

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF FLORIDA  
PENSACOLA DIVISION

IN RE:

VERA H. FITZPATRICK,  
  
DEBTOR.

CASE NO.: 03-43069

VERA H. FITZPATRICK,  
  
PLAINTIFF,

ADV. NO.: 08-03017

versus

COUNTRYWIDE HOME LOANS SERVICING LP; AND  
BUTLER & HOSCH, P.A.

DEFENDANTS.

**ORDER DENYING MOTION TO DISMISS COUNTS I, CONDITIONALLY  
GRANTING MOTION TO DISMISS COUNT VII, AND  
GRANTING MOTION TO DISMISS COUNTS II, III, IV, V, AND VI**

Martin S. Lewis, attorney for the Debtor Plaintiff  
Edmund S. Whitson, III, attorney for the Defendant Countrywide  
Margaret A. Krasicki, attorney for Butler & Hosch, P.A.

Defendant Countrywide Home Loans Servicing LP has filed a motion to dismiss this adversary case. 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. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I), and the Court has authority to enter a final order. For the reasons indicated below, Defendant's motion is granted in part and denied in part. Specifically, Defendant's motion to dismiss Counts II, III, IV, V, and VI is granted, Defendant's motion to dismiss Count I is denied, and Defendant's motion to dismiss Count VII is granted, unless

Plaintiff amends her complaint within 30 days in a manner consistent with this order.

### **FACTS**

On November 5, 2003, the Plaintiff filed a voluntary Chapter 13 bankruptcy petition. The Plaintiff's bankruptcy schedules listed a secured debt to Countrywide Home Loans Servicing LP ("Countrywide") in the amount of \$83,880.00. The debt is secured by Plaintiff's homestead. On December 19, 2003, Plaintiff's counsel sent a letter to Countrywide advising it that Plaintiff had filed a chapter 13 bankruptcy and indicating that the arrearage owed to Countrywide was included in Fitzpatrick's plan. The Plaintiff's original plan listed mortgage arrearage to Countrywide in the approximate amount of \$2,800.00.

Countrywide was represented throughout the bankruptcy proceeding by Butler & Hosch, P.A. which filed a notice of appearance in the bankruptcy case and filed a proof of claim for Countrywide's secured debt in the amount of \$86,837.42 including prepetition arrears of \$3,174.69. On April 14, 2004, Countrywide filed an objection to confirmation of the Plaintiff's plan due to the stated amount of arrearages. Countrywide claimed the correct amount of arrearage was \$3,174.69, the amount stated in its proof of claim. The Plaintiff amended her plan to reflect the amount stated in Countrywide's proof of claim and objection. The Plaintiff's plan was confirmed on May 13, 2004. Countrywide was to be paid the prepetition arrearages of \$3,174.69 through the Plaintiff's plan. Fitzpatrick was to pay the postpetition mortgage payments directly to Countrywide "outside of the plan."

On September 8, 2006, Countrywide filed a Motion for Relief from Stay, with an attached affidavit stating that the Plaintiff had defaulted under her mortgage and note by failing to make the July 1, 2006 and all subsequent payments. Countrywide stated arrears in the amount

of \$2,841.71 had accumulated and a principal balance of \$79,552.90 was owing on Fitzpatrick's debt. The bankruptcy court ordered the Plaintiff to pay Countrywide postpetition payments in the amount of \$2,582.17 to cover the postpetition arrearage. The sum to be paid as an arrearage included \$700.00 in attorney's fees and costs incurred for filing and prosecution of the relief from stay motion.

Plaintiff submitted to Countrywide the amount of \$2,582.17 by check curing all postpetition arrearage as required by the court's order. The Plaintiff made all subsequent monthly payments directly to Countrywide. On August 22, 2007, the Plaintiff was granted a discharge of all dischargeable debts pursuant to 11 U.S.C. § 524.

On or about November 3, 2007, the Plaintiff was served with a Summons and Complaint to Foreclose Mortgage by Butler & Hosch, on behalf of Countrywide. The complaint alleges that the Plaintiff has failed to make the installment payment due September 1, 2003 and each payment thereafter. The complaint stated that the principal balance due on the Plaintiff's note and mortgage was \$83,662.73.

The Plaintiff filed this adversary case alleging: (1) willful violation of the discharge injunction by Countrywide and Butler & Hosch; (2) violation of the Fair Debt Collection Practices Act (15 U.S.C. § 1692f(1)) by Butler & Hosch; (3) violation of the Fair Debt Collection Practices Act (15 U.S.C. § 1692c(a)(2)) by Butler & Hosch; (4) violation of the Fair Debt Collection Practices Act (15 U.S.C. § 1692d) by Butler & Hosch; (5) violation of the Florida Consumer Collection Practices Act (§ 559.72(9)) against Butler & Hosch; (6) materially inaccurate and/or misleading representations of fact in summons and complaint against Countrywide and Butler & Hosch; and (7) breach of contract by Countrywide. The Plaintiff

seeks actual statutory and punitive damages from the Defendants, including attorneys fees and expenses and seeks a permanent injunction against Defendants to prevent collection of the discharged debt.

The Defendant Butler & Hosch answered the adversary complaint on August 12, 2008, admitting the basic facts stated above. On August 12, 2008, Countrywide filed its motion to dismiss this case on several grounds: (1) lack of subject matter jurisdiction; (2) no private right of action for violation of a discharge order; (3) preemption by the Bankruptcy Code of the federal and state laws raised in Counts II-V; (4) preclusion of any cause of action due to Florida litigation privilege; and (5) failure to state a specific claim as to breach of contract. Butler and Hosch joined in Countrywide's motion to assert lack of subject matter jurisdiction. A hearing on the motion to dismiss was conducted and the matter was taken under advisement.

## LAW

Under Federal Rule of Bankruptcy Procedure 7012, the Court must view the complaint and any inferences which may be drawn from it in the light most favorable to the plaintiff. The facts presented in the complaint must be taken as true for purposes of ruling on the motion. *In re Levin*, 284 B.R. 308 (Bankr. S.D. Fla. 2002). The "party moving for dismissal has the burden of showing that no claim has been stated." *Brown v. Adams (In re Fort Worth Osteopathic Hospital, Inc.)*, 2008 WL 2963583 (Bankr. N.D. Tex. 2008)(citing 2 MOORE'S FEDERAL PRACTICE § 12.34[1][a] (3rd ed.2006)). Therefore, Countrywide and Butler & Hosch must prove that Fitzpatrick has no claim of any kind under each of her counts based upon the facts stated in her complaint.

### A. Subject Matter Jurisdiction

Countrywide and Butler & Hosch assert that this court lacks subject matter jurisdiction over all counts of the plaintiff's complaint. 28 U.S.C. § 1334(b) states that "the district courts shall have original but not exclusive jurisdiction of civil proceedings arising under title 11 or arising in or related to a case under title 11." Under 28 U.S.C. § 157(a), district courts may refer cases to the bankruptcy courts. Bankruptcy cases are referred to the bankruptcy courts routinely in this district and all other districts. Bankruptcy courts must analyze (1) if the cause of action arises from a right created by the Bankruptcy Code; (2) if the cause of action arises in a case under Title 11; or (3) if the cause is related to a case under Title 11. If any of the above is true, then subject matter jurisdiction attaches to the cause of action and the action is properly heard before a district court. *Wood v. Wood (Matter of Wood)*, 825 F.2d 90 (5th Cir. 1987).

For this court to have subject matter jurisdiction over this lawsuit, the court must have at least "related to" jurisdiction over the causes of action brought. "Related to" jurisdiction is the most expansive jurisdiction granted to judges under title 28. *Geruschat v. Ernst Young LLP (In re Seven Fields Development Corp.)*, 505 F.3d 237, 257 (3d Cir. 2007)(citing *Resorts Int'l, Inc. Litig. Trust v. Price Waterhouse*, 372 F.3d 154(3d Cir. 2004)). The test used by the Third Circuit to determine "related to" jurisdiction is "whether the outcome of the proceeding could conceivably have an effect on the estate being administered in bankruptcy." *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984). The Eleventh Circuit Court of Appeals adopted the Third Circuit test of "related to" jurisdiction in *Miller v. Kemira (In re Lemco Gypsum, Inc.)*, 910 F.2d 784 (11th Cir. 1990). In the *Seven Fields Development Corporation* case, the Third Circuit dealt with the proper test to be applied when an action is brought postconfirmation. The Third Circuit stated

[A]pplication of the *Pacor* test in the “post-confirmation context” was “problematic” inasmuch as “it is impossible for the bankrupt debtor’s estate to be affected by a post-confirmation dispute because the debtor’s estate ceases to exist once confirmation has occurred,” as generally “the confirmation of a plan vests all of the property of the estate in the reorganized debtor. . . In light of the circumstance that post-confirmation the debtor’s estate will not exist, and in recognition of the need to confine bankruptcy court jurisdiction to appropriate limits, we recognized a new test to be applied in the “post-confirmation context” in which “the essential inquiry” is “whether there is a close nexus to the bankruptcy plan or proceeding sufficient to uphold bankruptcy court jurisdiction over the matter” . . . In other words, “[a]t the post-confirmation stage, the claim must affect an integral aspect of the bankruptcy process—there must be a close nexus to the bankruptcy plan or proceeding.” . . . For instance, we held that “[m]atters that affect the interpretation, implementation, consummation, execution, or administration of the confirmed plan will typically have the requisite close nexus.”

*Geruschat v. Ernst Young LLP (In re Seven Fields Development Corp.)*, 505 F.3d 237, 258 (3d Cir. 2007)(quoting *Resorts Int’l Litig. Trust v. Price Waterhouse*, 372 F.3d 154 (3d Cir. 2004) (internal citations omitted). The Eleventh Circuit has not proposed a test for post-confirmation or postdischarge actions. The court concludes that the Eleventh Circuit would adopt the Third Circuit test as a corollary to its prior adoption of the *Pacor* test.

Under the test, all of the counts of Fitzpatrick’s complaint are “related to” a case under title 11. The causes of action “affect the implementation. . . execution . . . [and/or] administration of” Fitzpatrick’s plan. *Seven Fields Development Corp.*, 505 F.3d at 258; *Rodriguez v. Countrywide Home Loans, Inc. (In re Rodriguez)*, 2008 WL 4371669, \*9 (Bankr. S.D. Tex. 2008)(stating “the Court undoubtedly has subject matter jurisdiction over disputes arising under the debtors’ confirmed chapter 13 plans). Did Fitzpatrick pay in the bankruptcy case, under her plan, or, pursuant to other court orders, any or all of the arrearages Countrywide now alleges are due? If Countrywide failed to include all arrearages in its proof of claim or relief from stay affidavit and motion, are those amounts properly due and owing after discharge? Can

Countrywide claim that any amount it may have accrued but not charged to Fitzpatrick before or during the bankruptcy case is still collectible or is all pre-discharge debt discharged?

Count I, violation of the discharge injunction, can only arise in a bankruptcy case because it involves a bankruptcy discharge. Such a claim invokes “a substantive right created by the Bankruptcy Code” and arises under the Bankruptcy Code. 28 U.S.C. § 1334; *In re Toledo*, 170 F.3d 1340 (11th Cir. 1999); *In re Rodriguez*, 2008 WL 4371669. Also, under the Third Circuit test a violation of the discharge injunction affects the implementation and administration of Fitzpatrick’s estate. If Countrywide is seeking payment of amounts that were or should have been paid through the bankruptcy case, this court must have jurisdiction to enforce its own order. “[I]t is well established that courts retain jurisdiction to enforce their own orders.” *In re Rodriguez*, 2008 WL 4371669, at \*15 (quoting *Koehler v. Grant*, 213 B.R. 567 (8th Cir. BAP 1997)). Therefore, the Court has subject matter jurisdiction over this claim.

Counts II-V, violations of federal and state collection protection statutes, are allegations against Defendant Butler & Hosch. These counts do not arise under the Bankruptcy Code as Count I does. However, the issues raised in the counts arise from the same set of facts as Count I. The counts state that Butler & Hosch was attempting to improperly collect discharged or paid debts that were dealt with in Fitzpatrick’s plan or other court orders. These causes of action relate to the discharge order as well and the implementation and/or administration of that order.

Count VI alleges that Butler & Hosch and Countrywide falsely stated that Fitzpatrick owed a past due debt of \$83,662.73 and had been delinquent since September 2003. This cause of action is also related to the effect of debtor’s payments under her plan and her discharge. Under the *Seven Fields* test, this court has subject matter jurisdiction over the matter.

Count VII states that Countrywide breached its contract with Fitzpatrick. This breach is premised upon the actions taken by both parties in the bankruptcy case. It too meets the *Seven Fields* test for subject matter jurisdiction.

Assuming the allegations are true, all of the counts are at least related to the bankruptcy case and could be heard in the Bankruptcy Court if they are viable causes of actions. *In re Lemco Gypsum, Inc.*, 910 F.2d 784; *In re Seven Fields Development Corp.*, 505 F.3d 237; *see In re Rodriguez*, 2008 WL 4371669.

#### B. Right of Action for Violation of Discharge

Defendants contend that there exists no private right of action under 11 U.S.C. § 524 for a violation of a discharge order. The case law on this issue is conflicting. *See In re Rodriguez*, 2008 WL 4371669; *Padilla v. GMAC Mortgage Corp. (In re Padilla)*, 389 B.R. 409 (Bankr. E.D. Pa. 2008). The Court agrees with the *Rodriguez* case. A court can use its inherent powers or power under § 105 of the Bankruptcy Code to enforce its own orders and/or to punish parties who act in bad faith. *See Bessette v. Avco Fin. Servs., Inc.*, 230 F.3d 439 (1st Cir. 2000). The Court concludes this cause of action should not be dismissed.

#### C. Preemption of Bankruptcy Code

The interplay of bankruptcy law and legislation offering consumers collection protection has been analyzed by the United States Supreme Court. The Supreme Court “concluded that the consumer law ‘sought to prevent consumers from entering bankruptcy in the first place. However, if despite its protection, bankruptcy did occur, the debtor’s protection and remedy remained under the Bankruptcy [Code].’” *Cooper v. Litton Loan Servicing (In re Cooper)*, 253 B.R. 286, 291 (Bankr. N.D. Fla. 2000) (quoting *Kosozka v. Belford*, 417 U.S. 642, 651 (1974)).



By enactment of the Bankruptcy Code, Congress indicated its intent to create a system to regulate the full body of claims that fall within its reach. Just as Congress designed the Code to be broad enough to grant subject matter jurisdiction over all claims “related” to a bankruptcy case, it also provided remedies within the Code for addressing violations of it. *See Necci v. Universal Fidelity Corp.*, 297 B.R. 376 (Bankr. E.D. N.Y. 2003); *Randolph v. IMBS Ins.*, 288 B.R. 524 (Bankr. N.D. Ill. 2003); *Diamante v. Solomon & Solomon, P.C.*, 2001 WL 1217226 (N.D. N.Y. 2001) for discussions of why the Code, and its remedies, preempts consumer protection legislation. Specifically, the Code provides a remedy for any § 524 violation, which is the heart of the Plaintiff’s complaint. To allow the federal and state statutory collection practices claims to go forward would “thwart Congress’ intent in promulgating the Bankruptcy Code to create a singular federal system” to deal with the rights of debtors and creditors. *Diamante*, 2001 WL 1217226, at \* 3. Therefore, Counts II-V should be dismissed.

#### D. Applicability of Florida’s Litigation Privilege

Florida has long recognized a litigation privilege that gives immunity to litigants for statements made during a judicial proceeding or process. *See Myers v. Hodges*, 44 So. 357 (Fla. 1907). This privilege was created to protect the statements made in libel and slander suits. The privilege has been extended to afford immunity “to any act occurring during the course of a judicial proceeding . . . so long as the act has some relation to the proceeding.” *Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. U.S. Fire Ins. Co.*, 639 So.2d 606, 609 (Fla. 1994). The Florida Supreme Court has held that the litigation privilege applies in all causes of action, whether for common law torts or statutory violations. *Echvarria, McCalla, Raymer, Barrett & Frappier, et al v. Cole*, 950 So.2d 380 (Fla 2007).

Count VI of the Plaintiff's complaint alleges that the Defendants' summons and complaint in the foreclosure proceedings contained inaccurate and/or misleading representations of fact. The summons and complaint were served by the Defendants in accordance with Florida law for instituting a judicial foreclosure proceeding. Any statements made during the course of that judicial proceeding are protected ; therefore, since the basis of the Plaintiff's allegations in Count VI relate specifically to statements made in the foreclosure suit legal pleadings, the litigation privilege applies. *See Echvarria*, 950 So.2d 380; *Levin*, 639 So.2d 606. Count VI does not state a cause of action and is due to be dismissed.

#### E. Failure to State a Claim for Breach of Contract

Count VII of the Plaintiff's complaint alleges that Countrywide's conduct violated terms of their agreed upon and executed Note and Mortgage and seeks damages for such conduct. While the complaint describes a breach of contract claim, the Plaintiff does not specifically state that Countrywide breached the contract. Instead, the "Plaintiff alleges that the conduct of Countrywide is consistent with a breach of the terms of the Mortgage and Note."

The Court agrees with the Defendant's view that Count VII does not state a claim as written. Plaintiff must amend Count VII within 30 days to state a cause of action or the count will be dismissed.

#### Conclusion


This Court has subject matter jurisdiction over this case because its claims are either matters, like a violation of discharge order, that can only arise under the Bankruptcy Code, or they are claims that are related to the bankruptcy case and the violation of the Plaintiff's bankruptcy discharge.

The Court concludes that there is a private right of action for willful violation of a discharge order, at least to the extent that bankruptcy courts have the authority and inherent equitable power pursuant to § 105 to enforce their orders; therefore, Count I stands. Counts II, III, IV, and V are based on state and federal consumer protection laws and fail because such legislation is preempted by the Bankruptcy Code. Count VI fails because the claim is based on statements made in a judicial proceeding which are immune from suit because they are protected by Florida's litigation privilege. Count VII, if amended, may state a claim, and the court will give the plaintiff 30 days to amend Count VII.

THEREFORE, IT IS ORDERED that:

1. Countrywide Home Loans Servicing LP and Butler & Hosch, P.A.'s Motion to Dismiss Count I is DENIED.
2. Countrywide Home Loans Servicing LP's Motion to Dismiss Counts II, III, IV, V, and VI is GRANTED.
3. Countrywide Home Loans Servicing LP's Motion to Dismiss Count VII is GRANTED unless Plaintiff amends her complaint within thirty days in a manner consistent with this order.

Dated: November 3, 2008

  
MARGARET A. MAHONEY  
U.S. BANKRUPTCY JUDGE