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UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION

IN RE:

Thomas Richard Bruce

Debtor.

Case No. 00-50556 C-7

ORDER

THIS MATTER came on for hearing before the undersigned bankruptcy judge on October 25, 2000, in Winston-Salem, North Carolina upon the Debtor's Motion for Violation of Discharge by Meritech Mortgage Services, Inc. ("Meritech"). Esten H. Goldsmith appeared on behalf of the Debtor and Michael B. Stein appeared on behalf of Meritech.

JURISDICTION

The court has jurisdiction over the subject matter of this proceeding pursuant to 28 U.S.C. §§ 151, 157 and 1334 and the general Order of Reference entered by the United States District Court for the Middle District of North Carolina on August 15, 1984. This is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2)(A) which this court may hear and determine. Budget Serv. Co. v. Better Homes of Va., Inc., 804 F.2d 289, 292 (4th cir. 1986).

Having fully considered the file in this proceeding, the testimony and demeanor of the witness at the hearing, the applicable law and the arguments of counsel, the court makes the following findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052.

FINDINGS OF FACT

1. The Debtor filed a voluntary petition under Title 11 of the United States Code, Chapter 7, on March 30, 2000, in the United States Bankruptcy Court for the Middle District of North Carolina.
2. The Debtor listed on his schedules a claim by Meritech secured by Real Property located at 131Pintail Court, Concord, North Carolina 28025 (the "Real Property").
3. The Real Property was owned by the Debtor and Johnna G. Bruce. The Debtor and Ms. Bruce were divorced in August 1999, and Ms. Bruce did not file for bankruptcy.
4. The Debtor moved out of the Real Property in April 2000. On or about April 27, 2000, the Debtor, through counsel, notified Meritech in writing that the Debtor had moved from his home and that counsel had the key to the home in her possession.

5. On May 2, 2000, Meritech filed a Motion for Relief from Stay or, in the Alternative, for Adequate Protection.

6. On May 25, 2000, this court issued an Order granting relief from stay to institute and/or complete foreclosure proceedings in accordance with state law under the terms of the Deed of Trust described in the Motion covering property commonly known as 131 Pintail Court, Concord, North Carolina 28025.

7. A discharge order was entered in this case on June 19, 2000 and was served on Meritech on June 21, 2000.

8. On July 21, 2000, Meritech mailed a Mortgage Loan Statement to the Debtor. The statement showed the total amount due was \$9,298.07 but included the following notation:

THIS IS NOT A DEMAND FOR PAYMENT.

Our records indicate your loan is in bankruptcy. Due dates as listed on the above transaction history may differ from your bankruptcy. Please refer to the "Next Due" as stated on the coupon for your current due date.

The "Payment Coupon" at the bottom of the statement showed a "current" payment due in the amount of \$1,362.52. The "Next Due" date on the coupon was August 1, 2000.

9. On August 15, 2000, Meritech mailed a notice of coverage informing the Debtor that Meritech was force placing insurance on the real property. The notice stated as follows:

"Since we did not receive a response from you after informing you that hazard insurance was required on your property, we have purchased hazard insurance coverage in the amount of \$133,758. The annual premium of \$1,616.44 has been charged to your account, and your mortgage payment will increase substantially."

The letter dated August 15, 2000 was written more than three months after the Debtor notified Meritech that he had moved from the home and surrendered the keys to Meritech.

10. On August 18, 2000, Meritech mailed another Mortgage Loan Statement to the Debtor. The statement showed the total amount due was \$10,708.18 and included the following notation:

THIS IS NOT A DEMAND FOR PAYMENT.

Our records indicate your loan is in bankruptcy. Due dates as listed on the above transaction history may differ from your bankruptcy. Please refer to the "Next Due" as stated on the coupon for your current due date.

The "Payment Coupon" at the bottom of the statement showed a "current" payment due in the

amount of \$1,362.52. The "Next Due" date on the coupon was September 1, 2000.

11. On or about August 23, 2000 and September 27, 2000, Meritech sent identical letters to the Debtor stating:

"Due to your failure to honor your commitment in making your monthly mortgage payments, we have initiated foreclosure proceedings on your mortgage loan. Meritech has given this action careful consideration.

Our goal is to help you keep your home; however, we must have your cooperation. You must contact our office immediately to discuss your options."

Again, these letters were sent three to four months after the Debtor notified Meritech that he had moved from his home and surrendered the keys.

12. On or about August 30, 2000, Morris, Schneider & Prior, acting as agent for Meritech, sent a letter to the Debtor indicating that they had been retained to institute foreclosure proceedings. The letter stated that "[t]he debt secured by said Note and Deed of Trust is hereby declared due and payable. . ." The letter concluded by stating "[t]his letter is an attempt to collect a debt and any information obtained by virtue of it will be used for that purpose."

13. The Debtor received numerous telephone calls at his place of employment from representatives of Meritech inquiring as to the status of his bankruptcy. On each occasion, the Debtor directed the caller to contact his attorney.

14. Meritech did not present any evidence or testimony at the hearing.

DISCUSSION

The discharge injunction as provided in section 524 of the Bankruptcy Code enjoins the commencement or continuation of actions to collect debts discharged in bankruptcy. 11 U.S.C. § 524. Section 524 (a) (2) states that a discharge in a case under this title:

operates as an injunction against the commencement or continuation of an action, the employment of a 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 [.]

11 U.S.C. § 524 (a)(2). For a creditor to violate the discharge injunction of 11 U.S.C. § 524 (a), the underlying debt in question must have been discharged. In re Kern, 207 BR 118 (Bankr. D.S.C. 1996); In re Toussaint, 43 C.B.C.2d 1580 (Bankr. E.D.N.C. 2000). "The purpose of the discharge injunction is to effectuate one of the primary purposes of the Bankruptcy Code: to afford the debtor a financial fresh start and to insure that, once a debt is discharged, the debtor will not be pressured in any way to repay it." Watkins v. Guardian Loan Company of

Massapequa, Inc.(In re Watkins), 240 B.R. 668, 675 (Bankr. E.D.N.Y. 1999), citing In re Borowski, 216 B.R. 922, 924 (Bankr. E.D. Mich. 1998).

In this case, Meritech repeatedly communicated with the Debtor after the discharge in an attempt to collect a discharged debt. The discharge order was entered on June 19, 2000. Meritech telephoned the Debtor at work and continued to send the Debtor mortgage loan statements. The mortgage loan statements dated July 21, 2000 and August 18, 2000 acknowledged the bankruptcy and indicated that they were not demands for payment; however, both statements then directed the Debtor to refer to the payment coupons for the "current due date". The payment coupons showed current balances due on the first day of the following month. Furthermore, the Debtor moved from the property in April 2000. Meritech continued to send the Debtor requests for payment and numerous notices indicating that Meritech was trying to help the Debtor keep his home, after Meritech received notice that the Debtor had moved.

The court recognizes that a creditor has the right to enforce a valid lien against property for which it holds a Deed of Trust, and it is entitled to give statutory notice required under state law. The actions of Meritech went well beyond the statutory requirements of foreclosure in North Carolina and violated the discharge injunction.

Although section 524 does not explicitly authorize monetary damages for violation of a discharge injunction, the court may award actual damages pursuant to the statutory contempt powers set forth in 11 U.S.C. § 105. In re Hardy, 97 F.3d 1384 (11th Cir. 1996); Thomas v. Resolution Trust Corporation (In re Thomas), 184 B.R. 237 (Bankr. M.D.N.C. 1995). Section 105 provides that "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105 (a). The Fourth Circuit has held that section 105 authorizes the bankruptcy court to find a party in civil contempt. In re Walters, 868 F.2d 665, 668 (4th Cir. 1989)(order holding party in contempt for failure to comply with previous order of the court was appropriate in carrying out the administration of the estate and thus authorized by section 105 (a)).

In order to be found in civil contempt pursuant to section 105, "the offending party must have knowingly and willfully violated a definite and specific court order." Thomas v. Resolution Trust Corporation (In re Thomas), 184 B.R. at 241. In this case, Meritech was served with a copy of the discharge order on June 21, 2000. Meritech's repeated efforts to collect payment from the Debtor thereafter were knowing and willful violations of the discharge injunction.

At the hearing, counsel for Meritech argued that the unpublished decision by Judge J. Craig Whitley in In re Emory supports Meritech's position that the communications were not willful violations of the discharge order. In re Emory, No. 99-40608 (Bankr. W.D.N.C. Sept. 14, 2000). In that case, which involved alleged violations of the automatic stay pursuant to 11 U.S.C. § 362, the creditor sent one statement to the Debtor which showed an adjustment to the account after proceeds from the sale of collateral were applied. The statement showed a previous balance of \$66,459.78, an adjustment of \$47,376.00, and an account balance of \$19,083.78. The statement did not indicate that any payment was due nor did it include a payment due date. Judge Whitley denied the Debtor's motion for sanctions and found that the receipt was "purely

informational” and made “no demand for payment or any threat for failure to pay.”

The case at hand involves a completely different set of facts. Meritech sent multiple written statements to the Debtor indicating that payment was due. Representatives of Meritech continued to telephone the Debtor at his place of employment, even after the Debtor referred the callers to his bankruptcy attorney. The communications with the Debtor in this case were not merely informational. Nor does this case involve a single communication inadvertently mailed to a debtor. See, In re Hamrick, 175 B.R. 890 (Bankr. W.D.N.C. 1994) (inadvertent mailing of single dunning letter was not a willful violation of the automatic stay). Meritech knowingly, willfully, and repeatedly violated the discharge injunction.

Therefore, Meritech is found to be in civil contempt of the court’s order and is required to pay actual damages to the Debtor in the amount of \$180.00, which represents the three (3) hours the Debtor was required to miss work at his regular hourly rate of \$60.00 per hour.

In addition to actual damages, attorney’s fees may be awarded against a party that violates a discharge injunction upon a finding of contempt. Id., see also, In re Barbour, 77 B.R. 530 (Bankr.E.D.N.C. 1987); Kimco Leasing, Inc. v. Knee, 144 B.R. 1001 (N.D. Ind. 1992); In re Schatz, 122 B.R. 327, 328 (N.D. Ill. 1990). The court has reviewed the billing statements submitted by Debtor’s counsel for legal services performed in association with prosecuting this Motion. The court finds that Debtor’s counsel is entitled to reasonable attorney’s fees in the amount of \$1,500.00 for 12.0 hours at the rate of \$125.00 per hour.

CONCLUSION

The court finds Meritech in civil contempt for knowingly and willfully violating the discharge injunction in this case by continuing to send the Debtor requests for payment and telephoning the Debtor at his place of employment. The Debtor is entitled to recover actual damages and reasonable attorney’s fees.

Therefore, IT IS ORDERED, ADJUDGED AND DECREED that Meritech is in civil contempt for knowingly and willfully violating the discharge injunction and is required to pay monetary damages in the amount of \$180.00 to the Debtor, Thomas Richard Bruce, and attorney’s fees in the amount of \$1,500.00 to the Debtor’s attorney, Esten H. Goldsmith. It is further ORDERED, ADJUDGED AND DECREED that payment shall be made within ten (10) days after the entry of this order.

This the 7 day of November, 2000.

CATHARINE R. CARRUTHERS

Catharine R. Carruthers
United States Bankruptcy Judge