

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF ALABAMA

In Re

MONICA THIGPEN

Case No. 02-14280-MAM-13

Debtor

MONICA THIGPEN

Plaintiff

vs.

Adv. No. 04-01035

MATRIX FINANCIAL SERVICES  
CORPORATION

Defendant

**ORDER DENYING DEFENDANT’S MOTION TO RECONSIDER, ALTER  
OR AMEND AND DENYING DEFENDANT’S RENEWED MOTION TO  
DISMISS AND GRANTING PLAINTIFF’S MOTION TO STRIKE  
JURY DEMAND**

Steve Olen, Steven L. Nicolas, Royce A. Ray, III, Attorneys for Plaintiff, Mobile, AL  
Donald J. Stewart, Attorney for Plaintiff, Mobile, AL  
M. Warren Butler and William E. Shreve, Jr, Attorneys for Defendant, Mobile, AL

This case is before the Court on the motion of Matrix Financial Services Corporation to reconsider, alter or amend, and, alternatively, to renew its motion to dismiss. It is also before the Court on the plaintiff’s motion to strike the defendant’s jury demand. This Court has jurisdiction to hear these matters pursuant to 28 U.S.C. § § 157 and 1334 and the Order of Reference of the District Court. These matters are core proceedings 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 denying the defendant’s motion to reconsider, alter or amend and its motion

to renew its motion to dismiss. The Court is granting the plaintiff's motion to strike the defendant's jury demand, dependent upon the District Court's ruling on the request for withdrawal of the reference.

## FACTS

The Court stated most of the facts underlying these motions in the order denying defendant's motion to dismiss this case and the order denying defendant's request to stay discovery pending a District Court ruling on its motion to withdraw the reference. The facts will not be restated here and those stated in the other two orders are incorporated by reference. The only "new" fact is that, in her Memorandum in support of her motion to strike defendant's jury demand, plaintiff clarified that it was her intent to pursue only any recovery due to her, or the potential class she seeks to have certified, under § 105 of the Bankruptcy Code for "civil contempt . . . for sanctions for the defendant's abuse of the bankruptcy process." Plaintiff's Memorandum in Support of Motion to Strike Defendant's Jury Demand, p 2.

The plaintiff asserts that the Court misunderstood the import of her pleadings and the damages sought. Plaintiff asserts, from Eleventh Circuit case law, that compensatory and punitive damages may be available to plaintiff and her class under § 105. Thus, it is appropriate to pray for punitive damages in a civil § 105 context. Since only civil contempt is sought, the defendant has no jury trial right. Secondly, Thigpen asserts that Matrix waived its right to a jury trial by filing a proof of claim in the bankruptcy case.

Matrix asserts that the punitive damage request makes the cause of action at least a tort action not governed by § 105 and/or a request for criminal contempt. Either of these causes of action would require a jury trial. In its motion to reconsider, Matrix also asserts that if plaintiff's

complaint is one for civil contempt, the entire case is due to be dismissed. Civil contempt requires a court order that has been violated. No court order is alleged to be at issue in this case.

Thigpen asserts that she is not seeking relief for civil contempt under the inherent contempt power, but rather under the statutory contempt power of § 105. Section 105 does not require that any specific court order have been violated; only that an abuse of process or inappropriate behavior in conjunction with a stay relief order occurred.

#### LAW

##### 1.

The Court is ruling on these two motions in one order because the central issue is the same in both. What is the relief that the plaintiff is seeking? If it is civil relief under § 105 only, then no jury trial right exists. If it is not relief that is available under § 105 or is criminal contempt, then a jury trial right does exist.

The Federal Rules of Civil Procedure and the Federal Rules of Bankruptcy Procedure are notice pleading rules requiring liberal construction of pleadings in the first instance. *In re Yadidi*, 274 B.R. 843 (9th Cir. BAP 2002). Thus, in the ruling on the defendant's motion for stay pending ruling on withdrawal of reference and the motion to dismiss, the court took the broadest view possible of the complaint. This view included viewing the complaint as seeking tort relief and/or criminal contempt relief in which punitive damages are clearly available.

Plaintiff now is agreeing to limit her possible relief to § 105 avenues. As stated in the ruling on the motion to dismiss, the Court clearly finds that such relief is available to plaintiff based on the allegations in her pleadings, if proven at trial. *Thigpen v. Matrix Financial Services Corporation (In re Thigpen)*, Case No. 02-14280-MAM-13, Adv. No. 04-01035 (Bankr. S.D.

Ala. May 25, 2004), Order Denying Stay Pending Disposition of Motion for Withdrawal of Reference, pgs 6-7. The court finds no case law that requires plaintiff to seek broader relief, even if it might be available. The court accepts this narrowing of the complaint for purposes of this order.<sup>1</sup>

2.

The plaintiff says she is seeking “civil contempt” relief. This does not, however, really describe what the plaintiff’s complaint seeks. Section 105 relief is very often contempt-related relief. Therefore, most cases call violations of § 105 “contempt”. However, § 105 clearly allows for relief for abuse of process and allows any action “necessary or appropriate to enforce or implement court orders.” If affidavits have been improperly executed and used to gain relief from the automatic stay, then relief would be available for correction of the improper behavior. The use of the phrase “civil contempt” by Ms. Thigpen is not dispositive of whether her complaint states a ground for relief under § 105. It does. It seeks relief for Matrix’s abuse of the bankruptcy process.

3.

As stated in the order denying a stay pending a ruling on the withdrawal of the reference, a jury trial right exists if the cause of action was one that required a jury trial in 18th century England and does not involve a public right. *Thigpen v. Matrix Financial Services Corporation* (In re Thigpen), Case No. 02-14280-MAM-13, Adv. No. 04-01035 (Bankr. S.D. Ala. May 25, 2004), Order Denying Stay Pending Disposition of Motion for Withdrawal of Reference, pgs. 6-

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<sup>1</sup> No amended complaint is necessary at this time. The court concludes that the complaint can be read as so limited.

7. If the debtor is limiting herself to relief under § 105 for abuse of process and improper notarization of affidavits executed in conjunction with relief from stay motions, the debtor is seeking relief that is a public right and such relief was not available in 18th century England. Section 105 and the U.S. bankruptcy system did not exist in 18th century England. The right is a public one, rather than private, because it involves not only the parties, but the integrity of the judicial process and is a matter concerning the administration of the bankruptcy estate.

No jury trial right for contempt or sanctions exists according to case law either. *Ayres v. Walsh (In re East West Constr. Co., Inc.)*, 21 F.3d 1112 (9th Cir. 1994)(unpublished opinion)(“While there is a Sixth (sic) Amendment right to a jury trial in certain criminal contempt cases, there is no such right in civil contempt cases”); *Chorney v. Weingarten*, 7 F.3d 218 (1st Cir. 1993)(unpublished opinion)(“Absent an express statute, there is no right to jury trial in civil contempt proceedings”); *Fox Valley AMC /Jeep, Inc. v. AM Credit Corp.*, 836 F.2d 366 (7th Cir. 1988)(same); *In re Lucre Mgmt. Group, LLC*, 288 B.R. 579, 583 (D. Colo. 2003)(“The right to a jury trial and other procedural protections apply only to serious criminal contempt sanctions”); *Musslewhite v. O’Quinn (In re Musslewhite)*, 270 B.R. 72 (S.D. Tx. 2000)(same); *In re Rimsat, Ltd.*, 208 B.R. 910 (Bankr. N.D. Ind. 1997)(same). *But see Malone v. Norwest Financial California, Inc.*, 245 B.R. 384 (E.D. Cal. 2000)(stating jury trial right exists as to cause of action under § 524 where plaintiffs seek money damages, including punitive damages, as well as equitable relief); *Cox v. Billy Pounds Motors, Inc.*, 214 B.R. 635, n.4 (Bankr. N.D. Ala. 1997)(stating “serious” civil contempt may require a jury trial if action may

do more than strictly compensate the victim for actual losses).<sup>2</sup> The matter is a “core proceeding” because whether Matrix abused the bankruptcy process is integrally involved in the

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<sup>2</sup> Plaintiff asserts that in *Jove Engineering, Inc. v. IRS (In re Jove Engineering, Inc.)*, 92 F.3d 1539 (11th Cir. 1996), the Eleventh Circuit stated, in dicta, that punitive damages may be available in § 105 actions. The Court stated:

Section 105(a) states “[t]he court may issue *any* order, process or judgment that is necessary or appropriate to carry out the provisions of this title.” 11 U.S.C. § 105(a) (emphasis added). Sovereign immunity aside, § 105 uses the broad term “any” which encompasses all forms of orders including those that award monetary relief. The term “any” should be given this broad construction under the “settled rule that a statute must, if possible, be construed in such fashion that every word has some operative effect.” *United States v. Nordic Village*, 503 U.S. 30, 26, 112 S.Ct. 1011, 1015, 117 L.Ed.2d 181 (1992). The broad term “any” is only limited to those orders that are “necessary or appropriate” to carry out the Bankruptcy Code. Therefore, the plain meaning of § 105(a) encompasses *any* type of order, whether injunctive, compensative or punitive, as long as it is “necessary or appropriate to carry out the provisions of” the Bankruptcy Code.

*Jove Engineering*, 92 F.3d at 1554.

The Eleventh Circuit also stated:

Section 105 creates a statutory contempt power, distinct from the court’s inherent contempt powers in bankruptcy proceedings, for which Congress unequivocally waives sovereign immunity. *Jove*, 92 F.3d at 1553. The language of § 105 encompasses “any type of order whether injunctive, compensative or punitive, as long as it is ‘necessary or appropriate to carry out the provisions of the Bankruptcy Code.’” *Id.* at 1553-54. Therefore, “§ 105(a) grants courts independent statutory powers to award monetary and other forms of relief for automatic stay violations to the extent such awards are ‘necessary and appropriate’ to carry out the provisions of the Bankruptcy Code.” *Id.*

*In re Hardy*, 97 F.3d 1384, 1389-90 (11th Cir. 1996).

The court is not deciding this issue at this juncture. However, the court will only award punitive damages if it is firmly convinced they are available in a civil § 105 context. Some courts have made it clear that any serious, i.e. sizeable, punitive damage awards give a defendant a jury trial right. *E.g. Knupfer v. Lindblade (In re Dyer)*, 322 F.3d 1178, 1193-94 (9th Cir. 2003); *Cox*, *supra*, note 4.

bankruptcy court's authority to enforce its own orders and procedures. See *Dunmore v. U.S.*, 358 F.3d 1107, 1114-15 (9th Cir. 2004).

4.

Thigpen asserts that even if Matrix had a right to a jury trial as to the relief sought in her complaint, Matrix waived its right by filing a proof of claim in Ms. Thigpen's case.<sup>3</sup> The U.S. Supreme Court in *Langenkamp v. Culp*, 498 U.S. 42, 111 S.Ct. 721, 112 L.Ed. 2d 709 (1990) held that the filing of a proof of claim by a creditor "triggers the process of 'allowance and disallowance of claims,' thereby subjecting [the creditor] to the bankruptcy court's equitable power." *Langenkamp*, 498 U.S. at 44-45.

Matrix asserts that the filing of a proof of claim alone does not constitute a waiver of the right to a jury trial in all circumstances. As stated in *Germain v. Connecticut National Bank*, 988 F.2d 1323 (2nd Cir. 1993), the *Granfinanciera, S.A. v. Nordberg case*, 492 U.S. 22, 109 S.Ct. 2782, 109 L.Ed.2d 26 (1989)

stands for the proposition that by filing a proof of claim a creditor forsakes its right to adjudicate before a jury any issue that bears directly on the allowance of that claim . . . It is reasonable that a creditor or debtor who submits to the equity jurisdiction of the bankruptcy court thereby waives any right to a jury trial for the resolution of disputes vital to the bankruptcy process, such as those involving the determination of who is a valid creditor and which creditors are senior in the creditor hierarchy. . . We conclude that neither precedent nor logic supports the proposition that either the creditor or the debtor automatically waives all right to a jury trial whenever a proof of claim is filed. For a waiver to occur, the dispute must be part of the claims-allowance process or effect the hierarchical reordering of creditors' claims.

*Germain*, 988 F.2d at 1329-30.

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<sup>3</sup> The court takes judicial notice of the claims register in Ms. Thigpen's case which shows a proof of claim filed by Matrix.

Only issues directly related to the adjudication of the validity, priority and extent of Matrix's claim should be considered as outside the bounds of a jury trial. Issues unrelated to claims allowance should require a separate waiver.

This court concludes that the decisions subsequent to *Langenkamp, supra.*, that limit the waiver of the right to a jury trial to issues tied to the claims allowance process are correct. Waiver is the intentional relinquishment of a known right or privilege. *Standard Industries, Inc. v. Tigrett Industries, Inc.*, 397 U.S. 586, 587, 90 S.Ct. 1310, 1311, 25 L.Ed.2d 590 (1970); *Johnson V. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). If Matrix could not have foreseen the issues raised in this complaint and the complaint is not rooted in the claims allowance process, no waiver occurred.

This court believes Matrix could or should have foreseen litigation about its affidavit preparation process if what debtor alleges is true. Execution of signature pages and/or notarization of them separate and apart from the body of affidavits should be an obviously inappropriate action. Notarization requires a complete affidavit and a signer and notary in one place at one time. *Thigpen v. Matrix Financial Services Corporation (In re Thigpen)*, Case No. 02-14280-MAM-13, Adv. No. 04-01035 (Bankr. S.D. Ala. May 25, 2004), Order Denying Defendant's Motion to Dismiss Complaint.

The more difficult issue is whether the execution of the affidavit was part of the claims allowance process. Matrix filed the affidavit with the court as a part of a motion for relief from the stay. 11 U.S.C. § 362. Matrix sought to have the court remove its relationship with the debtor from the protection of the automatic stay. This action does not directly tie to the



allowance or disallowance of Matrix's claim. Therefore, Matrix did not waive its right to a jury trial in this case by filing a proof of claim.

#### CONCLUSION

The debtor, Monica Thigpen, chooses to limit the relief pursued in her complaint to those civil remedies accorded to her under § 105 of the Bankruptcy Code. Based upon this limitation of her complaint, the Court concludes that Matrix Financial Services Corporation does not have a right to a jury trial. For this reason, the plaintiff's motion to quash jury trial demand is to be granted, and the defendant's motions to reconsider, alter or amend the court's order of May 25, 2004 and the defendant's renewed motion to dismiss the case is to be denied.

IT IS ORDERED that

1. The motion of Matrix Financial Corporation to reconsider, alter or amend and alternative renewed motion to dismiss is DENIED;
2. The motion of Monica Thigpen to strike the defendant's jury demand is GRANTED; and
3. This order is subject to and dependent upon the District Court's ruling on the motion to withdraw reference.

Dated: August 2, 2004

  
MARGARET A. MAHONEY  
U.S. BANKRUPTCY JUDGE