

**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF MISSISSIPPI**

**IN RE: BOWLING L. JOHNSON**

**CASE NO. 11-52647-KMS**

**DEBTOR**

**CHAPTER 13**

**BOWLING L. JOHNSON**

**PLAINTIFF**

**V.**

**ADV. PRO. NO. 12-05020-KMS**

**REGIONS BANK**

**DEFENDANT**

**ORDER DENYING DEFENDANT’S MOTION TO DISMISS**

This matter came on for Hearing on November 15, 2012 (the “Hearing”) on the Motion to Dismiss Adversary Proceeding (the “Motion to Dismiss”) (Adv. Dkt. No. 10) and Brief in Support of Motion to Dismiss (Adv. Dkt. No. 11) filed by defendant Regions Bank and the Plaintiff’s Response to Motion to Dismiss (Adv. Dkt. No. 14) and Memorandum Brief in Support of Plaintiff’s Response to Motion to Dismiss (Adv. Dkt. No. 15) filed by plaintiff Bowling L. Johnson. At the Hearing, Jeff D. Rawlings appeared on behalf of defendant Regions Bank and Paul Caston represented plaintiff Johnson. At the Hearing, the Court took the matter under advisement without arguments by counsel for the parties. Having considered the pleadings and supporting briefs, the Court finds that the Motion to Dismiss should be DENIED for the reasons below.<sup>1</sup>

**JURISDICTION**

The Court has jurisdiction over the subject matter of and the parties to this proceeding pursuant to 28 U.S.C. § 1334. This matter is a core proceeding pursuant to 28 U.S.C. § 152(b)(2).

---

<sup>1</sup> The Court makes the following findings of fact and conclusions of law pursuant to Federal Bankruptcy Rule 7052. To the extent that any finding of fact is construed as a conclusion of law, it is adopted as such; and to the extent any conclusion of law is construed as a finding of fact, it is also adopted as such.

## I.

Debtor Bowling L. Johnson (“Johnson”) filed the above styled and numbered adversary proceeding against Regions Bank alleging that the bank violated the discharge injunction of 11 U.S.C. § 524<sup>2</sup> by filing two proofs of claim<sup>3</sup> for debts that were discharged in Johnson’s prior Chapter 7 bankruptcy case and seeking damages<sup>4</sup> for the alleged violation.<sup>5</sup> In response, defendant Regions Bank filed a motion to dismiss the adversary proceeding for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), made applicable to this proceeding by Federal Rule of Bankruptcy Procedure 7012, alleging that there is no private right of action for violations of the discharge injunction.<sup>6</sup>

## II.

### A. Governing Standards

Under Rule 12(b)(6), a court may dismiss a complaint for “failure to state a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). To survive a motion to dismiss under Rule 12(b)(6), the plaintiff must plead “enough facts to state a claim to relief that is plausible on

---

<sup>2</sup> “Bankruptcy Code” or “Code” refers to the United States Bankruptcy Code located at Title 11 of the United States Code. All Code sections hereinafter will refer to the Bankruptcy Code unless specifically noted otherwise.

<sup>3</sup> The Complaint asserts that counsel for Johnson notified Regions Bank of the prior discharge and requested that it withdraw its proofs of claim. (Compl. ¶¶ 13-14). Regions Bank did not withdraw its proofs of claim, and three weeks later the Debtor filed this adversary proceeding. Subsequent to the filing of this adversary proceeding, Regions Bank withdrew the proofs of claim at issue.

<sup>4</sup> The Complaint seeks actual damages, injunctive relief, reasonable attorney fees, punitive damages costs and other appropriate relief. (Compl. ¶ 18).

<sup>5</sup> Prior to Johnson’s instant case filed under Chapter 13, *In re Johnson*, No. 11-52647-KMS (Bankr. S.D. Miss. Filed Nov. 15, 2011), Johnson received a discharge under Chapter 7 of the Bankruptcy Code. *In re Johnson*, No. 10-51805-NPO (Bankr. S.D. Miss. discharged Dec. 1, 2010). The parties do not dispute that the debt of Regions Bank that is the subject of this adversary proceeding was discharged in Johnson’s Chapter 7 case.

<sup>6</sup> The facts are not in dispute. In its Motion to Dismiss, Regions Bank acknowledges that it was listed as a creditor in Johnson’s prior bankruptcy case, the bank had actual knowledge and notice that Johnson received a discharge for the debts, it filed proofs of claim for the discharged debts in the pending bankruptcy case, and it withdrew its two proofs of claim on June 19, 2012. (Motion to Dismiss, at ¶ 2).

its face.” *Hale v. King*, 642 F.3d 492, 498 (5th Cir. 2011) (citing *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) quoting *Bell v. Atl. Corp. v. Twombly*, 550 U.S. 554, 570 (2007)). The Court must determine, “in the light most favorable to the plaintiff, whether the complaint states any valid claim for relief.” *Cinel v. Connick*, 15 F.3d 1338, 1341 (5th Cir. 1994). All facts pled must be specific, not merely conclusory. *Guidry v. Bank of LaPlace*, 954 F.2d 278, 281 (5th Cir. 1992). All well-pleaded allegations contained in the plaintiff’s complaint must be accepted by the court as true. *Albright v. Oliver*, 510 U.S. 266, 268 (1994). When evaluating Rule 12(b)(6) motions, the Court should not dismiss “unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957). The single issue before the Court is whether there is a private right of action for a violation of the discharge injunction.

#### **B. Court’s Authority to Enforce the Discharge Injunction of § 524**

Regions Bank cites *Pertuso v. Ford Motor Credit Co.*, 233 F.3d 417 (6th Cir. 2000), for the proposition that there is no private right of action under § 524 and that § 105 cannot be invoked to remedy violations of the discharge injunction. *Pertuso* is not binding on this Court; moreover, courts within the Fifth Circuit have recognized debtors’ right to seek relief for violations of the discharge injunction. *Rodriguez v. Countrywide Home Loans, Inc. (In re Rodriguez)*, 396 B.R. 436, 456 (Bankr. S.D. Tex. 2008) (“Supreme Court and Circuit Court precedents have established debtors’ right to seek relief for violations of . . . the discharge injunction”).

Whether § 524 creates a private right of action is largely irrelevant because the Court may exercise its equitable powers conferred by § 105 to enforce the discharge injunction. *Ins. Co. of N. Am. v. NGC Settlement Trust & Asbestos Claims Mgmt. Corp. (In re Nat’l Gypsum*

Co.), 118 F.3d 1056, 1063 (5th Cir. 1997) (discharge injunction granted by § 524(a) is substantive right conferred by Bankruptcy Code often enforced by motion for contempt) (collecting cases); see *Cadles Grassy Meadows II, LLC v. Gervin (In re Gervin)*, 300 F. App'x 293, 301 (5th Cir. 2008); see also *Placid Ref. Co. v. Terrebonne Fuel & Lube, Inc. (In re Terrebonne Fuel & Lube, Inc.)*, 108 F.3d 609, 613 (5th Cir. 1997) (*aff'g* bankruptcy court's use of civil contempt power under § 105 to impose sanctions and to compensate debtor for damages suffered as result of violation of post-confirmation discharge injunction under § 1141 as both necessary and appropriate to carry out provisions of bankruptcy code). Although not itself creating a private right of action, § 105 “authorizes a bankruptcy court to fashion such orders as are necessary to further the purposes of the substantive provisions of the Bankruptcy Code.” *U.S. v. Sutton*, 786 F.2d 1305, 1307 (5th Cir. 1986).

Regions Bank argues that this case is analogous to *Brown v. American Home Mortgage Servicing, Inc. (In re Brown)*, Adv. No. 10-01210-NPO, 2012 WL 3150320, at \*12 (Bankr. N.D. Miss. July 6, 2012), in which the bankruptcy court refused to use its § 105 powers to create a private right to damages for the filing of a false proof of claim. In *Brown*, the debtors sought damages and legal fees for the filing of a false proof of claim and also for an alleged violation of § 506 of the Code. The bankruptcy court dispensed with the defendant's argument that § 506 does not create a private right to damages, reasoning that the determination was irrelevant because § 105(a) is a basis for awarding sanctions for violation of § 506. *Brown*, 2012 WL 3150320, at \*10-11. Regarding the claim for damages arising from the filing of a false proof of claim, the court refused to create a private cause of action using its § 105 powers because there was no underlying statute for the court to enforce through its equitable powers. *Id.* at \*12 (many courts have found that § 105 does not create private right of action for creditors filing false proof

of claim; courts cannot use § 105 to create substantive rights that do not exist under the Code). Unlike *Brown*, as the Debtor correctly notes, the issue in this case is not the filing of a false proof of claim but, rather, a violation of the discharge injunction. The allegation of a violation of § 524 is an “underlying statute” to which the Court’s equitable powers under § 105 can attach.

In *Bessette v. Avco Financial Services, Inc.*, 230 F.3d 439, 444 (1st Cir. 2000), the First Circuit was faced with the same defense raised by Regions Bank—that § 524 does not create a private cause of action. The First Circuit rejected the defendants’ argument holding that the plaintiffs could bring private causes of action for violations of the Code that create or enforce important rights. *Id.* at 444-45. The *Bessette* Court reasoned:

As this Court has previously recognized, “[s]ection 105(a) empowers the bankruptcy court to exercise its equitable powers—where ‘necessary’ or ‘appropriate’—to facilitate the implementation of other Bankruptcy Code provisions.” *Noonan v. Secretary of Health & Human Servs. (In re Ludlow Hosp. Soc’y, Inc.)*, 124 F.3d 22, 27 (1st Cir.1997); *see also SPM Mfg. Corp. v. Stern (In re SPM Mfg. Corp.)*, 984 F.2d 1305, 1311 (1st Cir.1993); *In re G.S.F. Corp.*, 938 F.2d 1467, 1475 (1st Cir.1991). While it is true that the considerable discretion conferred on courts sitting in bankruptcy by § 105 is not unlimited, in that it is not “ ‘a roving commission to do equity,’ ” *Noonan*, 124 F.3d at 27 (quoting *Chiasson v. J. Louis Matherne & Assocs.*, 4 F.3d 1329, 1334 (5th Cir.1993)), a court is well within its authority if it exercises its equitable powers to enforce a specific code provision, *see id.*; *SPM MFG.*, 984 F.2d at 1311, such as § 524. Thus, § 105 does not itself create a private right of action, but a court may invoke § 105(a) “if the equitable remedy utilized is demonstrably necessary to preserve a right elsewhere provided in the Code,” *Noonan*, 124 F.3d at 28, so long as the court acts consistent with the Code and does not alter the Code’s distribution of other substantive rights, *see id.*; *SPM Mfg.*, 984 F.2d at 1311.

. . . § 105 provides a bankruptcy court with statutory contempt powers, in addition to whatever inherent contempt powers the court may have. *See In re Hardy*, 97 F.3d at 1389; *In re Elias*, 98 B.R. 332, 337 (N.D.Ill.1989); *Cherry, III v. Arendall (In re Cherry, III)*, 247 B.R. 176, 186-87 (Bankr.E.D.Va.2000); *Matthews v. United States (In re Matthews)*, 184 B.R. 594, 598 (Bankr.S.D.Ala.1995). Those contempt powers inherently include the ability to sanction a party. *See In re Hardy*, 97 F.3d at 1389-90 (recognizing that courts’ statutory contempt powers must include the award of monetary and other forms of relief “to the extent such awards are necessary and appropriate to carry out the provisions of the Bankruptcy Code”); *Cherry*, 247 B.R. at 187 (“The measure of the court’s power

in civil contempt proceedings is determined by the requirements of full remedial relief.”).

Against this background it is clear . . . that a bankruptcy court is authorized to invoke § 105 to enforce the discharge injunction imposed by § 524 and order damages . . . if the merits so require. **Consistent with this determination, bankruptcy courts across the country have appropriately used their statutory contempt power to order monetary relief, in the form of actual damages, attorney fees, and punitive damages, when creditors have engaged in conduct that violates § 524.** See, e.g., *In re Hardy*, 97 F.3d at 1389-90; *In re Elias*, 98 B.R. at 337; *Cherry*, 247 B.R. at 191; *In re Arnold*, 206 B.R. 560, 568 (Bankr.N.D.Ala.1997); *Wiley v. Mason (In re Wiley)*, 224 B.R. 58, 66 (Bankr.N.D.Ill.1998) (denying motion to dismiss), *vacated on other grounds*, 237 B.R. 677 (Bankr.N.D.Ill.1999) (finding class representative inadequate because she suffered no injury); *Matthews*, 184 B.R. at 599-601; *In re Bowling*, 116 B.R. 659, 664-65 (Bankr.S.D.Ind.1990); cf. *In re Rosteck*, 899 F.2d 694, 697 (7th Cir.1990) (affirming sanction for violation of § 524 without reference to § 105 contempt powers). Therefore, we hold that § 524 is enforceable through § 105. See *Malone*, 245 B.R. at 395.

230 F.3d at 444-45 (emphasis added).

This Court agrees with the analysis of the First Circuit in *Bessette* and holds that a bankruptcy court is authorized to invoke § 105 to enforce the discharge injunction. See *In re Rodriguez*, 369 B.R. at 457-58 (adopting *Bessette* rationale; court need not address four factors in *Cort v. Ash* because § 105 empowers court to enforce discharge injunction and order damages); see also *Harris v. Washington Mutual Home Loans, Inc. (In re Harris)*, 297 B.R. 61 (Bankr. N.D. 2003), *aff'd* 312 B.R. 591 (N.D. Miss. 2004) (discussing and citing *Bessette* with approval).

In sum, § 105 empowers the Court to award a “broad range of remedies, including any damage remedy available in a private cause of action” to compensate a debtor for damage suffered from a creditor’s violation of the discharge injunction. See *Rojas v. Citi Corp Trust Bank FSB (In re Rojas)*, Adv. No. 09-07003, 2009 WL 2496807, at \*7 (Bankr. S.D. Tex. Aug. 12, 2009) (citing *Placid Ref. Co. v. Terrebone Fuel & Lube, Inc. (In re Terrebonne Fuel & Lube*,

*Inc.*), 108 F.3d 609, 613 (5th Cir. 1997) and rejecting defendant's argument that court's § 105 power is limited to civil contempt sanctions). Because the Complaint is essentially a request for damages under § 105, the motion to dismiss should be denied. *See In re Motichko*, 395 B.R. 25, 30-33 (Bankr. N.D. Ohio 2008) (denying motion to dismiss adversary seeking damages for violation of discharge injunction because court may enforce § 524 through its § 105 powers; dismissal on procedural grounds would elevate form over substance); *see also In re Bryant*, 340 B.R. 569, 573 (Bankr. N.D. Tex. 2006) ("bankruptcy court has discretion to treat a contested matter as an adversary proceeding pursuant to Fed. R. Bankr. P. 9014(c)").

### **C. Filing Proofs of Claim**

Having determined that § 105 empowers a court to impose sanctions for violations of discharge injunctions, the Court must determine, assuming all facts in the complaint as true, whether the allegations state a claim for which relief may be granted. Pursuant to § 524 of the Code, an order discharging a debt in a bankruptcy case "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." § 524(a)(2). The discharge injunction is broad and prohibits any act taken to collect a discharged debt as a personal liability of a debtor. *Collier on Bankruptcy P 524.02[2]* (Alan N. Resnick & Henry J. Sommer eds., 16th ed.). The Bankruptcy Court for the Northern District of Mississippi has at least implicitly recognized that the filing of a proof of claim for a discharged debt may constitute a violation of the discharge injunction. *Gilliland v. Capital One Bank (In re Gilliland)*, Adv. No. 07-1089-DHW, 2011 WL 4760040, at \*2-3 (Bankr. N.D. Miss. Oct. 7, 2011) (denying summary judgment against debt management company that filed a proof of claim, which was later withdrawn after an adversary complaint had been filed, seeking to collect a previously discharged debt); *Gilliland*

*v. Capital One Bank (In re Gilliland)*, 474 B.R. 482, 496-97 (Bankr. N.D. Miss. 2012) (denying motion for class certification but implicitly recognizing that filing of proof of claim that was previously discharged may warrant monetary sanctions); *but see Clayton v. Roundup Funding, LLC (In re Clayton)*, No. 09-03379-FLK13, 2010 WL 4008335, at \*3-5 (Bankr. E.D. Wash. Oct. 12, 2010) (§ 524(a) injunction does not encompass filing of claim because such act does not personally target debtor or debtor's property; if creditor files disputed and unenforceable claim, Code authorizes debtor to object to claim; if claim abuses judicial process, court can impose sanctions); *In re Surprise*, 342 B.R. 119, 122 (Bankr. N.D.N.Y. 2006) (filing proof of claim not action taken outside jurisdiction of bankruptcy court and did not violate § 524(a); appropriate remedy available was to file objection to proof of claim).<sup>7</sup>

The Complaint alleges that even after counsel for Johnson informed Regions Bank about the discharged debt and requested that it withdraw the proofs of claim, the bank failed to act, causing Johnson "mental distress and emotional anguish" and attorney fees and costs. In fact, Regions Bank did not withdraw the proofs of claim until after this adversary proceeding was initiated. Johnson has plead sufficient facts to survive dismissal under Rule 12(b)(6).

**IT IS THEREFORE ORDERED** that, for the reasons stated herein, the Motion to Dismiss is not well taken and should be and is hereby **DENIED**.

**SO ORDERED.**



Katharine M. Samson  
United States Bankruptcy Judge

Dated: March 26, 2013

---

<sup>7</sup> Regardless of whether the filing of a proof of claim for a discharged debt is considered a violation of the discharge injunction, the Court is authorized to use its § 105 powers to remedy an abuse of the proofs of claim process. *See In re Rojas*, 2009 WL 2496807, at \*3 (citing *Campbell v. Countrywide Home loans, Inc.*, 545 F.3d 348, 356 n.1 (5th Cir. 2008)).