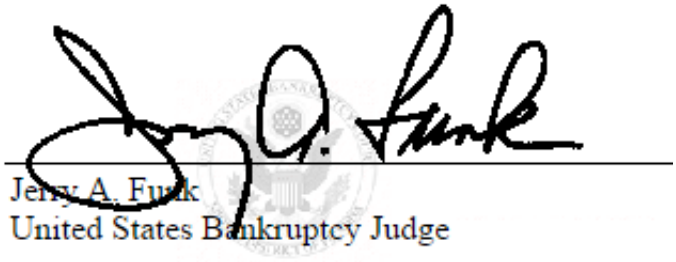
ORDERED.

Dated: November 28, 2017



Jerry A. Funk
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

IN RE:

	Chapter 11
GEA SEASIDE INVESTMENT, INC.,	Case No. 3:13-bk-0165-JAF
JACK ABERMAN,	Case No. 3:13-bk-0167-JAF
Debtors.	JOINTLY ADMINISTERED

_____/

GEA SEASIDE INVESTMENT, INC.,	Adv. No. 3:17-ap-0143-JAF
Plaintiff,	
v.	
CITY OF DAYTONA BEACH and CITY OF SOUTH DAYTONA,	
Defendant.	

_____/

ORDER OF DISMISSAL WITH PREJUDICE

This proceeding is before the Court on two motions to dismiss brought by Codefendants CITY OF DAYTONA BEACH ("Daytona Beach") and CITY OF SOUTH DAYTONA ("South Daytona"). (Docs. 13, 17). Plaintiff-Debtor GEA SEASIDE INVESTMENT, INC. ("GEA Seaside") filed a separate response to each motion (Docs. 22, 23), and South Daytona filed a reply

(Doc. 24). For the reasons stated herein, the motions to dismiss are granted and the instant proceeding is hereby dismissed with prejudice.

Background

In January 2013, Debtor GEA Seaside filed a petition under Chapter 11 of the Bankruptcy Code. GEA Seaside's Chapter 11 plan was confirmed in January 2016. (Doc. 953 in Case No. 3:13-bk-0165). A final decree finding the plan had been substantially consummated was entered on March 24, 2017 (the "Final Decree"). (Doc. 1110 in Case No. 3:13-bk-0165).

Debtor Jack Aberman ("Aberman") was a debtor in a jointly-administered Chapter 11 case. Aberman's individual case number was 3:13-bk-0167, which was jointly administered under GEA Seaside's case number. Aberman received an individual discharge in March 2017 (the "Discharge Injunction"). (Doc. 1111 in Case No. 3:13-bk-0165). Aberman was a plaintiff in the instant proceeding but filed a voluntary dismissal without prejudice and is no longer a party to this proceeding. (Doc. 25).

GEA Seaside is a Florida corporation in the business of leasing/renting residential real properties in Volusia County. Daytona Beach and South Daytona are municipalities within Volusia County. GEA Seaside operates its business within the territorial jurisdiction of Daytona Beach and South Daytona, and did so as debtor-in-possession during the pendency of its bankruptcy case. Neither Daytona Beach nor South Daytona filed a proof of claim in that case.

General allegations

The complaint contains the following allegations. All of GEA Seaside's rental properties were property of the bankruptcy estate. (Doc. 1 ¶ 13). Daytona Beach and South Daytona (collectively the "Cities") "targeted" GEA Seaside and its rental properties "for selective [ ] manufactured, over-enforcement of municipal code violations." (Doc. 1 ¶ 16). The complaint

contains three-and-a-half pages of citations issued by Daytona Beach, issued in 2014 and 2015. It appears GEA Seaside's conduct underlying the citations occurred post-petition. (Doc. 1 at 4-7).

"During the pendency of the Main Case and after the entry of the Discharge and Final Decree," the Cities "initiat[ed] administrative actions [and] citation actions against [GEA Seaside], and sought to impose liens on property of [GEA Seaside]'s bankruptcy estate." (Doc. 1 ¶ 20). The complaint also alleges that South Daytona has placed liens on GEA Seaside's real properties in excess of $67,500. (Doc. 1 ¶ 23). The notices/citations from the Cities have interfered with GEA Seaside's business operations and "frighten[ed] tenants." (Doc. 1 ¶ 25).

Count I – Willful violations of the automatic stay

Count I alleges a claim, pursuant to § 362(k), for violation of the automatic stay. It alleges the Cities had notice of the bankruptcy case and did not seek relief from the automatic stay prior to enforcement. (Doc. 1 ¶¶ 28-30). More specifically, the count alleges violations of §§ 362(a)(1), 362(a)(4), and 362(a)(6). (Doc. 1 ¶¶ 31-33). The complaint seeks compensatory and punitive damages "pursuant to 11 U.S.C. § 362(k)(1)." (Doc. 1 ¶ 37).

Count II – Willful violation of the permanent discharge injunction

Count II invokes § 105(a) of the Bankruptcy Code and alleges that, contrary to 11 U.S.C. § 524(a)(1), the Cities' acts also violated the Discharge Injunction. This count also seeks compensatory and punitive damages. Both Counts I and II were originally brought on behalf of both GEA Seaside and Aberman, but only GEA Seaside remains as a plaintiff in this proceeding.

The Cities' motions to dismiss

Daytona Beach's motion argues four points: a) the alleged violations in Count I are excepted from the automatic stay pursuant to § 362(b)(4); b) no "private right of action" exists for the violations alleged in Count II under § 524(a)(1); c) punitive damages are "generally not

allowed" against a municipality, citing Florida case law and § 768.28(5), Florida Statues;[1] and d) corporations are not "individuals" for purposes of obtaining punitive damages under § 362(k)(1). (Doc. 13 at 6-9).

South Daytona's motion to dismiss argues the following: a) the alleged violations are excepted from the automatic stay pursuant to § 362(b)(4);[2] b) no "private right of action" exists for the violations alleged in Count II; and c) punitive damages are not allowed against a municipality, citing City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981) (holding that municipalities are immune from punitive damages under § 1983 of the Civil Rights Act). (Doc. 17 at 5-9).

Standard for dismissal based on failure to state a claim

A motion brought under Rule 12(b)(6), made applicable here by Bankruptcy Rule 7012, challenges the sufficiency of the allegations in the complaint. Fed. R. Civ. P. 12(b)(6). In ruling on such a motion, the Court must accept all allegations as true and construe them in a light most favorable to the plaintiff. McCone v. Pitney Bowes, Inc., 582 F. App'x 798, 799-800 (11th Cir. 2014). "Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (citations omitted). The complaint must "state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). "A

[1] The Cities are correct that punitive damages are not available against a municipality here, but not for the reasons they cite. Punitive damages in bankruptcy are governed by Title 11, not by Florida law and not by the Civil Rights Act as cited by the Cities. Section 106(a)(3) of Title 11 specifically precludes any award of punitive damages against a "governmental unit" in actions or motions brought under § 362 or § 105, among others. 11 U.S.C. § 106(a)(3). A "municipality" is a "governmental unit" for purposes of Title 11. 11 U.S.C. § 101(27).

[2] Analysis under § 362(b)(4) is "fact intensive" and, therefore, is rarely appropriate for determination at the pleadings stage of a proceeding. See generally In re Montalvo, 537 B.R. 128, 143 (Bankr. D.P.R. 2015) (discussing the pecuniary-purpose test and the public-policy test under § 362(b)(4)).

claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. "[A] court may consider the factual allegations in the complaint, documents attached to the complaint as an exhibit or incorporated therein by reference, [or] matters of which judicial notice may be taken . . . ." In re XO Commc'ns., Inc., 330 B.R. 394, 418 (Bankr. S.D.N.Y. 2005).

Analysis

A. Count I – Violation of the automatic stay under § 362.

Section 362 of the Bankruptcy Code provides for and governs the automatic stay. Subsection 362(k) provides a statutory right of action to "individuals" for damages resulting from a willful violation of the automatic stay. 11 U.S.C. § 362(k)(1) (2013). While other circuits may differ, in the Eleventh Circuit a corporate debtor does not have a right to bring a claim for damages under § 362. Jove Eng'g, Inc. v. I.R.S., 92 F.3d 1539, 1550-51 (11th Cir. 1996) ("As set forth below, we . . . conclude that the district court correctly held that the term 'individual' in § 362(h) does not include a corporation. . . . Therefore, we conclude the plain meaning of the term 'individual' in § 362(h) does not include a corporation.") (applying § 362(h), which is now reordered as § 362(k)).

Rather than bringing an independent action under § 362(k), corporations are to seek sanctions in the form of monetary relief pursuant to the Court's statutory (*not* inherent) contempt power under § 105(a) of the Bankruptcy Code. Id. at 1554-59 ("Therefore, we conclude § 105(a) grants courts independent statutory powers to award monetary and other forms of relief for automatic stay violations . . . . As discussed, Jove is a corporation which cannot seek relief under § 362(h), but may seek several forms of relief under § 105(a) including attorney fees."). Claims

for sanctions seeking to invoke the Court's § 105(a) contempt power must follow the procedure detailed in Bankruptcy Rules 9020 and 9014.

Here, Debtor Jack Aberman voluntarily dismissed himself from this proceeding and no "individual" plaintiff remains. GEA Seaside is a corporate entity that has no right to bring a claim under § 362. As a result, in the absence of a plaintiff with the right to bring an action under § 362, the Court is required to dismiss Count I with prejudice.

B. Count II – Violation of the discharge injunction under § 524.

"Section 524 of the bankruptcy code provides the debtor with a post-discharge injunction against collection of debts discharged in bankruptcy, and thus embodies the 'fresh start' concept of the bankruptcy code." In re Hardy, 97 F.3d 1384, 1388-89 (11th Cir. 1996). "Instead of grounding liability for violation of the permanent [injunction] in the court's inherent contempt powers and § 524, . . . [the Court] rel[ies] on the other available avenue for relief, statutory contempt powers under § 105." Id. at 1389. Put more directly, a creditor "may be liable for contempt under § 105 if it willfully violated the permanent injunction of § 524." Id. at 1390; see also 4-524 *Collier on Bankruptcy* ¶ 524.02[c] (16th 2017) ("Civil contempt is the normal sanction for violations of the discharge injunction."). As stated above, contempt proceedings are governed by Bankruptcy Rules 9020 and 9014, which require the complainant to file a motion for order of contempt in the bankruptcy case as a contested matter—not an adversary proceeding. See id.

Here, Count II of the complaint invokes § 105(a) in order to raise the claim of violation of Discharge Injunction.[3] However, the complaint fails to comply with the corresponding procedural requirements of Rules 9020 and 9014. A party may only seek relief under § 105(a) through the

[3] The Discharge Injunction only applies to Aberman. But see F.C.C. v. NextWave Pers. Commc'ns Inc., 537 U.S. 293 (2003) (holding that corporate debtor's regulatory debts owed to a "governmental unit" were discharged by operation of the Chapter 11 confirmation order pursuant to 11 U.S.C. § 1141(d)(1)).

procedure set forth in Bankruptcy Rules 9020 and 9014. The instant complaint does not comply with this procedure. As a result, Count II must be dismissed with prejudice.

Conclusion

The voluntary dismissal of Aberman controls disposition of this proceeding. Because a corporation has no right to relief under § 362, Count I must be dismissed with prejudice. Jove Eng'g, Inc. v. I.R.S., 92 F.3d 1539, 1551 (11th Cir. 1996). Further, because no independent right of action for damages resulting from a violation of a discharge injunction exists outside of the contempt procedures set forth in Rules 9020 and 9014, Count II must be dismissed with prejudice. In re Hardy, 97 F.3d 1384, 1388-89 (11th Cir. 1996). Although the Court dismisses the instant adversary proceeding with prejudice, this dismissal is without prejudice to GEA Seaside properly raising the appropriate issues in the main case. See, e.g., F.C.C. v. NextWave Pers. Commc'ns Inc., 537 U.S. 293 (2003) (holding that regulatory debts owed to a "governmental unit" were discharged by operation of the Chapter 11 confirmation order pursuant to 11 U.S.C. § 1141(d)(1)(A)). If GEA Seaside pursues further action in the main case, it is encouraged to do so with stronger factual specificity as to the fines/liens at issue and with greater attention to relevant detail.

Accordingly, it is hereby **ORDERED**:

1. Daytona Beach's and South Daytona's motions to dismiss are GRANTED.

2. The instant proceeding is hereby DISMISSED WITH PREJUDICE.

3. This is a final order for purposes of this proceeding.

4. The Clerk's Office is directed to re-close the related bankruptcy cases (i.e., 3:13-bk-0165 and 3:13-bk-0167) after the thirtieth (30th) day following the date of entry of this Order if no motion for contempt is filed in case number 3:13-bk-0165.