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IT IS SO ORDERED.

Dated: March 6, 2017



Jeffery D. Hopkins
Jeffery D. Hopkins
United States Bankruptcy Judge

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

In Re	:	
	:	
TODD ABEL	:	Case No. 15-12292
LILLIAN ABEL	:	Chapter 13
	:	Judge Hopkins
Debtors	:	

ORDER GRANTING DEBTORS' MOTION FOR CONTEMPT

Presently before the Court is the Debtors' Motion for Contempt ("Motion")(Doc 38). The Motion requests that the Court find the creditor, Sprint Corporation (hereinafter "Sprint"), in contempt for violation of the discharge injunction. Sprint did not respond to the Motion. A hearing on the Motion was held on September 23, 2016.

Facts

The Debtors filed the present chapter 13 petition on June 10, 2015. This filing began the Debtors second bankruptcy case. Prior to this case, the Debtors had filed a chapter 13 petition on July 6, 2007 and received a discharge. In the previous case, the Debtors had listed on Schedule F a debt owed to Sprint in the amount of \$325.00 (Case No. 07-13198, Doc 1). Sprint was served with the petition and chapter 13 plan in the first case. However, Sprint did not file a proof of claim in that case. The Debtors completed their plan payments and received a full compliance discharge on April 3, 2009 (Doc 34). Subsequently, Sprint received electronic notice of the discharge (Doc 35).

When the Debtors commenced the present case, they did not list Sprint on the Schedules as a creditor. Sprint, however, filed a proof of claim in the amount of \$623.47 for "services performed." See Claim 12-1. Attached to the claim were two account statements from June 2007 and September 2007. The statements reflect that the account continued to be assessed discontinuation fees and late fees *after* the Debtors' discharge in the first bankruptcy case.

Subsequently, the chapter 13 Trustee filed a "Notice Regarding Claim Not Scheduled For Sprint Corporation Claim 12" ("Notice")(Doc 19). The Notice informed the Debtors that a failure to object to the claim within 30 days would result in payment of the claim under the chapter 13 plan. The Debtors objected to the proof of claim and asserted that the claim was an attempt to collect a discharged debt (Doc 27). Sprint did not respond to the objection. On November 3, 2015, the Court entered an order sustaining the Debtors' objection and disallowed the claim (Doc 30).

Thereafter, the Debtors filed this Motion seeking attorney's fees, actual and punitive damages, and any other relief to which they may be entitled against Sprint. The Motion also requests the Court to enjoin Sprint from further collection efforts, to direct Sprint to reconcile the couple's existing accounts and to remove any unwarranted fees

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or charges assessed against the Debtors related to the discharged debt.

Prior to the hearing, the Debtors' attorney filed a trial brief. In the brief the Debtors have asked for additional relief in the form of compensatory and non-compensatory damages. The Debtors have based the request for compensatory damages on the emotional distress Mr. Abel allegedly suffered as the result of Sprint's conduct and the attorney's fees incurred when filing the objection to claim and prosecuting the Motion. Finally, the Debtors have requested that the Court impose a "mild" non-compensatory sanction against Sprint for its violation of the discharge injunction (Doc 43).

Contempt Hearing

At the hearing, Debtors' counsel presented his case, highlighting the events mentioned above. Mr. Abel testified, that after receiving the discharge on April 3, 2009 in the first case, Sprint continued to send invoices and to make phone calls requesting payment. Mr. Abel testified that he became upset when he received the Notice from the chapter 13 Trustee in the second bankruptcy and that he felt confused and powerless. At the time, he believed that the Notice meant that Sprint and the Chapter 13 Trustee were accusing the couple of dishonesty in the current case and that their effort to obtain relief from creditors was in serious jeopardy.

Mr. Abel further testified that the filling of the proof of claim by Sprint and the Notice by the chapter 13 Trustee in this case exacerbated his ongoing anxiety. Mr. Abel testified that he reported the Notice and his feelings of general anxiety about bills to his psychologist who he sees every six months. Mrs. Abel oversees her husband's care. Mrs. Abel substantially corroborated her husband's testimony. In September 2015, she recalled Mr. Abel's condition worsening and having to increase his medications for anxiety. Mrs. Abel added that she also witnessed an increase in Mr. Abel's confusion and angst when the couple received the chapter 13 Trustee's Notice.

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However, the Debtors did not introduce any medical evidence at the hearing establishing a causal connection between Mr. Abel's medical treatment for anxiety and Sprint's filing of its proof of claim. Nor did the Debtors proffer testimony from a psychologist or other mental health professional concerning Mr. Abel's medical condition. It would have been helpful to the Debtors' claim had they produced medical records demonstrating that Mr. Abel's dosage for medication or physician visits increased about the same time that Sprint's proof of claim was filed in the second bankruptcy case. Instead, the Court has only the Debtors' testimony to rely upon as evidence that Sprint's filing of a proof of claim and the Notice had any deleterious effect on Mr. Abel's health. In addition to an increase in anxiety, both Mr. and Mrs. Abel testified that Sprint and their other creditors from the first case reported the discharged debts to various credit agencies. The Debtors claim that these reports frustrated their plans to buy a home and forced them to pay a higher interest rate on a vehicle loan obtained.

At the conclusion of the hearing the Court directed Debtors' counsel to file a supplemental brief outlining the attorney's fees and expenses incurred in prosecuting the Motion. The supplemental brief indicates an expenditure of \$3,175.00 for attorney's fees and expenses.

Law and Analysis

After a debtor completes plan payments in a Chapter 13 bankruptcy, she is entitled to a discharge, pursuant to 11 U.S.C. § 1328. When a debtor receives a discharge, a discharge injunction arises and takes the place of the automatic stay. *Green v. Welsh*, 956 F.2d 30, 32 (2d Cir. 1992). The discharge "operates as an injunction against the commencement or continuation of any action, the employment of process, 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). The discharge injunction effectively prohibits creditors from seeking repayment of debts discharged at the completion of a case

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commenced under Title 11.

When a creditor violates the discharge injunction the debtor may file a motion for contempt seeking monetary damages. See *Pertuso v. Ford Motor Credit Co.*, 233 F.3d 417 (6th Cir. 2000) (a debtor does not have a private right of action to recover damages for a violation of the discharge injunction and therefore may not institute an adversary proceeding for that purpose)¹. In the context of a motion for contempt, a court may impose sanctions if a debtor successfully demonstrates, by clear and convincing evidence, that the discharge injunction was violated and that the violation was done willfully or with actual knowledge of the injunction. *In re Gavitt*, 514 B.R. 243 (Bankr. S.D. Ohio 2014).

Sprint's Conduct Violated the Discharge Injunction

The threshold question which must be resolved, is whether the creditor's actions were intentional and if they were done willfully or with knowledge of the discharge injunction. *McCool v. Beneficial (In re McCool)*, 446 B.R. 819 (Bankr. N.D. Ohio 2010). It is clear from the evidence presented at the hearing that Sprint violated the discharge injunction by attempting to collect a discharged debt. When the Debtors received the discharge in the previous bankruptcy case, it included the debt owed to Sprint. Sprint received notice of the discharge on or about April 3, 2009. (Case No. 07-13198, Doc 35). Despite receiving that notice, Sprint filed a proof of claim in the present case, signaling an attempt to collect on a debt from the Debtors that had already been discharged.

The facts before the Court are nearly identical to those in *Green Point Credit, LLC v. McLean (In re Mclean)*, 794 F.3d 1313 (11th. Cir. 2015). In that case, the Eleventh Circuit found that a creditor willfully violated the discharge injunction when it

¹ In a similar case, Judge Buchanan dismissed an adversary proceeding by a debtor seeking damages from a creditor based on a violation of the discharge injunction. See *Sandra Marshall v. PNC Bank, N.A. (In re Marshall)*, Ch. 7 Case No. 09-10657, Adv. No.10-1046, slip op. at 43 (Bankr. S.D. Ohio August 24,

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filed a proof of claim for a debt that had been previously discharged. *Also see, In re Nordlund*, 494 B.R. 507 (Bankr. E.D. Cal. 2011)(A bankruptcy court found a creditor violated the discharge injunction after it sent post-discharge letters to the debtor indicating that payments should be made as soon as possible without any acknowledgment within the letter that the debt was discharged.). In *Green Point Credit* the court reasoned that filing a proof of claim for a debt previously discharged is "plainly an act to collect, recover, or offset the discharged debt as a personal liability. . . ." *Green Point Credit, LLC v. McLean* at 1322.

This Court agrees with the holding in *Green Point Credit*. Here, Sprint intentionally filed a proof of claim seeking to recover its discharged debt as a personal liability from the Debtors. This was done *after* Sprint received notice of the discharge on or about April 3, 2009, in the first case which included Sprint's debt. Sprint's filing of a proof of claim in the present case created for the Debtors "the kind of pressure to which the statute is sensitive." *Green Point Credit, LLC v. McLean* at 1323 ("Given the effect of [the creditor's] proof of claim on the [debtors'] bankruptcy, the bankruptcy court correctly concluded that [the creditor] violated the discharge injunction."). Thus, under the circumstances, the Debtors have met their burden of proving by clear and convincing evidence that Sprint violated the discharge injunction.

Damages

Having met the initial burden of proving that Sprint violated the discharge injunction, the Court next turns to the Debtors' request for damages. The Debtors seek an order requiring Sprint to pay them compensatory damages for attorney's fees, emotional distress, and for being forced to pay an increased interest rate on a vehicle loan. The Debtors also seek an order directing Sprint to pay a "mild" sanction for its misconduct identified in this case.

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When faced with a contemptible violation of a discharge injunction, courts generally permit an award of damages to the debtor as a sanction. *In re Chambers*, 324 B.R. 326 (Bankr. N.D. Ohio 2005). Under 11 U.S.C. § 105(a), bankruptcy courts have the power to allow debtors to recover attorney's fees as well as actual damages. *Miller v. Chateau Communities, Inc.*, (*In re Miller*), 282 F.3d 874 (6th Cir. 2002). To recover for a discharge injunction violation, the debtor must suffer actual injury that can be substantiated with adequate proof. *In re Martin*, 474 B.R. 789 (B.A.P. 6th Cir. 2012); *In re Gavitt* 514 B.R. 243,251 (Bankr. S.D. Ohio 2014). A debtor must prove her injury by a preponderance of the evidence. *In re Martin*, 474 B.R. at 789. On the other hand, civil contempt damages must be compensatory or designed to coerce compliance. *In re Dyer*, 322 F.3d 1178, 1192 (9th Cir. 2003).

Emotional Distress

In this case, the Debtors rely heavily on *In re Breul*, 533 B.R. 782 (Bankr. C.D. Cal 2015). In *Breul*, the court held that a debtor may recover emotional distress damages despite the lack of corroborating evidence when a creditor engages in *egregious* conduct or "when circumstances may make it so obvious that a reasonable person would suffer significant emotional harm." *In re Breul*, 533 B.R. at 796. According to the Debtors, Sprint's conduct in this case was egregious or, at the very least, was so obviously offensive that it would have caused anyone emotional distress, which under *Breul*, justifies this Court awarding them compensatory damages for a violation of the discharge injunction, without having to supply corroborating medical proof of injury.

Only a handful of courts have allowed debtors to recover damages for emotional distress caused by a creditor's violation of the discharge injunction. The Eleventh Circuit in *Green Point Credit* is one such court. In that case, the court held that a debtor must prove: (1) she suffered significant emotional distress, (2) clearly establish the significant emotional distress, and (3) demonstrate a causal connection between that significant

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emotional distress and the violation of the discharge injunction. *Green Point Credit, LLC v. McLean (In re Mclean)*, 794 F.3d at 1325-26. In a similar case, a court held that a debtor may recover emotional distress damages when the debtor clearly suffered from some appreciable emotional or mental harm and the creditor's actions were severe in nature. *In re Perviz*, 302 B.R. 357, 371 (Bankr. N.D. Ohio 2003). When considering the type of evidence needed to substantiate a claim for emotional distress the *Perviz* court stated:

[T]he greater the extent of the creditor's violation, the less corroborating evidence, including medical testimony, that will be needed to establish that the debtor suffered from an appreciable amount of emotional/mental distress so as to be compensable. The converse is also true, and thus the less severe the creditor's conduct, the more important corroborating evidence will become, particularly medical testimony, to sustain a case for compensatory damages based upon emotional/mental distress.

Id. at 371.

Of the courts that have permitted debtors to recover damages for emotional distress in this context, most require some corroborating medical evidence to support the award. *In re Chambers* 324 B.R. at 331 ("While this Court has permitted the recovery of damages for emotional distress for a creditor's violation of the discharge injunction, such damages are, by their very nature, speculative. And therefore, this Court has required that there must exist some discernable level of corroborating evidence to support such an award.").

Damages based on Post Discharge Collection Phone Calls and Reports to Credit Agencies

Mr. Abel claims to have experienced an emotional reaction to phone calls received from Sprint and the Notice filed by the Trustee. Unlike here, the *Perviz* court found that that the debtor in that case suffered from an appreciable amount of emotional

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distress after a creditor made hundreds of phone calls in an attempt to collect a discharged debt, interrupting the debtor's sleep and the "tranquility of the Debtor's household". *In re Perviz*, 302 B.R. at 371-72. Similarly, the *Breul* court found that the debtor in that case, an eighty-three year old man, living on social security income, had suffered emotional distress after a creditor recorded a judgment lien against his home during the pendency of his bankruptcy case in violation of the automatic stay and, seven years later, had refused to remove the lien after the debt had been discharged unless the debtor made a large payment. *In re Breul*, 533 B.R. 782 (Bankr. C.D. Cal 2015).

The circumstances in this case certainly do not rise to the level of abuse exhibited by the creditor in *Breul*. And, while the Court is troubled by Sprint's conduct in this case, it is not convinced that Mr. Abel suffered a significant or appreciable emotional harm from those actions. It may be true that Sprint made phone calls to the Debtors to collect a discharged debt, however, there is no proof suggesting the calls were voluminous, or occurred at times when it would have been emotionally distressing or disruptive of the Debtors' household tranquility. The Court might have reached a different result had the evidence shown that Sprint's calls occurred late at night or in early mornings, or were disruptive of the Debtors' home life, as happened in *Perviz*. However, nothing in the Debtors' testimony suggested that Sprint's calls to the Debtors were so obnoxious or extreme that they could have caused a reasonable person to become emotionally upset or agitated.

The Debtors also point to an increase in Mr. Abel's anxiety medication following the filing of Sprint's proof of claim as evidence of emotional distress. However, Sprint's filing a proof of claim on a discharged debt, without more, was not so severe as to substantiate a finding of significant emotional harm or that it would obviate the need for medical evidence. Some corroborating medical evidence was needed to establish that Mr. Abel suffered from an appreciable amount of emotional distress stemming from Sprint's conduct. Absent that, there is insufficient evidence linking Mr. Abel's decline in health to Sprint's conduct which would entitle the Debtors to an award of damages for

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emotional distress under the authorities cited.

Next, the Debtors assert that Sprint violated the discharge injunction by reporting its debt to certain credit bureaus or agencies. The Debtors contend that those reports frustrated their attempts to obtain financing on a mortgage loan for a home and forced them to pay a higher interest rate on a vehicle loan. According to the Debtors', Sprint's conduct violated the discharge injunction warranting payment of damages. However, in order for the Debtors to be able to recover damages based on contempt in this context, they would need to prove that Sprint's act of reporting the debt was undertaken with the specific purpose of coercing the debtor into paying. *In re Lohmeyer*, 365 B.R. 746, 750 (Bankr. N.D. Ohio 2007).

Here, the Debtors make no such claim. There was no evidence presented to support the Debtors' claims that Sprint reported inaccurate information to the credit agencies about its discharged debt or that Sprint's reporting was an attempt to collect the discharged debt from them.² "A creditor is under no obligation under the Bankruptcy Code to change the way it reported the status of a loan." *In re Vogt*, 257 B.R. 65, 72 (Bankr. D. Colo. 2000). A debtor's personal obligation to pay the debt is extinguished upon discharge, however, the debt itself remains. *In re Irby*, 337 B.R. 293, 295 (Bankr. N.D. Ohio 2005)(court rejected a similar claim by a debtor that a creditor's reporting of a debt which forced them to pay a higher mortgage interest rate constituted a violation of the discharge injunction).

Based on the evidence presented, the Court cannot conclude that the mere act by Sprint of reporting the discharged debt to credit agencies gives rise to a claim for sanctions predicated on a violation of the discharge injunction.

² 15 U.S.C. §1681 allows a creditor to report a debtor's bankruptcy filing to credit agencies for up to ten years but also requires that report to be accurate. See 15 U.S.C. § 1681c(a)(1)("Cases under Title 11 or under the Bankruptcy Act that, from the date of entry of the order for relief or the date of adjudication, as the case may be, antedate the report by more than 10 years") and 15 U.S.C. § 1681e(b)(" Whenever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates.").

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Attorneys Fee's

Although the Court is unwilling to sanction Sprint and award compensatory damages based on emotional distress or Sprint's reporting the discharged debt to credit agencies, payment of actual damages in the form of attorney's fees suffered by the Debtors is warranted. As noted, Sprint violated the discharge injunction in this case by filing a proof of claim seeking payment personally from the Debtors on a discharged debt. A bankruptcy judge has broad discretion in awarding attorney's fees as a sanction stemming from a discharge injunction violation by a creditor. *In re Chambers*, 324 B.R. at 330. Counsel for the Debtors submitted a supplemental memorandum with an itemization of attorney's fees and expenses incurred based on the Debtors' need to object to the proof of claim and to prosecute the contempt Motion. Neither Sprint nor the chapter 13 Trustee filed an objection to the fees requested. The fees contained in the supplemental memorandum filed by the Debtors' counsel appear reasonable based on the number of hours spent, the attorney's hourly rate and the pleadings filed.

Accordingly, Sprint is hereby **ORDERED** to pay **\$3,175.00** to Debtor's counsel.

Non- Compensatory Damages

The Debtors rely on *In re Biery*, 543 B.R. 289,300 (Bankr. E.D. Ky. 2015), in support of their contention that non-compensatory damages are warranted. In *In re Biery*, the court certified a class of debtors under Fed. R. Civ. P. 23 seeking to hold a residential mortgage company in contempt for violations of the discharge injunction. The Debtors point to *In re Biery* for the proposition that, like in that case, this Court should award "mild non-compensatory monetary damages as sanctions for a discharge violation," beyond the reasonable attorney's fees the class action debtors incurred. *In re Biery*, 543 B.R. at 300.

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Based on the totality of circumstances in this case, the Court agrees. Sprint's conduct in this case warrants the imposition of a mild sanction. Sprint intentionally filed a proof of claim seeking to collect a discharged debt from the Debtors, personally. As noted, the Debtors listed Sprint in the schedules in the first bankruptcy case. The Debtors completed the plan payments and received a discharge in that case which included the debt owed to Sprint. Along with all the other creditors listed in the Debtors' schedules, Sprint received electronic notice of the Debtors' discharge on or about April 3, 2009. None of the other creditors whose debts were discharged in the first case have continued to pursue recovery of those debts from the Debtors. Sprint had the presence of mind to file a proof of claim in the present case. However, Sprint has failed to appear at hearings or respond to the contempt Motion.

Non-compensatory sanctions are justified to coerce Sprint to improve its internal communication systems so as to heed notices and orders issued from the bankruptcy courts and to avoid committing future violations of the discharge injunction. When awarding non-compensatory damages, a court must only award damages that ensure compliance with the violated order and the Bankruptcy Code. *In re Dyer*, 322 F.3d 1178, 1192 (9th Cir. 2003); *see also Adell v. John Richards Homes Bldg. Co. (In re John Richards Homes Bldg. Co.)*, 552 Fed.Appx. 401,415 (6th Cir. 2013)("While § 105(a) establishes some punitive sanction power, that power is limited to sanctions that are necessary or appropriate to enforce the Bankruptcy Code"). To do more would impose a punitive sanction with the sole purpose of punishment. *See Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 828-29 (1994).

Based on the foregoing, Sprint is ordered to pay the Debtors **\$500.00** as a sanction for filing the proof of claim on a debt that had been discharged in a prior case and to ensure that Spring will comply in the future with the provisions of the Bankruptcy Code and orders of this Court.

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Conclusion

Sprint violated the discharge injunction when it filed its proof of claim in the current bankruptcy despite receiving notice of the Debtors' April 3, 2009 discharge in the Debtors' previous. Sprint's violation caused the Debtors compensatory and non-compensatory damages. Accordingly, the Debtors' Motion is **GRANTED** and the Debtors are hereby awarded damages in the amount of **\$3,175.00** incurred for attorney's fees and expenses. Sprint is further **ORDERED** to pay a non-compensatory sanction of **\$500.00** to the Debtors to enforce the Bankruptcy Code.

IT IS SO ORDERED.

Copies to:

Default List

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