IN THE UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

In re:

JAMES C. HUMPHREY, JR. and
SHANNON L. HUMPHREY,

Case No. 6:10-bk-17756-ABB
Chapter 7

Debtors.
_____/

ORDER

This matter comes before the Court on the Motion for Sanctions (Doc. No. 24) filed by the Debtors James C. Humphrey, Jr. and Shannon L. Humphrey ("Debtors") pursuant to 11 U.S.C. Sections 524(a) and 105(a) seeking the imposition of sanctions against Bank of America, N.A. for violations of the discharge injunction.[1] An evidentiary hearing was held on January 30, 2012 at which the Debtors and their counsel appeared. Bank of America did not respond to the Motion or appear at the hearing. The Motion is due to be granted for the reasons set forth herein. The Court makes the following Findings of Fact and Conclusions of Law after reviewing the pleadings and evidence and being otherwise fully advised in the premises.

FINDINGS OF FACT

The Debtors filed the above-captioned Chapter 7 bankruptcy case on October 4, 2010 ("Petition Date"). BAC Home Loans Servicing ("BAC") held a note and first-priority mortgage encumbering the Debtors' homestead located at 1700 Cedro Avenue, Deltona, Florida 32738 (the "Property") on the Petition Date. The Debtors listed BAC as a secured creditor in Schedule D with a claim in the amount of $153,598.00. BAC's

[1] The Debtors cite to 11 U.S.C. Section 362 in their Motion asserting Bank of America violated the automatic stay of 11 U.S.C. Section 362(a). The event chronology reflects no stay violation occurred and any relief sought by the Debtors pursuant to Section 362 is due to be denied.

address was listed as 450 American Street, Simi Valley, California 93065 in Schedule D and the creditor matrix.

Notice of the Debtors' bankruptcy case was issued by the Court to BAC on October 5, 2010. (Doc. No. 11). The Notice advised BAC of the existence of the automatic stay of 11 U.S.C. Section 362(a). The Chapter 7 Trustee conducted the Debtors' Section 341 meeting of creditors and declared this case a no asset case on November 20, 2010.

BAC did not seek relief from the automatic stay or otherwise make an appearance in the Debtors' case.

The Debtors received a discharge pursuant to 11 U.S.C. Section 727 on January 20, 2011 (Doc. No. 19) ("Discharge of Debtor"), and their case was closed on January 20, 2011. The Discharge of Debtor discharged the Debtors' debt on the BAC note ("the BAC debt").

The discharge injunction immediately arose upon entry of the Discharge of Debtor enjoining any and all acts to collect a discharged debt. The Discharge of Debtor advised parties of the discharge injunction in large bold-face underlined type:

> "**Collection of Discharged Debts Prohibited**"
>
> The discharge prohibits any attempt to collect from the debtor a debt that has been discharged. For example, a creditor is not permitted to contact a debtor by mail, phone, or otherwise, to file or continue a lawsuit, to attach wages or other property, or to take other action to collect a discharged debt from the debtors. A creditor who violates this order can be required to pay damages and attorney's fees to the debtor.

(Doc. No. 19). The Court mailed the Discharge of Debtor to BAC on January 22, 2011 (Doc. No. 22).

Bank of America succeeded BAC as holder of the mortgage encumbering the Property.

The Debtors received thirty-eight phone calls from Bank of America agents regarding collection of the BAC debt between June of 2011 and the evidentiary hearing. Debtors informed the callers of their discharge. Bank of America's agents responded they did not care about the bankruptcy and the phone calls would not stop until the Debtors contacted the Bank of America bankruptcy department and until Bank of America updated its computer system.

Debtors' counsel responded to the collection calls by sending two letters informing Bank of America of Debtors' discharge and demanding cessation of all collection attempts. The first letter was sent on July 12, 2011; the second was sent on August 9, 2011. (Doc. No. 24, Attachments 2, 4). Debtors' counsel attached a copy of the Discharge of Debtor to each letter and sent both letters via certified mail. Bank of America signed the postage receipt acknowledging both letters. (Doc. No. 24, Attachments 3 and 5). Calls from Bank of America to Debtors continued in spite of the letters.

Motion for Sanctions

The Debtors filed a Motion to Reopen their case and the Motion for Sanctions against Bank of America on September 13, 2011 (Doc. Nos. 23, 24) alleging Bank of America has attempted to collect from Debtors on the discharged BAC debt. Bank of America was served with these motions.

The Court issued an Order reopening the case on September 15, 2011. (Doc No. 25). Debtors filed a Notice of Address Change of Creditor and served the order on Bank

of America, NA, at the new address—P.O. Box 941633, Simi Valley, CA 93094-1633—on September 28, 2011. (Doc. No. 27 and 28).

An evidentiary hearing on the sanctions motions was scheduled and notice of the hearing was served by the Court on both parties.

The hearing was held on January 30, 2012. Bank of America did not appear. Debtors established actual damages of $10,000.00 and attorney's fees of $2,500.00 arising out of Bank of America's thirty-eight willful violations of the discharge injunction.

Bank of America received notice of the Debtors' discharge through communications from the Court, Debtors, and Debtors' counsel. Bank of America knew the BAC debt had been discharged and the statutory discharge injunction arose on January 20, 2011. Bank of America's telephone calls to the Debtors constitute thirty-eight attempts by Bank of America to collect a discharged debt from the Debtors. Each telephone call constitutes a violation of the Debtors' discharge injunction. Bank of America intended its actions; it willfully violated the Debtors' discharge injunction.

Bank of America is in contempt of the Debtors' discharge injunction. The Discharge of Debtor constitutes an order of this Court necessary to effectuate the Debtors' fresh start. Its behavior was intentional, egregious, and extreme. It blatantly and willfully ignored the discharge injunction, despite having received multiple notices of the discharge and requests to discontinue its collection efforts. Bank of America acted in bad faith. Its repeated telephone calls to the Debtors were vexatious and oppressive. Bank of America committed thirty-eight separate willful violations of the Debtors' discharge injunction.

The Debtors have suffered actual damages as a result of Bank of America's willful violations of the discharge injunction. Their damages include significant aggravation, emotional distress, inconvenience, and attorneys' fees. They suffered and incurred these damages as a direct result of Bank of America's actions.

The Debtors' significant aggravation, emotional distress, and inconvenience are readily apparent and do not require the presentation of medical evidence. Bank of America's willful, intentional, and repeated violations of the discharge injunction would ordinarily be expected to cause significant aggravation, emotional distress, and inconvenience. The Debtors are entitled to actual damages in the amount of $10,000.00 for actual damages for significant aggravation, emotional distress, and inconvenience.

The Debtors incurred attorneys' fees and costs as actual damages resulting from Bank of America's actions. Michael P. Kelton performed services for the Debtors. He expended twelve hours of attorney time. A total fee award of $2,500.00 for counsel's services is reasonable based upon the work performed and results achieved.

The Debtors are entitled to an award of actual damages of $12,500.00 pursuant to the Court's statutory and inherent contempt powers.

CONCLUSIONS OF LAW

The discharge injunction of 11 U.S.C. Section 524(a) automatically and immediately arose upon entry of the Debtors' discharge enjoining:

> . . . 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)(2). Section 524 "embodies the 'fresh start' concept of the bankruptcy code." Hardy v. United States (In re Hardy), 97 F.3d 1384, 1388-89 (11th Cir. 1996).

Bankruptcy Courts are empowered to award debtors actual damages for violations of the Section 524 discharge injunction pursuant to their statutory contempt powers deriving from 11 U.S.C. Section 105. Id. at 1389. Section 105(a) provides:

> 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).

A creditor may be held liable for contempt pursuant to Section 105(a) for willfully violating the permanent injunction of 11 U.S.C. Section 524. In re Hardy, 97 F.3d at 1390. Conduct is willful if the creditor: "1) knew that the discharge injunction was invoked and 2) intended the actions which violated the discharge injunction." Id. (applying the Jove Eng'g, Inc. v. I.R.S. (In re Jove Eng'g, Inc.), 92 F.3d 1539, 1555 (11th Cir. 1996), test to Section 524 discharge injunction violations).

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. Receipt of notice of a debtor's discharge is sufficient to establish the knowledge element of the two-part test. In re Hardy, 97 F.3d at 1390; In re Jove, 92 F.3d at 1555-56.

Bankruptcy Courts, in addition to their statutory contempt powers, have inherent contempt powers to sanction conduct "which abuses the judicial process." Chambers v. NASCO, Inc., 501 U.S. 32, 44-45 (1991). Conduct abusive of the judicial process includes "bad faith conduct" and "willful disobedience of a court order." Id. at 45-46. Bad faith conduct includes "hampering enforcement of a court order," and vexatious,

wanton or oppressive conduct. Barnes v. Dalton, 158 F.3d 1212, 1214 (11th Cir. 1998) (*citation omitted*); Glatter v. Mroz (In re Mroz), 65 F.3d 1567, 1575 (11th Cir. 1995).

Bank of America's predecessor had notice of the Debtors' bankruptcy case from the onset of the case and received notice of the Debtors' discharge through communications from the Court, Debtors, and Debtors' counsel. Bank of America knew when it began its collection calls to Debtors that the BAC debt had been discharged pursuant to 11 U.S.C. Section 727 and the statutory discharge injunction arose on January 20, 2011 pursuant to 11 U.S.C. Section 524(a). Bank of America's post-discharge communications to the Debtors regarding alleged mortgage arrearages constitute acts to collect or recover a discharged debt as a personal liability of the Debtors. Each telephone call constitutes a violation of the Debtors' discharge injunction.

Bank of America's actions constitute willful and intentional violations of the Debtors' discharge injunction. In re Hardy, 97 F.3d at 1390; In re Jove, 92 F.3d at 1555. Bank of America knew the discharge was entered and intended its actions which violated the discharge injunction. It did not discontinue its collection efforts when it was asked to do so by Debtors and their counsel. It is in contempt of Court for its continuous and repeated failures to honor the discharge injunction of 11 U.S.C. Section 524(a). 11 U.S.C. §§ 524(a), 105(a); In re Hardy, 97 F.3d at 1390; In re Jove, 92 F.3d at 1555. Bank of America committed thirty-eight separate willful violations of the discharge injunction.

Bank of America's repeated failures to honor the discharge injunction were intentional, egregious, and extreme. It acted in bad faith. Its conduct was vexatious, wanton, and oppressive. The Discharge of Debtor constitutes an order of this Court

essential to the Debtors' fresh start. Bank of America willfully disobeyed the discharge injunction.

The Debtors have suffered actual damages as a direct result of Bank of America's willful actions. Bank of America caused them to suffer significant aggravation, emotional distress, and inconvenience on each of the thirty-eight separate occasions it called them post-discharge. It caused them to incur attorney's fees.

The Debtors are entitled to an award of actual damages pursuant to 11 U.S.C. Section 105(a) and the Court's inherent powers. Chambers, 501 U.S. at 44-45; Barnes v. Dalton, 158 F.3d at 1214; In re Hardy, 97 F.3d at 1389; In re Mroz, 65 F.3d at 1575.

Emotional distress constitutes actual damages. In re Nibbelink, 403 B.R. 113, 120-21 (Bankr. M.D. Fla. 2009). Emotional distress is expected to occur where the conduct is egregious or extreme. Id. at 120. Significant emotional distress is readily apparent where the conduct is egregious and corroborating medical evidence is not required. Dawson v. Washington Mut. Bank, F.A. (In re Dawson), 390 F.3d 1139, 1150 (9th Cir. 2004). Entitlement to emotional distress damages exists "even in the absence of an egregious violation, if the individual in fact suffered significant emotional harm and the circumstances surrounding the violation make it obvious that a reasonable person would suffer significant emotional harm." Id. at 1151.

The Debtors' emotional distress is readily apparent due to Bank of America's intentional, egregious, and extreme conduct. They are not required to present corroborating medical evidence. In re Nibbelink, 403 B.R. at 120; In re Dawson, 390 F.3d at 1150-51. The Debtors are entitled to actual damages for significant emotional distress, aggravation, and inconvenience in the amount of $10,000.00.

Attorneys' fees and costs constitute actual damages that may be awarded in a discharge violation proceeding pursuant to the reasonableness criteria of Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-718 (5th Cir. 1974). In re Nibbelink, 403 B.R. at 122. The Debtors have incurred attorney's fees for services provided by Kelton. He expended twelve hours of attorney time. A total fee award of $2,500.00 is reasonable after consideration of the Johnson factors.[2] Debtor's counsel's fee is limited to $2,500.00; counsel is not entitled to receive a portion of any of the other damages awarded.

The Debtors are entitled to an award of actual damages of $12,500.00 pursuant to the Court's statutory and inherent contempt powers.

Accordingly, it is

ORDERED, ADJUDGED and DECREED that Bank of America, N.A. violated the Debtors' discharge injunction of 11 U.S.C. Section 524(a) and an award of actual damages of $12,500.00 is appropriate pursuant to 11 U.S.C. Section 105(a) and the Court's inherent powers; and it is further

ORDERED, ADJUDGED and DECREED that Bank of America, N.A. is enjoined pursuant to 11 U.S.C. Sections 524(a) and 105(a) from taking any further collection action against the Debtors; and it is further

[2] The reasonableness of attorney's fees and costs is determined through an examination of the criteria enunciated 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 714.

ORDERED, ADJUDGED and DECREED that Judgment shall be entered for Debtors James C. Humphrey, Jr. and Shannon L. Humphrey and against Bank of America, N.A. in the amount of $12,500.00, plus interest at the applicable federal judgment rate until paid; and it is further

ORDERED, ADJUDGED and DECREED that the Judgment shall be paid to Debtors James C. Humphrey, Jr. and Shannon L. Humphrey, c/o Michael P. Kelton, counsel for the Debtors, whose address is Paul & Elkind, P.A., 142 East New York Avenue, DeLand, Florida 32724.

A separate judgment consistent with these findings and rulings shall be entered contemporaneously.

Dated the 14th day of March, 2012.

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