

ORDERED.

Dated: March 16, 2017


Cynthia C. Jackson
United States Bankruptcy Judge

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

In re:

Paul F. Dean and
Debra P. Dean,

Case No. 6:10-bk-08725-CCJ
Chapter 13

Debtors.
_____ /

**ORDER GRANTING IN PART DEBTORS' MOTION
FOR CONTEMPT AND SANCTIONS AGAINST CLEARSPRING
LOAN SERVICES, INC. FOR VIOLATING THE POST-DISCHARGE INJUNCTION**

This case came before the Court for trial on the Debtors' Motion for Contempt and Sanctions Against ClearSpring Loan Services, Inc. for Violating the Post-Discharge Injunction (Doc. No. 87, the "Motion for Contempt"). The Court, having taken evidence and considered the record in this case, grants the Motion for Contempt in part, and awards the Debtors \$500 in attorney's fees.

Background

The Debtors, Paul and Debra Dean (the "Debtors"), filed for relief under Chapter 13 of the Bankruptcy Code on May 20, 2010. At the Petition Date, the Debtors' property located in

Cocoa, Florida (the “Property”) was encumbered by a mortgage held by secured creditor Coastal Bank (the “Mortgage”). The Debtors made all payments due under the Chapter 13 Plan, including all payments on the Mortgage, and the Court entered an Order on August 13, 2015, Discharging Debtors after Completion of Plan (Doc. No. 79, the “Discharge Order”). Copies of the Discharge Order were furnished to all creditors and parties in interest, including the successor-in-interest to Coastal Bank--Florida Community Bank. On January 18, 2016, Florida Community Bank sent a letter to the Debtors indicating that a change in servicing had occurred, transferring their mortgage to ClearSpring Loan Services (the “Creditor”).¹ Despite having received a copy of the Discharge Order, the Creditor sent the Debtors a Monthly Loan Statement² and a Default Letter.³

The Monthly Loan Statement notified the Debtors that they owed \$26,759.25 in past due fees and charges on the Mortgage, including \$9,707.29 in past due payments, \$4,140.74 in outstanding late charges, and \$8,866.88 in other fees. It is undisputed that the outstanding late charges and other fees identified in the Monthly Loan Statement included pre-petition fees and charges that were discharged by the Debtors’ completed Chapter 13 case. The first page of the Monthly Loan Statement contained the following message:

“THIS COMMUNICATION IS FROM A DEBT COLLECTOR. THIS IS AN ATTEMPT TO COLLECT A DEBT AND ANY INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE.”

Under this bolded language in small letters the Loan Statement further provided:

“If you are in active bankruptcy or received a discharge which included this debt, this communication is not intended to be and does not constitute an attempt to reaffirm or to collect a debt against you personally and is for informational purposes only.”

¹ Debtors’ Ex. 3.

² Debtors’ Ex. 6.

³ Debtors’ Ex. 8.

A detachable coupon for the total amount due of \$26,759.25 was included at the bottom of the first page of the Monthly Loan Statement. The second page of the Loan Statement also included a delinquency notice (bolded in part) stating:

Our records indicate that you became delinquent on 01/01/2016. As of 02/21/2016, you are 51 days delinquent on your mortgage loan. Failure to bring your loan current may result in fees, foreclosure, and possibly the loss of your home

...

Total Amount due: \$26,759.25.

Note: You must pay this amount to bring your loan current.

The Default Letter informed the Debtors that their mortgage payment was past due *post-petition* and that their loan was in default, and provided information about available relief options.

Upon receipt of the Monthly Loan Statement and Default Letter, the Debtors sent a letter to the Creditor disputing the past due fees and charges.⁴ The Creditor responded to the Debtors' letter indicating that it would review the Debtors' correspondence and would provide a response.⁵ Subsequently, the Debtors filed a Motion to Reopen Chapter 13 Case (Doc. No. 84), and a Motion for Contempt and Sanctions against Creditor (Doc. No. 87, the "Motion for Contempt").

The Debtors testified at trial that the Creditor's actions caused them actual damages, including attorney's fees and costs, and emotional distress and/or punitive damages in the amount of \$15,000. Ms. Dean testified that receiving the Monthly Statement and Default Letter affected her relationship with her husband and caused her anxiety and sleeping problems. She

⁴ Debtors' Ex. 5.

⁵ Creditor's Ex. 4.

further testified that she did not take any medication as a result or consult with a professional besides mentioning her discomfort during regular check-ups with her primary physician. Mr. Dean testified that the Creditor's actions impacted him also, but "he does not believe in doctors". Mr. Dean further testified that the Debtors' attorney charged \$250 per hour, but he did not specify the amount of hours the attorney charged for his services in connection with the matter.

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.⁶ 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"⁷ The Eleventh Circuit applies a two-prong test to determine whether the discharge injunction is violated.⁸ Under this test the defendant is in contempt if the defendant: (i) knew that the discharge injunction was invoked and (ii) intended the actions which violated the discharge injunction.⁹

Here, the Creditor concedes it had notice that the Debtors received a bankruptcy discharge in August 2015.¹⁰ Accordingly, the issue before the Court is whether either the Monthly Loan Statement or the Default Letter were attempts to collect a discharged debt.

In determining whether an action constitutes an attempt to collect a debt under the Fair Debt Collection Practice Act ("FDCPA"), the Eleventh Circuit Court applies "the least-sophisticated-debtor standard."¹¹ The Court sees no reason case law adjudicating violations of

⁶ *In re Hardy*, 97 F.3d 1384, 1388–89 (11th Cir. 1996).

⁷ 11 U.S.C. § 524 (2010).

⁸ *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 Doc. No. 97, p. 1.

¹¹ *Leahy-Fernandez v. Bayview Loan Servicing, LLC*, 159 F. Supp. 3d 1294, 1303 (M.D. Fla. 2016) (citing *Parker v. Midland Credit Mgmt., Inc.*, 874 F. Supp. 2d 1353, 1360 (M.D. Fla. 2012) (internal citation omitted)).

the FDCPA should not be applied equally in connection with examining a potential discharge violation. The Bankruptcy Court in *Roth* relied on such Eleventh Circuit case law in adjudicating a discharge injunction issue.¹² And indeed, the Creditor itself cites to the Eleventh Circuit's analyses under the FDCPA in its opposition to the Motion for Contempt.¹³

As the Eleventh Circuit has held, this “least sophisticated debtor standard” protects the vulnerable debtor while “preventing ‘liability for bizarre or idiosyncratic interpretations of collection notices.’”¹⁴ When presented with an alleged collection letter, in this district, courts consider the language of the letter, “specifically . . . statements that demand payment [and] discuss additional fees if payment is not tendered”¹⁵ A demand for payment may be implicit rather than express “where the letter states the amount of the debt, describes how the debt may be paid, provides the phone number and address to send payment, and expressly states that the letter is for the purpose of collecting a debt.”¹⁶ Courts note however that not all communications between a creditor and a debtor who received a discharge in bankruptcy is inappropriate under Section 524.¹⁷ For example, the purpose of a communication might only be to provide information and not to collect a debt.¹⁸

The Creditor contends that neither the Default Letter nor the Monthly Loan Statement meets the definition of a “debt collection attempt,” and therefore, there was no violation of the discharge injunction. In support of its contention, the Creditor relies on the Bankruptcy Court's holding in *Roth*, arguing that as in *Roth*, the Monthly Statement is not a collection attempt

¹² *In re Roth*, No. 10-30383, 2016 WL 4991500 (Bankr. M.D. Fla. Sept. 16, 2016).

¹³ Doc. No. 97.

¹⁴ *Parker v. Midland Credit Mgmt., Inc.*, 874 F. Supp. 2d at 1360 (internal citation omitted).

¹⁵ *In re Roth*, 2016 WL 4991500, at *3, *aff'd sub nom. Arlene Roth v. Nationstar Mortg. LLC*, No. 16-00510, 2017 WL 784595 (M.D. Fla. Mar. 1, 2017) (citing *Pinson v. Albertelli Law Partners LLC*, 618 F.Appx 551, 553 (11th Cir. 2015)).

¹⁶ *Pinson v. Albertelli Law Partners LLC*, 618 F. App'x at 553 (citing *Caceres v. McCalla Raymer, LLC*, 755 F.3d 1299, 1303 (11th Cir. 2014)).

¹⁷ *In re Roth*, 2016 WL 4991500, at *2.

¹⁸ *Pinson v. Albertelli Law*, 618 F. App'x at 553 (citing *Caceres*, 755 F.3d at 1302).

because of a disclaimer it includes. In particular, the Creditor points to the language included in the Monthly Statement which states in small type: “If you are in active bankruptcy or received a discharge which included this debt, this communication is not intended to be and does not constitute an attempt to reaffirm or to collect a debt against you personally and is for informational purposes only.”¹⁹

In *Roth*, (another Chapter 13 case), BAC Home Loans Servicing--the holder of a first mortgage on the debtor’s property--filed a proof of claim, which was subsequently transferred to Nationstar. The debtor made all payments under the Chapter 13 Plan and was discharged. Despite the discharge, Nationstar began sending monthly statements to the debtor and, as a result, the debtor filed a motion for sanctions. Although the parties entered into a confidential settlement agreement resolving the first motion, Nationstar subsequently sent debtor a notice titled “Informational Statement,” which reflected an amount due and a payment due date. The debtor then filed a second motion for sanctions against Nationstar.

In *Roth*, the Court found that the Informational Statement included *conspicuous* language that the statement was sent for informational purposes only and was not intended as a demand for payment.²⁰ The Court held that the Informational Statement’s language was not limited to one sentence “buried in boilerplate language,” but rather that the disclaimer was “prominently displayed in bold . . . and extensively describe[d] the purpose for the communication: that the Informational Statement . . . [did] not attempt to collect a debt.”²¹ In that case, the Informational Statement also provided a phone number the debtor could call if she did not want to receive monthly informational statements in the future. Moreover, the payment coupon attached to the Informational Statement in *Roth* was labeled “Voluntary Payment Coupon” indicating that “any

¹⁹ Debtors’ Ex. 6.

²⁰ *In re Roth*, 2016 WL 4991500, at *3.

²¹ *Id.* at *4.

payment made would be made voluntarily by [d]ebtor and was not required or demanded from Nationstar.”²²

The Court finds that the Default Letter does not amount to a collection attempt for a discharged debt because it was dealing with ongoing mortgage payments post-discharge. The Court does however find that the Monthly Loan Statement *was* such an improper attempt to collect a discharged debt. The Monthly Loan Statement was not sent for informational purposes. The statement prominently states in capital letters that the communication is from a debt collector and is an attempt to collect a debt, and that any information obtained would be used for that purpose. The bankruptcy disclaimer does not insulate the Creditor from liability for its collection attempt on a discharged debt: the disclaimer is in inconspicuous print *and* is coupled with request for payment and a statement of a past due amount.²³

And, although the letter provides a mailing address for contact with Creditor regarding additional information, concerns, and questions, it does not contain a language allowing the Debtors to opt out from receiving other monthly loan statements. In addition, the payment coupon attached to the Monthly Loan Statement requires a payment and does not indicate that any such payment would be voluntary if made by the Debtors. The Court finds this case more similar to the Eleventh Circuit case of *Pinson* (also cited to by the Creditor). There, the Eleventh Circuit Court of Appeals found that two letters sent by the creditor to the debtor post-discharge constituted an attempt to collect a debt.²⁴ In *Pinson*, the letters expressly indicated that they were written in attempt to collect a debt; stated the amount of the debt; described how the debt could

²² *Id.*

²³ See *Lapointe v. Bank of Am., N.A.*, No. 15-1402, 2015 WL 10097518, at *2 (M.D. Fla. Aug. 26, 2015) (the disclaimers in the creditor’s post-discharge communication with the debtor did not protect it from liability for violation of the discharge injunction because the creditor’s letters included requests for payment or statements of a past due amount; payment coupons with payment amounts; due dates; and payment instructions).

²⁴ *Pinson v. Albertelli Law Partners LLC*, 618 F.Appx 551, 554 (11th Cir. 2015).

be paid; and informed the debtor how to tender payment. The Court finds that the actions of the Creditor in this case constituted an attempt to collect a discharged debt in direct violation of the Debtors' discharge injunction.

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 for emotional distress, attorney's fees and costs, as well as punitive damages in the amount of \$15,000.²⁵ 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.²⁶ Courts have inherent contempt powers to "achieve the orderly and expeditious disposition of cases."²⁷ In addition, Section 105 of the Bankruptcy Code establishes the court's statutory contempt power.²⁸ 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."²⁹ 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"³⁰

In order to recover actual damages for emotional distress resulting from a violation of the discharge injunction, the Debtors must prove that their emotional distress "is more than fleeting, inconsequential, and medically insignificant."³¹ Emotional distress is expected to occur

²⁵ In their Motion, the Debtors first ask for \$15,000 in actual damages for significant emotional distress (Doc. No. 87, p. 2) and then request \$15,000 in punitive damages instead (Doc. No. 87, p. 7). The Court discusses the award of both types of damages.

²⁶ *In re Hardy*, 97 F.3d 1384, 1389 (11th Cir. 1996) (internal citation omitted).

²⁷ *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)).

²⁸ *In re Hardy*, 97 F.3d 1384, 1389 (11th Cir. 1996).

²⁹ 11 U.S.C. § 105(a) (2010).

³⁰ *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)).

³¹ *In re Beback*, No. 07-03826, 2013 WL 5156706, *3 (Bankr. M.D. Fla. Sept. 12, 2013) (citing *In re Nibbelink*, 403 B.R. 113, 120-21 (Bankr. M.D. Fla. 2009)).

if the conduct violating the discharge injunction is egregious or extreme.³² In the absence of an egregious or extreme conduct, the Debtors must provide medical or other corroborating evidence that shows “they suffered more than fleeting and inconsequential distress, embarrassment, humiliation, and annoyance.”³³

Here, the Creditor’s conduct was not “egregious or extreme”. The Creditor’s representative testified at trial that the reopening of the Debtors’ bankruptcy case and filing of the Motion for Contempt was the first time the Creditor became aware of the improperly included pre-discharge fees in the Mortgage loan balance. The Creditor did not make any other attempts to collect the discharged debt after the Debtors sent their letter disputing the charges.³⁴ Mr. Dean testified at trial that the Creditor ceased communication with the Debtors after they filed their motion to reopen the bankruptcy case. Although Ms. Dean testified that she suffered from anxiety and sleeping problems, the Debtors did not present any medical or other corroborating evidence in support of their request for damages for emotional distress. Accordingly, no such damages are awarded.

The Debtors’ also 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.”³⁵ 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

³² *In re Nibbelink*, 403 B.R. 113, 120 (Bankr. M.D. Fla. 2009) (citing *In re Hedetmeimi*, 297 B.R. 837, 842 (Bankr.M.D.Fla.2003)).

³³ *In re Beback*, 2013 WL 5156706, at *3 (citing *In re Nibbelink*, 403 B.R. at 120-21).

³⁴ *See Id.* at 122 (the Bankruptcy Court awarded punitive damages where the creditor attempted to collect discharged fees by making numerous phone calls and sending numerous letters to the debtors demanding that the debtors become current even after the debtor’s counsel tried to resolve the matter).

³⁵ *In re Beback*, 2013 WL 5156706, at *3 (citing *In re Nibbelink*, 403 B.R. at 122).

arrogant defiance of federal law.”³⁶ The Court finds no such conduct on the part of the Creditor here and thus will not award punitive damages.

Finally, the Debtors seek attorney’s fees. Mr. Dean testified at trial that the hourly rate for the Debtors’ attorney is \$250, however the Debtors provided no evidence demonstrating the actual amount of time charged by the attorney. The Court takes judicial notice that the trial of this matter lasted two hours and thus that the Debtors incurred at least and will be awarded \$500 in attorney’s fees. Unfortunately, the Debtors presented no evidence (which would have to consist of contemporaneous time records) to support any additional attorney fee award.³⁷

Conclusion

For the foregoing reasons, it is ORDERED that the Motion for Contempt is granted in part and the Debtors are awarded \$500 in attorney’s fees.

Attorney Thomas H. Yardley 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.

³⁶ *In re Nibbelink*, 403 B.R. 113, 120 (Bankr. M.D. Fla. 2009) (citing *In re Dynamic Tours & Transportation, Inc.*, 359 B.R. 336, 344 (Bankr.M.D.Fla.2006)).

³⁷ The Court determines reasonable attorney’s fees based on the “the product of the number of hours reasonably expended and a reasonable hourly rate.” *In re Nibbelink*, 403 B.R. at 122 (citing *John Deere Co. v. Deresinski (In re Deresinski)*, 250 B.R. 764, 768 (Bankr.M.D.Fla.2000) (citations omitted)). In order to make this determination, the Court needs the attorney’s contemporaneous time records detailing the dates, amount, and specific services provided. *Id.* (citing *In Re Newman*, No. 00-06154, 2003 WL 751327, at *3 (Bankr. M.D. Fla. Feb. 18, 2003) (internal citation omitted)).