

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

TRANSAMERICA FINANCIAL)
SERVICES,)
)
 Plaintiff)
)
 v.)
)
STEVEN T. DANNEY, et al.,)
)
 Defendants)

Docket No. 99-228-P-H

**RECOMMENDED DECISION ON PLAINTIFF’S MOTIONS TO DISMISS
COUNTERCLAIM AND TO DISMISS ACTION AND MEMORANDUM DECISION
ON DEFENDANTS’ REQUEST FOR SANCTIONS**

The plaintiff, Transamerica Financial Services, moves to dismiss the counterclaim filed by the defendants, Steven T. Danney and his wife, Sallianne Danney, in this action that has been removed to this court by the defendants and, if the motion to dismiss the counterclaim is granted, to dismiss the complaint as well.¹ I recommend that the court grant the motions.

I. Applicable Legal Standards

The plaintiff does not specify the subsection of Fed. R. Civ. P. 12(b) upon which its motion to dismiss the counterclaim is based, but it appears to argue either that this court lacks jurisdiction

¹ The defendants have requested oral argument on the motions. Docket No. 14. I am satisfied that the written submissions of the parties adequately address the issues raised. Therefore, the request for oral argument is denied.

over the subject matter of the counterclaim or that the counterclaim fails to state a claim upon which relief may be granted. The relevant sections of the rule are Fed. R. Civ. P. 12(b)(1) and 12(b)(6).

When a party moves to dismiss pursuant to Rule 12(b)(1), the proponent of the pleading bears the burden of demonstrating that the court has jurisdiction. *Aversa v. United States*, 99 F.3d 1200, 1209 (1st Cir. 1996). For purposes of a motion to dismiss under Rule 12(b)(1), the moving party may use affidavits and other matter to support the motion. The plaintiff may establish the actual existence of subject matter jurisdiction through extra-pleading material. 5A C. Wright & A. Miller, *Federal Practice and Procedure* § 1350 at 213 (2d ed. 1990); *see also Aversa*, 99 F.3d at 1210; *Hawes v. Club Ecuestre el Comandante*, 598 F.2d 698, 699 (1st Cir. 1979) (question of jurisdiction decided on basis of answers to interrogatories, deposition statements and an affidavit).

“When evaluating a motion to dismiss under Rule 12(b)(6), [the court] take[s] the well-pleaded facts as they appear in the complaint, extending the plaintiff every reasonable inference in [his] favor.” *Pihl v. Massachusetts Dep’t of Educ.*, 9 F.3d 184, 187 (1st Cir. 1993). The defendant is entitled to dismissal for failure to state a claim only if “it appears to a certainty that the plaintiff would be unable to recover under any set of facts.” *Roma Constr. Co. v. aRusso*, 96 F.3d 566, 569 (1st Cir. 1996); *see also Jackson v. Faber*, 834 F. Supp. 471, 473 (D. Me. 1993).

A plaintiff’s motion to dismiss its own complaint filed after the defendants have appeared in the action may be granted if the interests of the defendants will not be prejudiced thereby. *Puerto Rico Maritime Shipping Auth. v. Leith*, 668 F.2d 46, 50 (1st Cir. 1981); *Bath Iron Works Corp. v. Parmatic Filter Corp.*, 736 F. Supp. 1175, 1177-78 (D. Me. 1990).

II. Factual Background

The complaint, dated June 14, 1999, was filed in the Maine Superior Court (Cumberland County). It includes three counts: Count I, alleging default on a promissory note; Count II, alleging breach of contract; and Count III, alleging unjust enrichment. The note at issue was executed on March 11, 1993 in California. Complaint (Docket No. 1), Exh. A1. Both defendants signed the note. Both are now residents of Maine. Answer and Counterclaim (Docket No. 3) at 5 ¶1. The defendants removed the action to this court on July 16, 1999. Docket. On July 28, 1999 the defendants filed an answer to the complaint and a counterclaim, which has seven counts: Count I, alleging violation of 11 U.S.C. § 524(c); Count II, alleging violation of 11 U.S.C. § 524(a); Count III, alleging violation of the Maine Consumer Credit Code, specifically 9-A M.R.S.A. §5-116; Count IV, alleging violation of the Maine Unfair Trade Practices Act, 5 M.R.S.A. § 207; Count V, alleging a state-law claim of negligent infliction of emotional distress; Count VI, alleging a state-law claim of intentional infliction of emotional distress; and Count VII, seeking contempt sanctions for violation of a discharge order of the bankruptcy court located in the Central District of California. Answer and Counterclaim at 5-14.

The counterclaim includes the following factual allegations. The defendants executed and delivered a promissory note in the principal amount of \$136,082.47 to and in favor of the plaintiff on or about September 17, 1991. *Id.* ¶ 4. On July 29, 1992 the defendants filed a voluntary bankruptcy petition pursuant to Chapter 7 of the bankruptcy code in the United States Bankruptcy Court for the Central District of California; the plaintiff was listed as a creditor in this proceeding. *Id.* ¶¶ 6, 8. The plaintiff appeared in the bankruptcy case. *Id.* ¶ 9. An order of discharge applicable, *inter alia*, to the plaintiff's promissory note, was issued by the bankruptcy court in that proceeding

on December 4, 1992. *Id.* ¶ 10. On March 11, 1993 the defendants executed and delivered to and in favor of the plaintiff the note that is at issue in this proceeding, in the amount of \$146,600. *Id.* ¶ 12. The defendants did not reaffirm the original note pursuant to 11 U.S.C. § 523(c). *Id.* ¶ 11. Some \$98,565 of the proceeds of the second loan was used to pay the original note. *Id.* ¶ 14. The second note was never filed with or approved by the bankruptcy court. *Id.* ¶ 15.

The attorneys who currently represent the plaintiff are not the attorneys who filed this action in state court.

III. Analysis

A. The Counterclaim: Federal Claims

The plaintiff argues that there is no private cause of action under 11 U.S.C. § 524² for violation of a bankruptcy court's discharge order, requiring dismissal of Counts I and II of the counterclaim. Motion to Dismiss, etc. ("Plaintiff's Motion") (Docket No. 10) at 4-6. The defendants respond that courts that have decided this issue in accordance with the plaintiff's position are "wrong," and cite reported decisions of one federal district court and four bankruptcy courts that they contend support the contrary conclusion. Memorandum of Law in Opposition to Plaintiff's Motion to Dismiss (Docket No. 12) at 5-10.

The only reported decision that fully supports the defendants' position is *Rogers v. NationsCredit Fin. Servs. Corp.*, 233 B.R. 98 (N.D.Cal. 1999), in which a former Chapter 7 debtor

² Section 524(a)(2) provides, *inter alia*, that a discharge "operates as an injunction" against any act or action to collect a discharged debt. Section 524(c) provides in relevant part that an agreement between the debtor and a creditor in which the consideration, in whole or in part, is based on a debt dischargeable in a bankruptcy case is enforceable only under certain conditions. These are the two subsections of section 524 cited in the counterclaim.

brought an action alleging, *inter alia*, that a creditor had violated a discharge order of the bankruptcy court in that same judicial district. *Id.* at 101. The court held that a private right of action exists under section 524 of the bankruptcy code. *Id.* at 109. However, every reported decision upon which the *Rogers* court relied to support its conclusion and every other decision cited by the defendants in this case allowed a debtor to recover based on the bankruptcy court's contempt power rather than the existence of an independent private cause of action under section 524. *In re Latanowich*, 207 B.R. 326, 333 (Bankr. D. Mass. 1997); *In re Arnold*, 206 B.R. 560, 563, 567-68 (Bankr. N.D. Ala. 1997); *In re Walker*, 180 B.R. 834, 847 (Bankr. W.D. La. 1995); *In re Behrens*, 87 B.R. 971, 974, 976 (Bankr. N.D. Ill., 1988); *In re Roush*, 88 B.R. 163, 163 (Bankr. S.D. Ohio 1988). *In re Wiley*, 224 B.R. 58 (Bankr. N.D. Ill. 1998), upon which both the *Rogers* court and the defendants rely, was vacated on reconsideration, 237 B.R. 677 (1999). The contempt power may only be exercised by the court that issued the order that has allegedly been violated. *Ex parte Bradley*, 74 U.S. 364, 377 (1868); *Waffenschmidt v. MacKay*, 763 F.2d 711, 716 (5th Cir. 1985); *Hodge v. Hodge*, 66 F.Supp.2d 342, 345 (N.D.N.Y. 1999). In this case, the discharge order was issued in the Central District of California, not the District of Maine, and the California court is the only forum in which contempt of that order may be considered. *Bessette v. Avco Fin. Servs., Inc.*, 240 B.R. 147, 156 (D.R.I. 1999); *Pereira v. First N. Am. Bank*, 223 B.R. 28, 30 (N.D. Ga. 1998).

I find much more persuasive the recent decision of Chief Judge Lagueux of the District of Rhode Island in *Bessette* that there is no private cause of action under section 524, or under 11 U.S.C. § 105, 240 B.R. at 154-57, an alternative argument raised by the defendants here. The defendants' remedy for violation by any creditor of the bankruptcy discharge order is a proceeding for contempt in that court. *In re Nelson*, 234 B.R. 528, 533-34 (Bankr. M.D. Fla. 1999); *Pereira*, 223

B.R. at 30-31. *See generally In re Owen*, 169 B.R. 261, 262 & n.3 (Bankr. D. Me. 1994) (debtor sought damages for violation of order of discharge by reopening Chapter 7 proceeding). Accordingly, Counts I and II of the counterclaim must be dismissed.

For essentially the same reason — this court lacks jurisdiction to find a party in contempt of the order of another court — Count VII of the counterclaim must also be dismissed.

B. The State-Law Claims

If the court adopts my recommendation to dismiss the federal-law claims asserted in the counterclaim, the state-law claims should be dismissed as well. This court cannot find a party in contempt of the order of another court, and if there is no private cause of action for violation of 11 U.S.C. § 524, these facts mean that this court has no subject-matter jurisdiction over the federal claims raised in the complaint. Under such circumstances, a federal trial court may not exercise supplemental jurisdiction over state-law claims. *Pejepscot Indus. Park, Inc. v. Maine Cent. R.R. Co.*, 59 F.Supp.2d 109, 115 (D. Me. 1999). Accordingly, I recommend that the court dismiss Counts III-VI of the complaint.

C. The Complaint

The plaintiff seeks leave to dismiss its complaint if the counterclaim is dismissed. Plaintiff's Motion at 8-9. The defendants do not oppose this request, but, without citation to authority, contend that the plaintiff "should be deemed to have waived a claim to jurisdiction in the California bankruptcy court" by bringing this action in Maine. Memorandum of Law in Opposition to Plaintiff's Motion to Dismiss ("Defendants' Memorandum") (Docket No. 12) at 14. Possible waiver by the plaintiff of any "claim to jurisdiction" in another forum is a matter for consideration by that

court and irrelevant to this court's consideration of whether it has jurisdiction itself over the defendants' federal claims. I recommend that the court grant the plaintiff's motion in this regard.

The defendants go on to request that dismissal of the complaint be conditioned on the payment by the plaintiff's "current and/or former counsel" of their costs, expenses and attorney fees. Defendants' Memorandum at 14. They cite 28 U.S.C. § 1927 and 11 U.S.C. § 105(a) as the authority for such an order. Section 105(a) provides:

The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

Here, if the court adopts my recommendations concerning dismissal, it will not be carrying out any provision of the bankruptcy code. Nor will it be enforcing or implementing any court order or rule. Even if, as the defendants apparently mean to suggest, bringing this action was an abuse of process, the abuse, if any, has already occurred and will not be prevented by an award of sanctions after the fact. Section 105(a) provides no support for the defendants' request.

Section 1927 of Title 28 of the United States Code provides:

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

The defendants' argument under this statute is directed entirely at the filing of this action in the first place, Defendants' Memorandum at 15, which was not undertaken by the plaintiff's current attorney. Since section 1927 authorizes sanctions only against attorneys, *Bolivar v. Pocklington*, 975 F.2d 28,

33 n.13 (1st Cir. 1992), the person against whom the defendants appear to seek relief under the statute is the plaintiff's prior attorney, who has withdrawn, Docket No. 9. The defendants have made no showing that they have provided notice of this request to that attorney. *See Roadway Express, Inc. v. Piper*, 447 U.S. 752, 767 (1980) (attorney fees should not be assessed under § 1927 without fair notice and an opportunity to be heard). In addition, the defendants offer nothing in their memorandum to support the necessary predicate finding for an award under section 1927 that the attorney's conduct, objectively viewed, "be more severe than mere negligence, inadvertence, or incompetence." *Cruz v. Savage*, 896 F.2d 626, 632 (1st Cir. 1990). At a minimum, it would seem that a showing that the previous attorney was aware of the bankruptcy discharge in California would be necessary before anything more than negligence or incompetence could be established.

Accordingly, the defendants' request for sanctions is denied.

IV. Conclusion

For the foregoing reasons, I recommend that the plaintiff's motion to dismiss the counterclaim be **GRANTED** and that the plaintiff's motion for dismissal of its complaint without prejudice be **GRANTED**. I deny the defendants' request for imposition of sanctions.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review

by the district court and to appeal the district court's order.

Dated this 23rd day of December, 1999.

David M. Cohen
United States Magistrate Judge