IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

IN RE: DAVID R. AND BETH V. CALKINS, Debtors	**No. 5:08-bk-71329** **Ch. 7**
DAVID R. CALKINS and BETH V. CALKINS	**PLAINTIFFS**
v. **5:11-ap-7084**	
FORD MOTOR CREDIT COMPANY, LLC and **HOSTO, BUCHAN, PRATER & LAWRENCE, PLLC**	**DEFENDANTS**

ORDER

Before the Court is the motion to dismiss that was filed on July 8, 2011; the response that was filed on July 22, 2011; and the parties' supporting and supplemental briefs. The Court held a hearing on the motion to dismiss on October 5, 2011, and subsequently took the matter under advisement. Ford Motor Credit Company, LLC [Ford] and Hosto, Buchan, Prater & Lawrence, PLLC [Hosto] moved to dismiss the adversary proceeding filed by David R. Calkins and Beth V. Calkins [the Calkinses] under Federal Rule of Civil Procedure 12(b)(6), made applicable to these proceedings by Federal Rule of Bankruptcy Procedure 7012, for failure to state facts upon which relief can be granted.[1] Jurisdiction is proper in this Court under 28 U.S.C. § 1334 and 28 U.S.C. § 157. For the reasons stated below, the motion of Ford and Hosto is granted.

Background

On April 4, 2008, the Calkinses filed the above-captioned chapter 7 bankruptcy petition that contained a statement of their intention to reaffirm a debt they owed to Ford secured by one of their cars, a 2006 Ford Taurus [the vehicle]. Although the Calkinses remained

[1] The Calkinses filed an adversary proceeding on June 9, 2011, alleging that Ford and Hosto willfully violated the discharge injunction under 11 U.S.C. § 524, and that Hosto violated the Fair Debt Collections Practices Act [FDCPA] under 15 U.S.C. § 1692.

current on the vehicle payments during the pendency of their chapter 7 case, they did not execute a reaffirmation agreement with Ford, nor did they respond to Ford's motion for relief from stay as to the vehicle dated June 23, 2008. The Court granted Ford's unopposed motion for relief on July 16, 2008. The Calkinses received a discharge in their chapter 7 case on August 12, 2008, and the case was closed on August 18, 2008. Ford repossessed the vehicle on August 31, 2008. The Calkinses then filed a chapter 13 bankruptcy petition on September 5, 2008. Six days after the second bankruptcy was filed, the Calkinses filed a motion requesting the Court to direct Ford to turn the vehicle over to the Calkinses. Ford filed a response objecting to the Calkinses' motion for turnover and filed a motion for relief from stay as to the vehicle. The Court held an emergency hearing on the motions on September 22, 2008. The Court ruled that the vehicle was property of the Calkinses' chapter 13 bankruptcy estate and ordered its immediate return to the Calkinses; Ford complied.

On November 11, 2008, the Calkinses filed an adversary proceeding against Ford[2] alleging, among other things, that the vehicle had been damaged while it was in Ford's possession. The parties subsequently settled the adversary proceeding without a trial. The Calkinses' chapter 13 plan was confirmed on June 8, 2009, and provided that Ford would be paid the entire amount of its proof of claim ($12,230.61) because the vehicle had been purchased within the 910-day period prior to the commencement of the second bankruptcy. *See* 11 U.S.C. § 1325(a)(paragraph following subsection(9)). On December 10, 2009, the Court entered an order approving the Calkinses' stipulation that they were not eligible to receive a discharge in their chapter 13 case pursuant to 11 U.S.C. § 1328(f)(1).[3] The Calkinses then moved for a voluntary dismissal of their chapter 13

[2] The adversary proceeding was filed in the Calkinses' chapter 13 case, not in the chapter 7 case currently before the Court.

[3] 11 U.S.C. § 1328(f)(1) provides that a court shall not grant a discharge in a chapter 13 if a debtor has received a discharge in a chapter 7 filed during the 4-year period preceding the date of the order for relief in a chapter 13. The Calkinses filed their previous chapter 7 case on April 4, 2008, and received a discharge on August 12, 2008.
(continued...)

case on the same date that the Court ordered that they were not eligible for a discharge in the chapter 13 case.

The Calkinses' chapter 13 was dismissed on December 13, 2009. Ford repossessed the vehicle for a second time on January 11, 2010. According to the Calkinses, Ford subsequently sent the Calkinses four letters attempting to collect a deficiency judgment on the vehicle.[4] The Calkinses allegedly received the letters beginning in April 2011 and ending in May 2011. Hosto allegedly sent the Calkinses two additional letters attempting to collect the deficiency judgment on the vehicle, the first in June 2011 and the second in August 2011. On June 9, 2011, the Calkinses filed a motion to reopen the chapter 7 case that is currently before the Court; the Court entered an order granting the motion on June 11, 2011. The Calkinses filed this adversary proceeding on June 9, 2011, alleging that Ford and Hosto violated the discharge injunction that became effective when the Calkinses received their chapter 7 discharge on August 12, 2008, in contravention of 11 U.S.C. § 727 and § 524. They also alleged that Hosto's actions violated the Fair Debt Collection Practices Act [FDCPA] under 15 U.S.C. § 1692.

On July 8, 2011, Ford and Hosto filed a motion to dismiss the adversary proceeding pursuant to Federal Rule of Civil Procedure 12(b)(6) and Federal Rule of Bankruptcy Procedure 7012. They contend that the Calkinses' complaint fails to state a claim upon which relief can be granted because § 524 does not confer upon the Calkinses a private right of action for a violation of the discharge injunction; they further argue that any alleged breach of FDCPA relates directly to § 524, rendering this adversary proceeding improper and requiring the dismissal of the complaint. The Calkinses argue in response

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[3](...continued)
On September 5, 2008, approximately five months after filing their chapter 7 case and less than one month after receiving a discharge in their chapter 7 case, they filed their chapter 13 case.

[4] Although it is unclear from the record, the Court presumes that Ford sold the vehicle after repossessing it and a deficiency remained after the sale.

to the motion to dismiss that the Court need not determine whether a private right of action exists under § 524 because the Court has the power to enforce the discharge injunction under § 105.[5]

Findings of Fact and Conclusions of Law

The question before the Court is whether a private right of action exists for a violation of the discharge injunction under § 524. The interpretation of a statute begins with the language of the statute itself. *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979). Section 524 states that a discharge "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 the discharge of such debt is waived." 11 U.S.C. § 524(a)(2). The purpose of this subsection is to enjoin creditors from attempting to collect pre-petition debts after a debtor has received a discharge. Although no remedy for violating the discharge injunction is stated explicitly in § 524, the traditional remedy for violating an injunction lies in a contempt proceeding, not in an adversary proceeding. *Pertuso v. Ford Motor Credit Co.*, 233 F.3d 417, 421 (6th Cir. 2000).

When a federal statute is violated, even if the violation results in harm, the harmed party is not automatically given a private right of action as a way to remedy the injury. *Touche Ross*, 442 U.S. at 568 (citing *Cannon v. Univ. of Chicago*, 441 U.S. 677, 688 (1979)). Whether a statute provides a certain cause of action is an issue of statutory construction. *Id.* When a private right of action is not expressly provided by statute, the court must determine whether such a remedy may be implied under a four-part framework set forth

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[5] Section 105 states that

> [t]he 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.

11 U.S.C. § 105.

by the United States Supreme Court. *See Cort v. Ash*, 422 U.S. 66 (1975) (setting forth the framework adopted by the Eighth Circuit in *Redd v. Fed. Land Bank of St. Louis*, 851 F.2d 219, 220-21 (8th Cir. 1988)).[6]

Although all of the *Cort* factors potentially are instructive in determining whether there exists a private right of action under a statutory scheme, the factors are not weighted equally. *Touche Ross*, 442 U.S. at 575. The most important inquiry is whether Congress intended to create a private right of action. *Id.* The "recognition of a private right of action requires affirmative evidence of congressional intent in the language and purpose of the statute or in its legislative history." *Pertuso*, 233 F.3d at 421. The Eighth Circuit has not addressed whether § 524 creates a private right of action; however, the majority of courts that have decided this issue have determined that a violation of the discharge injunction under § 524 does *not* create a private right of action. *See, e.g.*, *Barrientos v. Wells Fargo Bank, N.A.*, 633 F.3d 1186 (9th Cir. 2011); *Joubert v. ABN AMRO Mtg. Group, Inc. f/k/a Atl. Mtg. & Inv. Corp.* (*In re Joubert*), 411 F.3d 452 (3rd Cir. 2005); *Cox v. Zale Del., Inc.*, 239 F.3d 910 (7th Cir. 2001); *Pertuso v. Ford Motor Credit Co.*, 233 F.3d 417 (6th Cir. 2000); *Bessette v. Avco Fin. Serv., Inc.* 230 F.3d 439 (1st Cir. 2000); *but see In re Vogt*, 257 B.R. 65 (Bankr. D. Colo. 2000).

In contrast to § 524, the bankruptcy code clearly provides a private right of action to remedy some violations, for example, violations of the automatic stay under § 362. *Walls v. Wells Fargo Bank, N.A.*, 276 F.3d 502, 509 (9th Cir. 2002). Sections 524 and 362 were enacted on November 6, 1978, and, at the time, neither section provided for a private right of action. *Id.* Both sections had generally been held enforceable only through actions for contempt. In 1984, Congress amended both § 524 and § 362. *Id.* In

[6] Under *Cort*, the relevant factors are whether (1) the plaintiff is one of the class for whose special benefit the statute was enacted; (2) there is any explicit or implicit indication of legislative intent either to create such a remedy or deny one; (3) it is consistent with the underlying purpose of the legislative scheme to imply such a remedy; and (4) the cause of action is one traditionally relegated to state law. *Cort*, 422 U.S. at 78.

the course of the 1984 amendments, Congress added subsection (h) to § 362, and expressly gave debtors a private right of action–the ability to sue for damages for willful violations of the automatic stay. *Id.* Notably, when Congress amended § 524 on the same day § 362 was amended, no similar provision was added to provide debtors with a private right of action for violations of the discharge injunction. *Id.*

Courts are not to be careless in finding a private right of action where none is stated.. *Pertuso*, 233 F.3d at 421. When Congress intends to create a private right of action, it knows how to do so. *Walls*, 276 F.3d at 508-09. If Congress had intended to create a private right of action for violations of § 524, it could have amended the language of the subsection to do so; there is no indication that Congress intended such a remedy for violations of § 524. *Id.* (citing *Pertuso*, 233 F.3d at 422 n.3). The Court agrees with the majority position and declines to imply a private right of action under § 524 where none is explicitly stated.

In the Calkinses' brief in response to Ford's and Hosto's motion to dismiss, the Calkinses argue that the Court need not reach the issue of whether there is a private right of action under § 524 because the Court has the power to enforce the discharge injunction pursuant to § 105. Without precluding the use of § 105 in contempt proceedings, the Court disagrees. Although § 105 is a powerful tool at the disposal of bankruptcy courts and may be invoked if necessary to preserve a right provided for in the bankruptcy code, it is not a "roving commission to do equity." *Bessette*, 230 F.3d at 444-45 (citing *Noonan v. Sec'y of Health & Hous. Servs.* (*In re Ludlow Hosp. Soc'y, Inc.*), 124 F.3d 22, 27 (1st Cir. 1997) which quotes *Chiasson v. J. Louis Matherne & Assoc.*, 4 F.3d 1329, 1334 (5th Cir. 1993)). Section 105 may not serve to create substantive rights where none previously existed within the code. *In re Gjestvang*, 405 B.R. 316, 321 (Bankr. E.D. Ark. 2009) (citing *In re Continental Airlines*, 203 F.3d 203, 211 (3rd Cir. 2000)). Simply stated, the Court may not use § 105 to preserve a right–in this case, a private right of action under § 524–when that right does not already exist within the bankruptcy code.

The Calkinses' FDCPA claim against Hosto is brought under non-bankruptcy law and is not a core proceeding arising in or under title 11, as referenced in 28 U.S.C. § 157(b). In the Eighth Circuit, a bankruptcy court may still have "related to" jurisdiction in a non-core proceeding when

> "the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy. An action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action and which in any way impacts upon the handling and administration of the bankrupt estate."

Dogpatch Prop. Inc. v. Dogpatch U.S.A., Inc. et al. (In re Dogpatch, U.S.A., Inc.), 810 F.2d 782, 786 (8th Cir. 1987) (quoting *Pacor v. Higgins*, 743 F.2d 984, 994 (3rd Cir. 1984)). Under this test, the Court does not have "related to" jurisdiction for the Calkinses' non-core FDCPA claim because the outcome of the FDCPA proceeding could have no conceivable effect on an "estate being administered in bankruptcy." Although the Calkinses' chapter 7 bankruptcy case was reopened on June 11, 2011, for the purpose of filing the instant adversary proceeding, the Calkinses' bankruptcy estate was fully administered and the case closed on August 18, 2008, well over two years ago.

Conclusion

For the reasons stated above, Ford's and Hosto's motion to dismiss is granted and the Calkinses' adversary proceeding is dismissed.

IT IS SO ORDERED.

Ben Barry
United States Bankruptcy Judge
Dated: 01/24/2012

cc: Joseph W. Cornell, attorney for the Calkinses
John Blume Buzbee, attorney for Ford and Hosto
William M. Clark, Jr., chapter 7 trustee
United States Trustee