UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

In re:

ROBERT & COLLEEN IMEL, Case No.: 10-31671-LMK

Debtors.

ROBERT & COLLEEN IMEL,

Plaintiffs,

v. Adv. Proc. No.: 11-03031-MAM

EVERHOME MORTGAGE CO. &
SHAPIRO, FISHMAN & GACHE, LLP

Defendant.

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTIONS TO DISMISS

Martin S. Lewis, Attorney for the Plaintiffs, Pensacola, Florida
Steven G. Powrozek, Attorney for the Defendants, Tampa, Florida

This matter is before the Court on the Defendants' Motions to Dismiss. The Court has jurisdiction to hear this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the Order of Reference of the District Court. The Court has the authority to enter a final order pursuant to 28 U.S.C. § 157(b). For the reasons indicated below, the Motions to Dismiss are due to be DENIED as to Plaintiffs' willful violation of the discharge injunction claim and GRANTED as to Plaintiffs' remaining claims.

FACTS

The Debtors filed a voluntary chapter 7 petition on August 9, 2010. In their schedules they listed a secured debt in the amount of $87,000 to EverHome for a mortgage on their

residence. Along with their petition, the Debtors filed a Statement of Intent indicating their desire to surrender the home. EverHome filed a Motion for Relief from Stay on September 21, 2010, and the Court entered an Order granting the motion on October 13, 2010. The Debtors were granted a discharge on December 13, 2010.

After notifying EverHome of their intent to surrender, but prior to their discharge, counsel for the Debtors notified EverHome by mail on October 8, 2010, of their desire to surrender the property. In response, the Debtors received correspondence on October 26, 2010, from EverHome notifying them that the company had received their correspondence. On November 8, 2010, the Debtors received a letter from the Shapiro firm and an attachment labeled "Form A" attempting to coordinate mediation between the Debtors and EverHome.

On December 22, 2010, counsel for the Debtors sent a letter to EverHome and the Shapiro firm notifying them that the Debtors were discharged on December 13, 2010. Following the entry of their discharge, the Debtors received an Annual Escrow Statement from EverHome projecting the amount of escrow payments that would become due over the year (becoming effective on February 1, 2011), stating that they had an escrow shortage of $1,389.23, and stating: "You may pay the entire shortage and reduce your monthly payment by the prorated shortage amount…If you decide to pay your shortage in full, please return this coupon. . . along with your check made payable to EverHome Mortgage Company." On February 25, 2011, the Debtors received a letter from EverHome stating that because EverHome did not receive evidence of continuing or replacement insurance, the company was providing insurance itself and was charging the premium to the Debtors' escrow account. The attached insurance policy was issued on February 25, 2011. On March 14, 2011, the Debtors received a letter from the Shapiro firm discussing foreclosure alternatives. The conclusion of the letters states: "You are

required to: make your mortgage payments; timely respond to the court in the pending foreclosure action; and be responsible for any and all fees and expenses incurred through this action." On the same day, counsel for the Debtors sent a letter to EverHome advising the company that the Debtors had been discharged on December 13, 2010.

The Debtors initiated this adversary proceeding on June 2, 2011, seeking damages for violation of the discharge injunction, violations of the Fair Debt Collection Practices Act, and violations of the Florida Consumer Collection Practices Act. Defendant EverHome filed a Motion to Dismiss on July 5, 2011 arguing that it was required to send the Debtors escrow statements pursuant to the Real Estate Settlement Procedures Act (RESPA), and that such notification was not an attempt to collect a debt. Defendant Shapiro, Fishman, and Gache also filed a Motion to Dismiss on July 5, 2011, arguing that it sent the Debtors correspondence as it was required to do pursuant to the Making Home Affordable Program, and that such correspondence was not an attempt to collect a debt. The Court held a hearing on August 8, 2011, and took this matter under advisement.

LAW

To survive a motion to dismiss for failure to state a claim upon which relief can be granted, a complaint must contain sufficient factual allegations such that it raises a right to relief above the speculative level. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In assessing the merits of a Rule 12(b)(6) motion, the Court must assume that all factual allegations set forth in the complaint are true. *See, e.g. Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 508 n.1 (2002). Because all factual allegations are taken as true, the failure to state a claim for relief presents a purely legal question. *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1269 n.19 (11th Cir. 2009).

The Defendants ask this Court to dismiss all five causes of action asserted in the Plaintiffs' complaint. For reasons that will be more apparent below, the Court will address Plaintiffs' First Claim alone, followed by a collective discussion of Plaintiffs' remaining Claims.

(1) Plaintiffs' First Claim—Willful Violation of the Discharge Injunction

11 U.S.C. § 524(a) explains that a bankruptcy discharge "operates as an injunction against the commencement or continuation of any action to collect a discharged debt from the debtor." *In re Wynne*, 422 B.R. 763, 768 (Bankr. M.D. Fla. 2010). Indeed, "[a] bankruptcy court's discharge order provides the debtor with a financial 'fresh start' by 'releas[ing] [the] debtor from personal liability with respect to any discharged debt." *In re Diaz*, Nos. 10–14426, 10–14475, 2011 WL 3117875, at *9 (11th Cir. July 27, 2011). Importantly, § 524 does not expressly create a private right of action for violations of the discharge injunction. *In re Hardy*, 97 F.3d 1384, 1389 (11th Cir. 1996). However, "Bankruptcy Courts may invoke their statutory contempt powers under § 105 of the Bankruptcy Code to provide a remedy for willful violations of the discharge injunction." *Wynne*, 422 B.R. at 768.

In considering Defendants' motions to dismiss, the Court need only decide whether Plaintiffs' First Claim states a claim upon which relief can be granted. In *In re Wynne*, 422 B.R. 763, 768 (Bankr. M.D. Fla. 2010), the bankruptcy court considered a motion to dismiss in factually similar circumstances to those now before the Court. In that case, Chief Judge Paul M. Glenn held that a debtor states a valid cause of action when his/her complaint asserts "facts alleging each material element of violation of the discharge injunction, i.e. contempt of court." *Wynne*, 422 B.R. at 768 (quoting *In re Motichko*, 395 B.R. 25, 31 (Bankr. N.D. Ohio 2008)); *see also In re Shortsleeve*, 349 B.R. 297, 301 (Bankr. M.D. Ala. 2006) (holding that the plaintiff

stated a valid claim when she alleged "willful actions by the defendant(s) to coerce payment of a discharged debt").

In this case, Plaintiffs' First Claim states a valid cause of action. Plaintiffs' First Claim alleges facts that, if true, indicate a willful violation of the discharge injunction. They allege the existence of this Court's discharge injunction order, the Defendants' knowledge of the order, and the Defendants' violation of the order. *See Wynne*, 422 B.R. at 769. Indeed, the Plaintiffs' assert that the Defendants' actions "constitute contempt of bankruptcy court orders," "constitute a gross violation of the discharge injunction," and "substantially frustrated the discharge order entered by this Court." (Plaintiffs' Complaint at ¶ 34-36). Moreover, the Plaintiffs request that the Court act to remedy those violations pursuant to Section 105 of the Bankruptcy Code. (Plaintiffs' Complaint at ¶¶ 37 and 39). Thus, this Court finds that the Plaintiffs' First Claim states sufficient factual allegations to survive Defendants' motions to dismiss.

(2) Plaintiffs' Second, Third, Fourth, and Fifth Claims

Plaintiffs' Second, Third and Fourth Claims allege violations of the Fair Debt Collections Practices Act ("FDCPA") and their Fifth Claim invokes the Florida Consumer Collection Practices Act ("FCCPA"). This Court lacks subject matter jurisdiction to hear those claims.

Bankruptcy court's derive subject matter jurisdiction from 28 U.S.C. § 1334(b). It states that "district courts shall have original but exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." The effect of § 1334(b) is to carve out three specific categories where jurisdiction is proper: (1) cases arising under title 11, (2) cases arising in title 11, and (3) those related to cases under title 11. *In re Toledo*, 170 F.3d 1340, 1344 (11th Cir. 1999). The district courts, in turn, have authority to specifically endow the three categories of jurisdiction upon bankruptcy courts through 28 U.S.C. § 157(a). *Shortsleeve*, 349

B.R. at 299. "The bankruptcy court's jurisdiction is derivative of and dependent upon these three bases." *Toledo*, 170 F.3d at 1344. In this district, the District Court has entered a general Order of Reference referring title 11 proceedings to this Court. 28 U.S.C. § 157(b) allows bankruptcy judges to hear and enter appropriate orders and judgments as to matters referred to them by the district court, including core proceedings. Section 157(b)(2) details a nonexhaustive list of core proceedings.

As to the three categories of jurisdiction, courts in this circuit adhere to the following tests. Matters arising under title 11 are "matters invoking a substantive right created by the Bankruptcy Code." *Toledo*, 170 F.3d at 1345. "Proceedings that arise in a case under title 11 are 'generally thought to involve administrative-type matters' or 'matters that could arise only in bankruptcy.'" *Wynne*, 422 B.R. at 770. "The usual articulation of the test for determining whether a civil proceeding is related to a bankruptcy is whether the outcome of the proceeding could conceivably have an effect on the estate being administered in bankruptcy." *Id.* (quoting *Carter v. Rodgers*, 220 F.3d 1249, 1253 (11th Cir. 2000)).

Here, Plaintiffs' FDCPA and FCCPA claims do not fall into any of the three specific categories of jurisdiction granted to this Court. Plaintiffs' FDCPA and FCCPA claims do not arise under title 11 because they "are not causes of action created by the Bankruptcy Code and can exist outside the bankruptcy case." *Wynne*, 422 B.R. at 770. Further, Plaintiffs' FDCPA and FCCPA claims are not core proceedings. *See* 11 U.S.C. § 157(b)(2).

Moreover, Plaintiffs' FDCPA and FCCPA claims do not arise in a case under title 11 because they are not bankruptcy administrative matters and could, and should, exist independent of title 11. *Wynne*, 422 B.R. at 770; *Shortsleeve*, 349 B.R. at 300 (speaking specifically to FDCPA claims). Any appropriate federal district court could properly entertain Plaintiffs'

FDCPA claims pursuant to 15 U.S.C. § 1692k(d) and, through 28 U.S.C. § 1367, could likely exercise jurisdiction over Plaintiffs' related state law claims. *See Wynne*, 422 B.R. at 770.

Finally, Plaintiffs' FDCPA and FCCPA claims are not related to the bankruptcy case. In considering whether to exercise "related to" jurisdiction over a combination of FDCPA and state law claims derived from post-petition conduct, many courts have held that the causes of action are not related to the bankruptcy case. *Wynne*, 422 B.R. at 771 (detailing a handful of courts that have declined jurisdiction). Here, the result is the same. Plaintiffs' FDCPA and FCCPA claims arose post-petition—after the full administration and resulting discharge in Plaintiffs' Chapter 7 case. As such, those claims are not property of the estate pursuant to 11 U.S.C. § 541. Thus, the prosecution of those claims, regardless of their success or failure, will have no effect on the administration of the bankruptcy estate. *Shortsleeve*, 349 B.R. at 300. Rather, any recovery from Plaintiffs' FDCPA and FCCPA claims would only serve to benefit the Plaintiffs themselves, rather than the bankruptcy estate. *Wynne*, 422 B.R. at 772.

In sum, this Court lacks subject matter jurisdiction to hear Plaintiffs' Second, Third, Fourth, and Fifth Claims. As additional grounds, the United States Supreme Court's recent decision in *Stern v. Marshall*, 131 S.Ct. 2594, 180 L.Ed.2d 475 (2011), dictates the same result. In that case, the Supreme Court held that a bankruptcy court could not constitutionally exercise jurisdiction over a state law counterclaim asserted by a debtor in her bankruptcy case. Although the Plaintiffs' in this case do not assert counterclaims, their FDCPA and FCCPA claims, like the counterclaim in *Stern*, are non-core and not integral to the bankruptcy case. The *Stern* decision counsels that this Court lacks jurisdictional power to adjudicate claims like Plaintiffs' Second, Third, Fourth, and Fifth Claims, which clearly fall outside of the bankruptcy case.

Therefore, it is ORDERED that:

1. Defendants' Motions to Dismiss shall be DENIED as to Plaintiffs' First Claim, willful violation of the discharge injunction.
2. Defendants' Motions to Dismiss shall be GRANTED as to Plaintiffs' Second, Third, Fourth, and Fifth Claims.
3. This matter will be set for status on October 17, 2011 at 9:15 a.m. to determine an appropriate date for the trial of Plaintiffs' First Claim. A notice will be sent with the conference telephone number.

Dated: September 2, 2011

Margaret A. Mahoney

MARGARET A. MAHONEY
U.S. BANKRUPTCY JUDGE