

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA  
Augusta Division

IN RE:	)	Chapter 7 Case
	)	Number <u>98-10271</u>
TERRY WILLIAMS	)	
SARAH E.R. WILLIAMS	)	
_____	)	
_____ Debtors	)	
_____	)	
TERRY WILLIAMS	)	FILED
_____ Plaintiff	)	at 2 O'clock & 25 min. P.M.
	)	Date: 9-3-99
vs.	)	
	)	Adversary Proceeding
SEARS, ROEBUCK & CO.	)	Number <u>98-01079A</u>
	)	
Defendant	)	
_____	)	

**ORDER**

Terry Williams ("Plaintiff"), brought this adversary proceeding against Sears, Roebuck & Company ("Defendant") seeking damages, attorney's fees, and punitive damages for alleged violations of 11 U.S.C. §524, §362, and the Truth in Lending Act 15 U.S.C. §§1601 et seq. ("TILA"). Plaintiff requests this court grant class certification for this proceeding. By motion, Defendant

seeks dismissal of Plaintiff's class action claim pursuant to Federal Rules of Civil Procedure ("F.R.C.P.") 23(d)(4). Defendant's motion for dismissal of Plaintiff's class action claims is granted in part and denied in part.

The facts, as relevant to the motion now before me, are as follows. Plaintiff filed a chapter 7 bankruptcy on January 30, 1998. On the date of the filing, Plaintiff owed a debt to Defendant in the amount of \$627.80. Defendant and Plaintiff entered into a reaffirmation agreement as to the debt owed. On March 4, 1998 the reaffirmation agreement was filed with this court. Plaintiff alleges that Defendant attempted to cancel the reaffirmation agreement by letter dated March 12, 1998. On May 27, 1998, Plaintiff was granted a discharge and the underlying case, case number 98-10271, was closed on June 5, 1998.

By motion dated July 30, 1998, Plaintiff requested that his chapter 7 case be reopened. By Order dated August 12, 1998 Plaintiff's motion was granted and this adversary proceeding was filed on August 13, 1998. The original complaint alleged that Defendant violated the discharge injunction of §524 through its attempt to cancel the previously filed reaffirmation agreement. Pursuant to leave of court, Plaintiff amended his complaint on November 30, 1998 to include a violation of the automatic stay of

§362 and a violation of TILA.

Plaintiff seeks to certify a class pursuant to F.R.C.P. 23, as incorporated by Federal Rule of Bankruptcy Procedure ("F.R.B.P.") 7023. F.R.C.P. 23(a) & (b) states:

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law

or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Plaintiff contends that Defendant has regularly engaged in the practice of rescinding reaffirmation agreements with its debtors in the same manner in which Plaintiff alleges Defendant attempted to rescind the subject reaffirmation agreement. Defendant seeks to dismiss the class action claims pursuant to F.R.C.P. 23(d)(4), which states:

In the conduct of actions to which this rule applies, the court may make appropriate orders: . . . (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly.

Typically, a motion to dismiss is held to the standard of F.R.C.P. 12(b)(6) so that a dismissal will be granted only where it appears beyond doubt that no set of facts could support a plaintiff's claims for relief. See Conley v. Gibson, 355 U.S. 41,

47, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957); Linder v. Portocarrero, 963 F.2d 332, 334 (11th Cir.1992). However, the dismissal motion before me concerns the sole legal question of whether the complaint, as pled, could conceivably satisfy the requirements for class certification. "Merits of claims generally are not to be examined as part of the class claim analysis. . . ." In re Wiley, 224 B.R. 58, 73 (Bkrtcy.N.D.Ill. 1998). Therefore, I accept the facts pled in the complaint as true and construe them in the light most favorable to Plaintiff for the sole purpose of acknowledging the possibility that the alleged violations took place. However, as to my decision on the certification of class question, I do not address the merits of the claims.

Plaintiff first alleges that the attempted rescission of the reaffirmation agreement by Defendant is a violation of §524. The Bankruptcy Code does not create a private cause of action for a §524 violation. Pereira v. First North American National Bank, 223 B.R. 28, 30 (N.D.Ga. 1998). However, "the modern trend is for courts to award actual damages for violation of §524 based on the inherent contempt power of the court." In re Hardy, 97 F.3d 1384, 1389 (11<sup>th</sup> Cir. 1996) (citations omitted). "Civil contempt is the normal sanction for violation of the discharge injunction." 4 Collier on Bankruptcy ¶524.02[2][c] p.524-18 (Lawrence P. King ed.,

15<sup>th</sup> ed. rev. 1998); see also In re Turner 221 B.R. 920, 925 (Bkrtcy.M.D.Fla. 1998). This court may impose a sanction under §105(a)<sup>1</sup> upon “[a] finding of civil contempt . . . based on clear and convincing evidence that a court order was violated.” Jove Engineering, Inc. v. I.R.S., 92 F.3d 1539, 1545 (11<sup>th</sup> Cir. 1996) (citations omitted). Even though this court has the power to award damages for violations of §524 by way of either inherent contempt powers or the statutory contempt powers of §105, Plaintiff does not allege a claim arising from civil contempt. Therefore, because no private right of action exists under §524, and Plaintiff has failed to allege a claim arising under civil contempt, Plaintiff’s complaint alleging a §524 violation is dismissed.

Plaintiff cites just one case where in a class was certified for purposes of a §524 violation. The case of In re Wiley, 224 B.R. 58 (Bkrtcy.N.D.Ill. 1998), involved a defendant that was using a reaffirmation agreement which contained an illegal provision and the failure to file the reaffirmation agreement with

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<sup>1</sup> 11 U.S.C. §105(a):

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

the court. The plaintiff sought class certification for damages resulting from the illegal reaffirmation agreement. The court ruled that a class may be certified for injunctive and declaratory purposes only and that any issue as to damages arising from Defendant's contemptuous conduct must be pled and proven by the individual debtors, based upon their individual circumstances, before the bankruptcy judge presiding in and having jurisdiction over their individual case. Wiley, 224 B.R. at 79. The court certified a class for limited injunctive and declaratory relief, but declined to certify as to damages because such an issue fails to meet the requirement of commonality, an element of certification required under F.R.C.P. 23(a)(2). Of concern to the court was that the numerous individual cases would present debtors which had filed and unfiled agreements, secured and unsecured debt, paid and unpaid agreements, representation and no legal representation, and in state and out-of-state residency. Wiley, 224 B.R. at 75. I agree with the Wiley court, that such discrepancies amongst class members does not meet the requirement of commonality, and further believe that this case would involve similar discrepancies. Thus, as to Plaintiff's request that a class be certified for purposes of awarding damages for a violation of §524, I deny certification. Furthermore, even if certification of a class for this issue were appropriate, the class

would be limited to only those debtors who obtained their discharge in this court. In re Nelson, 234 B.R. 528, 534 (Bkrtcy. M.D.Fla. 1999); Pereira, 223 B.R. at 31.

Wiley did grant class certification as to the §524 claim for limited injunctive and declaratory relief purposes. In Wiley, the injunctive relief involved the prevention of the defendant from using an illegal reaffirmation agreement form. In the case before me, Plaintiff has requested damages and injunctive relief in his §524 claim. The injunctive relief would prohibit Defendant from canceling active reaffirmation agreements. Under Wiley, such a claim may be suitable for class certification. However, in Wiley, the plaintiff structured his complaint as a contempt action. The complaint presented here offers an allegation of a §524 violation and brings the complaint as a private cause of action. As discussed, there is no private cause of action under the Bankruptcy Code for a §524 violation. As in Nelson, Plaintiff has not claimed damages arising from civil contempt. Therefore, as to Plaintiff's §524 claim, the cause of action as pled is dismissed.

As to Plaintiff's allegations that Defendant violated §362, Plaintiff contends that after the commencement of the underlying case, Defendant, in connection with the attempt to rescind the reaffirmation agreement, threatened to repossess

property of Plaintiff. As Plaintiff contends that this is a common practice of Defendant, he seeks class certification on this issue as well. The automatic stay of §362 continues to provide protection to a debtor until the debtor's bankruptcy case is closed, has been dismissed, or a discharge is entered, whichever occurs earlier. 11 U.S.C. §362(c)(2). As to Plaintiff's claim of a violation of §362(a) in this case, the facts as presented are sufficient to survive this motion to dismiss. Should a violation of the automatic stay occur, §362(h) provides for a private cause of action.<sup>2</sup> Therefore, as to Plaintiff's §362 claim, Defendant's F.R.C.P. 23(d)(4) motion is denied.

Finally, Plaintiff asserts that Defendant has violated the Truth In Lending Act, 15 U.S.C. §§ 1601 et seq., and accompanying Regulation Z, 12 C.F.R. § 226. In support of this allegation, Plaintiff states in his complaint that Defendant extends credit to consumers, this credit is subject to a finance charge, the extended credit is payable in more than four installments, and that such credit is primarily for personal, family and household purposes. These allegations, if proven, subject Defendant to Regulation Z.

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<sup>2</sup>11 U.S.C. §362(h):  
An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorney's fees, and, in appropriate circumstances, may recover punitive damages.

Furthermore, Plaintiff states that Defendant "failed to disclose properly the cost of this credit" and thus Defendant has "failed to comply with the Truth In Lending Act and Regulation Z". Plaintiff's Amended Complaint, p. 4. if proven as true, would establish a violation of 12 C.F.R. §226.18(d).<sup>3</sup>

As to the §362(a) violation and TILA counts, Plaintiff has satisfied the requirements set out in F.R.C.P. 23(a) & (b) to the extent necessary to defeat Defendant's motion to dismiss. For purposes of a motion to dismiss, Plaintiff has sufficiently shown that the potential class is so numerous as to make joinder of all parties impracticable; there are questions of law and fact common to the class; the claims of Plaintiff are typical of the claims of the class; and, Plaintiff will adequately protect the interests of the class. Thus, Plaintiff has satisfied F.R.C.P. 23(a). Plaintiff has further satisfied, for purposes of a motion to dismiss, the requirement of F.R.C.P. 23(b) by showing that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members and that a class action

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<sup>3</sup>12 C.F.R. §226.18(d):  
For each transaction, the creditor shall disclose the following information as applicable:  
(d) Finance Charge. The "finance charge", using that term, and a brief description such as "the dollar amount the credit will cost you".

is the superior method in which to resolve the controversy.

It is therefore ORDERED that the motion to dismiss by Sears, Roebuck and Co. is granted as to Plaintiff's complaint alleging a violation of §524.

It is further ORDERED that the motion to dismiss by Sears, Roebuck and Co. is denied as to Plaintiff's complaint concerning failure to properly disclose under TILA and Regulation Z and for violation of §362(a).

JOHN S. DALIS  
CHIEF UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia  
this 3rd Day of September, 1999.