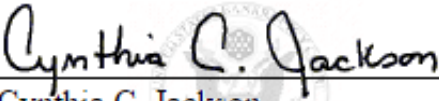


ORDERED.

Dated: October 03, 2017


Cynthia C. Jackson
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION
www.flmb.uscourts.gov

In re:

Dirceu Bizelli and
Sandra Bizelli,

Case No. 6:10-bk-12377-CCJ
Chapter 13

Debtors.

**ORDER GRANTING DEBTORS' MOTION
FOR SANCTIONS AGAINST CITIMORTGAGE, INC.**

This case came before the Court for trial on the Debtors' Motion for Sanctions against CitiMortgage, Inc. (Doc. No. 101, the "Motion for Sanctions"). The creditor, CitiMortgage, Inc. ("CitiMortgage") did not respond to the Motion for Sanctions or appear at trial. The Court, having taken evidence and considered the record in this case, grants the Motion for Sanctions, and awards the Debtors \$31,360.94 for damages.

Background

The Debtors, Dirceu and Sandra Bizelli (the "Debtors"), filed for relief under Chapter 13 of the Bankruptcy Code on July 15, 2010 (the "Petition Date"). At the Petition Date, the Debtors' property located in Poinciana, Florida (the "Property") was encumbered by a mortgage held by secured creditor CitiMortgage (the "Mortgage"). CitiMortgage, through counsel, appeared in the

Debtors' bankruptcy case.¹ The Debtors made all payments due under the Chapter 13 Plan, including all payments on the Mortgage. The Court entered an Order Discharging Debtors after Completion of Plan (Doc. No. 89, the "Discharge Order") and an Order Granting Debtors' Motion to Declare Debtor Current and Reinstated on Secured Claim of CitiMortgage (Doc. No. 99; the "Reinstated Order"). Copies of the Discharge Order were furnished by the clerk to all creditors and parties in interest, including CitiMortgage and counsel for CitiMortgage.² Counsel for Debtors served a copy of the Reinstated Order on counsel for CitiMortgage.³ CitiMortgage did not appeal either order.

The Discharge Order granted the Debtors a discharge pursuant to Section 1328(a) of the Bankruptcy Code. The Reinstated Order reinforced the Discharge Order by declaring the Debtors current and reinstated on the Mortgage as of July 2015 (the last Chapter 13 plan payment), and barring CitiMortgage from collecting any indebtedness incurred prior to and during the course of the Debtors' bankruptcy case. In August 2015, Mr. Bizelli made a monthly mortgage payment in the amount of \$848.69 to CitiMortgage, and continued to do so each month thereafter. Mr. Bizelli testified that he made *all* post-bankruptcy mortgage payments to CitiMortgage.

Despite having received a copy of the Discharge Order and Reinstated Order, and the Debtors having paid all post-bankruptcy mortgage payments, CitiMortgage started collection attempts against the Debtors. The Debtors received three letters dated August 3, 2016, from CitiMortgage (collectively the "August 3rd Letters"). The August 3rd Letters notified the Debtors that they owed and requested payment of a past due amount of \$3,649.28, and provided payment instructions to the Debtors. The Debtors received another three letters dated the following day from CitiMortgage (collectively the "August 4th Letters"). The August 4th Letters notified the Debtors that they owed and requested payment of a past due amount of \$2,803.20 and provided payment instructions to the Debtors.

The Debtors then received a letter from CitiMortgage informing them that a “Homeowner Support Specialist” would assist them with pursuing a hardship treatment for the Mortgage (the “Hardship Letter”). The Hardship Letter contained the contact information for the Homeowner Support Specialist and asked the Debtors to complete and return the hardship documents received from CitiMortgage quickly to keep the hardship review process on track.

Two days later, the Debtors received another letter from CitiMortgage (the “Notice Letter”). The Notice Letter informed the Debtors that CitiMortgage would be sending them various types of notices because of their delinquency. The Notice Letter encouraged the Debtors to “remain in regular contact” with their Homeowner Support Specialist named in the Hardship Letter and provided the contact information for the Homeowner Support Specialist, the CitiMortgage contact information for written requests, and contact information for several government agencies.

After receipt of these eight letters, Debtors’ counsel sent CitiMortgage a letter disputing any post-bankruptcy delinquency on the Mortgage and enclosing for review a copy of the Reinstated Order. CitiMortgage responded by sending another letter dated September 7, 2016 to the Debtors (the “September 7th Letter”). The September 7th Letter notified the Debtors that they owed and requested payment of a past due amount of \$2,831.50 (including \$30.22 in late charges), and provided payment instructions to the Debtors.

During this same time, CitiMortgage also contacted the Debtors by email and telephone. CitiMortgage sent the Debtors approximately thirty emails that either requested payment for the alleged past-due amounts or provided the Debtors with hardship options. CitiMortgage also telephoned the Debtors approximately thirty times to either request payment of the alleged past-due amounts or provided hardship options.

Subsequently, the Debtors filed the Motion for Sanctions. CitiMortgage did not file a response to the Motion for Sanctions. Prior to trial on the Motion for Sanctions, CitiMortgage transferred the servicing of the Debtors' Mortgage to a third party. Despite being noticed,⁴ CitiMortgage did not appear at trial.

Mr. Bizelli testified at trial that CitiMortgage's actions caused the Debtors actual damages, including attorney's fees and costs, and requested punitive damages against CitiMortgage. Mr. Bizelli missed seven days of work because he attended two hearings before the Court (a preliminary hearing and trial) and five meetings at his counsel's office regarding CitiMortgage's post-bankruptcy collection actions. Mr. Bizelli earns \$10 an hour at work. Mr. Bizelli stated that the new servicer now contacts him about the alleged amounts owed. Mr. Bizelli testified that he retained counsel, Mr. Branson, to represent him in this matter and is obligated to pay him a reasonable fee. Mr. Branson represented to the Court that attorney fees totaled \$3,900 and costs totaled \$0.94.

Discussion

Section 524 of the Bankruptcy Code embodies the "fresh start" concept by providing the debtor with a post-discharge injunction against collection of discharged debts.⁵ Under Section 524, a discharge "[o]perates 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"⁶ The discharge injunction is "intended to insure that once a debt is discharged, the debtor will not be pressured in any way to repay it."⁷ The Eleventh Circuit applies a two-prong test to determine whether the discharge injunction is violated.⁸ Under this test, the creditor is in contempt if the creditor: (i) knew that the discharge injunction was invoked and (ii) intended the actions which violated the discharge injunction.⁹ Having reviewed the evidence and considering the testimony of Mr. Bizelli, the Court finds that CitiMortgage knew that

the discharge injunction was invoked and intended to make the sixty-nine communications that attempted to collect a discharged debt from the Debtors.

The question thus becomes how much, if any, damages the Debtors are entitled to recover. The Debtors ask the Court to award the Debtors actual damages consisting of Mr. Bizelli's time missed from work, \$1,000 for each communication from CitiMortgage as provided under the Fair Debt Collection Practices Act ("FDCPA"), attorney's fees and costs, as well as punitive damages in an amount three times the amount of actual damages. The Debtors estimated at trial that actual damages totaled \$100,000 and as a result punitive damages should be \$300,000.

Although Section 524 does not explicitly authorize monetary relief for violation of the discharge injunction, a court may award damages pursuant to the inherent contempt powers of the court.¹⁰ Courts have inherent contempt powers to "achieve the orderly and expeditious disposition of cases."¹¹ In addition, Section 105 of the Bankruptcy Code establishes the court's statutory contempt power.¹² Under Section 105(a), "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."¹³ Thus, Section 105 "grants courts independent statutory powers to award monetary and other forms of relief . . . to the extent such awards are 'necessary and appropriate' to carry out the provisions of the Bankruptcy Code"¹⁴

The Court finds it appropriate to award wages to the Debtors for work Mr. Bizelli missed due to CitiMortgage's failure to comply with the Discharge Order and Reinstated Order. Mr. Bizelli missed 7 days of work (56 hours) attending court hearings and meeting with his counsel. Mr. Bizelli testified that he earns \$10 per hour. Accordingly, the Debtors are entitled to \$560.00 in actual damages based on CitiMortgage's failure to comply with the Discharge Order and Reinstated Order.¹⁵

The Court finds it inappropriate to award the Debtors \$1,000 for each communication received from CitiMortgage as damages. The Debtors argued at trial that the FDCPA imposes

damages against debt collectors in the amount of \$1,000 per violation, and that this Court should apply the same amount of damages against CitiMortgage for violating the Discharge Order and Reinstated Order. A debt collector who fails to comply with the FDCPA is liable to the individual for (i) any actual damages, (ii) in the case of any action by an individual, such additional damages as the court may allow not exceeding \$1,000, and (iii) reasonable attorney fees and costs of the action.¹⁶ Here, the Court cannot award the damages requested because the Debtors did not bring an action or assert a claim against CitiMortgage for violation of the FDCPA. And, even if the Court found that the Motion for Sanctions asserted a claim against CitiMortgage for violation of the FDCPA (which it doesn't), "a court may award a maximum amount of \$1,000 in statutory damages *per action*, rather than *per violation*."¹⁷ Accordingly, awarding the Debtors \$1,000 per violation is not appropriate.

The Court recognizes, however, that Mr. Bizelli expended personal time (i) reviewing and possibly responding to thirty emails from CitiMortgage, (ii) answering or listening to thirty phone communications from CitiMortgage and, (iii) reviewing nine letters from CitiMortgage. Mr. Bizelli could easily have spent one hour dealing with each communication from CitiMortgage, for a total of 69 hours. An appropriate hourly rate for Mr. Bizelli's personal time is \$100. The Court finds that the Debtors are entitled to \$6,900 in actual damages for personal time expended by Mr. Bizelli on CitiMortgage's failure to comply with the Discharge Order and Reinstated Order.

The Court also finds it appropriate to award the Debtors attorney's fees and costs incurred due to CitiMortgage's failure to comply with the Discharge Order and Reinstated Order. Mr. Branson represented to the Court that based on CitiMortgage's failure to comply with the Discharge Order and Reinstated Order, the Debtors incurred attorney fees in the amount of \$3,900 and costs of \$0.94. Mr. Branson appears before this Court regularly. This Court is familiar with

Mr. Branson's experience, reputation, and ability. Having considered the *Johnson* factors,¹⁸ the Court finds attorney fees of \$3,900 and costs of \$0.94 reasonable and appropriate.

In addition to actual costs, the Debtors seek punitive damages. An award of punitive damages is appropriate only in extreme circumstances and only if the violator acts "in an egregious, intentional manner."¹⁹ Some courts award punitive damages only if they find: (i) actual knowledge of a violation or reckless disregard of a protected right; (ii) maliciousness or bad faith; or (iii) "an arrogant defiance of federal law."²⁰

Here, CitiMortgage acted in an egregious and intentional manner in defiance of this Court's orders. CitiMortgage knew this Court entered the Discharge Order and Reinstated Order. Despite this knowledge, CitiMortgage contacted the Debtors sixty-nine times attempting to collect a discharged debt. CitiMortgage failed to respond to the Motion for Sanctions or appear at trial despite being represented by counsel and receiving notice. Finally, CitiMortgage did not correct the problem and comply with the Discharge Order and Reinstated Order. Instead, CitiMortgage transferred servicing of the Mortgage to a third party, who at the time of trial, was attempting to collect the same discharged debt from the Debtors. CitiMortgage's unresponsiveness and inactions demonstrate an arrogant defiance of bankruptcy law. The Court finds that CitiMortgage's actions merit an award of punitive damages in the amount of \$20,000. For the foregoing reasons, it is

ORDERED:

1. The Motion for Sanctions (Doc. No. 101) is granted.
2. CitiMortgage failed to comply with this Court's orders and pursuant to this Court's inherent powers and Section 105 of the Bankruptcy Code, actual damages in the amount of \$11,360.94 and punitive damages in the amount of \$20,000 are awarded to the Debtors, Dirceu and Sandra Bizelli, and against CitiMortgage, Inc. for a total award of \$31,360.94.

3. This Court reserves jurisdiction to enforce this order.
4. The Court will enter a separate judgment consistent with this order.

Attorney Robert Branson is directed to serve a copy of this order on interested parties and file a proof of service within three (3) days of entry of the order.

¹ During the Debtors' bankruptcy case, four different attorneys represented CitiMortgage. See Doc. Nos. 27, 42, 90 and Substitution of Counsel entry on 11/16/15. The bankruptcy court records indicate that counsel continues to represent CitiMortgage in this case.

² Doc. No. 92.

³ Doc. No. 100.

⁴ See Doc. No. 106.

⁵ *In re Hardy*, 97 F.3d 1384, 1388-89 (11th Cir. 1996).

⁶ 11 U.S.C. § 524 (2010).

⁷ *Walton v. Clark & Washington, P.C.*, 454 B.R. 537, 545 (Bankr. M.D. Fla. 2011) (quoting H.R.Rep. No. 95-595, at 365-66 (1977), as reprinted in 1978 U.S.C.C.A.N. 5963, 6322; S.Rep. No. 95-989, at 80 (1978)) as reprinted in 1978 U.S.C.C.A.N. 5787, 5866.

⁸ See *In re Hardy*, 97 F.3d at 1390.

⁹ *Id.* (citing *Jove Eng'g, Inc. v. I.R.S.*, 92 F.3d 1539, 1555 (11th Cir. 1996)).

¹⁰ *In re Hardy*, 97 F.3d at 1389 (internal citation omitted).

¹¹ *Jove Eng'g, Inc. v. I.R.S.*, 92 F.3d 1539, 1553 (11th Cir. 1996) (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43, 111 S.Ct. 2123, 2132 (1991)).

¹² *In re Hardy*, 97 F.3d at 1389.

¹³ 11 U.S.C. § 105(a) (2010).

¹⁴ See *In re Hardy*, 97 F.3d at 1389-90 (citing *Jove Eng'g, Inc. v. I.R.S.*, 92 F.3d 1539, 1553-54 (11th Cir. 1996)).

¹⁵ At trial, Debtor's counsel stated that Mr. Bizelli's missed work wages totaled \$5,400. Clearly, counsel miscalculated the amount owed.

¹⁶ See 15 U.S.C. § 1692k (2011).

¹⁷ *Johnson v. Critical Resolution Mediation, LLC*, 2017 WL 259000, *6 (M.D. Fla. 2017)(emphasis added)(citing 15 U.S.C. § 1692k(b)(1); *Harper v. Better Business Servs., Inc.*, 961 F.2d 1561, 1563 (11th Cir. 1992)).

¹⁸ To determine the reasonableness of attorney fees and costs, courts examine the factors stated by the Fifth Circuit Court of Appeals in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). The twelve factors are: (1) the time and labor required; (2) the novelty and difficulty of the questions involved; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and the length of the professional relationship with the client; (12) awards in similar cases. *Johnson*, 488 F.2d at 717.

¹⁹ See *In re Beback*, 2013 WL 5156706, at *3 (citing *In re Nibbelink*, 403 B.R. at 122).

²⁰ *In re Nibbelink*, 403 B.R. 113, 121 (Bankr. M.D. Fla. 2009) (citing *In re Dynamic Tours & Transportation, Inc.*, 359 B.R. 336, 344 (Bankr.M.D.Fla.2006)).