

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

In re: David Wallace Patrick, Sr. and
Deborah Marie Patrick,
Debtors.

Case No. 12-30997
Chapter 7

Order Denying Motion for Summary Judgment

Debtors reopened this chapter 7 case to bring a motion for violation of the discharge injunction against Carrington Mortgage Services, LLC (“Carrington”), which is currently pending before this court (Doc. 24) (“Motion”). The Motion is based upon Carrington’s written and verbal communications with Debtor David W. Patrick (“Debtor”) following closure of the case regarding an outstanding mortgage held by Carrington against property that was the Debtors’ former residence (“Property”).¹ The mortgage secures a debt that had been owed by the Debtor but on which he is no longer personally liable as a result of the discharge entered in this case on August 15, 2012.

Carrington now moves for summary judgment, seeking dismissal of the Motion as to its actions.² It claims that its various communications do not reflect an attempt to collect a discharged debt and that its actions are merely the exercise of its legitimate state foreclosure rights, which survived discharge, or in compliance with notice provisions required under federal law. For the reasons which follow, the court denies Carrington’s motion for summary judgment

¹ Carrington succeeded Bank of America as servicer of the mortgage loan secured by the Property on May 1, 2013. Bank of America was also named as a respondent to the Motion but Debtor settled his complaint against Bank of America so only the actions of Carrington remain at issue.

² In addition to the Motion, the record before the court consists of Carrington’s response to the Motion, Carrington’s motion for summary judgment [Doc. 47], Carrington’s statement of undisputed material facts submitted pursuant to Local Bankruptcy Rule 7056-1 (“Carrington’s Statement”), the affidavit of Chris Lechtanski, Assistant Vice President of Carrington, sworn to on June 18, 2014, to which is attached as exhibits all of the communications between Carrington and Debtor, including transcripts of telephone conversations on (i) May 21, 2013, (ii) June 20, 2013 and (iii) October 16, 2013 (“Lechtanski Aff.”), Debtors’ brief in opposition to summary judgment and Carrington’s reply brief in further support of summary judgment.

and sets the matter down for further proceedings. The court has core jurisdiction of this proceeding pursuant to 28 U.S.C. § 1334(b) and §§ 157(a), 157(b)(1), and 157(b)(2)(A).

Background

The following facts are not in dispute.³ Debtor obtained a discharge on August 15, 2012. On May 10, 2013, Carrington sent Debtor a letter advising that the servicing rights of the subject mortgage had been transferred to Carrington. The letter included a notice sent pursuant to the Fair Debt Collection Practices Act, 15 U.S.C. section 1692, *et seq.* It recites “This Notice is to remind you that *you owe* a debt. As of the date of this Notice, the amount of the debt *you owe* is \$193,008.15.” (emphasis added). The sixth paragraph of the notice includes the following language:

-IMPORTANT BANKRUPTCY NOTICE

If you have been discharged from personal liability on the mortgage because of bankruptcy proceedings and have not reaffirmed the mortgage, or if you are the subject of a pending bankruptcy proceeding, this letter is not an attempt to collect a debt from you but merely provides informational notice regarding the status of your loan. If you are represented by an attorney with respect to your mortgage, please forward this document to your attorney.

(“Bankruptcy Disclaimer”). The second page of the Notice states:

-MINI MIRANDA

This communication is from a debt collector and it is for the purposes of collecting a debt and any information obtained will be used for that purpose. This notice is required by the provisions of the Fair Debt Collection Practices Act and does not imply that we are attempting to collect money from anyone who has discharged the debt under the bankruptcy laws of the United States.

(“Mini Miranda”) (together with Bankruptcy Disclaimer, the “Disclaimers”).⁴

³ These facts are drawn largely from Carrington’s Statement and the Lechtanski Affidavit. Debtors did not file a statement in response to Carrington’s Statement as provided for in LBR 7056-1(c), but indicated for purposes of this motion, Debtors do not contest Carrington’s Statement.

⁴ The court finds it curious that the inclusion of the Mini Miranda is purportedly to comply with section 1692g of the Fair Debt Collection Practices Act, yet that Act at section 1692c prohibits a debt collector from communicating with a consumer if the debt collector knows the consumer is represented by an attorney with respect to such debt. Here, Carrington acknowledged in the initial call with Debtor that it knew of the bankruptcy. Thus, Carrington knew that Debtor was represented by bankruptcy counsel with respect to the mortgage debt.

Upon receipt of the foregoing, Debtor contacted Carrington by telephone. Debtor advised Carrington that the Property was vacant and that he had filed bankruptcy. Carrington confirmed that it was aware of Debtor's bankruptcy case and the fact that Debtor had received a discharge. Debtor stated his intention to voluntarily surrender the Property to Carrington by granting a deed in lieu of foreclosure. At Carrington's prompting, Debtor acquiesced to Carrington sending him information related to granting Carrington a deed to the Property. Carrington told Debtor that he would need to submit bank statements and paystubs in order to be "reviewed" for the deed in lieu of foreclosure option. Debtor said that he would speak to his attorney about this. Debtor emphasized to Carrington that he wished to get on with his life and wanted mortgage related paperwork to stop.

Over the next ten months, Carrington corresponded with the Debtor in at least twelve separate mailings related to the mortgage debt and called the Debtor twice. Carrington's first letter provided the Debtor with the name of a single point of contact for borrower assistance. Shortly thereafter, this contact, Mr. Calvo, telephoned the Debtor. During this call, Debtor informed Mr. Calvo that Carrington should not be contacting him due to the bankruptcy and directed him not to contact him again. Ex. O at pp. 87–88.

Following this conversation, Debtor received (i) an Annual Escrow Account Disclosure Statement," which indicated an escrow shortage of \$9,672.81; (ii) a "Notice Pursuant to Section 1304 of Article 13 of the New York Real Property Actions and Proceedings Law," which indicated that Debtor could cure the default by paying \$67,015.29; (iii) identical correspondence on two separate occasions from the "Home Retention Department" as to several loss mitigation programs for borrowers "having difficulty making ... mortgage payments;" (iv) a "Home Affordable Modification Program" solicitation; (v) a Notice directing Debtor to provide

fire/homeowner’s insurance and advising that if Debtor failed to do so Carrington would purchase insurance at Debtor’s expense;⁵ (vii) “Second and Final Notice of Fire Insurance Requirement,” which reiterated the cost of the policy and Debtor’s responsibility for payment (“If you do not obtain your own insurance coverage, you will be forced to pay for the lender placed coverage being obtained on your behalf ... ”); and (viii) a 14-day Pre-Foreclosure Notice. Additionally, despite Debtor’s prior instruction not to contact him, Mr. Calvo again telephoned Debtor. Ex. O at pp. 89–90.

Debtors’ bankruptcy case was reopened on October 30, 2013. Carrington continued to send Debtor correspondence including two notices regarding insurance coverage as well as a notice advising Debtor how he could avoid foreclosure and keep his home. The correspondence sent to Debtor contained the Bankruptcy Disclaimer and Mini Miranda, or some substantially similar form of notice. In all but one instance, the disclaimers are found not on the first page, but appear on the second, third, fourth, or sixth page of the communication. In all instances, the disclaimers follow, instead of precede, the primary message of the communication. The disclaimers are not bolded out, nor are they typed in all capital letters, or otherwise formatted to draw a reader’s attention.

Law Applicable to Granting Summary Judgment and Finding a Willful Violation of the Discharge Injunction

Federal Rule of Civil Procedure 56 provides that summary judgment must be granted “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). “Where the moving party demonstrates ‘the absence of a genuine issue of material fact,’ *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986), the opposing party must come

⁵ The stated premium for the policy was \$1,109.76. The notice indicated Debtor would be billed monthly for the premium.

forward with specific evidence demonstrating the existence of a genuine dispute of material fact.” *Brown v. Eli Lilly & Co.*, 654 F.3d 347, 358 (2d Cir. 2011) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)).

Upon entry of discharge, a creditor is prohibited from the “commencement or continuation of an action, ... or an act to collect, recover or offset any such debt as a personal liability of the debtor” 11 U.S.C. § 524(a)(2). Although the statute does not expressly authorize the recovery of damages, a violation of a discharge order is punishable by contempt. *In re Nicholas*, 457 B.R. 202, 224 (Bankr. E.D.N.Y. 2011) (citing *In re Nassoko*, 405 B.R. 515, 520 (Bankr. S.D.N.Y. 2009)). “[S]anctions in civil contempt proceedings may be employed ‘for either or both of two purposes: to coerce the defendant into compliance with the court’s order, and to compensate the complainant for losses sustained.’ ” *Local 28 of the Sheet Metal Workers’ Int’l Ass’n v. EEOC*, 478 U.S. 421, 443 (1986) (citations omitted). “A finding of civil contempt can entitle the aggrieved party to be compensated for all expenses, including attorneys’ fees.” *In re Cruz*, 254 B.R. 801, 816 (Bankr. S.D.N.Y. 2000) (citing *In re Mickens*, 229 B.R. 114, 118–19 (Bankr. W.D.Va. 1999)). The court “may award attorney’s fees, as well as punitive damages” if it finds a creditor’s violation of the discharge injunction to be “both willful and indicative of bad faith or vexatious intentions.” *In re Thompson*, 2007 WL 2406886, *2 (Bankr. N.D.N.Y. Aug. 21, 2007) (citing *In re Watkins*, 240 B.R. 668, 678 (Bankr. E.D.N.Y. 1999)).

For Carrington to succeed on its motion for summary judgment, Carrington must show that Debtor is unable to prove by clear and convincing evidence the elements of his claim of contempt. Specifically, that Carrington (i) had knowledge of the discharge and (ii) willfully violated it through attempts to collect or enforce the discharged mortgage debt. *Nassoko*, 405 B.R. at 521; *Torres v. Chase Bank, USA, N.A. (In re Torres)*, 367 B.R. 478, 490 (Bankr.

S.D.N.Y. 2007). “A creditor’s actions in violation of the discharge injunction are willful if the creditor knows the discharge has been entered and intends the actions which violated the discharge injunction.” 4 Collier on Bankruptcy ¶ 524.02[2][c].

Carrington does not dispute that it knew of Debtor’s discharge nor that it intended to send the mailings and initiated the last two telephone conversations with Debtor. Thus, Debtor must prove only that Carrington’s communications were attempts to collect or enforce the discharged mortgage debt as a personal liability of Debtor in order for this court to find a violation of the discharge injunction. If, in addition to proving that Carrington willfully violated the discharge injunction, Debtor can show that Carrington acted in bad faith or in a vexatious or oppressive manner, this court may impose sanctions. Sanctions may include compensatory (actual) damages, attorneys’ fees, coercive sanctions to ensure future compliance, as well as punitive damages.

Discussion

Upon entry of Debtor’s discharge, Carrington was permanently enjoined from any further attempts to collect from Debtor, as a personal liability, the mortgage debt that had been discharged. *See* 11 U.S.C. § 524(a)(2). Furthermore, Debtor was relieved of the accompanying contractual obligations undertaken in the mortgage to maintain fire insurance on the Property. *See In re Whitaker*, 2013 WL 2467932, *10 (Bankr. E.D. Tenn. June 7, 2013). Carrington was free to protect its mortgage interest in the Property by obtaining insurance, but could not re-impose upon the Debtor any obligation to do so.

The Written and Verbal Communications

Carrington argues that the written communications with Debtor were (i) in some instances mandated by governing law, regulation or the National Mortgage Settlement;⁶ (ii) innocuous and informational; and (iii) devoid of any demand for payment. Carrington emphasizes that all written communications sent to Debtor contained a Bankruptcy Disclaimer and the Mini-Miranda.

To Carrington's first point, the court finds that Carrington was required under 12 U.S.C. § 2605(c) to notify Debtor of the assignment of the servicing of the mortgage loan. *See* 12 U.S.C. § 2605(c) (providing that "[e]ach transferee servicer to whom the servicing of any federally regulated mortgage loan is assigned, sold, or transferred shall notify the borrower of any such assignment, sale or transfer"). By doing so, Carrington did not evince an intention to collect a debt from Debtor personally. The court is willing to carve out of the universe of communications, this communication complained of by Debtor.⁷

Carrington argues that at no time during the telephone conversations did it demand payment of any debt and, therefore, those calls cannot form the basis for a finding of a willful violation of the discharge injunction. The transcripts of the three conversations, however, when considered against the backdrop of the written communications, disclose a potentially oppressive and vexatious approach by Carrington in pursuit of returning the mortgage to a performing status rather than exercising its legitimate *in rem* remedies against the Property.

In the first conversation, Debtor advised Carrington that he wanted to give back the Property. Carrington informed Debtor that he could not just give the house back without going through a process. Debtor expressed that he did not want to receive more paperwork and wanted

⁶ The National Mortgage Settlement referred to here is between the United States Department of Justice and five mortgage lenders/servicers, including Bank of America. *See United States of America, et al. v. Bank of America Corp., et al.*, No 12-0361 (D.D.C. Apr. 4, 2012).

⁷ The court considers the Notice Pursuant to the Fair Debt Collection Practices Act, 15 U.S.C. section 1692, *et seq.* to be a notice separate and distinct from the Notice given pursuant to 12 U.S.C. § 2605(c).

to move on with his life. Carrington explained that there is a lot of paperwork involved and solicited Debtor's email address, which Debtor provided for purposes of receiving information related to granting a deed in lieu of foreclosure. Carrington then sent not one email, but a steady stream of written communications that appear to be largely aimed at managing Debtor's retention of the property and repayment of the discharged mortgage debt through loss mitigation. Furthermore, Carrington requested extensive financial documentation from Debtor—ostensibly required in order to permit Debtor to grant a deed in lieu of foreclosure—and informed Debtor of his obligation to pay for forced-placed insurance coverage.

During the initial conversation, Carrington inexplicably, (i) asks Debtor if he has time to update his “financials,” (ii) requests that Debtor follow-up with Carrington “about once a week to get an update on [his] file,” and (iii) informs Debtor that Carrington needs his two most recent bank statements to verify his income. When Debtor pushed back saying that Carrington did not need his income, Carrington responded that “[i]t's just part of the process ...” and that Debtor had to verify his income and wages, otherwise, Carrington could not complete the process. Carrington again requested Debtor's two most recent paystubs and bank statements.

In the second telephone conversation, Debtor informed Mr. Calvo that Carrington should not contact him again. Notwithstanding this clear directive, Mr. Calvo again telephoned Debtor and Carrington continued sending written communications to Debtor.

Some of the communications, when considered in isolation, may seem innocuous or informational. However, the court finds the collective impact of the communications could prove to be an attempt by Carrington to collect the discharged mortgage obligations. *See e.g., In re Nordlund*, 494 B.R. 507, 519 (Bankr. E.D. Ca. 2011) (stating “[e]ven if each letter from BofA had acknowledged the debtors' discharge and stated that BofA would take no action against the

debtors personally to collect its three home loans, the sheer volume and repetitiveness of BofA's letters communicated just the opposite"). There are cases where post-discharge communication is appropriate, such as where a debtor has communicated an interest in keeping a home. *See In re Schatz*, 452 B.R. 544, 549–50 (Bankr. M.D. Pa. 2011). This is not such a case. Carrington was aware from the first telephone conversation that the Debtor had no intention of keeping the Property. The notices Debtor received include cure and escrow shortage amounts, request a plethora of unnecessary financial information⁸ and, contrary to Carrington's assertions, indicate that Debtor is responsible for payment of forced-placed insurance coverage premiums.

Furthermore, the included Disclaimers—which are often buried in the documents—do not, in this court's opinion, negate as a matter of law the repeated, subtle message that Carrington was pressing to enforce discharged obligations. *See e.g., In re Nordlund*, 494 B.R. at 519. Disclaimers do not automatically exculpate a creditor from liability for a violation of the discharge injunction. *See Nassoko*, 405 B.R. at 525.

Conclusion

From the totality of Carrington's communications with the Debtor, the inference could be drawn that Carrington was attempting to enforce discharged obligations of the Debtor. Accordingly, Carrington's motion for summary judgment is denied. A separate scheduling order setting a trial date and related deadlines will issue.

Dated: December 4, 2014
Syracuse, New York

/s/ Margaret Cangilos-Ruiz
Margaret Cangilos-Ruiz
United States Bankruptcy Judge

⁸ It is beyond this court's comprehension what financial qualifications are necessary for a discharged debtor to provide a deed in lieu of foreclosure to Carrington. This alternative to foreclosure requires no financial participation by a debtor. The court appreciates that a non-debtor may need to prove an inability to pay a mortgage loan, but that is not the case here. This court has serious misgivings about Carrington's seemingly ill-tailored procedures.

