

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE  
EASTERN DISTRICT OF TENNESSEE**

In re

Case No. 98-32258

FRANK OLIVER BUSH  
PAMELA JOYCE BUSH

Debtors

FRANK OLIVER BUSH  
and PAMELA JOYCE BUSH

Plaintiffs

v.

Adv. Proc. No. 03-3154

COUNTRYWIDE HOME LOANS

Defendant

**MEMORANDUM**

APPEARANCES: RICHARD M. MAYER, ESQ.  
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Chapter 13 Trustee

**RICHARD STAIR, JR.**  
**UNITED STATES BANKRUPTCY JUDGE**

This adversary proceeding is before the court upon the Complaint filed by the Plaintiffs, Frank and Pamela Bush, on September 4, 2003. Pursuant to the Pre-Trial Order entered on December 4, 2003, the Plaintiffs request an order finding the Defendant, Countrywide Home Loans, successor in interest to Union Planters Bank, N.A., in contempt for violation of the discharge injunction of 11 U.S.C.A. § 524 (West 1993 & Supp. 2003) and assessing damages against the Defendant pursuant to 11 U.S.C.A. § 105(a) (West 1993), including the actual costs for the prosecution of this adversary proceeding and attorney's fees.

The trial of this adversary proceeding was held on January 27, 2004. The record before the court consists of nine exhibits introduced into evidence and the testimony of the Debtor, Pamela Bush, Gary Sleeper, and Melissa Blaylock.<sup>1</sup>

This is a core proceeding. 28 U.S.C.A. § 157(b)(2)(A) and (O) (West 1993).

## I

The Plaintiffs filed a voluntary petition under Chapter 13 of the Bankruptcy Code on May 19, 1998. Union Planters Bank, N.A. (Union Planters) was a creditor of the Plaintiffs, holding a claim secured by a first mortgage on their residence. On June 29, 1998, the court entered an Order Confirming Chapter 13 Plan (the Confirmed Plan), which required the Plaintiffs to pay the Chapter 13 Trustee \$212.00 weekly over the sixty-month term of the Confirmed Plan. In turn, the Confirmed Plan provided for the payment of Union Planters' mortgage by the Chapter 13 Trustee as follows:

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<sup>1</sup> The Debtor, Frank Bush, was in the hospital and unable to appear at trial.

The Debtor(s) owns a house located [at] 5416 Osage Drive, Knoxville, TN 37921, with a first mortgage held by Union Planters Bank which is to be paid . . . inside the plan in monthly installments of \$477.00 commencing 7/98 together with an approximate mortgage arrearage of \$1,908.00 paid in full in monthly installments of \$35.00 at 0% interest. Trustee to pay any future mortgage increases due to escrow and interest changes. Mortgage balance and lien survives plan.

TRIAL EX. 2. Pursuant to the Confirmed Plan, the Chapter 13 Trustee began making the required monthly mortgage and arrearage payments to Union Planters in July 1998, and payments continued without interruption throughout the term of the Confirmed Plan, which was completed in May 2003.<sup>2</sup> The court entered an Order Discharging Debtor After Completion of Chapter 13 Plan on July 1, 2003 (the Discharge Order), which, pursuant to 11 U.S.C.A. § 1328(a) (West Supp. 2003), expressly excepts debts provided for under 11 U.S.C.A. § 1322(b)(5) (West 1993) from the discharge.<sup>3</sup> See TRIAL EX. 4. All payments under the terms of the Confirmed Plan were made by the Chapter 13 Trustee and are reflected on the Trustee's Case Status Report. See TRIAL EX. 3. Ms. Blaylock, a certified public accountant employed in the office of the Chapter 13 Trustee, testified that according to the Plaintiffs' Case Status Report, all payments were made to Union Planters and then Countrywide on a timely basis. She also testified that while there is historically a lag-time between the filing of a Chapter 13 bankruptcy case and confirmation of a plan, if the plan provides for payments to begin in a certain month, the payments begin in that specified month.

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<sup>2</sup> In early 2002, Union Planters sold its interest in the Plaintiffs' mortgage to the Defendant.

<sup>3</sup> Sections 1328(a) and 1322(b)(2) are discussed in depth in this Memorandum *infra*.

After their discharge, the Plaintiffs received notice from the Chapter 13 Trustee that beginning in July 2003, it would be their responsibility to make all further payments to the Defendant under the mortgage. Thereafter, the Plaintiffs began receiving Monthly Home Loan Statements from the Defendant. Pursuant to these statements, the Plaintiffs made payments of \$512.08 on June 24, 2003, and July 18, 2003.<sup>4</sup> See COLL. TRIAL EX. 7. Upon receipt of the Monthly Home Loan Statement dated August 13, 2003, the Plaintiffs noticed that they were being assessed with late charges in the amount of \$55.26. See COLL. TRIAL EX. 8. Mrs. Bush testified that she contacted the Defendant regarding these charges, at which time she was told that the Plaintiffs were one month behind on their mortgage payments.

Based upon the August 13, 2003 monthly statement and her subsequent telephone call to the Defendant, Mrs. Bush made a payment over the telephone in the amount of \$567.34, which included her regular monthly payment of \$512.08, plus the \$55.26 late fees. See COLL. TRIAL EX. 7. The Plaintiffs also paid an additional \$9.00 fee to the Defendant in order to make this payment via telephone. See COLL. TRIAL EX. 7. Mrs. Bush testified that she thought that by making this payment over the telephone, her account would be completely current.

The Plaintiffs then received the Mortgage Home Loan Statement dated August 19, 2003, which also evidenced late charges in the amount of \$20.48, for a total due for September 2003 of \$532.56. Once again, Mrs. Bush contacted the Defendant via telephone,

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<sup>4</sup> Mrs. Bush testified that she believed these payments were for July and August 2003. The increased amount of the monthly payments from \$477.00, as called for in the Confirmed Plan, to \$512.08 apparently represents adjustments in interest and escrow payments.

and she was once again told that the Plaintiffs were one month behind on their mortgage payments. The Plaintiffs then made a payment to the Defendant in the amount of \$532.56, representing their regular monthly payment of \$512.08 plus the \$20.48 late charges assessed. See COLL. TRIAL EX. 7. Mrs. Bush testified that at that time, she contacted her attorney regarding the late fees that the Defendant was charging. Additionally, the Plaintiffs made their regular monthly payments of \$519.92 on September 23, 2003, October 19, 2003, November 27, 2003, and December 23, 2003.<sup>5</sup> See COLL. TRIAL EX. 4.

Mr. Sleeper, a case manager for the Defendant in its foreclosure and bankruptcy department, testified regarding the Defendant's procedures once an account enters and exits bankruptcy. First, all payments made by the Chapter 13 Trustee are matched with the schedule of payments due. Next, the amounts in the filed proof of claim are matched against payments made for maintenance and/or arrearages. Third, any outstanding pre-petition fees are written off, including any drive-by fees and brokers' price opinion fees. He testified that any fees that have not been expressly qualified must then be researched thoroughly to determine whether they were incurred pre-petition, post-petition, pre-discharge, or post-discharge. Mr. Sleeper testified that this process can take some time to clear up, especially in cases such as this one, when a loan has been acquired and the previous lender did not qualify its fees.

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<sup>5</sup> Mrs. Bush testified that after making these payments, she believed that the mortgage was current through February 2004.

Mr. Sleeper testified that after this adversary proceeding was filed, he personally reviewed and re-audited the Plaintiffs' account and determined that Union Planters mistakenly set up its ledger to reflect that payments to be received from the Chapter 13 Trustee under the Confirmed Plan were to commence in June 1998, rather than July 1998. Accordingly, the account continued to reflect a past due amount throughout the entire life of the Plaintiffs' Chapter 13 bankruptcy case. Mr. Sleeper then testified that the Defendant cannot always know that a problem exists until it actually arises, but that he would attempt to cure a problem such as the Plaintiffs' by crediting the account the proper amount and bringing it current. Mr. Sleeper acknowledged that when the Defendant acquired the loan from Union Planters, it also acquired any problems therewith and must therefore absorb the costs to remedy those mistakes, including those associated with the Plaintiffs' account. Along those lines, Mr. Sleeper conceded that the Plaintiffs had paid late charges on the account and that they should be reimbursed.

The Plaintiffs contend that late charges assessed by the Defendant violate the discharge injunction and/or the terms of the Confirmed Plan, and thus, they are entitled to reimbursement of the improper late fees, credit for the extra payment made to the Defendant, reimbursement of their attorney's fees, and punitive damages in the amount of \$1,000.00. At the close of proof, the Defendant offered to reimburse the late charges paid and to credit the Plaintiffs with the missed monthly payment, pending the outcome of this trial. Additionally, the Defendant maintains that it has acted in good faith, and it should not be subject to additional damages.

## II

Once the court enters a debtor's discharge, the following "discharge injunction" is triggered pursuant to § 524(a)(2):

(a) A discharge in a case under this title—

....

(2) 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 . . . [.]

11 U.S.C.A. § 524(a)(2). "The purpose of such an injunction is to protect the debtor from suits to collect debts that have been discharged in bankruptcy." *Hendrix v. Page (In re Hendrix)*, 986 F.2d 195, 199 (7<sup>th</sup> Cir. 1993). Accordingly, once the discharge has been granted, any creditor holding a pre-petition claim or cause of action against that debtor may not attempt to hold him personally liable for any pre-petition debts or liability thereon.

The key factor to be considered in this case is whether the mortgage was actually discharged and thus subject to the discharge injunction. Discharge of Chapter 13 debtors is addressed by 11 U.S.C.A. § 1328, which provides, in material part:

(a) 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[.]

11 U.S.C.A. § 1328(a)(1).

Section 1322(b) (5) is included within the section concerning the contents of Chapter 13 plans and provides that “the plan may . . . provide for . . . maintenance of payments while the case is pending on any . . . 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.A. § 1322(b) (5) (West 1993). This section includes ongoing mortgage obligations such as the one between the Plaintiffs and the Defendant. *See, e.g., Smith v. Keycorp Mortgage, Inc.*, 151 B.R. 870, 877 (N.D. Ill. 1993) (“Under Chapter 13, § 1322(b) (5) provides for the cure of default on residential loans extending beyond the plan period, and does not discharge the debt.”); *In re Chess*, 268 B.R. 150, 153 (Bankr. W.D. Tenn. 2001) (“[B]y virtue of 11 U.S.C. §§ 1328(a) (1) and 1322(b) (5), the remaining balance owed on the debtor’s long term home mortgage debt . . . was not discharged.”); *Telfair v. First Union Mortgage Corp. (In re Telfair)*, 224 B.R. 243, 249 (Bankr. S.D. Ga. 1998) (“[D]ischarge does not affect the [mortgage] debt due . . . pursuant to § 1322(b) (5).”).

Because the Defendant’s mortgage was not discharged in the Plaintiffs’ bankruptcy case, the discharge injunction of § 524(a) (2) is not triggered and does not apply. *Telfair*, 224 B.R. at 249 (“As the discharge does not affect the debt due [the mortgage holder], the discharge injunction of § 524 has no application.”), *aff’d by Telfair v. First Union Mortgage Corp.*, 216 F.3d 1333, 1337 n.8 (11<sup>th</sup> Cir. 2000) (stating that the bankruptcy and district courts found that the § 524(a) discharge injunction did not apply because the disputed debts

were covered by § 1322(b)(5), and although the debtor did not appeal on that issue, the circuit court would have affirmed on those grounds).

### III

Even though the mortgage was not discharged and is therefore not subject to the discharge injunction, the Plaintiffs argue that the court has the power to assess damages against the Defendant for its actions pursuant to its inherent powers under 11 U.S.C.A. § 105(a), which imposes upon the court a duty to uphold the provisions of the Bankruptcy Code. Section 105(a) defines the power of the court as follows:

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.

11 U.S.C.A. § 105(a). “The basic purpose of section 105 is to [provide] the bankruptcy courts [the] power to take whatever action is appropriate or necessary in aid of the exercise of their jurisdiction.” *Casse v. Key Bank Nat’l Ass’n (In re Casse)*, 198 F.3d 327, 336 (2d Cir. 1999) (quoting 2 COLLIER ON BANKRUPTCY ¶ 105-5 to -7 (Lawrence P. King ed., 15<sup>th</sup> ed. 1999)). Section 105(a) alone does not create a private cause of action, but instead, it must be invoked in connection with another section of the Bankruptcy Code. See *Greenblatt v. Richard Potasky Jeweler, Inc. (In re Richard Potasky Jeweler, Inc.)*, 222 B.R. 816, 829 (S.D. Ohio 1998); *Yancy v. Citifinancial, Inc. (In re Yancy)*, 301 B.R. 861, 868 (Bankr. W.D. Tenn. 2003).

Section 1327(a) (West 1993), governing confirmation of a Chapter 13 plan, provides that “[t]he 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.A. § 1327(a). As such, “creditors are limited to those rights that they are afforded by the plan, [and] they may not take actions to collect debts that are inconsistent with the method of payment provided for in the plan.” *United States v. Richman (In re Talbot)*, 124 F.3d 1201, 1209 (10<sup>th</sup> Cir. 1997) (quoting 8 COLLIER ON BANKRUPTCY ¶ 1327.02[1] (Lawrence P. King ed., 15<sup>th</sup> ed. 1996)). Based upon the terms of the Confirmed Plan, the Plaintiffs justifiably believed that upon completion thereof, their mortgage account would be current. Likewise, Ms. Blaylock testified that all payments under the Plaintiffs’ Confirmed Plan were made, and the proof presented shows that, in fact, payments totaling \$28,525.85 were paid to Union Planters and/or the Defendant towards the ongoing mortgage payment over the life of the Plaintiffs’ plan.<sup>6</sup> See TRIAL EX. 3.

At trial, Mr. Sleeper stated that it was Union Planters and not the Defendant who filed a proof of claim in the Plaintiffs’ bankruptcy case. Nevertheless, under § 1327(a), the Defendant, as successor in interest to Union Planters’ claim, was bound by the terms of the Plaintiffs’ Confirmed Plan, which expressly provided that mortgage payments would commence in July 1998, would continue throughout the term of the plan, and would then

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<sup>6</sup> Union Planters’ pre-petition arrearage claim was also fully paid over the term of the Confirmed Plan.

continue as ongoing maintenance payments to be re-assumed by the Plaintiffs after completion of the plan. See TRIAL EX. 2. As it was bound by the Confirmed Plan, the Defendant's continued assessment of an unpaid monthly payment and late charges violated § 1327(a). Because the provisions of the Confirmed Plan provided that payments would begin in July 1998, and Ms. Blaylock testified that all payments were made to either Union Planters or the Defendant under the terms of this plan, the court finds that the Plaintiffs' mortgage was current upon their discharge in July 2003. Furthermore, based upon the payments made by the Plaintiffs since that date, the mortgage is current through February 2004, and the Plaintiffs' next payment to the Defendant on the mortgage will be due for March 2004. The Defendant shall be required to make the appropriate adjustment to its records to reflect the current status of the Plaintiffs' loan.

With regards to the finance charges and other fees charged against and paid by the Plaintiffs, the court has the authority, pursuant to § 1327(a) and § 105(a), to hold the Defendant in contempt and to compensate the Plaintiffs for the Defendant's violation of the Confirmed Plan.<sup>7</sup> Accordingly, the Defendant shall be required to reimburse the Plaintiffs the aggregate sum of \$84.74, representing late fees of \$55.26 and \$20.48 paid by the Plaintiffs

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<sup>7</sup> Generally, civil contempt is used by courts to coerce an individual into performing or obeying an order of the court and to compensate the party injured by the contemptuous actions. *United States v. Bayshore Assocs., Inc.*, 934 F.2d 1391, 1400 (6<sup>th</sup> Cir. 1983); *In re Walker*, 257 B.R. 493, 497 (Bankr. N.D. Ohio 2001) ("Compensatory contempt orders compensate the party harmed by the other party's contemptuous actions; coercive orders seek to cajole the party in contempt to act in the manner desired by the court.") (quoting *Consol. Rail Corp. v. Yashinsky*, 170 F.3d 591, 595 (6<sup>th</sup> Cir. 1999)). Furthermore, civil contempt does not require an element of willfulness by the contemptuous party, so intent is irrelevant. *Rolex Watch U.S.A., Inc. v. Crowley*, 74 F.3d 716, 720 (6<sup>th</sup> Cir. 1996); *In re Crabtree*, 39 B.R. 702, 710 (Bankr. E.D. Tenn. 1984). Appropriate fines for civil contempt include the parties' actual damages incurred and reasonable attorney's fees. *Braun v. Champion Credit Union (In re Braun)*, 152 B.R. 466, 474 (N.D. Ohio 1993).

and the \$9.00 fee charged for their payment by telephone on August 20, 2003. Additionally, the Defendant shall be required to make these reimbursements and to send certification to the court within ten days that they have been paid to the Plaintiffs. Finally, the Defendant shall pay the Plaintiffs' attorney's fees incurred in the prosecution of this adversary proceeding, in the amount of \$2,359.50. See Trial Ex. 9.

A judgment consistent with this Memorandum will be entered.

FILED: February 5, 2004

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.  
UNITED STATES BANKRUPTCY JUDGE

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE  
EASTERN DISTRICT OF TENNESSEE**

In re

Case No. 98-32258

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PAMELA JOYCE BUSH

Debtors

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and PAMELA JOYCE BUSH

Plaintiffs

v.

Adv. Proc. No. 03-3154

COUNTRYWIDE HOME LOANS

Defendant

**J U D G M E N T**

For the reasons stated in the Memorandum filed this date, containing findings of fact and conclusions of law as required by Rule 52(a) of the Federal Rules of Civil Procedure, made applicable to this adversary proceeding by Rule 7052 of the Federal Rules of Bankruptcy Procedure, it is ORDERED, ADJUDGED, and DECREED as follows:

1. The Defendant Countrywide Home Loans is in contempt of the court's June 29, 1998 Order Confirming Chapter 13 Plan for its failure to abide by the terms of the Plaintiffs' confirmed plan.
2. To compensate the Plaintiffs, the Defendant is fined \$2,444.24, of which amount \$84.74 represents late charges and fees erroneously charged by the Defendant and paid by the Plaintiffs

and \$2,359.50 represents attorney's fees incurred by the Plaintiffs in their prosecution of this adversary proceeding. The Defendant shall remit \$84.74 to the Plaintiffs in care of their attorney, Richard M. Mayer, and shall remit the \$2,359.50 attorney fee directly to Mr. Mayer.

3. The Defendant shall immediately adjust its records to reflect that the Plaintiffs' mortgage is current through February 2004.

4. The Defendant shall, within ten (10) days, certify to the court in writing its compliance with this Judgment.

ENTER: February 5, 2004

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.  
UNITED STATES BANKRUPTCY JUDGE