

In the United States Bankruptcy Court

for the Northern District of Iowa

JOAN FRANCES LOEHR

Debtor(s).

Bankruptcy No. 96-12235-C

Chapter 7

ORDER RE APPLICATION FOR ORDER FOR RULE TO SHOW CAUSE

On April 7, 1998, the above-captioned matter came on for hearing pursuant to assignment on Debtor's Application for Order for Rule to Show Cause why Creditor Mercantile Bank, St. Louis, Missouri should not be held in contempt for willful violation of the discharge injunction under 11 U.S.C. §524(a). Debtor Joan Frances Loehr appeared in person with her attorney, Joseph Peiffer. Creditor Mercantile Bank, St. Louis, Missouri did not appear nor anyone for them. Evidence was presented after which the Court took the matter under advisement. This is a core proceeding under 28 U.S.C. §157(b)(2)(O).

FINDINGS OF FACT

Debtor filed her voluntary Chapter 7 Petition on September 5, 1996. One of the scheduled creditors was Mercantile Bank with whom Debtor had a Visa credit card account. The number of Debtor's account was 4656-2706-0211-0536. The administration of this estate was uneventful and a discharge was entered in due course on December 12, 1996. On December 2, 1997, almost a full year after the entry of discharge, Debtor received a letter directed to her from the Credit Card Center in St. Louis, Missouri referencing the account number listed in Debtor's Schedules. This letter was from the collection department and stated that they had attempted on several occasions to discuss the status of her credit card account but that "unfortunately, you have neglected to acknowledge any of our letters and/or messages and we find your failure to communicate with us alarming." The letter went on to state that if Debtor did not contact them, "we must consider taking whatever legal procedures necessary to secure our balance." The letter stated that the balance due as of December 2, 1997 was in the amount of \$2,965.04. (Exhibit B)

Upon receipt of this letter, Debtor contacted her attorney. Attorney Peiffer wrote a letter to the collection department on December 8, 1997 referencing this account number. Counsel attached to the letter a copy of the Chapter 7 Petition of Debtor as well as her Schedule F which listed the account number and Mercantile Bank as a creditor. Counsel also attached a copy of the discharge and copy of the December 2 letter. Counsel advised the Credit Card Center that their conduct constituted a violation of the discharge injunction under 11 U.S.C. §524 and advised that any further communication by them to Debtor would be considered an effort to collect this debt in violation of §524. (Exhibit C).

Debtor subsequently received a standard form billing statement from Mercantile Bank listing the same account number with a posting date of December 17, 1997. On December 23, 1997, Debtor received another letter from the Credit Card Center referencing the same account number. The letter reflected a current balance of \$3,005.04 and was directed personally to Debtor, Joan F. Loehr. It stated:

We are currently in the process of searching and verifying any property ownership under the above name. If ownership is verified, we will consider forwarding your credit card account to our legal area for disposition.

Debtor filed the presently pending Application for Rule to Show Cause on January 7, 1998. The matter was set for hearing on February 5, 1998 at 10:00 a.m. Hearing was held on February 5, 1998. Debtor appeared with counsel. Mercantile Bank did not file any appearance and at the time of hearing, no one appeared on behalf of Mercantile Bank, St. Louis. Evidence was presented and the Court took the matter under advisement at that time.

Subsequently, however, the Court became concerned about the extent and quality of service provided to Mercantile Bank. After consultation with Attorney Peiffer, it was determined that a new notice of the contempt proceeding should be sent to Mercantile Bank to insure that adequate and appropriate service was provided to them. The matter was rescheduled for hearing on April 7, 1998 and service was again provided to Mercantile Bank by Mr. Peiffer.

A certificate of service is now filed with the Court indicating that all of the appropriate documents were sent to Mercantile Bank. In addition, rather than send the matter by ordinary mail, Mr. Peiffer mailed these documents to Mercantile Bank by certified mail. The certified mail was directed to Mercantile Bank in care of Mr. Brandon Kay who is the individual who sent the Credit Card Center's December 2, 1997 letter to Debtor Joan Loehr. The file reflects that the certified letter has a return receipt and that it was accepted by Mercantile Bank on March 5, 1998.

As in the earlier contempt proceeding, Mercantile Bank did not file any pleadings in this case nor did they appear at the time of trial on April 7, 1998. As no one appeared on behalf of Mercantile Bank, the evidentiary record previously presented on February 5, 1998 was incorporated into this record. In addition, additional evidence was presented and the matter was again considered under submission.

The evidentiary record as supplemented establishes that, since February 5, 1998, Debtor has received two additional pieces of correspondence from Mercantile Bank. The most recent contains a statement date of March 26, 1998 and a payment date of April 20, 1998. It was marked and received into evidence as Debtor's Exhibit J. The other correspondence was received approximately one month prior to this billing statement.

The only difference between these two billing statements and the previous correspondence is that Debtor's name has now been removed from the billing statement and instead contains her ex-husband's name twice. It is now directed to George L. Loehr but contains the same mailing address as previously, which is Debtor's present residence. Debtor testified that she is aware that her ex-spouse is also receiving exact duplicates of these two billing statements received since February, 1998. She testified that, in her opinion, since the Bank is aware of the current address of Mr. Loehr, there is no justifiable reason to send this billing statement to her address. She testified that the past correspondence as well as the most recent billing statements from Mercantile Bank have created tension between her and her ex-husband concerning the proper party to pay this obligation, if at all.

Debtor testified that she is employed and earns \$15 per hour. She was required to miss an entire day of work to attend Court for this hearing. Her total lost wages were \$120. Additionally, Debtor testified that the bankruptcy was extremely traumatic for her and prior to the filing of the Petition, she was suicidal about her debt obligations and the fact that she was required to file for bankruptcy. She testified that the receipt of the postdischarge correspondence disturbed her greatly and that she has required the assistance of her psychiatrist on an emergency basis. It was necessary to increase her medication. She considered this correspondence, concerning obligations which she assumed were discharged, very unsettling.

Attorney Peiffer provided a professional statement that he had expended 3.5 hours at an hourly rate of \$160 per hour on this Application for Order for Rule to Show Cause.

CONCLUSIONS OF LAW

Upon the filing of a Chapter 7 bankruptcy petition, the automatic stay provisions of §362 of the Code provide protection against enforcement of debt during the pendency of the bankruptcy proceeding. When the discharge is entered under §727, the automatic stay provisions of §362 are replaced with an injunction under §524(a)(2) which states that:

(a) A discharge . . .

(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.

During the pendency of the bankruptcy proceeding, Debtor is protected by the automatic stay provided under §362(a) of

the Code. The automatic stay provides specific remedies for any violation of the automatic stay under §362(h) which states:

(h) an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

Unlike §362(h), §524 does not expressly authorize relief other than injunctive relief. In re Arnold, 206 B.R. 560, 567 (Bankr. N.D. Ala. 1997). However, while the discharge injunction is narrower in scope than the automatic stay, enforcement of its provisions are integral to the bankruptcy process. In re Atkins, 176 B.R. 998, 1007 (Bank. D. Minn. 1994). The modern trend is for courts to fashion appropriate relief to fit the circumstances of each case. As a violation of the discharge injunction is a violation of a court order, the most frequently used mechanism to enforce a discharge injunction is the general statutory enforcement power of 11 U.S.C. §105. Hardy v. United States, 97 F.3d 1384, 1389 (11th Cir. 1996).

The power of the Court to enforce its orders arises under §105(a) which states:

(a) 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.

Under the provisions of §105(a), the Court may award sanctions for contempt if Debtor is able to show: (1) that the discharge injunction was involved, and (2) the creditor willfully intended the actions which violated the provisions of §524. Hardy, 97 F.3d at 1390; In re Weeks, 570 F.2d 244, 245 (8th Cir. 1978); and In re Tom Powell & Son, Inc., 22 B.R. 657, 661 (Bankr. W.D. Mo. 1982). Willfulness in contempt cases means a deliberate or intended violation, as distinguished from an accidental, inadvertent or negligent violation of any order. Hubbard v. Fleet Mortg. Co., 810 F.2d 778, 781 (8th Cir. 1987). Willfulness may be inferred from the evidence. In re Mossie, 589 F.Supp. 1397, 1409 (W.D. Mo. 1984) (cited in Hubbard, 810 F.2d at 781).

The majority of courts deciding this issue conclude that it is appropriate to award damages for violations of §524. Arnold, 206 B.R. at 567. The Eighth Circuit has stated that: "In contempt cases, the trial court has discretion to fashion the punishment to fit the circumstances." Hubbard, 810 F.2d at 782 (citing United States v. United Mine Workers, 330 U.S. 258, 303 (1947)). Upon a finding of contempt, courts may award actual damages. Arnold, 206 B.R. at 567. Attorney's fees are awarded upon a finding by the court that a creditor willfully disobeyed a court order. An order granting a discharge in bankruptcy satisfies this criteria. In re Walker, 180 B.R. 834, 349 (Bankr. W.D. La. 1995); Atkins, 176 B.R. at 1009 (stating that an injunction created by a discharge order is a specific court order for the purposes of an adjudication of contempt).

Additionally, a majority of courts allow punitive damages for violation of §524. Arnold, 206 B.R. at 567. Punitive damages are awarded where conduct is willful and in clear disregard and disrespect to the bankruptcy laws. In re Miller, 89 B.R. 942, 944 (Bankr. M.D. Fla. 1988). Punitive damages are appropriate where the creditor demonstrates "a malevolent intent". In re Owen, 169 B.R. 261, 263 (Bankr. D. Maine 1994).

This Court concludes that actual and punitive damages can be awarded under appropriate circumstances where the conduct proven is egregious, intentional conduct or done willfully and maliciously.

ANALYSIS

Applying the foregoing legal principles, the burden of proof is upon Debtor to establish by clear and convincing evidence the two elements establishing a contempt under 11 U.S.C. §105(a). The first element requires that Debtor establish that the discharge injunction was involved. There is no doubt that this element has been completely satisfied. Debtor filed her Chapter 7 petition on September 5, 1996. She was granted a discharge on December 12, 1996 by entry of the discharge order. The correspondence sent to Debtor by Mercantile Bank is conduct designed for the sole purpose of collecting a pre-petition obligation. This is the precise conduct proscribed by §524(a)(2).

The second element requires that the creditor willfully intended the actions which violated the discharge injunction entered under §524. In this case, Mercantile Bank was provided notice of the pendency of this Application for Order for Rule to Show Cause, however, Mercantile Bank did not appear nor file any responsive pleading to this Application. The facts, as known by Debtor and presented to the Court, constitute the complete record upon which the Court must make its determinations. These facts establish that Debtor was granted a discharge in December of 1996 and an entire year passed before she received correspondence from Mercantile Bank concerning this obligation which was discharged. The initial letter refers to alleged attempted communications by Mercantile Bank with Debtor which are unsupported by the record. A year passed since the entry of the discharge with no contact by this creditor. The language of the letter appears carefully chosen to gain the attention of Debtor and is an undisguised attempt to obtain payment of the previously discharged obligation.

Less than a week after receiving this letter, Debtor had her attorney correspond with Mercantile Bank by letter. This letter was very explicit. It not only explained the previous entry of a discharge but included all relevant documentation establishing that this obligation was no longer enforceable. The letter was sufficiently specific that it should have left no doubt that future attempts to collect this debt would be considered a violation of the discharge injunction and treated as such.

Nevertheless, Debtor subsequently received a billing statement from Mercantile Bank for this same obligation and on December 23, 1997, Debtor received a letter from the Credit Card Center asserting a current balance of \$3,005.04. This letter carried an even more ominous tone than the first letter. While it is unclear what exact purpose would be served by advising Debtor that the collection company was "searching and verifying any property ownership under the above name", a fair interpretation would be that it was intended to raise the anxiety level of Debtor to cause her to pay this account. The letter also indicates that if ownership of any property could be verified, Mercantile Bank would turn the account over for legal collection. Again, this is language designed to frighten Debtor into taking action.

The record, as presented, establishes that Mercantile Bank was listed as a creditor and this specific account was listed in Debtor's Schedule F when the bankruptcy petition was filed. Mercantile Bank was provided notice of the pendency of the bankruptcy and no objections to discharge were entered. The discharge order was entered in December of 1996 and a full year passed before Mercantile Bank through the Credit Card Center commenced collection efforts on this account. It is unquestioned that Mercantile Bank knew or should have known of these matters and had more than sufficient time to take appropriate steps to delete this account from its collection process.

Nevertheless, in December of 1997, without any prior communication, Mercantile Bank began aggressive collection measures against this account. To avoid any misunderstanding, Debtor's counsel wrote Mercantile Bank a letter setting forth all of the relevant facts including documentation establishing that this obligation was subject to the discharge injunction under §524. Nevertheless, subsequent to that letter, a billing statement from Mercantile Bank was received by Debtor. Debtor received a strongly worded letter on December 23, 1997 implying that her property may be seized and that legal action would follow. She has continued to receive correspondence from Mercantile Bank on a monthly basis up to and including the end of March, 1998.

Willfulness means a deliberate or intended violation and may be inferred from the evidence. This creditor commenced collection efforts a full year after the entry of the discharge. Even assuming an innocent mistake as to this collection effort, additional correspondence and a thinly veiled threatening letter were received after the credit card company was notified by Debtor's counsel that collection efforts were inappropriate. The record is more than adequate to establish willfulness in this case and a finding that the conduct involved is much more than accidental or inadvertent conduct.

The Court concludes that Debtor has established by clear and convincing evidence both of the requisite elements to satisfy a finding of violation of a discharge order in violation of §524 and §105(a). Damages are warranted.

DAMAGES

Debtor was required to take off a full day of work in order to attend Court for this hearing. She earns \$15 per hour and lost eight hours work for a total of \$120 in lost wages. Additionally, Debtor's attorney, Joseph Peiffer, was required to perform legal services to protect Debtor's rights. It was necessary to counsel Debtor, write a letter to Mercantile Bank,

file the Application for Order for Rule to Show Cause, and appear at trial to present evidence on this §524 violation. Mr. Peiffer provided a professional statement that he expended 3.5 hours at an hourly rate of \$160 per hour on these matters for a total of \$560.

In addition, Debtor experienced significant emotional upset. It is the function of the Court to determine the credibility of witnesses. In this case, the evidence establishes that Debtor had previous emotional problems caused, at least in part, by the filing of her Chapter 7 bankruptcy petition. She has been under psychiatric care and the attempted collection efforts by Mercantile Bank caused her condition to deteriorate. The Court had an opportunity to observe the demeanor of Debtor and is satisfied that her complaints of emotional trauma are real and she experienced severe emotional upset because of this experience. The Court concludes that this emotional distress caused by the conduct of Mercantile Bank is a compensable item though obviously subject to no precise mathematical formula. The Court finds that an award of actual damages for emotional distress in the amount of \$1,000 under this record is appropriate.

In addition to actual damages, punitive damages may be awarded when the conduct in question is willful and in clear disregard of the bankruptcy laws. Any possibility that a mistake had occurred was negated when Attorney Peiffer sent Mercantile Bank the letter advising them of the violation on December 8, 1997. Nevertheless, Mercantile Bank continued to have contact with Debtor thereafter and, not only was there contact, but the contact was of such a nature that it suggested that this matter would be turned over for collection and strongly implied the seizure of Debtor's property. For a person in Debtor's emotional state, the Court is satisfied that this correspondence was intentionally threatening and constituted willful conduct in violation of the discharge injunction under §524 of the Code. As such, this conduct justifies an award of punitive damages.

While there is no exact mathematical standard for the award of punitive damages, they are imposed to provide deterrence. As such, the award of punitive damages must bear some relationship to the award of actual damages in order to implement this objective. Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1 (1991). This Court concludes, in this case, an award of punitive damages twice that of actual damages is appropriate. As the Court awarded \$1,680 in actual damages, an award of \$3,360 in punitive damages is appropriate under this record.

WHEREFORE, the Court finds that Debtor has established that Mercantile Bank, St. Louis, Missouri is in contempt of Court under 11 U.S.C. §105(a) for violation of the post-discharge injunction defined in 11 U.S.C. §524.

FURTHER, actual damages are awarded in favor of Debtor Joan Frances Loehr and against Mercantile Bank, St. Louis, Missouri in the amount of \$1,120.

FURTHER, Attorney's fees are awarded in favor of Debtor Joan Frances Loehr and against Mercantile Bank, St. Louis, Missouri in the amount of \$560.

FURTHER, Debtor has established that punitive damages are appropriate in this case and punitive damages are awarded in favor of Debtor Joan Frances Loehr and against Mercantile Bank, St. Louis, Missouri in the amount of \$3,360.

FURTHER, judgment for all of the foregoing shall enter in favor of Debtor Joan Frances Loehr and against Mercantile Bank, St. Louis, Missouri.

FURTHER, the cost of this contempt proceeding are assessed against Mercantile Bank, St. Louis, Missouri.

SO ORDERED this 14th day of April, 1998.

Paul J. Kilburg
U.S. Bankruptcy Judge