

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION**

IN RE:

COLBY RAY ATKINSON,

Debtor.

CASE NO.: 11-50259-KKS

CHAPTER: 7

COLBY ATKINSON,

Plaintiff,

v.

ADV. PROC.: 12-05025-KKS

GREEN TREE SERVICING LLC,

Defendants.

ORDER DENYING DEFENDANT’S MOTION TO DISMISS (DOC. 6)

This adversary proceeding came before the Court upon the Motion to Dismiss filed by Green Tree Servicing, LLC (the “Defendant”) (Doc. 6) and Plaintiff’s Response (Doc. 9). The Defendant argues that this adversary proceeding should be dismissed because a request for damages and an order for contempt for alleged violations of the discharge injunction should be brought by motion rather than by an adversary proceeding. The Court heard argument of counsel at a duly noticed hearing on November 29, 2012 and has reviewed the pleadings and the relevant cases. For the reasons set forth below, the Defendant’s Motion to Dismiss is denied.

While the Eleventh Circuit has not ruled directly on this issue, it has ruled in a case involving an adversary proceeding against the Internal Revenue Service for alleged violations of the discharge injunction. *Hardy v. Internal Revenue Service (In re Hardy)*, 97 F.3d 1384 (11th Cir. 1996). In *Hardy*, the Eleventh Circuit allowed the adversary proceeding to go forward on re-

mand, and further held that the bankruptcy court could find the IRS in contempt under § 105 and award sanctions, attorney fees and costs in that adversary proceeding.

The bankruptcy court for the Middle District of Florida squarely addressed whether an adversary proceeding may be the proper procedure for seeking contempt for alleged violations of the discharge injunction in *In re Wynne*, 422 B.R. 763 (Bankr. M.D. Fla. 2010). In *Wynne* the defendant moved to dismiss the adversary proceeding on the basis that there is no private right of action under 11 U.S.C. § 524 for contempt, and that only a motion (rather than an adversary proceeding) was the proper vehicle for seeking redress for alleged violations of the discharge injunction. The court in *Wynne* disagreed and denied the motion to dismiss the adversary proceeding, holding that as long as the debtor alleged the essential elements of a contempt action based on a willful violation of the discharge injunction, an adversary proceeding was proper. *In re Wynne*, 422 B.R. at 769. The *Wynne* court also found that bankruptcy courts may exercise their contempt powers under § 105 of the Bankruptcy Code to enforce the discharge injunction, even absent a private right of action under § 524. *Id.* at 768-69. Other bankruptcy decisions, including another from the Middle District of Florida, have permitted a debtor to seek contempt and sanctions for a violation of the discharge injunction in an adversary proceeding. *Motichko v. Premium Asset Recovery Corp.*, 395 B.R. 25 (Bankr. N.D. Ohio 2008); *Miller v. Mayer*, 81 B.R. 669 (Bankr. M.D. Fla. 1988).

Courts in other Circuits have allowed, and even mandated, parties to proceed via motion rather than an adversary proceeding. *See Barrientos v. Wells Fargo Bank, N.A.*, 633 F.3d 1186, 1190 (9th Cir. 2011); and *Kalikow v. Solow (In re Kalikow)*, 602 F.3d 82 (2nd Cir. 2010).¹ It may be, as the Plaintiff suggests, that such redress may be sought via either a motion or adversary proceeding. Rule 9020, Fed. R. Bankr. P., as amended in 2001, states: “Rule 9014 governs a *motion* for an order of contempt made by the US trustee or a party in interest.” (Emphasis added.)

¹ *See, also In re Frambes*, 454 B.R. 437 (Bankr. E.D. Ky. 2011).

Rule 9020 does not mandate that contempt must be by motion; it applies *if* a party files a motion, and provides that such a motion is governed by Rule 9014 (dealing with contested matters). As the Eleventh Circuit Court of Appeals stated in *Hardy*:

Section 105 grants statutory contempt powers in the bankruptcy context, stating, “The court may issue any order, process or judgment that is necessary or appropriate to carry out the provisions of this title.” *11 U.S.C. § 105(a)*. *Section 105* creates a statutory contempt power, distinct from the court’s inherent contempt powers in bankruptcy proceedings, Therefore, “§ *105(a)* grants courts independent statutory powers to award monetary and other forms of relief for automatic stay [and discharge] violations to the extent such awards are ‘necessary and appropriate’ to carry out the provisions of the Bankruptcy Code.”

97 F. 3d 1384 at 1389. (Citations omitted.)

Section 105 clearly authorizes bankruptcy courts to issue a “judgment” to enforce their statutory contempt powers. A judgment is the result of an adversary proceeding, not the result of a motion.

Here, the Defendant does not argue that the complaint in this adversary proceeding fails to provide it with notice of a claim for alleged violations of the discharge injunction. Any such argument would fail. The complaint sets forth that the Plaintiff-Debtor received his discharge on August 15, 2011 and that the Defendant was served with the discharge on August 17, 2011. The complaint asserts that the Defendant continued to inform the Debtor starting in January of 2012 of a past due balance and attempted to collect a debt that had been discharged.

In this Court’s view, the key is to ensure that all parties receive the due process to which they are entitled, and that the Rules are construed to ensure “the just, speedy, and inexpensive determination of every case and proceeding.” Fed. R. Bankr. P. 1001. An adversary proceeding ensures procedural safeguards that are not necessarily afforded when proceeding by motion. For defendants, an adversary proceeding requires a properly served summons, twenty days to file an answer, room for dispositive motions and time for discovery. Further, an adversary proceeding involves only the immediate parties to the dispute rather than all creditors and parties in interest,

including the Trustee (if any).² Had the Debtor filed a motion for contempt in the administrative case, rather than this adversary proceeding, the Court feels that the most appropriate procedure would be to order the application of Rule 9014 to afford the parties the more structured process of an adversary proceeding in a contested matter. Such a procedure would not ensure any speedier or less expensive resolution of the issues. For these reasons, it is

ORDERED and ADJUDGED that Defendant's Motion to Dismiss (Doc. 6) is DENIED. The Defendant shall have twenty (20) days from the entry of this Order within which to file and serve an answer.

DONE and ORDERED in Tallahassee, Florida this 18th day of December, 2012.



KAREN K. SPECIE
United States Bankruptcy Judge

cc: All interested parties

² The only apparent increased cost of an adversary proceeding over a motion is the filing fee.