

UNITED STATES BANKRUPTCY COURT
 NORTHERN DISTRICT OF INDIANA
 HAMMOND DIVISION

IN RE:)	
)	
JACQUELINE M STERLING,)	CASE NO. 09-24206 jpk
)	Chapter 7
Debtor.)	

JACQUELINE M STERLING,)	
)	
Plaintiff,)	
)	
V.)	ADVERSARY NO. 12-2102 jpk
)	
SOUTHLAKE NAUTILUS HEALTH &)	
RACQUET CLUB, INC., a CORP.,)	
AUSTGEN KUIPER & ASSOCIATES P.C.)	
DAVID M. AUSTGEN,)	
)	
Defendants.)	

ORDER DETERMINING AUSTGEN DEFENDANTS'
MOTION TO DISMISS ADVERSARY COMPLAINT ["MOTION TO DISMISS"]

This adversary proceeding was initiated by a complaint filed by Jacqueline M. Sterling (“Sterling”) on June 25, 2012, naming as defendants Southlake Nautilus Health & Racquet Club, Inc. (“Southlake”); Austgen Kuiper & Associates, P.C. (“Associates”); and David M. Austgen (“Austgen”). On September 18, 2012, as record No. 9, Associates and Austgen filed a motion to dismiss the complaint in relation to themselves.¹ In accordance with the court’s record No. 10 order, Sterling filed a legal memorandum in response to the motion to dismiss, and Associates and Austgen filed a reply to Sterling’s response. This order determines the foregoing motion to dismiss. The court has full jurisdiction and final judgment authority with respect to matters addressed in the adversary proceeding – citation of authority for this statement is unnecessary. The adversary proceeding is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(O).

¹ The determination made by this order does not affect the actions stated against Southlake.

The gist of the allegations of the complaint is that Sterling received a discharge in her Chapter 7 case (Case No. 09-24206), and that subsequent to her discharge the defendants violated the post-discharge injunction provided statutorily by 11 U.S.C. § 524(a)(2) by continuing collection activities against her with respect to a pre-petition debt and judgment obtained with respect to that debt in the state court in which the judgment was entered. The complaint alleges that the collection activities included the defendants' obtaining the issuance of a bench warrant, which Sterling alleges was subsequently executed and caused her to be incarcerated, resulting in various forms of injuries/damage. However, the complaint is somewhat rambling and appears to perhaps seek to assert certain claims against the defendants other than violation of 11 U.S.C. § 524(a)(2).

The motion to dismiss focuses essentially on three points:

1. That an action concerning violation of 11 U.S.C. § 524(a)(2) must be initiated by motion as an action for civil contempt, and that Sterling's initiation of this action by an adversary proceeding is improper and should lead to dismissal of the complaint.
2. That any attempt by Sterling to assert an action for malicious prosecution or an action for false imprisonment cannot be properly asserted before this court with respect to the §524(a)(2) claim.
3. That the extent the complaint seeks a jury trial with respect to any claim which it advances, Sterling is not entitled to a jury trial.

Let's resolve the assertions of Associates and Austgen in reverse order.

As to the jury trial issue, Associates and Austgen are correct: Sterling is not entitled to a jury trial on any claim advanced in any way in this adversary proceeding. Under any circumstance, the determination of a violation of 11 U.S.C. § 524(a)(2) is a matter for the court, and does not present a claim which in any manner involves determination of factual issues by a jury. Apart from the foregoing, the United States Bankruptcy Court for the Northern District of

Indiana has no authority to conduct jury trials in any context; N.D.Ind.L.R. 200.1(c)(1). To the extent the complaint seeks a jury trial with respect to any claims sought to be advanced, the motion to dismiss the attempted assertion of a jury trial right is granted.

Associates and Austgen are also correct in their assertion that any attempt by Sterling to assert an action before this court for either malicious prosecution or for false imprisonment must also be dismissed. An asserted violation of 11 U.S.C. § 524(a)(2) stands on its own as a separate action apart from any other cause of action which may have arisen from facts giving rise to a potential violation of the post-discharge injunction. More importantly, a United States Bankruptcy Court has no subject matter jurisdiction to address state civil common law actions of malicious prosecution or false imprisonment in the context of this case. The motion to dismiss is granted to the extent that the complaint seeks to assert Indiana State common law theories of malicious prosecution or false imprisonment as either direct claims in this adversary proceeding, or somehow conjunctively in relation to an asserted action for violation of the post-discharge injunction.²

We now come to the most interesting part of the motion to dismiss, a contention which is as easily resolved as were the previous ones; however, in this case, resolved against Associates and Austgen.

The motion to dismiss is premised on Fed.R.Bankr.P. 7012(b)/Fed.R.Civ.P. 12(b)(6). The motion asserts that an action for alleged violation of 11 U.S.C. § 524(c)(2) must be initiated as a motion for civil contempt, and that the initiation of such an action by means of an

² If the circumstances of which Sterling complains may give rise to an action for malicious prosecution and/or false imprisonment, that action can be asserted by Sterling before an Indiana state court. The assertion of that action would be totally independent of the federal claim of violation of 11 U.S.C. § 524(a)(2).

adversary proceeding is improper.³

This court has previously determined that an action for alleged violation of 11 U.S.C. § 524(a)(2) must be initiated by an adversary proceeding, and that a motion for contempt is not an appropriate vehicle for the assertion of such an action. As is true with other issues addressed at various times by the United States Court of Appeals for the 7th Circuit, lines of authority on parallel issues do not necessarily converge, and it is left to a trial court such as this one to attempt to resolve them cohesively. Seventh Circuit law is clear that an action for civil contempt can only be brought for violation of a court order; See, In re Rimsat, Ltd, 208B.R. 910 (Bankr.N.D.Ind. 1997); *U.S. vs Dowell*, 257F.3d 694, 699 (7th Cir. 2001). The post-discharge injunction of 11 U.S.C. § 524(a)(2) is a statutory injunction imposed by operation of law; it is not an injunction imposed by a court order. In the discharge process in a Chapter 7 case, the court issues only an order of discharge, and no part of that order or of any other order issued with respect to a Chapter 7 debtor's discharge or the closing of a Chapter 7 case mentions in any manner the post-discharge injunction of 11 U.S.C. § 524(a)(2) or imposes it as an order of the court independently of the statutory imposition. Most actions initiated by debtors before this court for violation of § 524(a)(2) directly seek to recover money or property allegedly taken as a result of violation of the post-discharge injunction [a matter clearly within the scope of Fed.R.Bankr.P. 7001(1)]; seek to invalidate a lien allegedly imposed as a violation of the post-discharge injunction [an action clearly within the scope of Fed.R.Bankr.P. 7001(2)]; or seek to obtain some form of court assertion of an injunction or reaffirmation of the post-discharge injunction (within the scope of Fed.R.Bankr.P. 7001(7)). When a complaint seeks these forms

³ The motion to dismiss does not challenge the sufficiency of the complaint to state a claim for violation of Section 524(a)(2), but rather challenges the mechanism by which the assertion of that claim was presented to the court. The court deems the complaint to satisfy the requirements of Fed.R.Bankr.P. 7008(a)/Fed.R.Civ.P. 8(a), as those requirements have been established by rulings of the U.S. Supreme Court; See, *Bell Atlantic Corp. vs. Twombly*, 127 S.Ct. 1955 (2007); *Ashcroft vs. Iqbal*, 129 Escort 1937, 1949-50 (2009); *Erickson vs. Pardus*, 127 Escort 2197, 2200 (2007).

of relief in relation to an alleged § 524(a)(2) violation, that the action must be initiated by an adversary proceeding.

In several cases cited by Associates and Austgen, the United States Court of Appeals for the 7th Circuit has indeed indicated an action asserting a violation of 11 U.S.C. § 524(a)(2) is properly initiated by a motion for civil contempt for violation of an injunction; *Cox vs. Zales Delaware, Inc.* 239F3d 910 (7th Cir 2001); *In re Consolidated Industries Corporation*, 360F3d 712 (7th Cir 2004). A similar expression of the supposed rule is stated in *In re Mogg*, 2007 WL 2608501(Bkrtcy. SD Ill. 2007). Interestingly, in each of the three foregoing cases – despite the statement that the matter before the court should have been presented by motion rather than by adversary proceeding – each of the courts determined the issue/issues before it on the merits *as if the case had been presented by the proper mechanism*. It is thus apparent that despite the statements of preference for initiation of a § 524(a)(2) action by means of a motion, the courts did not avoid the merits of the action based upon this procedural technicality. In a sense, then, the statements of proceeding by means of a motion rather than an adversary proceeding are *dicta*. But, we'll take the 7th Circuit direction as substantive. The Prayer For Relief in the complaint states:

Plaintiff Sterling prays this Honorable Court find David M. Austgen, Austgen Kuiper & Associates and Southlake Nautilus Health & Racquet Club Inc. (i) be found to have violated the general Discharge of all debts for Sterling and (ii) be adjudged in contempt of the order of general Discharge and (iii) fined for all the compensatory and actual damages and injuries incurred by Sterling, including Sterling's costs and attorney Fees of all actions in this Bankruptcy and State court.

This request for relief does not directly assert any claim subject to Fed.R.Bankr.P. 7001: it apparently seeks to assert solely an action for contempt allegedly arising from violation of 11 U.S.C. § 524(a)(2). Thus, perhaps in accordance with the essentially precatory statements of the United States Court of Appeals for the 7th Circuit, Sterling could have presented her action to this court my means of a motion. However, as noted above, the very cases which

established this supposed requirement met the merits of the allegations in the adversary proceeding. A similar circumstance arose in *Kovacs vs. U.S. of America*, 614F3d 666 (7th Cir 2010) – decided after the foregoing 7th Circuit cases – in which an adversary proceeding was utilized as a mechanism for challenging the alleged violation of 11 U.S.C. § 524(a)(2) by the Internal Revenue Service. In *Kovacs* there is no discussion whatsoever of the mechanism by which the matter was presented to the court, and the court reached the merits. It is clear from the foregoing that the 7th Circuit does not deem the utilization of an adversary proceeding, as contrasted to a motion, as being a basis to dismiss an action alleging violation of 11 U.S.C. § 524(a)(2). Even *In re Mogg, supra*, met the merits of the action despite its assertions that the action should have been brought by means of a motion. Moreover, the assertion that an action presented to this court by means of an adversary proceeding rather than by motion should be dismissed due to the utilization of an improper procedure is disingenuous. “An adversary proceeding provides the parties with more, not less, procedural protections than what are available in a contested matter by way of a motion,” *In re Wagner*, 87BR612 (Bkrtcy. C.D. Cal. 1988). As stated in *In re Dunmore*, 262 BR 85 (Bkrtcy. N.D. Cal. 2001):

As an aside, the court notes that an adversary proceeding is a more formal procedural framework than a contested matter, with more stringent rules of evidence applicable. While some courts have voided results in contested matters when the dispute should have been litigated as an adversary proceeding, e.g. *In re Lyons*, 995 F.2d 923 (9th Cir.1993), the court is not aware of any case which has voided a judgment in an adversary proceeding because it should have been litigated as a contested matter. As this court noted in *Practical Bankruptcy Procedure* (Shepard's/McGraw-Hill 1993), § 10.03: “Bringing a dispute before the court as an adversary proceeding which does not fall within one of the [provisions of FRBP 7001] is not per se improper, in that no one can complain if they are given more than the minimum required for procedural fairness.”

Also, *In re Montano*, 398 BR 47 (Bkrtcy. New Mexico 2008) [citing *Dunmore*, and commenting on *In re Mogg, supra*].

The court determines that the utilization of an adversary proceeding rather than a motion in the circumstances of this case – even if perhaps (but perhaps not) inappropriate – does not give rise for grounds for dismissal of the complaint with respect to the complaint’s assertions of violation of 11 U.S.C. § 524(a)(2). The motion to dismiss on this basis is denied. The adversary proceeding continues as an assertion of violation of § 524(a)(2).

IT IS ORDERED as follows:

- A. The motion to dismiss filed by Associates and by Austgen is granted to the extent of any request for a jury trial in this adversary proceeding.
- B. The motion to dismiss of Associates and Austgen is granted as to any assertion in the complaint of a separate cause of action for malicious prosecution or for false imprisonment.
- C. The motion to dismiss of Associates and Austgen is denied with respect to the contention that the matters addressed by the complaint in reference to 11 U.S.C. § 524(a)(2) must be presented to the court by means of a motion, rather than by means of an adversary proceeding.⁴

Dated at Hammond, Indiana on January 31, 2013.

/s/ J. Philip Klingeberger
J. Philip Klingeberger, Judge
United States Bankruptcy Court

Distribution:
Attorneys of record

⁴ An order scheduling a preliminary pretrial conference in the adversary proceeding will be entered separately.