UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

In re:	Case No. 3:12-bk-1896-JAF
CYNTHIA A. BURGESS,	Chapter 13
Debtor.	

CYNTHIA A. BURGESS,	
Plaintiff,	
v.	Adv. No. 3:13-ap-611-JAF
BANK OF AMERICA, N.A.,	
Defendant.	

ORDER GRANTING MOTION TO DISMISS AMENDED COMPLAINT

This proceeding came before the Court upon Defendant Bank of America, N.A.'s Motion to Dismiss Amended Complaint (the "Motion to Dismiss")(Doc. 17), Plaintiff Cynthia A. Burgess' Response in Opposition to Defendant Bank of America's Motion to Dismiss Amended Complaint ("the "Response")(Doc. 20), and Defendant Bank of America N.A.'s Reply in Support of Motion to Dismiss Amended Complaint (the "Reply")(Doc. 31). Upon consideration of the Motion to Dismiss, the Response, and the Reply, the Court finds it appropriate to grant the Motion to Dismiss and dismiss this adversary proceeding.

Background

Plaintiff commenced this proceeding on September 20, 2013, by filing a complaint in the St. Johns County Circuit Court (the "State Court Complaint"). The State Court Complaint alleged that: 1) Plaintiff took out a home mortgage loan from Defendant and thereafter became delinquent on the debt; 2) on or about January 3, 2013, the "debt became uncollectable [sic]" and Defendant was notified of the status of the debt by the Clerk of this Court; and 3) Defendant continued to demand payment on the alleged debt by sending collection letters to Plaintiff on April 29, 2013, May 30, 2013, June 27, 2013, and July 19, 2013. Plaintiff sought damages under the Florida Consumer Collection Practices Act for herself and others similarly situated. On November 1, 2013, Defendant removed this proceeding to the United States District Court (the "District Court"). On November 11, 2013, Defendant filed a motion to dismiss the complaint on the basis, among others, that Plaintiff could not state a claim under the Florida Consumer Collection Practices Act because the Bankruptcy Code preempts state law.

On November 27, 2013, Plaintiff filed an amended complaint (the "Amended Complaint"). Count One of the Amended Complaint is entitled Violation of the Bankruptcy Discharge Order Individual and Class Claim. Count Two of the Amended Complaint is entitled Fair Debt Collection Practices Act Violation Individual and Subclass Claim. On December 11, 2013, Defendant filed the Motion to Dismiss. On January 10, 2013, Plaintiff filed the Response. On that same day, Plaintiff dismissed Count II of the Amended Complaint, leaving only Count I, the claim for violation of the discharge injunction. On January 30, 2013, the District Court referred this proceeding to this Court. On February 13, 2014, Defendant filed the Reply.

Discussion

Motion to Dismiss Standard

A motion to dismiss pursuant to Rule 12(b) tests the sufficiency of a complaint and asks the court to determine whether the complaint sets forth sufficient factual allegations to establish a claim for relief. When evaluating whether a plaintiff has stated a claim, a court must determine whether the complaint satisfies Rule 8(a)(2), which requires "a short and plain statement of the claim showing that the pleader is entitled to relief." To survive a Rule 12(b) motion, the complaint must contain enough factual matter (taken as true) to "raise [the] right to relief above the speculative level." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). "[N]aked assertions devoid of further factual enhancement" will not satisfy Rule 8(a)(2)'s requirement of a short plain statement of the claim showing the pleader is entitled to relief. Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009) (citing Twombly, 550 U.S. at 557) (internal quotations omitted). A "formulaic recitation of the elements of a cause of action will not do." Id. Thus, a plaintiff must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the conduct alleged." Twombly, 550 U.S. at 555.

A mere possibility that the defendant acted in contravention to the law will not suffice. Id. Although a court must accept all well pleaded facts as true, it is not required to accept legal conclusions. Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252, 1260 (11th Cir. 2009). A complaint must contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face. Iqbal, 129 S.Ct. at 1949.

Application to the Instant Case

Section 524 of the Bankruptcy Code operates as a post-discharge injunction against the collection of debts discharged in bankruptcy and is thus the embodiment of the Code's fresh start

concept. Hardy v. United States (In re Hardy), 97 F.3d 1384,1388-89 (11th Cir. 1996). Section 524 provides in relevant 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, 1141, 1228, or 1328 of this title, whether or not discharge of such debt is waived;
> >
> > (2) 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 (2014).

Defendant asserts that Plaintiff cannot state a claim for a violation of the discharge injunction because neither § 524 nor § 105 of the Bankruptcy Code provides a private right of action and the exclusive remedy for a violation of § 524 is a motion for contempt in the bankruptcy court which issued the injunction order. The Ninth and the Sixth Circuits have held that § 524 does not create a private right of action. See Walls v. Wells Fargo Bank, N.A., 276 F.3d 502, 509 (9th Cir. 2002)("Implying a private remedy [for violation of the discharge injunction] could put enforcement of the discharge injunction in the hands of a court that did not issue it (perhaps even in the hands of a jury), which is inconsistent with the present scheme that leaves enforcement to the bankruptcy judge whose discharge gave rise to the injunction."); Pertuso v. Ford Motor Credit Co., 233 F.3d 417, 421-23 (6th Cir. 2000). The Eleventh Circuit recognizes that § 524 does not expressly authorize money damages for a violation of the discharge injunction but finds that a court is permitted to award actual damages pursuant to the statutory contempt powers set forth in § 105. Hardy, 97 F.3d at 1388-89 (11th Cir. 1996). "In

other words, even though § 524 does not expressly authorize a 'private right of action' for violations of the discharge injunction, [bankruptcy] courts may exercise their contempt power under § 105 to enforce the provisions of § 524." Wynne v. Aurora Loan Servs., LLC (In re Wynne), 422 B.R. 763, 768 (Bankr. M.D. Fla. 2010).

While the Hardy court did not specifically address the issue of whether § 105 creates a private right of action, the courts in Walls and Pertuso held that it does not. Walls, 276 F.3d at 506 (noting that "violations of [§ 524] may not be independently remedied through § 105 absent a contempt proceeding in the bankruptcy court."); Pertuso, 233 F.3d at 421 (noting that "[t]he obvious purpose of [the discharge injunction] is to enjoin the proscribed conduct-and the traditional remedy for violation of an injunction lies in contempt proceedings, not in a lawsuit such as this one."). The Court agrees that § 105 does not create a private right of action. "If the court were to read § 105 as creating a cause of action other than via civil contempt to remedy violations of § 524, it would be acting as a legislature." Price v. Am. Serv. Co., 2013 WL 1914939 at * 4 (N.D. Tex. May 9, 2013). "[I]t is not up to [the court] to read other remedies into the carefully articulated set of rights and remedies set out in the Bankruptcy Code." Walls, 276 F.3d at 507. The exclusive remedy for a violation of the discharge injunction is a contempt proceeding in the bankruptcy court that entered the discharge order.

Defendant argues that, in addition to the fact that the remedy for an alleged violation of § 524 must be sought by a contempt proceeding in the bankruptcy court, it must be sought by way of motion rather than an adversary proceeding. Bankruptcy Rule 9020 provides that Rule 9014 governs a motion for an order of contempt made by the United States Trustee or a party in interest. Rule 9014 provides that "in a contested matter not otherwise governed by these rules, relief shall be requested by motion." Rule 7001 lists the types of proceedings that qualify as

adversary proceedings and does not include contempt proceedings. Nonetheless, a number of courts have permitted debtors to bring an action for contempt for violation of the discharge injunction by way of an adversary proceeding. See e.g., In re Motichko, 395 B.R. 25, 33 (Bankr. N.D. Ohio 2008)(noting that dismissing on procedural grounds alone would elevate form over substance); In re Wynne, 422 B.R. 763, 769 (Bankr. M.D. Fla. 2010); In re Kilbourne, 507 B.R. 219 (Bankr. S.D. Ohio 2014). Other courts hold that a contempt proceeding for violation of the discharge injunction must be initiated by a motion in the bankruptcy case rather than an adversary proceeding. See, e.g., Barrientos v. Wells Fargo Bank, N.A., 633 F.3d 1186, 1191 (9th Cir. 2011); In re Frambes, 454 B.R. 437, 443 (Bankr. E.D. Ky. 2011).

The Court agrees with the latter courts and holds that a contempt proceeding for violation of the discharge injunction must be initiated by a motion in the bankruptcy case. The Court recognizes that requiring a debtor in a two party contempt proceeding to dismiss an adversary proceeding and refile it as a contested motion might seem like "unnecessary 'hoop jumping' [which] merely serve[s] to increase the costs of litigation, without providing any real benefit to either party." Motichko, 395 B.R. at 33. However, the notion that the "line between adversary proceedings and contested matters is a formal distinction without a substantive difference" is particularly unavailing in a class action context. In re Biery, 2013 WL 4602698 at * 2-3 (Bankr. E.D. Ky. Aug. 29, 2013). Bankruptcy Rule 7023 provides that Federal Rule of Civil Procedure 23, which deals with class actions, applies in adversary proceedings. However, pursuant to Rule 9014, whether Rule 23 applies in contested matters is within the court's discretion and bankruptcy courts routinely exercise that discretion not to invoke Rule 7023 in contested matters. Id. at *3. Upon the foregoing, the Court will dismiss this adversary proceeding. It is

ORDERED:

1. This adversary proceeding is dismissed. The entry of this Order is without prejudice to Plaintiff filing a motion for contempt in the bankruptcy case within twenty one (21) days of the date of this Order, failing which the Court will close the file without further order of the Court.

2. All other pending motions are denied as moot.

DATED April 28, 2014 at Jacksonville, Florida.

/s/

Jerry A. Funk
United States Bankruptcy Judge