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

In re

Case No. 99-33508

ROBERT LEE STOUT, JR.
ANGELIA L. STOUT
f/k/a ANGELIA L. WOLFENBARGER

Debtors

ROBERT LEE STOUT, JR. and
ANGELIA L. STOUT

Plaintiffs

v. Adv. Proc. No. 04-3280

HOMECOMINGS FINANCIAL

Defendant

**MEMORANDUM ON MOTION FOR SUMMARY JUDGMENT**

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

The Plaintiffs / Debtors filed the Complaint initiating this adversary proceeding on November 4, 2004, asking the court to enter an order (1) finding the Defendant, Homecomings Financial, in contempt for violating the discharge injunction of 11 U.S.C.A. § 524(a) (West 2004); (2) directing the Defendant to provide the Debtors with a statement making their mortgage current; and (3) assessing punitive damages for willful violation of the discharge injunction. The Defendant filed an Answer on December 6, 2004, denying the Debtors' allegations, requesting dismissal of the adversary proceeding, and requesting reasonable attorneys' fees and the costs of defending the adversary proceeding.

Presently before the court is the Motion for Summary Judgment filed by the Defendant on April 5, 2005. The Motion is supported by a Memorandum of Law, as required by E.D. Tenn. LBR 7007-1, together with the Affidavit of Pat Gibson, Bankruptcy Specialist, with five exhibits: (A) an accounting of the Debtors' account reflecting the money received between August 1999 and December 2004; (B) an electronic recording of a conversation between the Debtor, Mr. Stout, and a representative of the Defendant; (C) the Note evidencing the indebtedness owed by the Debtors; (D) the Assignment of the Deed of Trust on the Debtors' residence; and (E) the Deed of Trust on the Debtors' residence. The court also takes judicial notice, pursuant to Federal Rule of Evidence 201, of certain undisputed facts of record in the Debtors' case file. The Debtors did not file a response to the Motion, and "[their] failure to respond shall be construed by the court to mean that the [Debtors do] not oppose the relief requested by the motion." E.D. Tenn. LBR 7007-1.

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

**I**

The Debtors filed the Voluntary Petition commencing their Chapter 13 bankruptcy case on August 26, 1999. The Defendant is a creditor, holding a Balloon Note dated April 27, 1999, between the Debtors and MG Investments, Inc., in the principal amount of $62,400.00 (Note), which is secured by the Debtors' residence located at 5437 Osage Drive, Knoxville, Tennessee, as evidenced by a Deed of Trust executed by the Debtors on April 27, 1999 (Deed of Trust). The Defendant filed two proofs of claim in the Debtors' case on October 12, 1999, evidencing the total mortgage obligation of $62,335.05, payable at $513.35 per month, and an arrearage amount of $1,176.70, representing two months' arrearage on the mortgage. The Defendant amended both claims on October 22, 2004, with respect to the mailing address. It also amended its arrearage claim to $1,731.33.

The Order Confirming Debtors' Chapter 13 Plan (Plan) was entered on October 14, 1999. Under the terms of the Plan, the Debtors were to pay $1,615.00 per month to the Chapter 13 Trustee. The ongoing mortgage payments of $513.35 to the Defendant were paid inside the Plan, commencing in October 1999. The Plan also listed an arrearage of approximately $1,500.00, payable in installments of $30.00 per month at 0% interest. The Debtors made their payments through wage order, and pursuant to the Preliminary Trustee's Report submitted on December 2, 2004, the Trustee paid the Defendant $31,326.55 on the mortgage obligation and $1,176.70 on the arrearage claim. Upon completion of their Plan, the Debtors received their discharge on December 13, 2004.

On October 13, 2004, prior to entry of the Order Discharging Debtor After Completion of Chapter 13 Plan (Discharge Order), the Defendant mailed a Statement to the Debtors, indicating that it would take $2,350.28 to bring the account current. That amount was broken down into two

categories. The first, "mortgage amount" category, included principal and interest of $513.35, unpaid late fees of $77.01, fees and expenses in the amount of $108.87, and $513.35 due each for August, September, and October 2004. The "non-mortgage amounts" consisted of $111.00 for "property inspection fee." COMPL., EX. B. Additionally, the Statement reflects that "[t]his is not a request for payment," and it states the following:

> Our records indicate that you filed a bankruptcy. This statement is sent for informational purposes only and is not an attempt to collect a debt. It does not alter or affect the terms of your bankruptcy proceedings. Please disregard the payment information if it conflicts with any order or requirement of the court.
>
> If you filed a Chapter 13, any unpaid amounts prior to the filing of your bankruptcy petition may be paid through and in accordance with your bankruptcy plan. If you are a Chapter 13 debtor whose plan requires you to make regular post petition payments directly to the Chapter 13 trustee, any payment should be remitted to the trustee directly and not to Homecomings.
>
> If you would like us to discontinue sending you this monthly billing statement in the future or if you have any questions regarding this account, please call 1.800.206.2901.

COMPL., EX. B. Thereafter, on October 19, 2004, the Defendant received a payment from the Debtors in the amount of $513.35. It also received the following payments from the Chapter 13 Trustee: $426.62 on November 30, 2004, $570.57 in January 2005, and $.80 in March 2005.

The Debtors filed their Complaint on November 4, 2004, arguing that the Defendant had violated the terms of the Debtors' confirmed Plan, as well as the discharge injunction. The Debtors also asked the court to order that their mortgage was current and have the Defendant send a statement to that effect. Finally, the Debtors sought punitive damages against the Defendant for willful violation of the Bankruptcy Code. In its Answer, the Defendant argued that, although the Plan provided for payments of $513.35 each month, the Defendant did not always receive that amount. The Defendant also denied the Debtors' allegations that it violated any section of the Bankruptcy Code, or that the Debtors were entitled to any damages. Finally, the Defendant avers that it is

entitled to reasonable attorneys' fees and expenses incurred in connection with defending this action. The Defendant now seeks summary judgment.

As set forth in the Pretrial Order entered on February 4, 2005, the issues before the court are, as follows: (1) whether the Defendant violated the permanent injunction under § 524; (2) whether the Defendant violated the terms of the Debtors' confirmed Chapter 13 Plan; (3) whether damages can be assessed against the Defendant under 11 U.S.C.A. § 105 (West 2004), and if so, whether they are entitled to damages and in what amount; and (4) whether the Defendant is entitled to its reasonable attorneys' fees and costs under the Deed of Trust and Note if the Defendant is the prevailing party.

**II**

Rule 56 of the Federal Rules of Civil Procedure allows summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c) (applicable to adversary proceedings under Federal Rule of Bankruptcy Procedure 7056). When deciding a motion for summary judgment, the court does not weigh the evidence to determine the truth of the matter, but instead, simply determines whether a genuine issue for trial exists. *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2510 (1986).

The moving party bears the initial burden of proving that there is no genuine issue of material fact, thus entitling it to judgment as a matter of law. *Owens Corning v. Nat'l Union Fire Ins. Co.*, 257 F.3d 484, 491 (6th Cir. 2001). The burden then shifts to the nonmoving party to produce specific facts

showing a genuine issue for trial. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 106 S. Ct. 1348, 1356 (1986) (citing FED. R. CIV. P. 56(e)). The nonmoving party must cite specific evidence and may not merely rely upon allegations contained in the pleadings. *Harris v. Gen. Motors Corp.*, 201 F.3d 800, 802 (6th Cir. 2000). The facts and all resulting inferences are viewed in a light most favorable to the non-moving party, *Matsushita*, 106 S. Ct. at 1356, whereby the court will decide whether "the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 106 S. Ct. at 2512. "[O]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson*, 106 S. Ct. at 2510.

**III**

The Debtors first aver that the Defendant violated the discharge injunction by sending the Statement. 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 (7th Cir. 1993). Accordingly, once discharge has been entered by the court, 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.

There are two primary flaws with the Debtors' contention that the Defendant violated the discharge injunction. The first, which actually resolves the issue, is the fact that the Debtors' Discharge Order was entered on December 13, 2004, two months *after* the Defendant sent the Statement. Accordingly, until the Discharge Order was entered, there was no discharge injunction in effect, and sending a letter on October 13, 2004, could not have violated it.

Second, and equally important, is the fact that the Debtors' mortgage was not discharged on December 13, 2004, and thus, is not now covered by 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— (5) . . . 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 this one. *See, e.g., 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."). Moreover, the Discharge Order expressly excepted § 1322(b)(5) debts from discharge.

Because the Defendant's mortgage was not discharged in the Debtors' bankruptcy case, the discharge injunction of § 524(a)(2) does not apply. *Telfair v. First Union Mortgage Corp. (In re Telfair),*

224 B.R. 243, 249 (Bankr. S.D. Ga. 1998) ("As the discharge does not affect the debt due [the mortgage holder], the discharge injunction of § 524 has no application."). Therefore, the Defendant would not have violated § 524(a) even if it had sent the Statement after entry of the Discharge Order on December 13, 2004.

The Debtors also aver that the Defendant violated the terms of their confirmed Chapter 13 Plan. Confirmation is governed by 11 U.S.C.A. § 1327 (West 2004), which 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 (10th Cir. 1997) (quoting 8 COLLIER ON BANKRUPTCY ¶ 1327.02[1] (Lawrence P. King ed., 15th ed. 1996)).

There is nothing in the Debtors' Plan concerning the Defendant's conduct in sending the Statement. The Statement does not ask for payment, and, in fact, expressly states that it is not a request for payment. Instead, the purpose of the Statement appears to be purely informational. The fact that it referenced an arrearage on the account does not elevate the Statement to being a demand for payment. Because there was an arrearage, the Defendant was within its rights to report that information to the Debtors. Furthermore, because the Debtors' mortgage is an on-going debt, upon which they remain liable after they complete their Plan, it is to be expected that the Debtors will receive statements from the Defendant in the future. The Debtors' assertion that the Defendant violated the terms of the Chapter 13 Plan is without merit.

Likewise, there is no basis for granting the Debtors' request for damages pursuant to 11 U.S.C.A. § 105(a) (West 2004), which 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). This section of the Bankruptcy Code provides bankruptcy courts with the ability and "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., 15th ed. 1999)). Nevertheless, "§ 105(a) is not without limits, may not be used to circumvent the Bankruptcy Code, and does not create a private cause of action unless it is invoked in connection with another section of the Bankruptcy Code." *In re Rose*, 314 B.R. 663, 681 n.11 (Bankr. E.D. Tenn. 2004) (citing, among others, *Greenblatt v. Richard Potasky Jeweler, Inc. (In re Richard Potasky Jeweler, Inc.)*, 222 B.R. 816, 829 (S.D. Ohio 1998) and *Yancy v. Citifinancial, Inc. (In re Yancy)*, 301 B.R. 861, 868 (Bankr. W.D. Tenn. 2003)). Instead, the court may only use § 105(a)'s equitable powers "in furtherance of the goals of the [Bankruptcy] Code." *Childress v. Middleton Arms, L.P. (In re Middleton Arms, L.P.)*, 934 F.2d 723, 725 (6th Cir. 1991).

Here, the Defendant has not violated any section of the Bankruptcy Code to be tied with § 105(a). Accordingly, there is no basis for the court to invoke its § 105(a) powers to assess damages and/or to hold the Defendant in contempt. Furthermore, there is nothing in the record to indicate that the Debtors actually suffered any damages as a result of receiving the Statement.

Based upon the record, the court finds that there are no genuine issues of material fact, and the Defendant is entitled to judgment as a matter of law. The Defendant's Motion for Summary Judgment will be granted, and the Debtors' Complaint shall be dismissed.

**IV**

The final question before the court is whether the Defendant, as the prevailing party, is entitled to its reasonable attorneys' fees and costs incurred in defending this lawsuit, by virtue of the Note and Deed of Trust. The Defendant bases this request upon the following language in the Deed of Trust:

> 7. Protection of Lender's Rights in the Property. If Borrower fails to perform the covenants and agreements contained in this Security Instrument, or there is a legal proceeding that may significantly affect Lender's rights in the Property (such as a proceeding in bankruptcy, probate, for condemnation or forfeiture or to enforce laws or regulations), then Lender may do and pay for whatever is necessary to protect the value of the Property and Lender's rights in the Property. Lender's actions may including paying any sums secured by a lien which has priority over this Security Instrument, appearing in court, paying reasonable attorneys' fees and entering on the Property to make repairs. Although Lender may take action under this paragraph 7, Lender does not have to do so.
>
> Any amounts disbursed by Lender under this paragraph 7 shall become additional debt of Borrower secured by this Security Instrument. Unless Borrower and Lender agree to other terms of payment, these amounts shall bear interest from the date of disbursement at the Note rate and shall be payable, with interest, upon notice from Lender to Borrower requesting payment.

GIBSON AFF., EX. E.

Tennessee follows the "American Rule" with respect to attorneys' fees, requiring that each party pays its own attorney's fees, "unless there is a statute or contractual provision providing otherwise[.]" *Barton v. Gilleland*, No. E2004-01369-COA-R3-CV, 2005 Tenn. App. LEXIS 187, at

*47 (Tenn. Ct. App. Mar. 30, 2005) (citing *State v. Brown & Williamson Tobacco Corp.*, 18 S.W.3d 186, 194 (Tenn. 2000)). Along those lines, it has been held that

> One of the most common exceptions to the American Rule involves contracts containing provisions expressly allowing the prevailing party to recover its reasonable attorney's fees incurred to enforce the contract. Thus, parties who have prevailed in litigation to enforce contract rights are entitled to recover their reasonable attorney's fees once they demonstrate that the contract upon which their claims are based contains a provision entitling the prevailing party to its attorney's fees.

*Childress v. Union Realty Co., Ltd.*, No. W2003-02934-COA-R3-CV, 2005 Tenn. App. LEXIS 167, at *16-17 (Tenn. Ct. App. Mar. 28, 2005) (quoting *Hosier v. Crye-Leike Commercial, Inc.*, No. M2000-01182-COA-R3-CV, 2001 Tenn. App. LEXIS 498, at *6-8 (Tenn. Ct. App. July 17, 2001)) (internal citations omitted).

In this case, the Deed of Trust clearly provides that the Defendant will be entitled to reasonable attorneys' fees for defending this adversary proceeding. Therefore, the Defendant shall be directed to submit to the court an affidavit within ten days evidencing the fees and expenses incurred in its defense of this lawsuit. The Debtor will be allowed ten days after the affidavit is filed to assert any objection to the requested fees and expenses, after which the court will determine the reasonableness and amount thereof.

An order consistent with this Memorandum will be entered.

FILED: May 4, 2005

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**

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Plaintiffs

v. Adv. Proc. No. 04-3280

HOMECOMINGS FINANCIAL

Defendant

**O R D E R**

For the reasons stated in the Memorandum on Motion for Summary Judgment filed this date, the court directs the following:

1. The Motion for Summary Judgment filed by the Defendant on April 5, 2005, is GRANTED. The Plaintiff's Complaint filed November 4, 2004, is DISMISSED.

2. The Defendant shall, within ten (10) days, file an affidavit detailing by date, time, and hourly rate of its attorneys, the fees and expenses it has incurred in the defense of this adversary proceeding. The Plaintiff shall, within ten (10) days after the affidavit is filed, assert any objection to the requested fees and expenses. The court will thereafter determine the amount of fees and expenses which the Defendant is entitled without further notice or hearing.

SO ORDERED.

ENTER: May 4, 2005

BY THE COURT

s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE