IT IS SO ORDERED.

Dated: May 25, 2012
02:17:15 PM

Kay Woods
Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:	*	
FRANCIS ROBERT MACOVITZ,	*	**CASE NUMBER 08-40049**
Debtor.	*	
* * * * * * * * * * * * * * * *	*	
FRANCIS ROBERT MACOVITZ, JR.,	*	**ADVERSARY NUMBER 09-4303**
Plaintiff,	*	
v.	*	
ABSOLUTE COLLECTION SERVICE,	*	**HONORABLE KAY WOODS**
Defendant.	*	

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MEMORANDUM OPINION REGARDING MOTION FOR PARTIAL SUMMARY JUDGMENT

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This cause is before the Court on Motion for Partial Summary Judgment Finding Defendant in Contempt of Discharge Violation ("Motion") (Doc. # 45) filed by Plaintiff Francis Robert Macovitz,

Jr. on February 13, 2012. On March 2, 2012, Defendant Absolute Collection Service filed Defendant Absolute Collection Service, Inc.'s Reply to Motion for Partial Summary Judgment ("Response") (Doc. # 47). The Plaintiff filed Reply in Support of Motion for Partial Summary Judgment Finding Defendant in Contempt of Discharge Violation (Doc. # 48) on March 5, 2012. For the reasons that follow, the Court will grant the Motion.

This Court has jurisdiction pursuant to 28 U.S.C. § 1334 and the general orders of reference (General Order Nos. 84 and 2012-7) 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 Federal Rule of Bankruptcy Procedure 7052.

I. PROCEDURAL AND FACTUAL BACKGROUND

A. Procedural Background

On January 9, 2008, the Plaintiff filed a voluntary petition pursuant to chapter 7 of the Bankruptcy Code (Main Case, Doc. # 1). The Plaintiff received a discharge on April 24, 2008 (Main Case, Doc. # 15). On September 24, 2009, the Plaintiff filed Motion to Reopen Case (Main Case, Doc. # 19), which this Court granted on October 5, 2009 (Main Case, Doc. # 20). The Plaintiff commenced this adversary proceeding on November 2, 2009, by filing Complaint Seeking Damages in Core and Non-Core Adversary Proceeding for

Violation of the Discharge Injunction and Federal Law (Doc. # 1). The Complaint alleges two counts: (i) the Defendant willfully violated the Plaintiff's discharge injunction ("Count One"); and (ii) the Defendant's actions in attempting to collect the debt violated the Fair Debt Collection Practices Act. The Motion before the Court seeks a determination of liability regarding Count One only.

The Defendant filed Defendant Absolute Collection Service, Inc.'s Answer and Affirmative Defenses (Doc. # 13) on February 5, 2010.

After various orders extending discovery deadlines were entered (Docs. ## 16, 20, 23), the discovery period closed on August 7, 2011 (Doc. # 32). On January 9, 2012, the Court held a telephonic status conference at which the Court granted the parties leave to file dispositive motions and set a briefing schedule.

B. Facts

As stated, *supra*, the Plaintiff filed a chapter 7 petition on January 9, 2008, and received a discharge in that case on April 24, 2008. In his bankruptcy petition, the Plaintiff scheduled a debt in the amount of $400.00 owed to Forum Health ("Forum Debt"). (Main Case, Doc. # 1 at 16.) The Defendant was not scheduled as a creditor in the Petition.

The Defendant contacted the Plaintiff on several occasions beginning in December 2008 in an attempt to collect the Forum Debt. (Mot., Ex A., at 4-5.) Such contacts continued through February

2009. (*Id.*) Although the Plaintiff notified the Defendant that he had filed for bankruptcy protection, the Defendant refused to cease its collection efforts until the Plaintiff produced documentation from his attorney regarding the bankruptcy filing. (Mot. at 2; Resp. at 1.)

II. STANDARD OF REVIEW

The procedure for granting summary judgment is found in FED. R. CIV. P. 56(a), made applicable to this proceeding through FED. R. BANKR. P. 7056, which provides in part that: "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a) (West 2012); *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); *Tenn. Dept. of Mental Health & Mental 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; *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.

In a motion for summary judgment, the movant bears the initial burden to establish an absence of evidence to support the nonmoving

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party's case. *Celotex*, 477 U.S. at 322; *Gibson v. Gibson (In re Gibson)*, 219 B.R. 195, 198 (B.A.P. 6th Cir. 1998). 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, in responding to a proper motion for summary judgment, the nonmoving party "cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must 'present affirmative evidence in order to defeat a properly supported motion for summary judgment.'" *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989) (quoting *Anderson*, 477 U.S. at 257). That is, the nonmoving party has an affirmative duty to direct the court's attention to those specific portions of the record upon which it seeks to rely to create a genuine issue of material fact. *Street*, 886 F.2d at 1479.

III. LEGAL ANALYSIS REGARDING WILLFUL VIOLATION OF THE DISCHARGE INJUNCTION

Section 524 of the Bankruptcy Code provides, 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, 944, 1228, or 1328 of this title, whether or not discharge of such debt is waived;
>
> (2) <u>operates as an injunction against the commencement or continuation of an action</u>, the

> employment of process, or an act, <u>to collect, recovery or offset any such debt as personal liability of the debtor</u>, whether or not discharge of such debt is waived[.]

11 U.S.C. § 524 (West 2012) (emphasis added). In deciding whether a violation of the discharge injunction has occurred, bankruptcy courts look to the standard[1] set forth in Section 362(k)[2] regarding whether violations of the automatic stay can be considered willful. *See In re Perviz*, 302 B.R. 357, 365 (Bankr. N.D. Ohio 2003) (internal citations omitted) ("When a violation of the discharge injunction of § 524(a) is at issue, a finding of contempt is appropriate when, under the identical standard as set forth in § 362(h) [now § 362(k)], the creditor's actions are found to be 'willful.' Couched in the language of § 524, a 'willful' violation of the discharge injunction takes place 'if the creditor knew the discharge injunction was invoked and intended the actions which violated the discharge injunction.'"); *see also In re Pincombe*, 256

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[1] Section 362(k) provides that "an individual injured by any willful violation of a stay . . . shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages." 11 U.S.C. § 362(k) (West 2012). "As used here, 'willful' does not require any specific intent to violate the stay. Rather, 'willful' has simply been interpreted to mean any intentional and deliberate act undertaken with knowledge – whether obtained through formal notice or otherwise – of the pending bankruptcy." *In re Perviz*, 302 B.R. 357, 365 (Bankr. N.D. Ohio 2003) (internal citations omitted). Further, "bankruptcy law only requires that a party receive actual notice which is defined as the type of notice that would cause a reasonably prudent person to make a further inquiry; formal notice is not required." *Id.* at 367-68.

[2] Pursuant to the 2005 Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA"), § 362(k) now deals with the consequences of a violation of the automatic stay. 11 U.S.C. § 362 (West 2012). Prior to BAPCPA, the relevant section was § 362(h). 11 U.S.C. § 362 (West 2004).

B.R. 74 (Bankr. N.D. Ill. 2000) ("The test applicable to the determination of a willful violation of the automatic stay is equally applicable to the determination of willful violation of the post-discharge injunction under § 524").

Section 524 provides for willfulness "if the creditor knew the discharge injunction was invoked and intended the actions which violated the discharge injunction." *Poole v. U.B. Vehicle Leasing, Inc. (In re Poole),* 242 B.R. 104, 110 (Bankr. N.D. Ga. 1999).

In *In re Riddick*, the Bankruptcy Court for the Northern District of Ohio explained:

> It may not be uncommon for collection agencies to contact debtors who, without the agencies' prior knowledge, have filed for bankruptcy. However, once these collection agencies learn of a bankruptcy filing, they must have procedures in place to ensure that all collection efforts against a debtor will stop. Otherwise, these agencies will be at risk of continually running afoul of the constraints imposed by 11 U.S.C. § 362(a), continually burdening the courts with unnecessary motions to enforce the automatic stay, and continually facing the chance of being sanctioned.

231 B.R. 265, 268 (Bankr. N.D. Ohio 1999) (emphasis added). Although the *Riddick* case concerned a violation of the automatic stay rather than a violation of the discharge injunction, the reasoning is equally applicable in the instant case.

Here, the actions taken by the Defendant mirror the actions of the collection agency in *Riddick*. In *Riddick*, the debtors scheduled student loan debt to the United States Department of Education ("USDOE") and provided for three payments to be made to the USDOE under the plan. The chapter 13 plan was confirmed without

objection. Despite the confirmation of the debtors' plan, the debtors received two separate collection letters from the USDOE indicating that Aman (collection company) was responsible for collecting the student loan debt. The debtor wife informed a representative at Aman that she had filed a chapter 13 case. The Aman representative "refused to accept the offered information and informed [the debtor] that collection efforts would not be stopped until [the debtor] sent Aman a letter indicating that her bankruptcy attorney had proper authority to represent her. [The Aman representative] also indicated that until the referenced letter was received, she would continue to call [the debtor] once a week regarding collection on her student loan." *Id.*

In the instant case, the Defendant continually contacted the Plaintiff to collect the Forum Debt despite having knowledge of the Plaintiff's bankruptcy proceeding. In its Response, the Defendant argues, "[t]he essential legal question is whether Defendant's request for written confirmation of the Plaintiff's bankruptcy status is unreasonable." (Resp. at unnumbered 2.) The essential legal question is whether the Defendant's actions were willful – not whether the Defendant's actions were objectively unreasonable. The reasonableness or unreasonableness of the Defendant's conduct is not determinative of a violation of the discharge injunction. The issue presently before the Court is only whether the Defendant's actions constitute violations of the discharge injunction.

The Defendant does not dispute that it received notice of the

Debtor's bankruptcy proceedings and discharge, but – despite such notice – the Defendant continued its collection efforts of the Forum Debt. However, the Defendant misstates the legal standard for violation of the discharge injunction. The Defendant merely asserts that it was permitted to continue collection efforts until it received written (and what the Defendant determined to be "official") notification of the bankruptcy case. The Defendant cites no case law or statute that permits such conduct; it merely states that it receives a lot of oral information and that checking the veracity of such information would be time consuming and expensive. The Defendant asserts that it "only seeks to actually confirm that a bankruptcy has, in fact, been filed, as it receives many oral representations of bankruptcy filings that are never consummated." (*Id.* at 2.) The Defendant's position allows it to be willfully ignorant until the Plaintiff provides documentation that the Defendant (apparently in its sole discretion) decides constitutes "actual confirmation" of the bankruptcy. The Defendant has no legal basis for requiring this additional written notice before it ceases collection efforts once it has been put on inquiry notice of the bankruptcy.

IV. CONCLUSION

The Plaintiff's discharge on June 2, 2008, discharged the Plaintiff of personal liability for the debts the Defendant sought to collect. The discharge also constituted an injunction against collection of all discharged prepetition debts. The Defendant

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asserts (and it is not disputed) that it did not have knowledge or notice of the Plaintiff's bankruptcy filing and discharge when it made the first contact with him. However, it is also not disputed that, thereafter, each time the Defendant contacted the Plaintiff in an attempt to collect the discharged debt, the Defendant did so with knowledge of the Plaintiff's bankruptcy. Despite having knowledge of the Plaintiff's bankruptcy case, the Defendant continued to contact the Plaintiff in an attempt to collection on prepetition debts. The discharge injunction operates to protect debtors from such collection attempts. Section 524 of the Bankruptcy Code specifically prohibits the actions undertaken by the Defendant in this matter. As a consequence, the Court finds that the Defendant willfully violated the discharge injunction and will grant summary judgment to the Plaintiff with respect to violations of the discharge injunction. An appropriate order will follow.

# # #

IT IS SO ORDERED.

Dated: May 25, 2012
02:17:16 PM

Kay Woods
Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:	*	
FRANCIS ROBERT MACOVITZ,	*	**CASE NUMBER 08-40049**
Debtor.	*	
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FRANCIS ROBERT MACOVITZ, JR.,	*	**ADVERSARY NUMBER 09-4303**
Plaintiff,	*	
v.	*	
ABSOLUTE COLLECTION SERVICE,	*	**HONORABLE KAY WOODS**
Defendant.	*	

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ORDER (i) GRANTING MOTION FOR PARTIAL SUMMARY JUDGMENT; AND (ii) SETTING FINAL PRE-TRIAL

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This cause is before the Court on Motion for Partial Summary Judgment finding Defendant in Contempt of Discharge Violation

("Motion") (Doc. # 45) filed by Plaintiff Francis Robert Macovitz, Jr. on February 13, 2012. On March 2, 2012, Defendant Absolute Collection Service filed Defendant Absolute Collection Service, Inc.'s Reply to Motion for Partial Summary Judgment (Doc. # 47). The Plaintiff filed Reply in Support of Motion for Partial Summary Judgment finding Defendant in Contempt of Discharge Violation (Doc. # 48) on March 5, 2012. For the reasons set forth in this Court's Memorandum Opinion entered on this date, the Court will grant the Motion.

A final pre-trial in this matter is set for Tuesday, June 19 at 9:30 a.m. at which time the parties as well as their counsel, shall be prepared to provide the Court with: (i) the estimated time trial will take; (ii) the number of witnesses that will be called and their identity; (iii) the number and identity of exhibits that each party intends to introduce and any other information necessary for the Court to be able to schedule a trial on the calendar.

# # #

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