

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF IOWA**

In Re:
Robert R. Cargill

Case No. 12-03636-als7

Debtor.

**MEMORANDUM OF DECISION
(date entered on docket: June 22, 2018)**

Before the Court is Robert Cargill's Motion for Sanctions for violation of the discharge injunction by Liberty Canyon Townhome Homeowner's Association. The Court has jurisdiction of this proceeding pursuant to 11 U.S.C. sections 157 and 1334.

FACTUAL BACKGROUND

Cargill filed a chapter 7 petition on November 28, 2012. The schedules reflect that he owned real estate in Agoura Hills California that was subject to mortgages that were substantially in excess of its fair market value. The condominium was part of an HOA community, Liberty Canyon Townhomes ("Liberty"), which was identified on Cargill's Schedule D as having a "possible statutory lien" for the unsecured claim amount of \$275.00. Prior to filing bankruptcy Cargill moved from the townhome but continued to pay his HOA fees.

Cargill's discharge was granted on February 20, 2013 and the case was closed the following month. No further billings were sent to Cargill requesting payment of the HOA fees and he mistakenly believed that entry of his discharge ended his obligation to pay Liberty. After several months had passed Cargill received a letter¹ from Liberty's attorney demanding payment of \$2,802.50 in delinquent HOA fees and \$331.86 in legal fees. In October 2013 the real estate was foreclosed and Cargill's ownership interest was terminated. Over two years later Liberty sent a demand letter² seeking \$4,084.36 for "assessments up to the date of foreclosure and legal fees since the opening of your file." Because the amount requested for HOA fees included a time period after Cargill's interest in the property had ceased, his attorney sent a letter to Liberty's counsel that addressed the lack of ownership and offered a

¹ The content of the letter acknowledges that the demand for payment is subject to the Federal Fair Debt Collections Act but it does not contain the verification of debt language required under 15 U.S.C § 1692g.

² This letter did not contain any FDCPA disclosures.

settlement. On July 18, 2016 Liberty filed suit in California seeking a judgment against Cargill for delinquent HOA fees of \$5,462.44, plus interest and late fees. Attorney fees were also requested subject to further proof. This Motion for Sanctions was then filed in this Court and the California state court action was stayed³.

DISCUSSION

The bankruptcy code treats discharge of amounts owing to homeowner associations as follows:

. . . *a fee or assessment* that becomes due and payable after the order for relief to a membership association with respect to the debtor’s interest in a unit that has condominium ownership, in a share of a cooperative corporation, or a lot in a homeowners association, for as long as the debtor or the trustee has a legal, equitable, or possessory ownership interest in such unit, such corporation, or such lot, but nothing in this paragraph shall except from discharge the debt of a debtor for a membership association fee or assessment for a period arising before entry of the order for relief in a pending or subsequent bankruptcy case . . .⁴

The statutory language in the bankruptcy code clearly limits any fees or assessments to the time period during which a debtor has an interest in the real estate. Based upon the timing of the foreclosure, Cargill does not dispute that the monthly HOA dues are owing up to October 31, 2018. According to the submitted exhibits that amount totals \$3,547.50.

The remaining issue is extremely narrow in scope: what amount, if any, of Liberty’s attorney fees are non-dischargeable. Liberty’s declaration states that it is entitled to “an award of attorneys’ fees and costs for collection of delinquent assessments.” At least two Courts have generally held that use of the word “fee” in 523(a)(16) can include attorney fees incurred in collecting delinquent accounts. Any such amounts, however, are necessarily limited to the time period described in that same statute. No specific amount of attorney fees were stated or estimated in the state court lawsuit filed by Liberty, rather attorney fees were requested subject to additional proof. Cargill’s brief contains a letter dated September 26, 2016 that includes an accounting. That document reflects the following charges:

Date	Fin Date	Description	Amount
10/01/2013	Oct-13	Legal, liens/Cargill	\$ 331.86
04/17/2015	Apr-15	Legal, liens/Cargill	\$ 70.00

³ Trial is currently scheduled for July 18, 2018.

⁴ 11 U.S.C § 523(a)(16)

01/22/2016	Feb-16	Legal, liens/Cargill	\$1,089.36
04/22/2016	May-16	Legal, liens/Cargill	\$ 56.86
06/17/2016	Jun-16	Legal, liens/Cargill	\$ 130.00

The only legal fees identified that were charged on the account prior to termination of Cargill's interest in the property are \$331.86. Liberty states that the fees arose from its efforts prior to the foreclosure on the real estate. Nothing in the record supports such a conclusion.

It is under the foregoing facts that the Court evaluates Cargill's Motion for Sanctions related to Liberty's attempts to collect the outstanding townhome fees. 11 U.S.C §524(a)(2) states that a 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 any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived." In the Eighth Circuit, courts have held that a "willful violation" of the section 524(a)(2) discharge injunction "will warrant a finding of civil contempt and imposition of sanctions." See *In re Lang*, 398 B.R. 1, 3 (Bankr. N.D. Iowa 2008). "The movant has the burden to show by clear and convincing evidence that the creditor had knowledge of the discharge and willfully violated it by pursuing collection activities." See *id.*; *In re Adesta Comms.*, No. BK01-83236-TJM, 2010 Bankr. LEXIS 2351 at *6 (Bankr. D. Neb. Aug. 5, 2010). The record establishes that Liberty was listed as a creditor and as such is deemed to have received the notices filed by the Court thereby making it aware of the status of Cargill's bankruptcy. As early as December 2015 Liberty was aware that Cargill was represented by counsel and that there was a dispute involving the amount of charges owed. In spite of this information, Liberty filed suit in July 2016 in California state court to collect amounts that were clearly not owed by Cargill under 11 U.S.C. 523(a)(16). This conduct is determined to be a willful violation of the discharge injunction.

Much of this dispute could have been resolved without the need for Court intervention. For that reason, an award of reasonable attorney fees to Cargill's counsel is warranted for having to pursue additional efforts to enforce his clients rights under the discharge injunction and 523(a)(16).

IT IS THEREFORE ORDERED:

1. The objection filed by Liberty is overruled in part and granted in part.
2. Cargill shall pay \$3,547.50 in delinquent association dues, late fees, interest; and attorney fees of \$331.86.

3. The Motion for Sanctions is granted.
4. Liberty shall dismiss with prejudice its lawsuit against Cargill filed in the Superior Court of California in Los Angeles under case number 16K08972.
5. Any award of attorney fees is subject to Cargill's attorney submitting an itemization of his fees and expenses related to the Motion for Sanctions for the Court's review and approval.

/s/ Anita L. Shodeen
Anita L. Shodeen
U.S. Bankruptcy Judge

Parties receiving this Memorandum of Decision from the Clerk of Court:
Electronic Filers in this Chapter Case