UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

In Re

GENEVA ROGERS CORNER Case No. 02-13156-MAM-13

Debtor

GENEVA ROGERS CORNER, ROBERT L. BURSON, SR., SANDRA A. BURSON, ALBERT A. NEWBERRY, and DEBRA NEWBERRY, on behalf of themselves and all others similarly situated

Plaintiffs

vs. Adv. Pro. No. 03-01034-MAM

FIRST USA BANK, N.A.

Defendant

ORDER PARTIALLY GRANTING AND PARTIALLY DENYING DEFENDANT'S MOTION TO DISMISS

Steve Olen and Royce Ray, Olen, Nicholas & Copeland, P.C., Attorneys for the Plaintiffs
Donald J. Stewart, Cabaniss, Johnston, Gardner, Dumas & O'Neal, Attorney for the Plaintiffs
Philip D. Anker and Matthew P. Previn, Wilmer, Cutler & Pickering, Attorneys for the Defendant
Matthew C. McDonald and Kirkland E. Reid, Miller, Hamilton, Snider& Odom, LLC, Attorneys for the Defendant

This case is before the Court on the motion of the defendant Bank One, Delaware, N.A., f/k/a First USA Bank (Bank One) to dismiss the complaint. This 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. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2) and the Court has the authority to enter a final order. For the reasons indicated below, the Court is partially granting and partially denying the defendant's motion to dismiss.

FACTS

Geneva Rogers filed a chapter 13 case in this Court on June 5, 2002. Robert and Sandra Burson filed on October 24, 2000. Albert and Debra Newberry filed their case on November 14, 2000. Each of these debtors confirmed a chapter 13 plan that paid less than 100% to his or her unsecured creditors based upon the claims filed by the creditors.

Bank One was an unsecured creditor in each debtor's case. Bank One filed proofs of claim seeking from the debtors in each case more than the debtors believe is owed due to addition of postpetition interest and/or late fees. Bank One admitted that its claims in these cases were filed for an incorrect amount.[1] In this adversary case, the debtors seek to enjoin Bank One from collecting these sums or claiming them at any time, to have the Court declare the practice of adding these charges to proofs of claim illegal and improper, to require Bank One to credit or pay any illegal charges to the debtors, to disgorge any profits received from the illegal charges and to award actual damages, attorneys fees, costs and punitive damages or sanctions from Bank One. The plaintiffs request that a nationwide class be certified for relief.

As stated in footnote 1, after the filing of this suit, Bank One amended the proofs of claims in these plaintiffs' cases to exclude any disputed charges. Bank One does not admit that it improperly calculated or filed the original proofs of claim.

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[1]Bank One's admission was in the form of an amended claim filed in each case that lowered the amount of the claim originally filed.

LAW

The defendant seeks dismissal of the complaint pursuant to Fed. R. Bankr. P. 7012 (b)(6) and (b)(7). Bank One bears the burden of proof that based upon the facts stated in the complaint, it is entitled to relief. Under Fed. R. Civ. P. 12(b)(6),[2] dismissal of a complaint is appropriate "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Blackston v. Alabama*, 30 F. 3d 117, 120 (11th Cir. 1994) (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984). "On a motion to dismiss the court must accept as true all facts alleged and draw all inferences therefrom in the light most favorable to the plaintiffs." *Hornfeld v. City of North Miami Beach*, 29 F. Supp. 2d 1357, 1361 (S.D. Fla. 1998). A very low sufficiency threshold is necessary for a complaint to survive a motion to dismiss. *Id.* at 1361 (citing to *Ancata v. Prison Health Servs., Inc.*, 769 F.2d 700, 703 (11th Cir. 1985).

Pursuant to Fed. R. Civ. P. 12(b)(7), a complaint may be dismissed for failure to join a party under Rule 19 of the Federal Rules. "[T]he movant bears the burden of : (1) producing evidence showing the nature of the interest possessed by an absent party: and (2) that the protection of that interest will be impaired if the party is not joined." *Swartz v. Beach*, 229 F. Supp. 2d 1239, 1250 (D.Wyo. 2002).

The Court considers these motions in the case's present context, i.e., precertification of a class. The class certification hearing is the proper place to address issues that deal with

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[2]Most of the Federal Rules of Civil Procedure are incorporated into the Federal Bankruptcy Rules of Procedure. Federal Rule 12 is one of the incorporated rules. Rule 12(b)(6) and (b)(7) are identical to Bankruptcy Rule 7012(b)(6) and (b)(7). Therefore, nonbankruptcy cases that interpret the rule are applicable.

certification and class claims. Therefore, the Court will only consider whether these individual debtors' complaint must be dismissed on either of the asserted grounds.

A.

1.

As a Fed. R. Bankr. P. 7012(b)(6) issue, Bank One asserts that the plaintiffs' claim for damages or other monetary relief under 11 U.S.C.§ 502 must fail because section 502 specifies the remedy for any improper or incorrect proofs of claim. That remedy is disallowance or adjustment of the claims and, if appropriate, repayment to the cases of improper payments to the debtors. As the Court reads the debtors' complaint, it does not assert a claim under 11 U.S.C. § 502 at all. All claims are couched as causes of action under 11 U.S.C. § 105. However, the complaint does seek to have the Court disallow any improper charges made by Bank One and seeks reimbursement of those overcharged amounts. This relief is the relief allowed in section 502. Therefore, the Court will discuss Bank One's argument.

Section 502 of the Bankruptcy Code is entitled "allowance of claims or interests." The section deals with the allowance and disallowance of claims. At section 502(a), it states that "a claim or interest, proof of which is filed under section 501 of this title, is allowed, unless a party in interest, including a creditor of a general partner in a partnership that is a debtor in a case under chapter 7 of this title, objects." Each of the current plaintiffs are debtors in this district with cases in this judge's court. Therefore, objections to claims of Bank One are appropriate under section 502(b) of the Bankruptcy Code. According to section 502(a), parties in interest may object to claims. The Court concludes that debtors are parties in interest. The Code does not specify who are parties in interest in chapter 13 cases. However, section 1109(b) which

applies in chapter 11 cases provides some guidance. It states that "a party in interest, including the debtor, the trustee, a creditors' committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter." Case law has held that a party in interest is "generally understood to include all persons whose pecuniary interests are directly affected by the bankruptcy proceedings." *In re Lewis*, 723 B.R. 739, 743 (Bankr. N.D. Ga. 2001) (quoting *Nintendo Co., Ltd. v. Patten (In re Alpex Computer Corp.*), 71 F.3d 353, 356 (10th Cir. 1995)).

The Court agrees with Bank One that the remedy for an objection to a creditor's proof of claim is disallowance or amendment of the claim. 11 U.S.C. § 502(b) ("[I]f . . . objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim. . . and shall allow such claim in such amount except [for specified reasons].") The Court agrees with the well reasoned opinion in *Kerney v. Capital One Financial Corp. (In re Sims*), 278 B.R. 457 (Bankr. E.D. Tenn. 2002) that there is no private right of action available under section 502 for debtors seeking relief beyond disallowance of all or a portion of Bank One's claim. As stated in the *Sims* decision, this does not mean that these debtors cannot pursue their claim objections in this adversary case if they wish to do so. *Id.* at p. 467. ("[T]o the extent that the first claim of this adversary proceeding constitutes objections to the claims of Capital One in the various cases, it is proper.") Since the claim objections are coupled with requests for other relief, the objections in an adversary case posture are appropriate. *Id*. at p. 467. But, as *Sims* states, under section 502, there is no right to relief beyond allowance or disallowance of the claim. There is no private right of action for improprieties committed by a creditor in filing proofs of claim under section 502.

2.

However, the debtors have done more than simply object to the claims of Bank One. They have asserted that they or their estates are owed further sums beyond the mere fixing of the claims. Debtors allege that Bank One's actions in filing overstated claims is an "abuse of the bankruptcy process" and that the Court should sanction Bank One for these overstatements pursuant to 11 U.S.C.§ 105. This is a claim separate and apart from the claim objections themselves.

As stated in *In re Sims*, courts have authority to sanction abusive actions pursuant to 11 U.S.C. § 105. *Id.* at p. 481- 482. Courts have entertained this type of relief in other cases and have allowed recovery to parties when a party's actions in a bankruptcy case warranted relief. E.g. *Walton v. LaBarge (In re Clark),* 223 F.3d 859 (8th Cir. 2000) (awarding attorneys fees and expenses to United States Trustee as sanction against improper attorney disclosures); *In re Rimsat, Ltd.*, 212 F.3d 1039 (7th Cir. 2000) (awarding sanctions against creditor and creditor's counsel for abuse of process in handling of depositions); *In re Volpert*, 110 F.3d 494 (7th Cir. 1997) (same); *Caldwell v. Unified Capital Corp. (In re Rainbow Magazines, Inc.)*, 77 F.3d 278 (9th Cir. 1996) (same)*; Jones v. Bank of Santa Fe (In re Courtesy Inns, Ltd.*), 40 F.3d 1084, 1089 (10th Cir. 1994). *See also Chambers v. NASCO, Inc*., 501 U.S. 32 (1991) (utilizing inherent contempt powers of courts); *Glatter v.Mroz (In re Mroz)*, 65 F.3d 1567 (11th Cir. 1995) (same). In fact, in the *Sims* case, the Court denied Capital One's motion to dismiss the plaintiffs' claims under section 105. *Sims* at p. 481-82. The plaintiffs in this case, like *Sims*, allege that potentially thousands of debtors have had improper proofs of claim filed in their cases. In this case, the Court assumes that the debtors intend to attempt to prove that Bank One systematically

and knowingly overstated claim balances in these cases and others around the nation. Therefore, relief may be appropriate depending upon the proof provided at trial. For all of the reasons stated above and in the *Sims* case, defendant's motion to dismiss the complaint as to section 105 relief is due to be denied.

3.

The Court concludes it should not as a matter of law dismiss either the claim objections or the request for relief under section 105, because both are available to the named plaintiffs, depending upon the proof at trial. The Court does conclude that there is no private right of action under section 502 for compensatory or punitive damages.[3]

B.

Bank One asserts that the debtors cannot seek relief because their claims are moot. Bank One amended its proofs of claim in each of the debtor's cases after the filing of this adversary. The mootness doctrine does not provide an avenue for Bank One to preclude debtors' possible class claim. This Court has ruled on this issue in a different context in at least two other class

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[3] The Court has ruled that a private right of action did exist under 11 U.S.C. § 506 of the Bankruptcy Code in some other cases decided by this Court. *Noletto*, supra.; *Franklin L. Miller v. First Union Bank (In re Miller)*, Case No. 97-12807, Adv. No. 99-1137 (Bankr. S.D. Ala.); *Roland E. Harris v. First Union Mortgage Corp. (In re Harris),* Case No. 96-14029, Adv. No. 99-1144 (Bankr. S. D. Ala.); *Catherine Slick v. Norwest Mortgage, Inc.(In re Slick)*, Case No. 98-14378, Adv. No. 99-1136 (Bankr. S.D. Ala.); *Rocky D. Sheffield v. Homeside Lending, Inc. (In re Sheffield)*, Case No. 97-10511, Adv. No. 97-1124 (Bankr. S.D. Ala.); *Michael F. Powe v. Chrysler Financial Corp. (In re Powe)*, Case No. 98-10935, Adv. No. 99-1121 (Bankr. S.D. Ala.). This case is distinguishable.

First, this case deals with a different Code section -- section 502 -- and deals with unsecured creditor claims that do not survive the discharge of the debtor. Second, section 502 does clearly provide the remedy in the statute. Section 506 does not. Third, in the prior rulings the Court did utilize section 105 to deal with the defendants. The court stated that it was sanctioning the defendants, at least in part, for their abuse of process under section 105. E.g. *Slick*, supra, Order Awarding Judgment to the Plaintiffs (Bankr. S.D. Ala. May 10, 2002).

action cases. Those rulings are incorporated by reference. *Powe v. Chrysler Financial Corp.*, 278 B.R. 539, 549-50 (Bankr. S. D. Ala. 2002) (quoting from *Noletto v. NationsBanc Mortgage Corp.*, Case Nol. 98-13813-MAM-13, Adv. No. 99-1120, Order granting class certification motion (Bankr. S.D. Ala. Dec. 29, 2000). The claims of the plaintiffs were viable at the filing of the case. It would be patently inappropriate for Bank One to be able to moot any action against it simply by fixing the claims of anyone who dared file suit before an adjudication of the propriety of class certification could even be reached. As to these debtors' individual claim objections, it might alleviate the need for any claim objection process. However, the abuse of process claim still exists. Amending the claims does not extinguish the debtors' claim that Bank One should be sanctioned under section 105.

C.

Bank One asserts that injunctive relief is not available to the debtors because they have an adequate remedy at law. It may be that injunctive relief is appropriate as part of any relief granted under section 105 for abuse of process. Courts have inherent power to sanction abusive process that includes the right to prevent further abusive actions. In this case, that authority might include the right to enjoin Bank One to insure that no further inappropriate claims are filed. Until the trial has been held, this issue cannot be decided and plaintiffs' complaint states a facially valid claim.

D.

Bank One asserts that punitive damages are not available to the plaintiffs due to law in the Eleventh Circuit on damages in section 362 cases. *In re Jove Engineering, Inc.*, 92 F. 3d 1539 (11th Cir. 1996); *Hardy v. U.S. (In re Hardy)*, 97 F.3d 1384 (11th Cir. 1994). This is a very

different case from the ones cited by Bank One. This case does not allege any violation of the stay. The decisions in *Jove* and *Hardy* dealt with 11 U.S.C. § 105 in its capacity as a contempt power. They did state that civil contempt sanctions should be coercive, not punitive. *Hardy* at p. 1390; *Jove* at p. 1557-59. The complaint in this case does not allege that Bank One violated any court order and thus is guilty of contempt. The complaint alleges that the action of Bank One in filing incorrect documents in the bankruptcy courts nationwide constitutes an abuse of process that should be stopped, that the debtors should be compensated for their damages from the action, and that the debtors should be paid attorneys fees and punitive damages. Courts have awarded damages under section 105 when a party acted in bad faith. E.g. *Kerney v. Capital One Financial Corp. (In re Sims)*, 278 B.R. 457 (Bankr. E.D. Tenn. 2002) (allowing claim to survive motion to dismiss); *Jones v. Bank of Santa Fe (In re Courtesy Inns)*, 40 F.3d 1084 (10th Cir. 1994) (assessing attorneys fees to lender's attorney); *Engel v. Bresset (In re Engel)*, 246 B.R. 784 (Bankr. M.D. Pa. 2000) (assessing punitive damages and attorneys fees); *First Fed. Sav. and Loan Ass'n of Largo v. Froid (In re Froid)*, 106 B.R. 293 (Bankr. M.D. Fla. 1989) (discussing that court had power to assess fees and expenses although not so holding under particular facts); *Mortgage Mart, Inc. v. Rechnitzer (In re Chisum)*, 68 B.R. 471 (9th Cir. BAP 1986) (same as *Engel*). Therefore, the Court concludes that Bank One's motion to dismiss on this ground is due to be denied.

E.

Bank One asserts that this adversary cannot proceed without joinder of the bankruptcy trustee in this district, and, ultimately, all chapter 13 trustees in the nation. Fed. R. Civ. P. 19 (which is incorporated into the Bankruptcy Rules as Rule 7019) requires a complaint to be

dismissed if an indispensable party is not joined. An "indispensable party" is either one without whom complete relief cannot be granted or one who has an interest in the proceedings. *Laker Airways, Inc. v. British Airways, PLC*, 182 F.3d 843, 847 (11th Cir. 1999). Bank One asserts that the trustee will have to administer any amounts that Bank One might be ordered to repay to the estates of the debtors, or might elect to withhold future distributions to Bank One to correct any overpayment. In essence, Bank One asserts that the administrative duties of the trustee make him or her indispensable. The Court concludes that trustees are not indispensable parties to this litigation.

The Bankruptcy Code says any party in interest may object to claims. 11 U.S.C. § 502(a). The Code does not require the trustee to be a party to those objections. The Court found no cases that required the trustee to be a party to a debtor's claim objection. The defendant cites to the *Sims* case for authority for its position, but that case holds that "chapter 13 debtors, <u>either individually or in conjunction with the chapter 13 trustee</u>, have standing to recover on behalf of the estate any sums misdistributed." *Sims* at p. 484 (emphasis added). This view is shared by a major bankruptcy treatise. 4 COLLIER ON BANKRUPTCY § 502.02 (15th ed. rev. 2001).

As to the sanctions request for "abuse of process," the trustee is not a required party. Although initially brought to the Court's attention by a debtor in this case, the issue is really one between the Court and Bank One. A creditor should not be allowed to abuse the integrity of the Court process or institution. This was the nature of the abuse of the parties subject to sanction under section 105 cited above in Part A.2. The filing of knowingly false or improper pleadings in a court is potentially punishable as an abuse of process. The trustee is not a required party to this inquiry.

The cases on indispensability conclude that courts should look to the prejudice that might be suffered by the nonjoinder of a party. *Rhone-Poulenc Inc. v. International Ins. Co.*, 71 F.3d 1299 (7th Cir. 1995). In this case, there will be no prejudice to the trustees. If Bank One is enjoined from filing future claims with certain charges included, this can hardly be a burden for or detrimental to any trustee. If Bank One is ordered to repay improperly claimed funds or a debtor's estate receives a portion of any sanction award, the trustee is also not prejudiced. A trustee might be inconvenienced by such a payment order, but inconvenience is not prejudice.

F.

Bank One asserts that this Court lacks subject matter jurisdiction over the plaintiffs' claims. As to the debtors in this district, the Court clearly has jurisdiction. As to other plaintiffs, the Court concludes that it has subject matter jurisdiction. The Court explained its position in *In re Noletto* and will not reiterate its views here. *Noletto v. NationsBanc Mortgage Corp. (In re Noletto),* 244 B.R. 845 (Bankr. S.D. Ala. 2000); *see also Bank United v. Manley*, 273 B.R. 229 (N.D. Ala. 2001). The *Noletto* ruling is incorporated by reference.

CONCLUSION

For all of the reasons indicated above, the Court has concluded that Bank One's motion is due to be denied in part and granted in part. The Court is granting Bank One's motion to the extent of declaring that there is no private right of action pursuant to 11 U.S.C.§ 502 for compensatory or punitive damages. All other aspects of Bank One's motion are due to be denied.

IT IS ORDERED that:

1. The motion of First USA Bank, N.A. to dismiss this case pursuant to Fed. R. Bankr. P. 7012(b)(6) and (b)(7) is DENIED in all respects except that the Court

GRANTS the motion to the extent of dismissing any claim against First USA Bank, N.A. for compensatory or punitive damages under 11 U.S.C.§ 502.

2. A hearing on the motion of the plaintiffs for class certification will be held on **September 12, 2003 at 9:00 a.m.** in U.S. Bankruptcy Court, Courtroom 2, 201 St. Louis Street, Mobile, AL 36602. Any memoranda or responses to the motion for class certification shall be filed and served no later than September 5, 2003.

Dated: July 3, 2003

MARGARET A. MAHONEY
U.S. BANKRUPTCY JUDGE