NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL FOR THE FIRST CIRCUIT

BAP NO. EB 06-028

Bankruptcy No. 96-10791-LHK
Adversary Proceeding No. 04-01078-LHK

KRISTY J. CURTIS,
f/k/a KRISTY J. WINSLOW,
f/k/a/ KRISTY J. PRATT,
Debtor.

KRISTY J. CURTIS,
f/k/a KRISTY J. WINSLOW,
f/k/a/ KRISTY J. PRATT,
Plaintiff - Appellant,

v.

SALEM FIVE MORTGAGE COMPANY, LLC,
Defendant - Appellee.

Appeal from the United States Bankruptcy Court
for the District of Maine
(Hon. Louis H. Kornreich, U.S. Bankruptcy Judge)

Before
de Jesús, Vaughn and Deasy, United States Bankruptcy Appellate Panel Judges.

James F. Molleur, Esq., on brief for Plaintiff-Appellant.

Timothy M. Mitchelson, Esq., on brief for Defendant-Appellee.

February 28, 2007

Vaughn, U.S. Bankruptcy Appellate Panel Judge.

Kristy J. Curtis ("Curtis") appeals from the bankruptcy court's March 21, 2006, order granting Salem Five Mortgage Company, LLC's ("Salem") motion for summary judgment. In granting the motion, the court determined that Curtis had not proven the existence of a material fact showing that Salem violated the discharge injunction of 11 U.S.C. § 524(a)(2).[1] Curtis argues that there are several genuine issues of material fact preventing entry of the judgment summarily. For the reasons set forth below, the decision is VACATED and REMANDED.

BACKGROUND[2]

While married, Curtis and her husband purchased residential property in Stockton Springs, Maine, that was financed by Camden National Bank ("Camden"). In May 1996, Curtis and her husband divorced. The divorce judgment awarded the Stockton Springs property to the husband, William Pratt ("Pratt"), and ordered that Pratt be solely responsible for the Camden mortgage. An abstract of the divorce decree was filed in the Waldo County Registry of Deeds on June 3, 1996, which, under Maine law, had the effect of a quitclaim deed in releasing Curtis's interest in the property. See ME. REV. STAT. ANN. tit. 19-A, § 953(7) (2005). Nonetheless, Curtis remained personally obligated to Camden. Thus, when Curtis filed a voluntary Chapter 7 petition on July 29, 1996, she scheduled Camden as a mortgage creditor but did not schedule any interest in the Stockton Springs property.

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[1] All references to the "Bankruptcy Code" or to specific sections are to the Bankruptcy Reform Act of 1978, as amended prior to April 20, 2005, 11 U.S.C. § 101, et seq.

[2] The facts recited herein are taken from the parties' pretrial stipulations and exhibits thereto (Appellant's App. at 25) and from Curtis's deposition (Appellant's App. at 275).

One month later, on August 28, 1996, Camden notified Curtis that it had transferred the loan to Salem.[3] Curtis claims she contacted Camden after her divorce to inform it that she was no longer living in the Stockton Springs house and that Pratt would be responsible for the debt pursuant to the divorce judgment. Curtis has no documentation to support her claim that she orally advised Camden of her divorce, and she did not provide Camden or Salem with a copy of the divorce abstract.[4] When Curtis's discharge was entered on October 22, 1996, Camden was still listed in her schedules as the sole mortgagee for the Stockton Springs property.

After discharge, Salem sent eighteen default notices, addressed to Curtis and Pratt, regarding the Stockton Springs mortgage on July 2, 1999, September 6, 2000, September 7, 2000, February 2, 2001, August 1, 2001, August 2, 2001, March 2, 2002, July 1, 2002, August 1, 2002, January 2, 2003, February 3, 2003, March 3, 2003, April 1, 2003, May 1, 2003, September 2, 2003, October 2, 2003, December 1, 2003, and December 15, 2003. Other than the four notices sent after May 1, 2003, which Curtis requested be sent to her, Curtis received only the notice dated February 2, 2001.

During this time, Salem also sent information to credit reporting agencies indicating that Curtis was an obligor on the debt and that payments on the account had been delinquent. For example, a credit report issued by Experian in December 1999 shows the Stockton Springs

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[3] Both parties and the bankruptcy court—and this Panel, too—seem to have assumed that the mortgage itself was transferred from Camden to Salem, though there appears to be nothing in the record actually stating this. The Loan Sale Notice dated August 28, 1996, informs Curtis and her ex-husband that "*servicing* of your Mortgage Loan is to be transferred." Appellant's App. at 66 (emphasis added). Nowhere in the notice does it state that the loan itself is being transferred to Salem.

[4] As noted by the bankruptcy court, Paragraph 2 of the parties' stipulated facts states that the divorce decree made Pratt responsible for the mortgage, whereas Paragraph 3 states that Curtis and Pratt reached an oral agreement affixing Pratt's responsibility. Regardless, the parties agree that Pratt assumed responsibility for the Stockton Springs mortgage.

mortgage debt with Salem as "open/current, was past due 30 days." Appellant's App. at 444. Curtis blames the presence of this information in her credit reports for numerous post-bankruptcy denials of credit she experienced, though she has not presented evidence beyond her own conclusions. Between 1998 and 2004, Curtis was denied credit on several occasions, including Dutch Chevrolet's denial of a consumer loan, Camden's denial of a debt consolidation loan, MBNA/Sam's Club denial of a credit card application, and Camden's denial of a credit application.

In or around October 2001, Curtis purchased residential real property in Searsport, Maine, financed by a mortgage with Washington Mutual. After October 2001, Curtis contacted Salem to change the information in her credit report given that she had received a discharge and that Pratt was solely responsible for the mortgage debt. Salem told her that unless Pratt refinanced, she would continue to appear as a co-debtor on the loan. In May 2003, Curtis asked Salem to send her copies of default notices on the Stockton Springs mortgage to keep track of the account because she thought it was affecting her credit. In June 2003, Curtis filed a complaint with the Office of Consumer Credit Regulation to force Salem to remove the mortgage debt from her credit report. Salem's position remained unchanged, until March 2004, when Pratt refinanced the Stockton Springs property and paid Salem in full. Payment of the mortgage debt was then noted in Curtis's credit reports.

On April 15, 2004, the bankruptcy case was reopened, and Curtis filed her two-count complaint the next day. Count I alleged that Salem violated the discharge injunction of 11 U.S.C. § 524(a)(2), and Count II alleged a violation of the Fair Credit Reporting Act. Count II was dismissed by agreement of the parties, and Salem filed a motion for summary judgment with

regard to Count I. The bankruptcy court granted Salem's motion on March 21, 2006, and this appeal followed.

JURISDICTION

A bankruptcy appellate panel's jurisdiction includes appeals "from final judgments, orders, and decrees." 28 U.S.C. § 158(a)(1); Fleet Data Processing Corp. v. Branch (In re Bank of New England Corp.), 218 B.R. 643, 645 (B.A.P. 1st Cir. 1998). "A decision is final if it 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" Id. at 646 (quoting Catlin v. United States, 324 U.S. 229, 233 (1945)). Here, the bankruptcy court's March 21, 2006, order was a final order, as its summary dismissal of Curtis's complaint ended litigation of the matter.

STANDARD OF REVIEW

A bankruptcy court's factual findings are generally reviewed under the clearly erroneous standard and conclusions of law are reviewed *de novo*. See TI Fed. Credit Union v. DelBonis, 72 F.3d 921, 928 (1st Cir. 1995); Western Auto Supply Co. v. Savage Arms, Inc. (In re Savage Indus., Inc.), 43 F.3d 714, 719–20 n.8 (1st Cir. 1994). The bankruptcy court's grant of summary judgment is reviewed *de novo.* See McCrory v. Spigel (In re Spigel), 260 F.3d 27, 31 (1st Cir. 2001); Campana v. Pilavis (In re Pilavis), 244 B.R. 173, 174 (B.A.P. 1st Cir. 2000); see also Rosen v. Bezner, 996 F.2d 1527, 1530 n.2 (3rd Cir. 1993).

DISCUSSION

The issue on appeal is whether the bankruptcy court erred in finding that the record showed Curtis did not meet her burden of establishing a genuine issue of material fact as to her claim that Salem violated the discharge injunction of § 524(a)(2) when it decided not to remove

the Stockton Springs mortgage debt from its credit reports sent to credit reporting agencies, and when it sent default notices of the Stockton Springs mortgage to Curtis, even though her personal liability for this debt had been discharged.

Summary judgment should be granted only when "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. In this context, 'genuine' means that the evidence is such that a reasonable jury could resolve the point in favor of the nonmoving party." Rodriguez-Pinto v. Tirado-Delgado, 982 F.2d 34, 38 (1st Cir. 1993) (quoting United States v. One Parcel of Real Prop., 960 F.2d 200, 204 (1st Cir. 1992)). "Material," in the context of Rule 56(c), means that the fact has "the potential to affect the outcome of the suit under the applicable law." Nereida-Gonzalez v. Tirado-Delgado, 990 F.2d 701, 703 (1st Cir. 1993). Courts faced with a motion for summary judgment should read the "record in the light most flattering to the nonmovant and indulg[e] all reasonable inferences in that party's favor." Maldonado-Denis v. Castillo-Rodriguez, 23 F.3d 576, 581 (1st Cir. 1994).

Subsequent to the bankruptcy court issuing its opinion, the First Circuit Court of Appeals handed down Pratt v. Gen. Motors Acceptance Corp. (In re Pratt), 462 F.3d 14, 19 (1st Cir. 2006), which interprets and applies § 524(a)(2)—the discharge injunction. Section 524(a)(2) provides that a bankruptcy discharge "operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset [a discharged debt] as a personal liability of the debtor, whether or not discharge of such debt is waived." 11 U.S.C. § 524(a)(2). In Pratt, the debtors surrendered a vehicle, but the secured

creditor refused post-discharge to either release its lien without full payment or to repossess the vehicle. The creditor's refusal to release the lien prevented the debtors from being able to dispose of the worthless vehicle, and this refusal was held to be "'coercive' in its effect, and thus [a] willful[] violation [of] the discharge injunction" even though Maine statutory law gave the creditor the right to refuse to release its lien until the loan was paid in full. In re Pratt, 462 F.3d at 20. The court continued to explain that "the core issue is whether the creditor acted in such a way as to 'coerce' or 'harass' the debtor improperly." Id. at 19. A finding of bad faith is not a prerequisite for a violation of the discharge injunction, so long as the act is "objectively coercive." Id. "[E]ven legitimate state-law rights exercised in a coercive manner might impinge upon the important federal interest served by the discharge injunction, which is to ensure that debtors receive a 'fresh start' and are not unfairly coerced into repaying discharged prepetition debts." Id. Essentially, the "objectively coercive" standard is not concerned with the intent of the creditor, but with whether the creditor's actions were coercive in effect, i.e., had the practical effect of pressuring the debtor to repay the debt. Pratt makes clear that the existence *vel non* of objective coercion is a case specific, factual determination. Id.

Prior to Pratt, the bankruptcy court below found neither the default notices sent to Curtis nor the credit reports showing a delinquent obligation to be violations of the discharge injunction. With regard to the default notices, the court divided them into three categories: "those sent to the Stockton Springs address that were not received by Curtis; the one received by Curtis dated February 2, 2001; and those sent to her at her request after May 2003." Appellant's App. at 449.

With respect to those notices not received by Curtis, the bankruptcy court found them to be "of no concern," which this Panel interprets to mean that Curtis could not be harassed or coerced by something that never reached her. Id. at 450. Curtis argues that whether she actually received the notices is not determinative of whether the notices violated § 524(a)(2), as she could still be improperly coerced by notices sent to her and received by her ex-husband.

With regard to those notices requested by Curtis and received at her Searspoint address, the court stated, "Curtis knew when she received them that Salem was not pressing her for payment." Id. Curtis, though, argues that Salem pressured her into requesting the notices, and this pressure was a passive collection act that would not pass muster as a non-violation under Pratt.

Finally, the bankruptcy court found that the February 2, 2001, notice of default received by Curtis "is clearly evidence of an act to collect a debt." Id. However, because Salem sent the notice prior to becoming aware of Curtis's discharge, the court concluded that the February 2, 2001, notice was not a *willful* act to collect a debt, and therefore not a violation of the discharge injunction. For purposes of summary judgment, the bankruptcy court found that the earliest that Salem had knowledge of Curtis's bankruptcy and discharge was between April 2001 and October 2001, which is when Curtis claims she personally informed Salem of her discharge. Curtis, though, argues that Salem received notice of her bankruptcy when Salem acquired the mortgage from Camden approximately one month after she filed her bankruptcy petition. The Panel notes that the bankruptcy court appears to have, at least in part, imputed to Curtis a duty to inform Salem of her bankruptcy at the time the mortgage was transferred.

The bankruptcy court also concluded that the credit reports issued by Salem were not violations of § 524(a)(2). The court found that the credit reports issued prior to Salem becoming aware of Curtis's discharge were not, like the February 2, 2001, notice of default, *willful* acts to collect a debt. With regard to the credit reports issued after Salem became aware of the discharge, the court found those to be willful, but went on to state:

> However, the willful act of publishing erroneous credit reports is not, by itself, enough to implicate § 524, even if that act is repeated and causes injury. To have avoided summary judgment on this aspect of her case, Curtis would have had to have shown there to be a genuine issue of material fact for trial on the essential element of her case that Salem's credit reports were issued to persuade her to pay the mortgage as a personal liability. Curtis' offer of the credit reports themselves and the denials of credit is not enough to set up a genuine issue of fact on the essential element of her claim.

Id. at 449 (citation omitted). In light of Pratt, it would be appropriate for the bankruptcy court to consider whether the *default notices* are contemporaneous evidence probative of Salem's intent in issuing the *credit reports*.

Under the standard set forth in Pratt, a variety of somewhat passive acts are potentially violations of the discharge injunction if they are objectively coercive or coercive in effect. See In re Pratt, 462 F.3d at 20. We remand in order for the bankruptcy court to consider its findings in light of Pratt. Specifically, the bankruptcy court shall consider the time at which Salem learned of Curtis's discharge, and whether any or all of the default notices or credit reporting activities violate § 524(a)(2).

CONCLUSION

For the reasons stated, the case is **VACATED** and **REMANDED** for further proceedings consistent with this opinion. Whether further hearings are necessary is a matter left to the discretion of the bankruptcy court.