding for Violation of the Automatic Stay, Discharge Injunction and Federal Law ("Complaint"). The Complaint asserts three claims for relief: (i) a claim for a willful violation of the automatic stay ("Claim One"); (ii) a claim for a willful violation of the discharge injunction ("Claim Two"); and (iii) declaratory judgment that the actions of Ford violated the Bankruptcy Code.

In the Motion to Dismiss, Ford asserts that Claims One and Two should be dismissed because: (i) this Court lacks subject-matter jurisdiction; and (ii) Debtor has failed to state a claim upon which relief can be granted. Debtor asserts in the Memo in Opposition that this Court should deny the Motion to Dismiss because: (i) Ford violated the automatic stay by repossessing property of the estate

and (ii) this Court has previously held that it will consider additional sanctions for Ford's violation of the discharge injunction at the conclusion of this adversary proceeding. For the reasons given below, the Court will deny the Motion to Dismiss.

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. §§ 1391(b), 1408, and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). The following constitutes the Court's findings of fact and conclusions of law pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure.

#### **I. PROCEDURAL AND FACTUAL BACKGROUND**

The Complaint arises from events regarding repossession of Debtor's 2007 Ford Focus ("Debtor's Car") and a reaffirmation agreement concerning the debt on Debtor's Car ("Reaffirmation Agreement") (Main Case Doc. # 37).

As alleged by the Debtor, Ford sent Debtor the Reaffirmation Agreement on August 21, 2008, and stated that if Debtor did not sign it, Ford would repossess Debtor's Car. Debtor executed the Reaffirmation Agreement on September 25, 2009, and returned the signed Reaffirmation Agreement to Ford on September 29, 2009. Debtor contends that the Reaffirmation Agreement was properly filled out and, as a consequence, Ford should have filed the Reaffirmation Agreement with the Court. However, Ford took no action regarding

the Reaffirmation Agreement until February 13, 2009, at which time it signed and filed the Reaffirmation Agreement. Ford filed the Reaffirmation Agreement approximately six weeks after it repossessed Debtor's car on December 31, 2008, and nearly three months after the Discharge Date.

Debtor alleges that Debtor's Car was still property of the bankruptcy estate when Ford repossessed it. Debtor further asserts that Ford led Debtor to believe that Ford would return Debtor's Car to her when the Reaffirmation Agreement was filed. As a consequence, Debtor continued to make regular monthly payments to Ford subsequent to repossession.

The Court entered Order Disapproving Reaffirmation Agreement (Main Case Doc. # 38) on February 19, 2009, because the Reaffirmation Agreement was not made prior to the Discharge Date as required by § 524(c)(1) of the Bankruptcy Code. On February 27, 2009, Ford filed Motion to Reconsider Order Disapproving Reaffirmation Agreement ("Motion to Reconsider") (Main Case Doc. # 40). Ford argued in its Motion to Reconsider that the Reaffirmation Agreement was "made" when the Debtor signed the Reaffirmation Agreement, which was prior to the Discharge Date. The Court set the Motion to Reconsider for hearing on March 19, 2009 ("Reconsideration Hearing").

Debtor alleges that she received notice from Ford that Debtor's Car was going to be sold at auction on March 18, 2009 - one day before the Reconsideration Hearing. As a result, Debtor alleges

that she was forced to purchase a vehicle to replace Debtor's Car at an interest rate of 17 percent per annum (compared to the 3.9 percent interest on Debtor's Car).

Following the Reconsideration Hearing, this Court entered Memorandum Opinion Regarding Motion to Reconsider Order Disapproving Reaffirmation Agreement ("Memorandum Opinion") (Main Case Doc. # 47) and Order Denying Motion to Reconsider Order Disapproving Reaffirmation Agreement (Main Case Doc. # 48). In the Memorandum Opinion, the Court noted that Ford had taken "diametrically different positions at various times with regard to the Reaffirmation Agreement." (Memo. Op. at 2.) The Court found that Ford had presented no reason to justify the relief it sought and, accordingly, denied the Motion to Reconsider.

As a result of Ford's conflicting positions in the Motion to Reconsider and at the Reconsideration Hearing, as well as the facts that were represented to the Court by Ford's counsel, this Court issued Order to Appear and Show Cause ("Show Cause Order") (Main Case Doc. # 49), which ordered one or more representatives of Ford to appear at a hearing on March 24, 2009, and show cause (i) why Ford should not be found to have violated the discharge injunction in 11 U.S.C. § 524(a)(2) by collecting payments from Debtor on a discharged debt; (ii) why Ford should not be sanctioned for such violations; and (iii) why Debtor should not be entitled to recover her costs, including attorneys' fees, resulting from or relating to such violations. The Court held a hearing on the Show Cause Order

on April 30, 2009.

On June 11, 2009, this Court entered Order Sanctioning Ford Motor Credit, LLC ("Sanction Order") (Main Case Doc. # 63). This Court found that Ford violated the discharge injunction and issued sanctions against Ford. The Court ordered Ford to:

(i) return all post-petition payments to Debtor, to the extent Ford [has] not already done so; (ii) provide this Court and Debtor's counsel with an accounting of all post-petition payments made by Debtor to Ford; and (iii) provide this Court and Debtor's counsel with evidence that all post-petition payments made by Debtor to Ford have been returned.

(Sanction Order at 7.) Additionally, at the conclusion of the Sanction Order, the Court stated:

The Show Cause Order also referenced the possible sanction of Debtor's recovery of costs and damages resulting from or relating to Ford's violation of the discharge injunction. Absent Debtor's filing of Adversary Proceeding No. 09-4105, this Court would have invited Debtor to file a detailed request for such costs. Under the circumstances, the Court will determine if further sanctions against Ford are appropriate at the conclusion of the adversary proceeding.

(*Id.* at 7-8.)

The Complaint alleges that Ford's willful violation of the Bankruptcy Code caused Debtor economic and non-economic damages, which include humiliation, aggravation, anger, embarrassment, and emotional distress. The Complaint also requests an award of attorneys fees.

The Motion to Dismiss asserts that: (i) this Court lacks subject-matter jurisdiction over the instant Adversary Proceeding because 11 U.S.C. § 524 provides no private cause of action for a

violation of the discharge injunction; and (ii) Debtor has failed to state a claim upon which relief can be granted because the automatic stay was not in effect when Ford took any of the alleged improper actions and this Court has already issued the Sanction Order against Ford.

## **II. SUBJECT-MATTER JURISDICTION**

The Court will first consider Ford's argument that this Adversary Proceeding should be dismissed for lack of subject-matter jurisdiction. Federal Rule of Bankruptcy Procedure 7012(b) incorporates Federal Rule of Civil Procedure 12(b) into adversary proceedings. Under Federal Rule of Civil Procedure 12(b)(1), lack of subject-matter jurisdiction is a defense to an action. FED R. CIV. P. 12(b)(1). When a defendant makes a facial attack on a court's subject-matter jurisdiction, the reviewing court takes the allegations in the complaint as true. *Gentek Building Products, Inc. v. Sherwin-Williams Company*, 491 F.3d 320, 330 (6th Cir. 2007). Thus, the court has subject-matter jurisdiction if the allegations in the complaint establish a federal claim. *Id.*

District courts have jurisdiction over all cases under the Bankruptcy Code. 28 U.S.C. § 1334 (West 2009). This Court also has jurisdiction "over all cases under title 11" 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).

Section 157 of title 28 states:

(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising

under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

(b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

28 U.S.C. § 157 (West 2009).

Proceedings to enforce the automatic stay or discharge injunction are core proceedings pursuant to 28 U.S.C. § 157(b)(2). See *United States v. Harchar*, 331 B.R. 720, 725 n. 10 (N.D. Ohio 2005) (stating that enforcement of the automatic stay is a core proceeding); and *In re Price*, 383 B.R. 411, 413 (Bankr. N.D. Ohio 2007) (stating that enforcement of the discharge injunction is a core proceeding).

In the Complaint, Debtor alleges that Ford's actions violated the automatic stay and discharge injunction. Ford does not argue that Counts One and Two are not core proceedings, rather Ford argues that this Court lacks subject-matter jurisdiction because there is no private cause of action under 11 U.S.C. § 524 for a violation of the discharge injunction. Whether or not a party has a private right of action does not divest this Court of subject-matter jurisdiction.

In Counts One and Two Debtor alleges claims against Ford for violations of the automatic stay and discharge injunction, respectively. Debtor also alleges other actions - e.g., that Ford breached the peace in repossessing Debtor's Car - which are related

to this bankruptcy case. When viewed in the light favorable to Debtor, the allegations in the Complaint establish claims "arising under title 11, or arising in a case under title 11," which can be heard by this Court pursuant to 28 U.S.C. § 157(b). As a consequence, this Court has subject-matter jurisdiction over Counts One and Two.

### **III. FAILURE TO STATE A CLAIM**

Ford also moves to dismiss Debtor's Complaint on the grounds that it fails to state a claim upon which relief can be granted. In so moving, Ford relies on Federal Rule of Civil Procedure 12(b)(6), which is incorporated herein by Federal Rule of Bankruptcy Procedure 7012(b).

A party may bring a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6) to test whether a cognizable claim has been pled in the complaint. A cognizable claim for relief must contain (i) a short and plain statement of the claim that shows the plaintiff is entitled to relief, (ii) give the defendant fair notice of the claim, and (iii) state the grounds upon which the claim rests. See FED. R. CIV. P. 8(a); *Conley v. Gibson*, 355 U.S. 41, 47 (1957). If a plaintiff fails to state a cognizable claim, the court can dismiss the complaint.<sup>1</sup>

Under Rule 12(b)(6), a complaint will be dismissed if it fails to allege "enough facts to state a claim to relief that is plausible

---

<sup>1</sup> The court's dismissal of meritless claims precludes the waste of judicial resources. *Neitzke v. Williams*, 490 U.S. 319, 326-27 (1989).

on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).<sup>2</sup> Referring to *Twombly*, the Court of Appeals for the Sixth Circuit noted:

The Supreme Court has recently clarified the law with respect to what a plaintiff must plead in order to survive a Rule 12(b)(6) motion. The Court stated that "a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Additionally, the Court emphasized that even though a complaint need not contain "detailed" factual allegations, its "[f]actual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true."

*Ass'n of Cleveland Fire Fighters v. City of Cleveland*, 502 F.3d 545, 548 (6th Cir. 2007) (citations omitted) (alteration in original).

"A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009).

In determining whether a cognizable claim has been pled, the court must "construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff." *Directv, Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007). However, the Court does

---

<sup>2</sup>In *Twombly*, the Supreme Court held that the following language from *Conley* had earned its retirement: "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley*, 355 U.S. at 45-46. "The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." *Twombly*, 550 U.S. at 563.

not have to accept as true legal conclusions or unwarranted factual inferences. *Id.*

**A. Count One - Willful Violation of the Automatic Stay**

The automatic stay of 11 U.S.C. § 362(a)(3) prevents a creditor from taking "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate." 11 U.S.C. § 362(a)(3) (West 2009). The automatic stay continues to prohibit action against property of the estate until such property is no longer property of the estate. See 11 U.S.C. § 362(c)(1) (West 2009). Generally, property of the estate remains property of the estate until it is abandoned, or otherwise disposed of, under the Bankruptcy Code.

Under 11 U.S.C. § 362(k)(1), a debtor seeking damages for a willful violation of the automatic stay has the burden of establishing three elements by a preponderance of the evidence: (i) the actions taken were in violation of the automatic stay; (ii) the violation was willful; and (iii) the violation caused actual damages. See *Clayton v. King (In re Clayton)*, 235 B.R. 801, 806-07 & n.2 (Bankr. M.D.N.C. 1998); see also *In re Glanzer*, 2008 Bankr. LEXIS 1141, \*4 (Bankr. N.D. Ohio 2008)

A willful violation of the automatic stay entitles an injured debtor to recover actual damages, including costs and attorney's fees and, if appropriate, punitive damages. 11 U.S.C. § 362(k)(1) (West 2009). A violation of the automatic stay is willful so long as the creditor had notice of the bankruptcy filing and its actions

were intentional. *Transouth Financial Corp. v. Sharon (In re Sharon)*, 234 B.R. 676, 687-88 (B.A.P. 6th Cir. 1999).

Ford argues, "[T]he stay terminated on November 25, 2008 [the Discharge Date] and was no longer effective when Ford repossessed the vehicle on December 31, 2008. Plaintiff has failed to state a claim upon which relief can be granted." (Mot. to Dismiss at 6.)

Debtor counters that the stay was still in place at the time Ford repossessed Debtor's Car because "the case had not been closed and the trustee had not abandoned the property." (Memo in Opp. at 3.)

Debtor alleges that Debtor's Car had not been abandoned under § 362(h)(1) because Debtor (i) timely filed her statement of intent as required under § 521(a)(2) and (ii) took timely action to reaffirm the debt by sending Ford the completed Reaffirmation Agreement. Moreover, Debtor contends that Debtor's Car was not abandoned under § 521(a)(6) because Debtor attempted to enter into the Reaffirmation Agreement with Ford.

Therefore, Debtor has alleged that (i) Ford's repossession of Debtor's Car was a violation of the automatic stay; (ii) Ford's violation of the automatic stay was willful because Ford had knowledge of Debtor's bankruptcy case; and (iii) Debtor incurred actual damages as a result of Ford's violation of the stay. As a consequence, taking the facts pled in the Complaint as true, Debtor has alleged enough facts to state a claim to relief that is plausible on its face under § 362(k)(1). Therefore, the Court will deny Ford's Motion to Dismiss Count One.

**B. Count Two - Violation of the Discharge Injunction**

The discharge injunction 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 2009). Thus, after the Discharge Date, Ford was enjoined from taking any action to collect on the discharged debt from Debtor personally.

This Court has already found that Ford's actions with regard to the Reaffirmation Agreement and the collection and retention of payments from the Debtor violated the discharge injunction. In the Sanction Order the Court stated:

The actions of Ford cannot and will not be condoned by this Court. Ford held a position of power and influence over Debtor with regard to Debtor's Car. Ford abused its power by enticing Debtor to make payments on a discharged debt in the unrealistic hope that Ford would return Debtor's Car to Debtor. Because Ford's actions regarding the Reaffirmation Agreement were designed to encourage Debtor to make post-repossession payments on the discharged debt, Debtor did not make such payments to Ford voluntarily. This Court finds that Ford's conduct regarding the Reaffirmation Agreement constituted an act to collect the discharged debt. As a consequence, the Court finds that Ford violated the discharge injunction in 11 U.S.C. § 524(a)(2).

. . . .

Absent Debtor's filing of [the instant] Adversary Proceeding No. 09-4105, this Court would have invited Debtor to file a detailed request for such costs. Under the circumstances, the Court will determine if further sanctions against Ford are appropriate at the conclusion of the adversary proceeding.

(Sanction Order at 6-8.)

Nevertheless, Ford argues that the Complaint fails to state a claim for a violation of the discharge injunction because (i) there is no private cause of action for a violation of the discharge injunction and (ii) the Court has already held Ford in contempt for violating the discharge injunction. To the contrary, Debtor argues that the Court specifically left open the issue of additional sanctions for Ford's violation of the discharge injunction in the Sanction Order.

Ford is correct in its assertion that there is no private cause of action for a violation of the discharge injunction. See *Pertuso v. Ford Motor Credit Co.*, 233 F.3d 417 (6th Cir. 2000). However, Ford also correctly acknowledges this Court's prior opinion on this very issue in *Motichko v. Premium Asset Recovery Corp.*, 395 B.R. 25 (Bankr. N.D. Ohio 2008), which stated that this Court would treat the discharge injunction claim in the *Motichko* adversary proceeding as a motion for contempt for violation of the discharge injunction. Although the traditional method of bringing violations of the discharge injunction to the Court's attention is through a motion for contempt, this Court will not elevate form over substance. See *Id.* at 32-33. As a result, this Court deems Claim Two to be a continuation of the Court's inquiry into Ford's violation of the discharge injunction and a means to determine the appropriate kind and amount of additional sanctions, if any, for Ford's violation of the discharge injunction.

Ford attempts to distinguish *Motichko* from the instant

Adversary Proceeding by arguing that collateral estoppel<sup>3</sup> applies to this Adversary Proceeding because "Ford has already been found in contempt." (Mot. to Dismiss at 8.) Ford is correct that, by virtue of the Sanction Order, Ford cannot controvert that it has violated the discharge injunction. However, Ford's argument ignores the express terms of the Sanction Order, which stated, "Absent Debtor's filing of Adversary Proceeding No. 09-4105, this Court would have invited Debtor to file a detailed request for such costs. Under the circumstances, the Court will determine if further sanctions against Ford are appropriate at the conclusion of the adversary proceeding." (Sanction Order at 8.)

The Sanction Order expressly reserved the issue of additional sanctions for Ford's violation of the discharge injunction until the conclusion of this Adversary Proceeding. As a consequence, Ford's arguments for dismissal of Count Two are not well taken. The Court will deny Ford's Motion to Dismiss Count Two.

#### **IV. CONCLUSION**

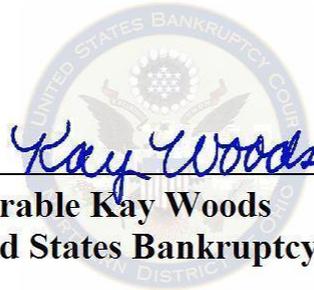
For the reasons stated above, the Court denies the Motion to Dismiss because (i) this Court has subject-matter jurisdiction over the instant Adversary Proceeding and (ii) the Complaint states cognizable claims for relief in both Counts One and Two. An appropriate Order will follow.

# # #

---

<sup>3</sup> *Res Judicata* or law of the case is more likely applicable here. In any event, Ford is precluded from relitigating whether it violated the discharge injunction.

IT IS SO ORDERED.



Dated: September 04, 2009  
09:38:21 AM

Honorable Kay Woods  
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO

IN RE:

MELISSA GIGLIO  
aka MELISSA CANDELLA,  
  
Debtor.

CASE NUMBER 08-42141

MELISSA GIGLIO,  
  
Plaintiff,

ADVERSARY NUMBER 09-4105

v.

FORD MOTOR CREDIT COMPANY LLC,  
  
Defendant.

HONORABLE KAY WOODS

\*\*\*\*\*  
ORDER DENYING MOTION TO DISMISS  
\*\*\*\*\*

This cause is before the Court on Motion to Dismiss Pursuant to Federal Rule of Bankruptcy Procedure 7012(b) and Federal Rule of Civil Procedure 12(b)(1)&(6) ("Motion to Dismiss") filed by

Defendant Ford Motor Credit Company LLC FKA Ford Motor Credit Company ("Ford") on August 7, 2009. On August 27, 2009, Plaintiff/Debtor Melissa Giglio aka Melissa Candella filed Memorandum in Opposition (Doc. # 11), which opposes the Motion to Dismiss.

For the reasons given in the Court's Memorandum Opinion entered this date, the Court hereby denies the Motion to Dismiss because (i) this Court has subject-matter jurisdiction over the instant Adversary Proceeding and (ii) the Complaint states cognizable claims for relief in both Counts One and Two.

# # #