

In the United States Bankruptcy Court
for the
Southern District of Georgia
Brunswick Division

In the matter of:)	
)	Adversary Proceeding
ROBIE J. HIRES, SR.)	
(Chapter 13 Case Number <u>95-20932</u>))	Number <u>03-2057</u>
)	
<i>Debtor</i>)	
)	
)	
ROBIE J. HIRES, SR.)	
)	
<i>Plaintiff</i>)	
)	
v.)	
)	
COMMERCIAL LOAN SERVICES, INC.,)	
AS ASSIGNEE OF BARNETT BANK SE)	
GA NA, BANK OF AMERICA, NA,)	
AS SUCCESSOR TO BARNETT BANK)	
SE GA NA, AND W. DOUGLAS ADAMS,)	
AS AGENT FOR COMMERCIAL LOAN)	
SERVICES, INC.)	
)	
<i>Defendants</i>)	

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 Date 6/2/04 *cc*
 MICHAEL F. McHUGH, CLERK
 United States Bankruptcy Court
 Savannah, Georgia

MEMORANDUM AND ORDER

On March 26, 2003, Robie J. Hires, Sr. ("Debtor") filed a motion to reopen his Chapter 13 case that had been closed on June 29, 2000. The motion was granted in an Order filed May 15, 2003. On October 16, 2003, Debtor filed an adversary complaint

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against Commercial Loan Services, Inc, as an assignee of Barnett Bank SE GA, NA, Bank of America, NA, as a successor to Barnett Bank SE GA, NA, and W. Douglas Adams (“Adams”), as an agent for Commercial Loan Services, Inc. In his complaint Debtor alleges that the aforementioned parties violated the discharge order that he received in his prior Chapter 13 proceeding. In response, Bank of America filed a Motion for Summary Judgment on March 19, 2004, and Adams filed a Motion to Dismiss on April 8, 2004. A hearing in this matter was held on April 8, 2004.

This matter is a core proceeding within the jurisdiction of this Court under 28 U.S.C. § 157(b). Pursuant to Federal Rule of Bankruptcy Procedure 7052(a), I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

On March 30, 2004, this Court was provided with a Joint Statement outlining the facts of the case and the position of the parties that was agreed to by Debtor, Bank of America and Adams. None of the facts were listed as being in dispute. Joint Statement, §d (March 30, 2004).

Debtor filed for relief under Chapter 13 of the Bankruptcy Code on November 6, 1995. He listed a signature loan dated June 2, 1989, in the amount of

\$24,330.00 and a signature loan dated June 16, 1989, in the amount of \$1,173.00 as being payable to Barnett Bank of Southeast Georgia as an unsecured creditor. Voluntary Petition, Schedule F (Nov. 6, 1995). While Barnett Bank was served with notice of Debtor's bankruptcy filing on November 8, 1995, it did not file a claim. An order confirming Debtor's plan was entered on April 3, 1996.

In 1997 and during the pendency of Debtor's Chapter 13 case, Commercial purchased the two aforementioned signature loans from Barnett Bank. On December 3, 1997, Commercial filed a Suit on Promissory Note against Debtor in the Superior Court of Wayne County (Civil Action No. 97-CU-0885). Debtor was personally served with the Suit on Promissory Note on December 15, 1997. Debtor did not file an answer nor did he notify Commercial or the Superior Court of Wayne County that he had previously filed Chapter 13 bankruptcy. Likewise, Debtor never amended his bankruptcy schedules to include Commercial. Following Debtor's discharge from Chapter 13 on April 13, 2000, a default judgment was entered against Debtor on April 1, 2002, and a writ of *feri facias* was entered on April 10, 2002.

Debtor alleges that Commercial and its counsel, W. Douglas Adams, violated his discharge order and 11 U.S.C. § 524(a) by maintaining a collection suit against him in state court. Specifically, he alleges that he has been denied a loan because of the

judgment that is pending against him in Wayne County. In his complaint, Debtor prayed that the judgment be removed from records of Wayne County and that he be awarded \$5,000.00 in compensatory damages, \$10,000.00 in punitive damages, and \$5,000.00 in attorney's fees.

Bank of America filed a Motion for Summary Judgment on March 19, 2004, and Debtor has not filed a response. In 1998 Barnett Bank merged with NationsBank and NationsBank later changed its name to Bank of America in 1999. Affidavit of Bradley C. Cleek, ¶ 4 (March 18, 2004). Such merger was after Commercial had purchased the two signature loans in question from Barnett Bank. Id. Thus, Bank of America argues that it never assumed nor did it ever have an interest in the two signature loans at issue. Further, Debtor has stated that he "has no evidence that proves Bank of America had an interest in the account that formed the basis of the complaint. However, Bank of America is successor to Nations Bank that is successor to Barnett Bank." Plaintiff's Answer to Interrogatories, ¶ 6 (March 18, 2004). Based on the foregoing, Bank of America requests that this Court grant its Motion for Summary Judgment.

Adams, in his motion to dismiss, states that Debtor has not alleged that he has done anything to violate Debtor's discharge in bankruptcy. Specifically, Adams notes that he no longer represented Commercial at the time the default judgment was entered in

Wayne County. Further, Debtor has conceded that Commercial was never scheduled as a creditor in Debtor's bankruptcy petition and that neither Commercial nor Adams were ever notified of the pendency of such bankruptcy.

When Debtor filed his complaint, he listed the address for service to Commercial as follows:

Commercial Loan Services, Inc.
Assignee of Barnett Bank SE GA
% W. Douglas Adams
P.O. Box 857
Brunswick, GA 31521-0857

Certificate of Service (Oct. 30, 2003)

Service was received at the aforementioned address by Adams. However, Adams filed notice on November 17, 2003, that he has never been appointed as an agent to accept service for Commercial. Debtor explained making service at the aforementioned address by saying that it was the address listed in the general execution docket of Wayne County. Debtor has been unable to perfect service on Commercial at a different address as neither Debtor nor Adams know how to locate Commercial. Further, the Georgia Secretary of State has no record of Commercial being incorporated in Georgia.

CONCLUSIONS OF LAW

Bank of America's Motion for Summary Judgment

Federal Rule of Civil Procedure 56, made applicable to bankruptcy practice pursuant to Federal Rule of Bankruptcy Procedure 7056, governs a summary judgment motion. Summary judgment is appropriate only when the pleadings, depositions, and affidavits submitted by the parties indicate that there is no genuine issue of material fact and show that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). In analyzing a motion for summary judgment, the Court must view all the evidence and factual inferences drawn therefrom in the light most favorable to the nonmoving party. *See Allen v. Tyson Foods, Inc.*, 121 F.3d 642, 646 (11th Cir. 1997). The moving party bears the initial burden of showing no such issues exist. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). However, Rule 56(e) provides that:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Thus, once the moving party has met its burden, the burden then shifts to the nonmoving party to come forward with specific facts showing that there is a genuine issue for trial. *See*

Allen 121 F.3d at 646.

Debtor did not reply to Bank of America's motion for summary judgment. Further, he admitted at the April 8, 2004, hearing and in his responses to various interrogatories that he has no evidence against Bank of America that proves it had an interest in the account that formed the basis of his adversary complaint. Instead, he points to the fact that Bank of America merged with Barnett Bank and is, thus, a successor in interest. However, Debtor has not disputed that the merger between Bank of America and Barnett Bank occurred *after* the two signature loans in question had been transferred to Commercial and *before* judgment was entered in Wayne County. Debtor's suit is for a violation of his discharge order such that this Court is only concerned with actions occurring after Debtor's discharge. Bank of America bears no responsibility for the entry of the default judgment and Debtor has presented no evidence that it violated his bankruptcy discharge. Therefore, it is appropriate to grant Bank of America's Motion for Summary Judgment.

W. Douglas Adams

By motion, Adams seeks to dismiss the adversary complaint of Debtor for failure to state a claim for which relief may be granted. Because matters outside the pleadings were offered and considered by this Court, I must treat the motion to dismiss as one for summary judgment under Bankruptcy Rule 7056 and apply the standard previously

articulated. *See, e.g. Barton v. Educ. Credit Manag. Corp. (In re Barton)*, 266 B.R. 922, 923 (Bankr. S.D. Ga. 2001) (Dalis, J.) (treating motion to dismiss as motion for summary judgment where matters outside the pleadings were offered); *See also* Fed.R.Civ.P. 12(b) (“If . . . matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment[.]”)

Because I have chosen to treat Adam’s motion to dismiss as a motion for summary judgment, this Court is presented with the issue of whether it must provide Debtor with notice of the conversion such that Debtor will be “given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.” F.R.Civ.P. 12(b). The Eleventh Circuit has stated that:

The cases from this circuit are clear that before a motion to dismiss may be converted to one for summary judgment the court must first communicate its intention to the parties to so treat the motion and then allow the parties ten days to submit any relevant evidence and argument in support or opposition to the merits. Although this notice requirement is a “brightline test” litigants may waive the notice . . .

Marine Coatings of Alabama, Inc. v. U.S., 792 F.2d 1565, 1568 (11th Cir. 1986) (internal citations omitted).

Because the April 8, 2004, hearing dealt with not only Adams’ motion to dismiss, but also Bank of America’s motion for summary judgment, Debtor was undoubtedly aware that this

Court was considering matters outside of the pleadings. Further, Debtor clearly expressed to this Court that he had no intention to respond to Bank of America's motion for summary judgment. Finally, Debtor did not contest any of the facts contained in the Joint Statement filed with this Court on March 3, 2004. Based on these facts, I hold that it is proper to consider Adams' motion as one for summary judgment without further notice.

Debtor has argued that sanctions should be imposed on Adams because he violated the April 13, 2000, discharge order of this Court by participating in the entering of a default judgment on a prepetition debt. Section 524(a) discusses the effect of discharge and states in relevant part that:

A discharge in a case under this title-

(2) 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, whether or not discharge of such debt is waived[.]

However, the Bankruptcy Code does not create a private cause of action for a § 524 violation. See Pereira v. First North Am. Nat'l Bank, 223 B.R. 28, 30 (N.D. Ga. 1998). Notably, § 524, unlike § 362(h) involving the automatic stay, does not expressly allow for damages and costs. In lieu of a private right of action under § 524, the sole remedy for

violations of that section is an individual action for civil contempt. While relying on § 105,¹ the Eleventh Circuit has held that a finding of contempt for violation of a discharge order is appropriate when the creditor's actions are found to be "willful." See Hardy v. U.S. (In re Hardy), 97 F.3d 1384, 1390 (11th Cir. 1996). As with the test for violations of the automatic stay, a violation of the discharge injunction is "willful" if the creditor knew the discharge injunction was invoked and intended the actions which violated the discharge injunction. Id.

Adams did not willfully violate the discharge order. Instead, Adams testified that he no longer represented Commercial at the time the default judgment was entered and Debtor has presented no evidence to the contrary. This fact alone is sufficient to sustain a summary judgment in favor of Adams. In addition, Adams, as counsel for Commercial, was never notified of Debtor's bankruptcy or the discharge despite the fact that Debtor was served with notice of the suit against him in Wayne County. Therefore, even if, contrary to the evidence, this Court were to presume that Adams played a part in the entry of the judgment in Wayne County, the violation of the discharge order by Adams was inadvertent as he was unaware of the discharge injunction. See In re Venegas, 257 B.R. 41, 48 (Bankr. D. Idaho 2001) (holding that judgment creditor's inadvertent violation of the automatic stay and the discharge order did not warrant the imposition of sanctions); Martin v. Avco Fin. Services (In re Martin), 157 B.R. 268, 277 (Bankr. W.D. Virg. 1993) (denying sanctions

¹The Eleventh Circuit in Hardy v. U.S. (In re Hardy), 97 F.3d 1384, 1389 (11th Cir. 1996) decided to ground liability for violation of the discharge order in the statutory contempt power granted by 11 U.S.C. § 105 as opposed to utilizing the court's inherent contempt power.

where creditor “acted with the good-faith, albeit mistaken, belief that its actions were permissible”). Because there is no evidence that Adams willfully violated the discharge order, it is appropriate to grant Adams summary judgment.

Commercial

This Court lacks the authority to impose sanctions on Commercial for violation of the discharge order or to invalidate the judgment in Wayne County because Commercial has not been served with notice of this adversary proceeding. To satisfy constitutional due process, litigants must receive “notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950). “The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.” Id. at 315, 70 S.Ct. at 657.

Here, Debtor attempted to serve Commercial by merely mailing the complaint to Adams. While Debtor may have had reason to initially believe that service at such address was appropriate, that impression was undoubtedly dispelled when Adams filed his November 17, 2003, Notice in which he stated that, “he has *never* been appointed as agent for Commercial[.]” (emphasis added). Debtor has not made any further attempts to

serve Commercial. For example, he has not taken the steps necessary to request that this Court allow for service by publication.² Failure to provide Commercial with notice constitutes constitutional lack of due process such that this court does not have jurisdiction required to adjudicate Debtor's claims against Commercial. It should be noted, however, that even if Debtor properly perfected service on Commercial this Court would not be inclined to grant Debtor's motion for sanctions in regard to Commercial. Much like the preceding discussion concerning Adams, Commercial was never made aware of Debtor's bankruptcy and, thus, it does not appear that it willfully violated this Court's discharge order.

Because the judgment in Wayne County relates to a debt that was discharged in Debtor's Chapter 13 case, it appears that the judgment is void. See § 524(a) ("A discharge in a case under this title--(1) voids any judgment *at any time obtained*, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section . . . 1328 of this title[.]" (emphasis added)). As discussed, this Court lacks the authority to make that determination because of the absence of personal jurisdiction over Commercial. However, the Superior Court of Wayne County should have the power to correct the public records upon proper application.

²Service by publication is not a preferred method of service but is proper where a party cannot be served by any other means. See Younger v. Younger (In re Younger), 166 B.R. 494, (Bankr. S.D. Ga. 1993) (Davis, J.) (*citing* Wright & Miller, Federal Practice and Procedure, Civil 2d § 1074).

ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that Bank of America's Motion for Summary Judgment is GRANTED and the action against Bank of America is dismissed with prejudice.

IT IS FURTHER ORDERED that W. Douglas Adams is GRANTED summary judgment as to any cause of action for violation of Robie J. Hires, Sr.'s April 13, 2000, discharge and the adversary complaint against Adams is dismissed with prejudice.

IT IS FURTHER ORDERED Complaint of Robie J. Hires, Sr., requesting that sanctions be imposed on Commercial Loan Services, Inc. for its violation of his discharge order and that the judgment and Fifa be removed from the public records of Wayne County is DENIED, without prejudice.



Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 1st day of June, 2004.

C: ~~Debtor~~
~~Debtor Atty~~
Plaintiff *Hires*
Plff Atty *Henry*
Defendant *Bank of Amer (2)*
Deft Atty *W. Douglas Adams*
Trustee *Massey*
~~U.S. Trustee~~
6/2/04
ch *CT Corp. System*