

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ENTERED ON
MAY 24 2007

DOCKET

IN RE:)	CASE NO. 04-70716-JB
)	
TIMOTHY ALLEN STRICKLAND,)	CHAPTER 7
)	
Debtor.)	
)	
)	
TIMOTHY ALLEN STRICKLAND)	ADVERSARY PROCEEDING
and TONI LEE STRICKLAND,)	NO. 07-6054
)	
Plaintiff,)	
)	
v.)	
)	
CADD CENTERS OF FLORIDA, INC.,)	
)	
Defendant.)	

ORDER

This adversary proceeding is before the Court on defendant CADD Centers of Florida, Inc.'s ("CADD") motion to dismiss four counts of plaintiffs' five-count complaint (Docket #8). Plaintiffs Timothy Allen Strickland and Toni Lee Strickland filed a complaint against CADD alleging breach of a settlement agreement and violation of the discharge injunction, seeking a declaratory judgment regarding alleged defaults under a settlement agreement, and seeking damages, including punitive damages and attorneys' fees. Defendant filed a motion to dismiss all counts of plaintiffs' complaint except the count seeking a declaratory judgment as to performance under the settlement agreement. After carefully considering the parties' briefs and the record in the case, the Court concludes that CADD's

motion to dismiss Counts I and V should be denied and the motion to dismiss Counts II and IV should be granted.

Mr. Strickland filed a Chapter 7 case on July 2, 2004. In October of 2004, CADD filed an adversary proceeding objecting to Mr. Strickland's discharge and to the dischargeability of a debt. After mediation, the plaintiffs entered into a settlement agreement dated February 9, 2005, with the Chapter 7 Trustee and CADD agreeing, among other things, that a debt owed to CADD arising out of a judgment from a Florida court was nondischargeable to the extent of \$150,000.00 (the "Settlement Agreement"). The Settlement Agreement provided for payment terms and financial reporting requirements, and it contained a paragraph with respect to the payment of attorneys' fees. On May 13, 2005, the Court entered a "Final Judgment of Nondischargeability" in which the Court entered a judgment in favor of CADD in the amount of \$150,000.00 and ordered that payments should be made pursuant to the Settlement Agreement (hereinafter the "Nondischargeable Judgment").

Two years after entering into the Settlement Agreement, the Stricklands filed this adversary proceeding alleging that defendant CADD, through its counsel, improperly sent notices of default under the Settlement Agreement, improperly accelerated the debt owed under the Settlement Agreement, and threatened to file a fraudulent conveyance claim against Mrs. Strickland as to which CADD had and has no standing. In their complaint, the Stricklands allege that these actions amount to a breach of the Settlement Agreement and a violation of the discharge injunction under § 524 of the Bankruptcy Code. The Stricklands seek a declaratory judgment with respect to whether they have been in default under the Settlement Agreement and they seek actual damages, punitive damages, and attorneys fees.

In considering a motion to dismiss for failure to state a claim on which relief can be granted under Federal Rule of Civil Procedure 12(b)(6), made applicable in adversary proceedings by Federal Rule of Bankruptcy Procedure 7012(b), all facts pled in the plaintiff's complaint are to be accepted as true and construed in the light most favorable to the non-movant. *Marshall County Bd. of Educ. v. Marshall County Gas Dist.*, 992 F.2d 1171, 1174 (11th Cir. 1993). A complaint should not be dismissed under Rule 12(b)(6) for failure to state a claim "unless it appears beyond a doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). The Court may dismiss a complaint under Rule 12(b)(6) "when, on the basis of a dispositive issue of law, no construction of the factual allegations will support the cause of action." *Marshall County Bd. of Educ.*, 992 F.2d at 1174.

Count I of plaintiffs' complaint seeks damages for breach of contract. Plaintiffs allege that CADD breached the implied duty of good faith and fair dealing in the Settlement Agreement by declaring defaults when no defaults existed and by threatening to pursue collection actions. The facts set forth by plaintiffs, when accepted as true and taken in the light most favorable to plaintiffs, support a cause of action for breach of contract. "Every contract implies a covenant of good faith and fair dealing in the performance of the terms of the agreement." *Camp v. Peetluck*, 262 Ga. App. 345, 350, 585 S.E.2d 704, 708 (2003). Since the factual allegations if true support a cause of action, CADD's motion to dismiss Count I of plaintiff's complaint cannot be granted.

In Count II, both plaintiffs allege that CADD violated the discharge injunction under 11 U.S.C. § 524(a) by demanding payment of the Nondischargeable Judgment and by taking and threatening to take actions to collect or enforce the Nondischargeable Judgment,

including threatening to file a state court complaint seeking avoidance of a fraudulent transfer from Mr. Strickland to Mrs. Strickland which allegedly took place before the bankruptcy was filed. There are three problems with plaintiffs' claim for violation of the discharge injunction. First, Mrs. Strickland does not have a claim for violation of the discharge injunction, as she did not receive a bankruptcy discharge. Second, Count II contains allegations that CADD violated the discharge injunction by threatening to file a fraudulent conveyance claim against Mrs. Strickland in the Superior Court of Fulton County.¹ But again threatening to file an action against Mrs. Strickland does not violate the discharge injunction, because Mrs. Strickland did not receive a discharge.

Third, CADD argues that plaintiffs fail to state a claim for violation of the discharge injunction since the complaint by its terms alleges that CADD sought to collect and enforce a nondischargeable judgment. 11 U.S.C. § 524(a) provides:

“A discharge in a case under this title—

(1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section 727, 944, 1141, 1228, or 1328 of this title, whether or not discharge of such debt is waived;

(2) operates as an injunction against the commencement or continuation of an action, the employment of a 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.”

A discharge injunction only operates against actions to collect, recover or offset a discharged debt. Debts determined to be nondischargeable are specifically excepted from a Chapter 7 discharge. 11 U.S.C. § 523(a) (2006). The Nondischargeable Judgment provided that one

¹ On February 7, 2007, CADD filed an adversary proceeding in the bankruptcy court against the Stricklands to avoid a pre-petition transfer, A.P. No. 07-6049. Following a status conference on April 11, 2007, CADD filed a voluntary dismissal of its fraudulent conveyance action.

hundred fifty thousand dollars (\$150,000.00) of the debt Mr. Strickland owed to CADD was nondischargeable. In the Settlement Agreement, the parties agreed to payment terms that allowed plaintiffs to pay the judgment by making certain minimum monthly payments and possible additional quarterly payments if the quarterly combined gross income of the Stricklands and certain companies owned by the Stricklands, as specified in the Settlement Agreement, exceeded twenty-eight thousand dollars (\$28,000.00). While the terms of the Settlement Agreement made it possible for Mr. Strickland to satisfy CADD's nondischargeable debt for less than the full amount of \$150,000.00, any allegations that CADD improperly declared defaults or improperly accelerated the debt amount to an attempt to collect the Nondischargeable Judgment. As such, these allegations do not state a claim for violation of the discharge injunction under 11 U.S.C. § 524(a)(2), because the discharge injunction only prohibits collection of discharged debts. Thus, the Stricklands have not pled facts which would support a claim for violation of the discharge injunction.

CADD also moves to dismiss Count IV of plaintiffs' complaint in which the Stricklands seek punitive damages, arguing that punitive damages are not recoverable on actions for breach of contract. CADD's argument has merit. Under Georgia law, punitive damages are not permitted in actions for breach of contract. O.C.G.A. § 13-6-10 (1982); *Trust Co. Bank v. Citizens & Southern Trust Co.*, 260 Ga. 124, 126, 390 S.E.2d. 589, 592 (1990); John K. Larkins, Jr., *Georgia Contracts: Law and Litigation* § 12-24 (2002). The claim for punitive damages for violation of the discharge injunction in Count IV must also be dismissed since CADD's motion to dismiss the claim for violation of the discharge injunction is being granted.

Finally, CADD's motion to dismiss plaintiffs' claim for attorneys' fees in Count V cannot be granted. Georgia law specifically provides that attorneys' fees are recoverable in a breach of contract action when defendant has acted in bad faith, been stubbornly litigious or caused plaintiff unnecessary trouble and expense and plaintiff has specifically pleaded for attorneys' fees. O.C.G.A. § 13-6-11 (Supp. 2006); *Carol v. Johnson*, 144 Ga. App. 750, 753, 242 S.E.2d 296, 298 (1978). Additionally, Paragraph 12 of the Settlement Agreement provides as follows:

"In the event any of the Parties default on any of their respective obligations under this Settlement Agreement, and any of the other Parties is required to bring appropriate action to enforce the terms and conditions of this Settlement Agreement or pursue collection actions thereon, the prevailing party may request the assessment of his, her or its legal fees, costs and other expenses association with any action to compel or ensure compliance of this Settlement Agreement or in any subsequent litigation brought in execution on the Judgment of Nondischargeability with respect to the CADD Claim. Such determination will be based upon applicable state and federal law."

Plaintiffs seek enforcement of the terms and conditions of the Settlement Agreement and allege that CADD breached the implied covenant of good faith and fair dealing by declaring defaults when none existed and improperly accelerating the debt. Since the claim for attorneys' fees is supported by the factual allegations in the complaint, the motion to dismiss the claim in Count V must be denied.

In accordance with the above reasoning, CADD's motion to dismiss Counts I and V is denied and the motion to dismiss Counts II and IV is granted.

IT IS SO ORDERED, this 23rd day of May, 2007.


JOYCE BIHARY
UNITED STATES BANKRUPTCY JUDGE

CERTIFICATE OF MAILING

A copy of the foregoing Order mailed by United States Mail to the following:

Timothy Allen Strickland
Toni Lee Strickland
10245 Twingate Drive
Alpharetta, GA 30022

Jonathan C. Ginsberg, Esq.
Ginsberg Law Office, PC
1854 A Independence Square
Atlanta, GA 30338

Steve M. Berman, Esq.
Berman, PLC
401 S. Florida Avenue, Suite 300
Tampa, FL 33602

Lindsay Haigh, Esq.
Beth Rogers, Esq.
Frank X. Moore & Associates
3343 Peachtree Road, NE
East Tower, Suite 1150,
Atlanta, GA 30326

Neil C. Gordon, Esq.
Chapter 7 Trustee
Suite 2100
171 17th Street, NW
Atlanta, GA 30363

Kathy Harmon
Judicial Assistant to Judge Bihary

Date: May 24, 2007