

UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF FLORIDA  
ORLANDO DIVISION

Vagabond River Villa 60X28 Mobile  
Home ID#3506A/3506B (the "Property").

In re:

Case No: 6:96-bk-03065-ABB  
Chapter 13

ROBERT FERGUSON,

Debtor.

**ORDER**

This matter came before the Court on the Debtor's Motion for Sanctions Against Citibank (West) FSB f/k/a California Federal Bank (Doc. No. 64) ("Sanctions Motion") filed by Robert Ferguson, the Debtor herein ("Debtor"), and this Court's Order to Show Cause entered on April 4, 2006 (Doc. No. 76). An evidentiary hearing was conducted on July 11, 2006 at which the Debtor, counsel for the Debtor, the Chapter 13 Trustee, and former counsel for Citibank (West) FSB f/k/a California Federal Bank ("Citibank") appeared. The Court makes the following Findings of Fact and Conclusions of Law after reviewing the pleadings and evidence, hearing live testimony and argument, and being otherwise fully advised in the premises.

**FINDINGS OF FACT**

***Case Background: Events Prior to Closing of Case***

The Debtor and his wife Linda K. Ferguson obtained a loan from California Federal-Florida a/k/a California Federal Savings and Loan Association ("California Federal") in the amount of \$50,750.00 and executed a promissory note setting forth the terms of the loan on February 10, 1989. The Debtor and his wife executed a Mortgage on February 10, 1989 granting California Federal a security interest in their homestead located in Seminole County, Florida, which is described as:

That parcel of land lying in Section 10, Township 20 South, Range 32 East, Seminole County, Florida, described as follows: From the Southwest corner of Section 10, run North 660.00 feet to a point on the centerline of the 50 foot Right of Way of Osceola Road; thence run East 25.00 feet to the East Right of Way line of said Osceola Road; thence run along the East Right of Way, together with a 1989

The Debtor filed this individual Chapter 13 case on May 15, 1996 ("Petition Date") (Doc. No. 1).<sup>1</sup> He listed California Federal as a secured creditor in Schedule D holding a first priority mortgage on the Property. The Debtor set forth in his Statement of Intention he intended to retain the Property and reaffirm the mortgage debt. California Federal received notice of the Debtor's bankruptcy case.

California Federal actively participated in this bankruptcy case. It timely filed a secured proof of claim, Claim No. 3, on June 19, 1996 (the "Claim"). The total Claim amount was \$60,116.89, which contained an arrearage amount of \$15,064.61 for pre-petition mortgage arrearages. Robert D. Wilson, Esquire ("Wilson"), as counsel for California Federal, signed the Claim. The Claim sets forth all notices were to be sent to "Robert D. Wilson, Wilson & Williams, P.A., Post Office Box 908, Ocala, Florida 34478." Claim at ¶ 2. California Federal, through Wilson, filed a Motion for Relief from the Automatic Stay or for Adequate Protection (Doc. Nos. 17, 18), filed an appraisal (Doc. No. 23), and made appearances at hearings relating to the stay relief motion and plan confirmation.

The Claim was fully included in the Debtor's Second Amended Plan dated November 4, 1996 (Doc. No. 33) ("Plan"). The Plan resolved California Federal's Motion for Relief and the Debtor's objection to the Claim. The Plan was confirmed on November 25, 1996 (Doc. No. 34).

The Debtor successfully fulfilled his Plan obligations on March 11, 2002 (Doc. No. 53). He paid the Claim in full, which included the pre-petition mortgage arrearage amount of \$15,064.61. He received a discharge on March 13, 2002 (Doc. No. 53). The Chapter 13 Trustee issued her final report (Doc. No. 55) and the Debtor's case was closed on September 20, 2002 (Doc. No. 56). All creditors and parties in interest were notified of the successful completion of the Plan and the closing of the case. No creditor or party in interest challenged the issuance of the discharge or the closing of the case.

<sup>1</sup> This case was commenced before the enactment of The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (Pub. L. No. 109-8 (2005)) (commonly referred to as "BAPCPA"). BAPCPA was enacted on April 20, 2005 and became generally effective on October 17, 2005.

California Federal, despite the existence of the automatic stay and the confirmed Plan, sent notices and loan statements to the Debtor throughout 1999 and 2001 containing incorrect principal mortgage balances and alleged unpaid mortgage arrearages.<sup>2</sup>

***Case Background: Events Occurring After Closing of Case***

The Debtor was current with his mortgage obligations at the conclusion of his bankruptcy case. The full amount of the Claim, including arrearages contained therein, had been paid by the Debtor as well as his on-going regular monthly mortgage payments.<sup>3</sup> The Debtor continued to make monthly mortgage payments after the conclusion of his bankruptcy case.

California Federal, it appears, assigned the note and mortgage to Citibank at some point. California Federal and Citibank both use the same account number of 8250244343 to identify the Debtor's loan.<sup>4</sup> Citibank has sent monthly billing statements to the Debtor. The statements set forth Citibank's addresses as P.O. Box 997150, Sacramento, CA 95899-7150 for correspondence and P.O. Box 894904, Los Angeles, CA 90189-4904 for payments.<sup>5</sup> Citibank, through its billing statements, asserts the Debtor owes mortgage arrearages and unspecified "fees/charges" in excess of \$5,000.00, with the "fees/charges" figure increasing each month.<sup>6</sup> The May 31, 2006 statement sets forth "fees/charges" in the amount of \$6,249.43.<sup>7</sup> Citibank states an incorrect principal balance for the Debtor's mortgage in its statements.

The Claim, which included pre-petition mortgage arrearages, was fully paid through the Debtor's Plan. The "fees/charges" Citibank is attempting to collect from the Debtor relate to Claim amounts that were paid pursuant to the Debtor's Plan. Citibank is not entitled to the "fees/charges" contained in its billing statements. Citibank knows the

Debtor fulfilled his Plan obligations and that the statutory discharge injunction arose on March 13, 2002. The monthly statements issued by Citibank constitute attempts by Citibank to collect a discharged debt from the Debtor. Citibank's actions violate the Debtor's discharge injunction.

The Debtor disputed Citibank's post-discharge collection attempts and the incorrect principal balance figure. He, through counsel, communicated with Citibank in writing requesting the fees and charges be explained. Citibank sent a payoff statement to the Debtor and stated the fees and charges represented fees incurred during his bankruptcy case. No further explanation was provided by Citibank.

The Debtor demanded Citibank remove the charges. Citibank refused to remove the charges. The Debtor's only recourse was to seek the assistance of the Court. He filed a Motion to Reopen his Chapter 13 case (Doc. No. 58). The Motion to Reopen was sent to "Citibank (West) N.A., Attn. President, Officer, Manager or General Agent where creditor routinely does business, PO Box 997150, Sacramento, CA 95889-7150," which is the correspondence address contained in Citibank's statements, and "California Federal Bank, c/o Robert D. Wilson, P.O. Box 908, Ocala, FL 34478-0908." A hearing on the Motion to Reopen was noticed for September 7, 2005. The notice was properly sent to Citibank at the Sacramento address and to Wilson (Doc. Nos. 59, 60). Citibank did not respond to the Motion to Reopen.

A hearing on the Motion to Reopen was conducted on September 7, 2005. Citibank did not appear at the hearing. The Debtor's case was conditionally reopened by Order entered on September 14, 2005 (Doc. No. 62) and the Debtor filed the Sanctions Motion (Doc. No. 64). The Sanctions Motion was served on Citibank at its Sacramento address and on Wilson. A preliminary hearing on the Sanctions Motion was set for October 18, 2005 and was properly noticed.

The preliminary hearing on the Sanctions Motion was held on October 18, 2005. Citibank did not respond to the Sanctions Motion nor did it appear at the October 18th hearing. The Court entered an Order on November 7, 2005 (Doc. 69) ("Order I") granting the Sanctions Motion on a preliminary basis, disallowing all arrearages and fees claimed by Citibank, establishing \$19,000.16 as the correct principal mortgage balance as of October 2005, ordering Citibank to immediately update and correct

<sup>2</sup> Doc. No. 68, Debtor's Exhibits 4-9.

<sup>3</sup> Doc. No. 68, Debtor's Exh. No. 3.

<sup>4</sup> Doc. No. 68, Debtor's Exh. Nos. 8-10; Doc. No. 94, Debtor's Exh. Nos. 1-4.

<sup>5</sup> Doc. No. 68, Debtor's Exh. Nos. 10, 12, 13; Doc. No. 94, Debtor's Exh. Nos. 1-4.

<sup>6</sup> Doc. No. 68, Debtor's Exh. Nos. 10-13; Doc. No. 94, Debtor's Exh. Nos. 1-4.

<sup>7</sup> Doc. No. 94, Debtor's Exh. No. 4.

its records, finding Citibank violated the Debtor's discharge order, and setting an evidentiary hearing for November 29, 2005 for further determination of proper sanctions against Citibank.

Order I was sent to Citibank, both to the Sacramento address and to Wilson, by the Court. Citibank was noticed of the November 29, 2005 hearing. Citibank did not comply with Order I. A final evidentiary hearing on the Sanctions Motion was held on November 29, 2005. Citibank did not appear at the hearing. The Sanctions Motion was granted based upon Citibank's willful violation of the Debtor's discharge injunction. An Order was entered on December 8, 2005 (Doc. No. 72) ("Order II") ordering Citibank to pay sanctions in the amount of \$10,000.00 to the Debtor within fifteen days of the date of Order II and setting the matter for hearing on February 7, 2006 for the consideration of further sanctions against Citibank for its willful violations of the orders.

Order II was sent to Citibank by the Court; it was sent both to the Sacramento address and to Wilson. Citibank was noticed of the February 7, 2006 hearing. A hearing was conducted on February 7, 2006 to determine whether Citibank had complied with Orders I and II and whether additional sanctions were appropriate. Citibank did not appear at the hearing. Citibank did not comply with Order I or Order II.

Two orders and a judgment were entered on April 4, 2006 sanctioning Citibank. The orders and the judgment were mailed to Citibank by the Court. An Order (Doc. No. 75) ("Order III") was entered finding Citibank committed willful violations of the discharge injunction, finding Citibank in contempt of Court for its failure to comply with Orders I and II, awarding the Debtor sanctions of \$5,000.00 for attorney's fees, and directing Citibank to pay such sum within fifteen days.

The entry of Order III, combined with Order II, brought the sanctions issued against Citibank to \$15,000.00. A Judgment (Doc. No. 77) was entered in favor of the Debtor and against Citibank in the amount of \$15,000.00. An Order to Show Cause (Doc. No. 76) ("Order IV"), was entered directing a Citibank representative to appear at a show cause hearing on May 2, 2006 to show cause why additional sanctions should not be imposed against Citibank.

The show cause hearing was reset for July 11, 2006 and sent notice to Citibank of the hearing

via mail. Debtor's counsel served notice of the hearing on Citibank via certified mail, return receipt requested, addressed to Citibank at its correspondence address: "Citibank (West) FSB Attn: President, General Managing or R.A. P.O. Box 997150 Sacramento, CA 95899-7520." The mailing was received by Citibank on May 17, 2006 and signed for by "EC" (Doc. No. 92).

Wilson filed a Motion to Withdraw as Counsel on May 2, 2006 (Doc. No. 85) requesting he be allowed to withdraw as counsel and be stricken from the record as counsel.<sup>8</sup> His motion was set for hearing on July 11, 2006. The hearing was duly noticed by the Court.

### *Sanctions*

The hearing on the show cause Order and Wilson's Motion to Withdraw was held on July 11, 2006. Citibank did not appear at the hearing. Wilson appeared and stated he had never represented Citibank, only California Federal. His motion to withdraw was granted.

Citibank's conduct is egregious. Citibank received notice of the Debtor's discharge through communications from the Court, the Debtor and Debtor's counsel, and the Chapter 13 Trustee. It knew the Debtor was protected by the discharge injunction. Citibank's communications to the Debtor are attempts to collect a debt that had been paid and discharged in his Chapter 13 case. The Claim, including its mortgage arrearages component, was paid in full through the Plan. The communications from Citibank are an attempt by Citibank to have the Debtor pay erroneous charges and Claim amounts paid through the Plan. Citibank has misstated the Debtor's mortgage balance in its communications, continued collection actions and failed to update its account records. Citibank knew, through its receipt of Court notices, orders, and communications from the Court, the Debtor and his counsel, and the Chapter 13 Trustee, the discharge injunction was invoked. Citibank intended its actions which violated the discharge injunction. Citibank willfully violated the Debtor's discharge injunction.

Citibank's willful and wrongful conduct continued throughout 2005 and 2006. Citibank wrongfully continued to assess amounts labeled as "fees/charges" against the Debtor. It continued to send monthly statements to the Debtor containing grossly incorrect information and to increase the

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<sup>8</sup> Doc. No. 85.

“fees/charges” assessed against the Debtor. It failed to provide essential information to the Debtor regarding his mortgage and failed to respond to his requests for information. Citibank continued on a course of conduct ignoring every notice, pleading, and order sent to it by the Debtor’s counsel and the Court. Citibank failed to appear for properly noticed hearings and to comply with this Court’s Orders, which Orders are necessary and appropriate to carry out the provisions of the Bankruptcy Code. Citibank’s conduct constitutes willful violations of the Debtor’s discharge injunction and the Orders entered by this Court. Citibank is in contempt of the Debtor’s discharge injunction and Order I, Order II, Order III, and Order IV.

The Debtor has suffered further injuries, including actual damages for attorneys’ fees and costs, in the amount of \$10,000.00 as a result of Citibank’s actions. An award of additional sanctions in the amount of \$10,000.00 for injuries suffered by the Debtor as a result of Citibank’s contemptuous conduct. This amount is in addition to the sanctions previously awarded to the Debtor in Orders II, and III, thereby creating a total sanctions award of \$25,000.00. The sanctions awards are necessary and appropriate to enforce the orders of this Court, the provisions of the Bankruptcy Code, and to prevent further abuse of the judicial process by Citibank.<sup>9</sup> A judgment for sanctions totaling \$25,000.00<sup>10</sup> shall be entered in favor of the Debtor and against Citibank.

### **CONCLUSIONS OF LAW**

A discharge injunction automatically and immediately arises pursuant to 11 U.S.C. § 524(a) when a debtor is granted a discharge. A discharge specifically “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 whether or not discharge of such debt is waived.” 11 U.S.C. § 524(a) (2005). The injunction is broad, forever protecting a debtor post-discharge

<sup>9</sup> The question was raised whether the judgment to be awarded in favor of the Debtor and against Citibank can be set off against the mortgage to satisfy the mortgage balance in full or in part. This issue is not being determined by the Court.

<sup>10</sup> To summarize, the amount of \$25,000.00 is comprised of: \$10,000.00 awarded previously to the Debtor by Order entered on December 8, 2005 (Doc. No. 72); \$5,000.00 awarded previously to the Debtor for attorney’s fees by Order entered on April 4, 2006 (Doc. No. 75); and additional sanctions of \$10,000.00 awarded pursuant to this Order.

from the collection of discharged debts. 4 COLLIER ON BANKRUPTCY ¶ 524.02[2], at 524-14.9 (15th ed. rev. 2005). Section 524 “thus embodies the ‘fresh start’ concept of the bankruptcy code.” Hardy by & Through Internal Revenue Serv. v. United States (In re Hardy), 97 F.3d 1384, 1988-89 (11th Cir. 1996).

Section 524 provides injunctive relief to a debtor but does not specifically provide for other relief, such as monetary damages. Courts are empowered to award debtors actual damages for violations of § 524 pursuant to the courts’ inherent contempt powers. Id. at 1389; *see also Chambers v. NASCO, Inc.*, 501 U.S. 32, 44-45, 50, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991) (recognizing the existence and potency of the courts’ inherent powers to sanction conduct which abuses the judicial process). Courts also have statutory contempt powers deriving from § 105 of the Bankruptcy Code. In re Hardy, 97 F.3d at 1389; Jove Eng’g, Inc. v. Internal Revenue Serv. (In re Jove Eng’g, Inc.), 92 F.3d 1539, 1543 (11th Cir. 1996) (explaining § 105(a) is distinct from the court’s inherent powers). Section 105(a) of the Bankruptcy Code grants a bankruptcy court broad power in the administration of bankruptcy cases:

The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

11 U.S.C. § 105(a). The inclusion of the word “any” in § 105(a) “. . . encompasses all forms of orders including those that award monetary relief . . . . The broad term ‘any’ is only limited to those orders that are ‘necessary or appropriate’ to carry out the Bankruptcy Code.” In re Jove, 92 F.3d at 1554.

A bankruptcy court may invoke its statutory contempt powers of § 105(a) to enforce a discharge injunction. In re Hardy, 97 F.3d at 1389; In re Riser, 298 B.R. 469, 472 (Bankr. M.D. Fla. 2003); *see also In re Manzanares*, 345 B.R. 773, 790 (Bankr. S.D. Fla. 2006). A creditor may be held liable for contempt pursuant to § 105(a) for willfully violating the permanent injunction of § 524. In re Jove, 92 F.3d at 1553-54. The Eleventh Circuit Court of Appeals has held conduct is willful if the creditor: “1)

knew that the discharge injunction was invoked and 2) intended the actions which violated the discharge injunction.” In re Hardy, 97 F.3d at 1390; In re Jove, 92 F.3d at 1555.

The subjective beliefs or intent of the creditor are irrelevant. In re Hardy, 97 F.3d at 1390; In re Jove, 92 F.3d at 1555; In re Manzanaraes, 345 B.R. at 791. Receipt of notice of a debtor’s discharge is sufficient to establish the knowledge element of the Eleventh Circuit Court of Appeal’s two-part test. In re Hardy, 97 F.3d at 1390; In re Jove, 92 F.3d at 1555-56. The existence of willfulness is not required for a civil contempt determination relating to noncompliance with a court order:

The absence of willfulness does not relieve from civil contempt. Civil as distinguished from criminal contempt is a sanction to enforce compliance with an order of the court or to compensate for losses or damages sustained by reason of noncompliance. Since the purpose is remedial, it matters not with what intent the defendant did the prohibited act.

McComb v. Jacksonville Paper Co., 336 U.S. 187, 191, 69 S. Ct. 497, 499, 93 L. Ed. 599 (1949).

Citibank actively participated in the Debtor’s bankruptcy case and knew his mortgage arrearages were paid in full through the Plan. Citibank knew the Debtor was current on his mortgage payments at the conclusion of his Chapter 13 case. The Debtor obtained a discharge pursuant to 11 U.S.C. § 1328(a) on March 13, 2002. The discharge injunction of § 524(a) arose immediately upon the entry of the Debtor’s discharge. Citibank knew, through its receipt of Court notices, orders, and communications from the Court, the Debtor and his counsel, and the Chapter 13 Trustee, the Debtor obtained a discharge and that the discharge injunction of § 524 was in effect.

Citibank’s on-going post-discharge communications to the Debtor constitute acts to collect or recover a discharged debt as a personal liability of the Debtor pursuant to 11 U.S.C. § 524(a)(2). Citibank’s communications to the Debtor, failure to correct its account records to reflect payments made through the Debtor’s Chapter 13 Plan, failure to correct the mortgage balance, continuing assessment of “fees/charges” against the Debtor, and failure to comply with Order I, Order II, Order III, and Order IV constitute willful and intentional violations of the Debtor’s discharge

injunction.<sup>11</sup> Citibank intended the actions which violated the Debtor’s discharge injunction.

Order I, Order II, Order III, and Order IV were necessary and appropriate to carry out the provisions of the Bankruptcy Code. Citibank has willfully violated the Orders of this Court. Citibank’s conduct constitutes willful violation of the Debtor’s discharge injunction and the Court’s Orders. In re Hardy, 97 F.3d at 1390; In re Jove, 92 F.3d at 1555. Citibank is in contempt of the Debtor’s discharge injunction and Order I, Order II, Order III, and Order IV. 11 U.S.C. §§ 524(a), 105(a); In re Hardy, 97 F.3d at 1390; In re Jove, 92 F.3d at 1555.

The Debtor is entitled to recover \$10,000.00 for actual costs, including attorneys’ fees, incurred by the Debtor as a result of Citibank’s contempt. The award of \$10,000.00 is in addition to the \$15,000.00 previously awarded to the Debtor in Order II and Order III. The award of monetary damages to the Debtor is made pursuant to the Court’s inherent contempt power and its statutory contempt power of 11 U.S.C. § 105(a) to enforce the Debtor’s discharge injunction, the Court’s necessary and appropriate orders, the provisions of the Bankruptcy Code, and to prevent the further abuse of the judicial process by Citibank.

Accordingly, it is

**ORDERED, ADJUDGED and DECREED** the Debtor’s Sanctions Motion is hereby **GRANTED**; and it is further

**ORDERED, ADJUDGED and DECREED** that the Debtor is hereby awarded additional sanctions in the amount of \$10,000.00 against Citibank (West) FSB f/k/a California Federal Bank for a total sanctions award of \$25,000.00 pursuant to the Orders previously entered on December 8, 2005 and April 4, 2006 (Doc. Nos. 72, 75); and it is further

**ORDERED, ADJUDGED and DECREED** that all other Orders entered by this Court relating to this matter shall remain in full force and effect.

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<sup>11</sup> Any potential violation of the Truth in Lending Act (15 U.S.C. §§ 1601 *et seq.*), the Fair Debt Collection Practices Act (15 U.S.C. §§ 1692 *et seq.* contained within the Truth in Lending Act), or other federal and/or state statutes and regulations governing creditor practices is not being determined.

A separate judgment in favor of the Debtor and against Citibank (West) FSB f/k/a California Federal Bank in the total amount of \$25,000.00 consistent with these Findings of Fact and Conclusions of Law shall be entered contemporaneously. The judgment to be entered shall supersede the Judgment entered on April 4, 2006 (Doc. No. 77) awarding the Debtor \$15,000.00.

Dated this 21<sup>st</sup> day of September, 2006.

/s/ Arthur B. Briskman  
ARTHUR B. BRISKMAN  
United States Bankruptcy Judge