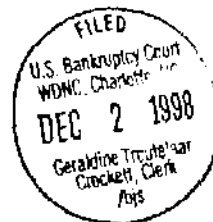


UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA



In Re:) Case No. 95-31864
Camillia Withers) Chapter 13
Debtor.) JUDGMENT ENTERED ON DEC 02 1998

ORDER GRANTING MOTION OF CAMILLIA WITHERS TO REOPEN CASE AND
MOTION FOR SANCTIONS FOR VIOLATION OF THE DISCHARGE INJUNCTION

This matter is before the court for hearing on Camillia Withers' (debtor's) Motion to Reopen Case and Motion for Sanctions for Violation of the Discharge Injunction. The court has concluded that Ms. Withers' Motion to Reopen Case should be granted. In addition, the court has concluded that the actions of Irwin Mortgage Corporation and its predecessor, Inland Mortgage Corporation, constitute a violation of the discharge injunction. Consequently, Ms. Withers' Motion for Sanctions for Violation of the Discharge Injunction should be granted.

FINDINGS OF FACT

1. In December 1995, Ms. Withers filed a Chapter 13 plan which proposed payments of \$250.00 per month for a ten percent payout to her general unsecured creditors. The plan included a pre-petition mortgage arrearage claim held by Inland Mortgage Corporation (Inland) (predecessor to Irwin Mortgage Corporation) in the amount of \$8,000.00 as a secured claim for payment by the Trustee. The plan also provided for ongoing current mortgage payments to Inland in the amount of \$690.00 per month to be paid directly to Inland by the debtor's non-filing spouse.

2. The debtor listed Inland on the creditor's matrix filed in the case and Inland received a copy of the § 341 First Meeting Notice. No representative of Inland appeared at the § 341 First Meeting of Creditors.

3. Following the First Meeting of Creditors, the Trustee recommended confirmation of the Chapter 13 plan with payments of \$258.00 per month for a ten percent payout to general unsecured creditors and with Inland's current monthly mortgage to be paid outside the plan by Ms. Withers' non-filing spouse. The Plan was confirmed by order dated January 26, 1996.

4. Inland did not file a proof of claim for its pre-petition arrearage.

5. The Trustee properly served Inland with a copy of the Motion of Trustee for Allowance of Claims Determination and Designation of Unsecured Percentage Dividend. This Motion indicated that Inland had not filed a proof of claim for the mortgage arrears owed to it by the debtor. Inland did not respond to this motion.

6. Despite not having filed a proof of claim, Inland participated in the bankruptcy case by filing a Motion for Relief from Automatic Stay and from Co-Debtor Stay. The parties resolved the Motion for Relief from Automatic Stay and from Co-Debtor Stay and entered a Consent Order Modifying Automatic Stay and Co-Debtor's Stay.

7. On June 2, 1998, Ms. Withers successfully completed her Chapter 13 plan and both the Motion for Discharge and the Final Decree were entered and served on all parties in the case,

including Inland.

8. Just over one month following the debtor's discharge from her Chapter 13 case, Irwin Mortgage Corporation (Irwin), which had succeeded Inland Mortgage Corporation, informed the debtor that it was beginning foreclosure proceedings and demanded \$21,000.00 from the debtor. The \$21,000.00 represented the pre-petition mortgage arrearages together with late charges, interest, and fees. Irwin proceeded to file the foreclosure action in the North Carolina state courts. Shortly thereafter the debtor filed this Motion to Reopen Case and Motion for Sanctions for Violation of the Discharge Injunction.

CONCLUSIONS OF LAW

9. As an initial matter, the court must determine whether to grant the debtor's Motion to Reopen Case. Section 350(b) of the Bankruptcy Code governs when a case may be reopened and provides that: "A case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause." 11 U.S.C. § 350(b). As this case was closed in this court, the court will reopen the debtor's Chapter 13 case in order to allow her to move for sanctions against Irwin.

10. The main issue before this court becomes, then, whether Irwin's filing of the foreclosure action violates the discharge injunction of 11 U.S.C. § 524(a)(2). Section 524(a)(2) provides that "[a] discharge in a case under this title 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

discharge of such debt is waived" 11 U.S.C. § 524(a)(2). In essence, 11 U.S.C. § 524(a)(2) provides a broad injunction against legal proceedings and any other acts to collect a discharged debt. 4 COLLIER ON BANKRUPTCY ¶ 524.02[2], at 524-14 (Lawrence P. King et al. Eds., 15th ed. rev. 1998). The discharge injunction is the equivalent of a court order such that any violation of the injunction can be sanctioned as contempt of court. Id. Consequently, creditors must maintain procedures to prevent violation of § 524(a)(2) or risk being held liable for damages and attorney's fees. Id. ¶ 524.02[2][c], at 524-16.

11. The court must begin by recognizing that Ms. Withers proposed to pay Inland's mortgage arrearage claim under her Chapter 13 plan and Inland did not object to such treatment before confirmation of debtor's plan. Under the provisions of 11 U.S.C. § 1327(a), once Ms. Withers' Chapter 13 plan was confirmed both she and her creditors, including Inland, were bound by the terms of the plan.¹ As Inland did not file a proof of claim, however, the Chapter 13 Trustee did not pay Inland's \$8,000.00 claim for mortgage arrearages. It is axiomatic that "creditors who want to be recognized and participate in a Chapter 13 case must file a proof of claim . . . unlike in a Chapter 11 case where holders of non-disputed, non-contingent claims properly scheduled do not."

¹11 U.S.C. § 1327(a) provides: "The provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan." 11 U.S.C. § 1327(a).

Matter of Scott, 67 B.R. 1011, 1013 (Bankr. M.D. Fla. 1986).

12. Accordingly, then, the court must determine whether Irwin's \$8,000.00 pre-petition mortgage arrearage claim was discharged from Ms. Withers' Chapter 13 case when she successfully completed her Chapter 13 plan despite the fact that the Chapter 13 Trustee did not pay the claim. If the arrearage claim was discharged when Ms. Withers' Motion for Discharge and The Final Decree were entered in her Chapter 13 case, then Irwin necessarily violated the discharge injunction by bringing its foreclosure action.

13. The discharge in Chapter 13 is governed by 11 U.S.C. § 1328(a), which provides in material part:

As soon as practicable after completion by the debtor of all payments under the plan, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title, except any debt:

- (1) provided for under section 1322(b)(5) of this title;
- (2) of the kind specified in paragraph (5), (8), or (9) of section 523(a) of this title ; or
- (3) for restitution, or a criminal fine, included in a sentence on the debtor's conviction of a crime.

11 U.S.C. § 1328(a). The general proposition regarding the discharge of claims is that if a claim is "provided for" in the Chapter 13 plan, it is discharged despite whether the holder of the claim has received distributions under the plan. 3 KEITH M. LUNDIN, CHAPTER 13 BANKRUPTCY § 9.16, at 9-29 (2nd ed. 1994). "Provided for" as used in § 1328(a) means that a plan "'makes a provision' for, 'deals with,' or even 'refers to' a claim" not that the claim was

paid either partially or entirely by distributions under the plan. Rake v. Wade 508 U.S. 464, 474, 113 S.Ct. 2187, 2193 (1993). For example, the United States Court of Appeals for the Ninth Circuit in In the Matter of Joseph S. Gregory, 705 F.2d 1118 (9th Cir. 1983), held that a plan which proposed zero payment to unsecured creditors "provided for" those unsecured debts such that once the plan was confirmed and the required payments were made, the debts became dischargeable. In addition, § 1328(a) "unmistakably contemplates that a plan 'provides for' a claim when the plan cures a default and allows for the maintenance of regular payments on that claim, as authorized by § 1322(b)(5)." Rake, 508 U.S. at 474. Applying the foregoing to Ms. Withers' Chapter 13 case, it is clear that her Chapter 13 plan provided for Irwin's mortgage arrearage claim despite the fact that Irwin received no distributions under the plan.

14. It is important to note, however, that § 1328(a) provides three exceptions to the general discharge, one of which is for claims provided for under 11 U.S.C. § 1322(b)(5). Section 1322(b)(5) is the provision of the Code that authorizes a debtor to cure a default on a home mortgage by making payments on arrearages under a Chapter 13 plan. Specifically, § 1322(b)(5) states that "the plan may . . . provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last

payment is due after the date on which the final payment under the plan is due" 11 U.S.C. § 1322(b)(5).

15. Thus, the question arises whether the exception to the discharge in § 1328(a) for claims provided for under § 1322(b)(5) applies to only the arrearage claim or to both the arrearage claim and the claim for regular monthly payments. When Ms. Withers provided for Irwin's claim in her Chapter 13 plan, she treated the arrearage claim and the claim for regular monthly payments as two separate debts, with the \$8,000.00 arrearage claim to be paid under the plan and the claim for regular monthly payments to be paid by the debtor's non-filing spouse outside of the plan. Legally, however, Irwin's claim is a single debt, and that debt is the ongoing long-term debt excepted from discharge in § 1328(a)(1). Consequently, the unpaid balance of the long-term debt owed Irwin survives Ms. Withers' Chapter 13 proceeding, but the arrearage claim was discharged when Ms. Withers successfully completed her Chapter 13 plan.

16. It follows from this analysis that Ms. Withers emerged from her Chapter 13 proceeding having discharged her pre-petition arrearage obligation and otherwise current in her mortgage payments. By attempting to collect the discharged arrearage debt through foreclosure, Irwin violated the discharge injunction of 11 U.S.C. § 524(a)(2). Consequently, the court concludes that it should grant the debtor's motion for sanctions against Irwin.

17. This result is consistent with the collective nature of a bankruptcy proceeding. Bankruptcy provides the solution to the circumstance where a debtor's resources are insufficient to satisfy all creditors in full. It is designed to provide for marshaling of the debtor's resources and distribution of them to creditors pursuant to priorities established by the Bankruptcy Code and, in the case of Chapter 13, pursuant to a plan of reorganization. Bankruptcy must be the exclusive remedy in order to be effective. Thus, the Code provides for a stay of all collection efforts other than in the bankruptcy proceeding, and discharge of claims not filed in the bankruptcy proceeding (after proper notice) is necessary to enforce that stay. Otherwise a creditor could simply opt-out of the proceeding by failing to file a claim and then seek collection of its debt after completion of the proceeding. To permit that would undercut the entire process. Here, Irwin received appropriate notice and was provided for in the debtor's plan, but failed to make a claim. Discharge of that claim is required to enforce the policy and procedures of the Code.

18. It does not appear that the debtor has been harmed by Irwin's actions other than by the aggravation and expense of this proceeding. Consequently, the court has concluded that it should award nominal damages and attorneys fees to the debtor.

19. Irwin's violation of the discharge injunction may be remedied by dismissal of its foreclosure proceeding and

reimposition of the discharge injunction.

20. This case is somewhat complicated by the fact that the Chapter 13 proceeding was filed by Ms. Withers rather than jointly by Mr. and Ms. Withers in addition to the fact that Mr. and Ms. Withers are joint obligors on Irwin's Deed of Trust. Thus, the court emphasizes that nothing about this decision purports to affect the rights of Irwin as they pertain to the debtor's non-filing spouse.

It is therefore ORDERED that:

1. Camillia Withers' Motion to Reopen Case is granted;
2. Camillia Withers' Motion for Sanctions for Violation of the Discharge Injunction is granted;
3. The discharge injunction of 11 U.S.C. § 524(a)(2) is applicable to Irwin Mortgage Corporation with respect to the debtor's, Camillia Withers', prepetition arrearage obligation;
4. Irwin Mortgage Corporation shall dismiss its foreclosure proceeding against the debtor's, Camillia Withers', property within 14 days of the date of this Order;
5. Irwin Mortgage Corporation shall pay \$250.00 to Camillia Withers and \$750.00 to her attorney, David Badger, within 30 days of the date of this Order, as damages and attorneys fees.

December 1, 1998.


George R. Hodges