UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI

IN RE:

LARRY DALE SHERMAN AND TRUDY RENEE SHERMAN,	**CASE NO. 03-54660-NPO**
DEBTORS.	**CHAPTER 13**
LARRY DALE SHERMAN AND TRUSY RENE (SIC) SHERMAN,	**PLAINTIFFS**
V.	**ADV. PROC. NO. 10-05020-NPO**
BENEFICIAL FINANCIAL I, INC., F/K/A, BENEFICIAL MORTGAGE COMPANY OF MISSISSIPPI	**DEFENDANT**

MEMORANDUM OPINION AND ORDER DENYING DEFENDANT BENEFICIAL FINANCIAL I, INC.'S MOTION TO DISMISS

On July 15, 2010, there came on for hearing (the "Hearing") on the Defendant Beneficial Financial I, Inc.'s Motion to Dismiss (the "Motion") (Adv. Dkt. No. 6)[1] filed by the Defendant, Beneficial Financial I, Inc. ("Beneficial"), together with the Defendant Beneficial Financial I, Inc.'s Memorandum of Law in Support of its Motion to Dismiss ("Beneficial's Brief") (Adv. Dkt. No. 7); the Response to Defendant's Motion to Dismiss ("Shermans' Response") (Adv. Dkt. No. 12) filed by the Plaintiffs and Debtors, Larry Dale Sherman and Trudy Rene (sic) Sherman (the "Shermans"), together with Plaintiff's (sic) Memorandum of Support for Their Response to Defendant's Motion

[1] Citations to the record are as follows: (1) citations to docket entries in this adversary proceeding are cited as "(Adv. Dkt. No. ___)"; (2) citations to the docket entries in the main bankruptcy case, Case No. 03-54660-NPO, are cited as "(Bankr. Dkt. No. ___)"; and citations to docket entries in adversary proceeding number 04-05137-ERG are cited as "(Adv. No. 04-05137-ERG, Adv. Dkt. No. ____)."

to Dismiss ("Shermans' Brief") (Adv. Dkt. No. 13); and Defendant Beneficial Financial I, Inc.'s Reply in Support of its Motion to Dismiss ("Beneficial's Reply") (Adv. Dkt. No. 15), in the above-styled adversary proceeding (the "Adversary"). At the Hearing, Jason Graeber represented the Shermans, and Katrina L. Dannheim represented Beneficial. The Court, being fully advised in the premises, finds that the Motion is not well-taken and should be denied for the reasons set forth herein.

Jurisdiction

This Court has jurisdiction over the parties and the subject matter of this proceeding pursuant to 28 U.S.C. § 1334. This matter is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(A). Notice of the Motion was proper under the circumstances.

Facts

According to the Complaint Seeking Damages for Violations of the Discharge Injunction and Federal Laws (the "Adversary Complaint") (Adv. Dkt. No. 1), the Shermans allege the following facts:[2]

The Shermans filed a voluntary chapter 13 bankruptcy petition (the "Petition") (Bankr. Dkt. No. 1) on September 19, 2003. Included on the schedules (Bankr. Dkt. No. 6) filed with the Petition was a secured debt in favor of Beneficial for a mortgage related to the Shermans' home located in Biloxi, Mississippi. The Shermans filed an adversary proceeding (the "Previous Adversary") (Adv. No. 04-05137-ERG, Adv. Dkt. No. 1) against Beneficial on October 27, 2004.

[2] When considering a motion pursuant to Federal Rule of Civil Procedure ("Civil Rule")12(b)(6), the Court must "liberally construe the [Debtor's] complaint in favor of the [Debtor as the non-moving party] and assume the truth of all pleaded facts." Oliver v. Scott, 276 F.3d 736, 740 (5th Cir. 2002). Civil Rule 12(b)(6) is made applicable pursuant to Federal Rule of Bankruptcy Procedure 7012.

On January 9, 2008, the Court granted a joint motion compromising and settling the Previous Adversary against Beneficial (the "Settlement Agreement") (Adv. No. 04-05137-ERG, Adv. Dkt. No. 19). Pursuant to 11 U.S.C. § 1328, the Shermans were granted a discharge (Bankr. Dkt. No. 52), and their case was closed on January 23, 2008 (Bankr. Dkt. No. 53).

In the Adversary Complaint, the Shermans further allege that, on October 2, 2009, Beneficial mailed a letter (the "First Letter") to the Shermans seeking to collect fees and expenses related to the Shermans' mortgage. On December 10, 2009, Beneficial sent a second letter (the "Second Letter") (Exhibit B to the Adversary Complaint) to the Shermans seeking to collect those same fees and expenses. The Second Letter included the following statement by Beneficial: "This is an attempt to collect a debt by a debt collector and any information obtained will be used for that purpose."[3] As a result of the letters, the Shermans contacted Kathy Desieko, an employee of Beneficial's foreclosure department. Ms. Desieko informed the Shermans that Beneficial was seeking to foreclose on the Shermans' home due to pre-bankruptcy charges. Those charges were discharged in the Shermans' bankruptcy and resolved by the Settlement Agreement.

The Shermans filed this Adversary on May 13, 2010. The Adversary Complaint sets forth three (3) counts. The first count alleges a violation of the discharge injunction pursuant to 11 U.S.C. § 524. The second and third counts allege violations of the Fair Debt Collection Practices Act (the "FDCPA") – 15 U.S.C. § 1692 *et. seq*. Beneficial sought dismissal of counts II and III pursuant to Civil Rule 12(b)(6) for two reasons. First, Beneficial argues that the Shermans failed to allege that Beneficial is a "debt collector" for purposes of the FDCPA. Second, Beneficial argues that the

[3] The First Letter is not part of the record.

Bankruptcy Code[4] provides the exclusive remedy for the violation of the discharge injunction and relief is not available under the FDCPA.

Discussion

A. Standard of Review for Motion to Dismiss

In considering a motion under Civil Rule 12(b)(6), made applicable pursuant to Bankruptcy Rule 7012, the "court accepts all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff." Martin K. Eby Constr. Co. v. Dallas Area Rapid Transit, 369 F.3d 464, 467 (5th Cir. 2004). To overcome a 12(b)(6) motion, the Debtors must plead "enough facts to state a claim to relief that is plausible on its face." Blackstock v. Sedgwick Claims Mgmt. Srvcs., Inc., 2009 WL 2754761, at * 1 (N.D. Miss. Aug. 26, 2009) (*citing* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L.Ed. 2d 929 (2007); *accord* Ashcroft v. Iqbal, – U.S. –, 129 S. Ct. 1937, 1948-51, 173 L.Ed. 2d 868 (2009)). "Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all allegations in the complaint are true (even if doubtful in fact)." Id. (*citing* Twombly, 550 U.S. at 555) (internal citations and footnote omitted). "Conversely, 'when the allegations in a complaint, however true, could not raise a claim of entitlement to relief, this basic deficiency should be exposed at the point of minimum expenditure of time and money by the parties and the court.'" Id. (*quoting* Cuvillier v. Taylor, 503 F.3d 397, 401 (5th Cir. 2007)).

B. Sufficiency of the Allegations in the Complaint

Beneficial first argues in its Motion that the FDCPA claims must be dismissed because the Shermans failed to allege that Beneficial is a debt collector. For the purposes of Civil Rule 12(b)(6),

[4] Hereinafter the Bankruptcy Code will be referred to as the "Code."

this Court ruled at the Hearing that the Motion should be denied on this ground.[5] In paragraph nine of the Adversary Complaint, the Shermans allege that Beneficial is a "debt collector" as that term is defined by 15 U.S.C. § 1692a(6). Furthermore, the Shermans attached the Second Letter sent by Beneficial to the Shermans as Exhibit B to the Adversary Complaint. At the top of the Second Letter, Beneficial states, "This is an attempt to collect a debt by a debt collector and any information obtained will be used for that purpose." At the Hearing on the Motion, Beneficial argued that this language was used out of an abundance of caution due to the regulations in the industry, and that self identification as a debt collector does not make one a debt collector for purposes of the FDCPA. While that might be true, it is beyond the scope of a Civil Rule 12(b)(6) inquiry. The Shermans need only allege sufficient facts to "raise a right to relief above the speculative level, on the assumption that all allegations in the complaint are true (even if doubtful in fact)." Blackstock, 2009 WL 2754761, at * 1 (*citing* Twombly, 550 U.S. at 555) (internal citations and footnote omitted). The Shermans have done so through the language contained in both paragraph nine of the Adversary Complaint and the Second Letter attached as Exhibit B thereto. For these reasons, the Motion on this ground should be denied.

C. The FDCPA and the Bankruptcy Code

1. Argument of the Parties

Next, Beneficial argues that counts II and III of the Adversary Complaint should be dismissed because the sole remedy for a violation of the discharge injunction lies in the Code. Beneficial contends that the three counts set forth in the Adversary Complaint are all based on a single factual

[5] This ruling is without prejudice regarding Beneficial's ability to provide authority at a later time supporting its premise that it is not, in fact, a debt collector.

allegation–that Beneficial attempted to collect fees and expenses that were discharged in a prior bankruptcy case. According to Beneficial, the Shermans' sole remedy is an action for contempt pursuant to § 105 of the Code. By alleging violations of the FDCPA, Beneficial argues that the Shermans are attempting to circumvent well-established bankruptcy remedies. Conversely, the Shermans argue that the Code and the FDCPA coexist. Where the two statutory schemes present no irreconcilable conflict, the Shermans argue that it is permissible to pursue a remedy under each.

2. Authority Relied on by the Parties

At the Hearing on the Motion, the parties acknowledged that the circuits are split on this issue. The Ninth Circuit, in Walls v. Wells Fargo Bank, N.A., 276 F.3d 502 (9th Cir. 2002), found that the Code provided the exclusive remedy for the violation of a discharge injunction. The Seventh Circuit, in Randolph v. IMBS, Inc., 368 F.3d 726 (7th Cir. 2004), declined to follow Walls, finding that the Code and the FDCPA merely overlap and that a remedy may be pursued under each. For the reasons that follow, this Court finds the Randolph opinion from the Seventh Circuit more persuasive and declines to follow Walls.

a. The Walls case

In Walls, the debtor alleged, *inter alia*, that Wells Fargo violated the FDCPA when it attempted to collect on a debt post-discharge. Walls, 276 F.3d at 505. The district court granted Wells Fargo's motion to dismiss the FDCPA claim. On appeal, the debtor argued that the Code does not preclude a simultaneous claim under the FDCPA. Id. at 510. Specifically, the debtor argued that the FDCPA violation was outside of the bankruptcy proceeding because the bankruptcy was closed. She went further to state that the FDCPA was needed to protect a debtor who has been discharged. Id.

On appeal, the Ninth Circuit stated that the debtor's FDCPA claim was based on an alleged violation of § 524 of the Code, and that the Code provides its own remedy for such a violation in the form of civil contempt pursuant to § 105. "To permit a simultaneous claim under the FDCPA would allow through the back door what [the debtor] cannot accomplish through the front door–a private right of action." Id. at 510. The circuit court noted that the FDCPA was enacted "to avoid bankruptcy." Id. When bankruptcy does occur, however, the court stated that the Code is the debtor's exclusive source for protection and remedy. Id. Since the debtor's FDCPA claim was based on a violation of the discharge injunction, that court held that the Code precluded a simultaneous action under the FDCPA, implying that the Code preempts the FDCPA. Id. at 511.

b. The Randolph case

The Seventh Circuit faced a similar situation in Randolph. In that case, the Court of Appeals addressed three consolidated cases on appeal. Randolph, 368 F.3d at 728. Since the facts were similar in each case, the circuit court only discussed the facts of one. The debtor, Cheryl Alexander, sought protection from her creditors by filing for bankruptcy pursuant to Chapter 13. On her schedule of unsecured, nonpriority claims, she listed a debt owed to her dentist, Dr. Kannankeril. Dr. Kannankeril filed a proof of claim, and the confirmed plan listed the debt as one to be paid over time. Approximately two years after the plan was confirmed, Dr. Kannankeril died. His office hired Unlimited Progress, Inc. to collect old accounts. Unlimited sent a dunning letter to Ms. Alexander, which she ignored. When Ms. Alexander received the second dunning letter, she turned it over to her attorney. Ms. Alexander's attorney notified Unlimited of the chapter 13 proceedings, and Unlimited immediately closed the file and never contacted Ms. Alexander again. Id.

Ms. Alexander then sued Unlimited alleging two claims for relief. First, she alleged that Unlimited falsely represented that she was required to pay Dr. Kannankeril's bill immediately. Second, she alleged that Unlimited violated the FDCPA by contacting her directly, even though she was represented by an attorney. Id. at 728-29. The parties consented to a decision by a magistrate judge, who held that the Code preempted the FDCPA when an alleged violation of the FDCPA also violated the Code. Id. at 729. Since the FDCPA uses a strict liability approach, and the Code condemns only willful attempts at debt collection, the magistrate judge found them incompatible. Regarding the other two cases made part of the consolidated appeal, those courts held that the Code provided the exclusive remedy when a debtor is in bankruptcy and used this reasoning to prevent claims under the FDCPA. Id.

The Seventh Circuit pointed out that the issue in these cases was not preemption since both statutory schemes were federal. Id. at 730. "When two federal statutes address the same subject in different ways, the right question is whether one implicitly repeals the other–and repeal by implication is a rare bird indeed." Id. The Court of Appeals went on to point out the different operational requirements of the statutes. Judge Easterbrook, writing for the court, pointed out that a debtor dunned when the automatic stay or the discharge injunction is in place can ask the court to hold the other party in contempt; however, "this option is available . . . only if the violation is 'willful'." Id. at 728. On the other hand, the FDCPA, under § 1692e(2)(a), creates a strict liability rule. Id. at 730. The Seventh Circuit held that these different standards do not create irreconcilable conflict; the statutes merely overlap, and any debt collector can simultaneously comply with both. Id.

The Seventh Circuit provided a table in its opinion to illustrate the operational differences. This table shows that the Code governs anyone who willfully violates the provisions of the Code, and the Code does not provide a defense for a willful violation. The FDCPA governs debt collectors only, provides a strict liability rule, and provides two defenses. The Court of Appeals determined that each statutory scheme provides coverage that the other lacks. Id. at 731. According to that court, "Overlapping statutes do not repeal one another by implication; as long as people can comply with both, then courts can enforce both." Id.

Based on this analysis, the Seventh Circuit pointed out that the Ninth Circuit's opinion in Walls would permit negligent attempts to collect from debtors during or after bankruptcy. Id. at 728. The Ninth Circuit's strict application of the Code would eliminate any penalty for negligent attempts to collect on debts of consumers when those debts are related to the consumers' bankruptcies. Id. at 732. Since the FDCPA would act to govern these negligent attempts at debt collection, and since the court could not see how this would contradict the Code, the Seventh Circuit declined to follow Walls and held that the FDCPA could provide a remedy under the facts presented. Id. at 731-32.

This Court finds the reasoning in Randolph for post-discharge conduct to be more persuasive. Since both statutes are federal, preemption is not the issue. Furthermore, the two statutory schemes overlap, with each providing coverage that the other lacks. The Code covers all persons, including debt collectors, and governs all activities in bankruptcy. The FDCPA regulates all activities by debt collectors, not just those affecting debtors in bankruptcy. Accordingly, it would be illogical to allow debt collectors to pursue debts in a negligent manner after a debtor's discharge simply because the debt was administered in a bankruptcy proceeding when that same negligent pursuit would be prohibited by the FDCPA if the consumer had not filed for bankruptcy relief.

c. Cases Within the Fifth Circuit

In Beneficial's Brief, Beneficial suggests that precedent within the Fifth Circuit supports the Ninth Circuit's view in Walls. *See* B-Real, LLC v. Rogers, 405 B.R. 428 (M.D. La. 2009). That case, however, is factually distinguishable from the present case. In Rogers, the debtor sued the creditor for violations of the FDCPA when the creditor erroneously filed proofs of claim in the debtor's voluntary bankruptcy proceeding. Id. at 429. The district court discussed the split among the circuits and even noted that Randolph was correct in stating that "overlapping and not entirely congruent remedial systems can coexist." Id. at 431-32. However, the Rogers court stated that the issue in that case was whether filing a proof of claim on a prescribed debt could constitute a violation of the FDCPA. Id. at 432. Since the Code invites creditors to file proofs of claim, and the bankruptcy court supervises the claims process, the district court found that the debtor's FDCPA claims were precluded by the Code. It is important to note that the district court limited its holding by stating, "Under these particular circumstances, claims under the FDCPA are not viable." Id. at 434.

Similarly, Beneficial's Reply relies on Gilliland v. Capital One Bank (In re Gilliland), 386 B.R. 622 (Bankr. N.D. Miss. 2008), arguing that a debtor should not be able to bypass the remedies provided in the Code for more lucrative claims under the FDCPA. Gilliland, however, is distinguishable from the present case for the same reason Rogers is–it too deals with an alleged proof of claim violation. Id. at 623.

The Shermans' Brief relies on Eastman v. Baker Recovery Servs. (In re Eastman), 2009 Bankr. LEXIS 4352 (Bankr. W.D. Tex. April 17, 2009), which this Court finds more analogous. Eastman addresses whether a plaintiff may assert claims under the FDCPA and the Code for attempts

to collect on a debt post-discharge when the claims would be supported by the same set of facts. Id. at *6. The bankruptcy court addressed the circuit split and found the Seventh Circuit's Randolph opinion more persuasive. Id. at *6-7. In adopting Randolph, that court noted that the holding in Walls was based on the incorrect premise that the Code preempted the FDCPA. Id. at *7.

3. Application of the Law to the Adversary

Under the present facts, this Court is faced with an attempt to collect a debt outside of the proof of claim process similar to the facts presented in Randolph and Eastman, not the erroneous filing of a proof of claim like in Rogers and Gilliland. Here, Beneficial attempted to collect discharged debts from the Shermans by sending the First Letter and the Second Letter. Assuming these collection attempts by Beneficial were negligent, there would be no remedy for the Shermans under Walls. As Randolph points out, that outcome is illogical. The reasoning in Randolph illustrates that the Code and the FDCPA coexist in the present facts. By recognizing this coexistence, Randolph ensures that a debtor/consumer is protected from the negligence of a debt collector post-discharge like other consumers. Likewise, debt collectors face the same prohibition against the negligent pursuit of a debt after a debtor's discharge as they would for the negligent pursuit of a debt of a consumer who has not filed for bankruptcy and received a discharge. Based on the facts of this Adversary and the reasoning found in Randolph and Eastman, the Court finds that the Shermans have stated causes of action under both the FDCPA and § 524 of the Code. For these reasons, the Motion on this ground should be denied.

IT IS, THEREFORE, ORDERED that the Motion hereby is denied.

SO ORDERED and dated this the 19th day of October, 2010.

/ s / Neil P. Olack
NEIL P. OLACK
U. S. BANKRUPTCY JUDGE