

1 WRITTEN DECISION - NOT FOR PUBLICATION

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ENTERED	<u>1/31/08</u>
FILED	
JAN 30 2008	
CLERK, U.S. BANKRUPTCY COURT SOUTHERN DISTRICT OF CALIFORNIA	
BY	<u>120</u> DEPUTY

8 UNITED STATES BANKRUPTCY COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

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11 In re) Case No. 06-01685-B7
12) Adversary No. 07-90221
13 ADOLFO BARRIENTOS,)
14 MARIA ENRIQUETTA BARRIENTOS,)
15)
16 Debtors.) ORDER ON DEFENDANT'S
17) MOTION TO DISMISS
18)
19 ADOLFO BARRIENTOS,)
20 MARIA ENRIQUETTA BARRIENTOS,)
21)
22 Plaintiffs,)
23)
24 v.)
25)
26 WELLS FARGO BANK NATIONAL)
ASSOCIATION, AND DOES 1)
THROUGH 10, INCLUSIVE,)
Defendants.)

22 Defendant Wells Fargo Bank has moved to dismiss plaintiffs'
23 First Amended Complaint for failure to state a claim for which
24 relief could be granted.

25 The Court has subject matter jurisdiction pursuant to
26 28 U.S.C. § 1334 and General Order No. 312-D of the United States

1 District Court for the Southern District of California. This is
2 a core proceeding under 28 U.S.C. § 157(b)(2)(A), (O).

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Discussion

5 Plaintiffs have sued Wells Fargo by adversary proceeding in
6 this Court for violating the discharge injunction contained in
7 11 U.S.C. § 524. Plaintiffs set out a single cause of action,
8 captioned "Violation of Discharge Injunction 11 USC 524". The
9 sole question presented by the motion to dismiss is whether
10 plaintiffs have some private right of action to sue for violation
11 of the discharge injunction. The Ninth Circuit Court of Appeals
12 has already answered that question in the negative.

13 In Walls v. Wells Fargo Bank, 276 F.3d 502 (9th Cir. 2002),
14 the court was directly urged to find a private right of action
15 under both § 524 and § 105. The court rejected those arguments.
16 In discussing the question, the court noted:

17 Walls argues that § 524 creates
18 substantive rights in favor of the debtor;
19 therefore § 105(a) should be available to
20 enforce these rights and should not be
 limited only to authorizing a cause of action
 for contempt.

21 276 F.3d at 506. Walls invoked a First Circuit decision,
22 Bessette, but the Ninth Circuit stated:

23 We disagree that Bessette goes so far, but
24 regardless, are persuaded that violations of
25 that section may not independently be
 remedied through § 105 absent a contempt
 proceeding in the bankruptcy court.

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1 Id. The Ninth Circuit's reading of Besette was that in its
2 decision:

3 The First Circuit addressed only the § 105(a)
4 issue. It states that § 105 does not itself
5 create a private right of action, but that it
6 does provide a bankruptcy court with
7 statutory contempt powers in addition to
8 whatever inherent contempt powers the court
9 may have. Because these powers inherently
10 include the ability to sanction a party, the
11 court concluded that a bankruptcy court is
12 authorized to invoke § 105 to enforce the
13 discharge injunction and order damages for
14 the debtor if appropriate on the merits.

15
16 Walls suggests that § 105 may be used to
17 create substantive rights in the Code,
18 therefore a private right of action is
19 appropriate because § 105 empowers the
20 bankruptcy court to use "any" means necessary
21 to advance the purpose of the Code. However,
22 to create a new remedy would put us in the
23 business of legislating.

24 276 F.3d at 506-07.

25 In deciding that Congress did not intend to create a private
26 right of action under § 524 or under § 105, the Ninth Circuit
observed:

In the 1984 amendments, Congress added
subsection (b) to § 362, expressly conferring
on debtors the right to sue for damages for a
willful violation of the automatic stay.
Section 524 was amended on the same day, but
no similar provision, providing a private
right of action for violation of the
discharge injunction, was added.

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1 276 F.3d at 509. After another sentence, the court placed its
2 footnote 3, which stated:

3 This also bolsters our conclusion that
4 § 105 does not allow for a private right of
5 action to enforce § 524. If Congress had
6 understood § 105 as permitting a private
7 cause of action, the 1984 amendment creating
8 one for violations of § 362 would have been
9 superfluous.

10 Id.

11 Yet another reason presented by the Ninth Circuit for why
12 implying a private right of action would be inappropriate was
13 recognition that:

14 Implying a private remedy here could put
15 enforcement of the discharge injunction in
16 the hands of a court that did not issue it
17 (perhaps even in the hands of a jury), which
18 is inconsistent with the present scheme that
19 leaves enforcement to the bankruptcy judge
20 whose discharge order gave rise to the
21 injunction.

22 Id.

23 In light of Walls, it is clear that plaintiffs have no
24 private right of action under either § 524 or § 105. So,
25 rhetorically, the question is how do they get their concerns
26 before the Court. The answer should be clear: Plaintiffs want
27 this court to utilize the court's powers under § 105 to remedy an
28 alleged violation of the discharge injunction. To do so, they
29 need to ask the court to examine the circumstances. They cannot,
30 however, simply sue defendants under the authority of the court's
31 powers because they would thus be exercising a right of action
32 they do not have, at least on a *de facto* basis.

1 The Court recognizes, however, that the water is somewhat
2 muddied by language such as in Walls, where Walls had, in part,
3 sued for contempt. There, the district court referred the
4 "request for contempt to the bankruptcy court." 276 F.3d at 507.
5 Or, in In re Dyer, 322 F.3d 1178, 1189 (9th Cir. 2003), where the
6 court stated:

7 Nonetheless, we have held that the
8 Trustee may be entitled to recovery for
9 violation of the automatic stay "under
 section 105(a) as a sanction for ordinary
 civil contempt."

10 The Dyer court referenced the Walls decision in stating that the
11 trustee "is limited to the civil contempt remedy provided by
12 § 105(a)." To the extent such language can be read to suggest a
13 trustee does have a private right of action under § 105(a), it is
14 diametrically contrary to Walls, which has not been reversed or
15 vacated. Moreover, such a reading would be inconsistent with In
16 re Bennett, 298 F.2d 1059, 1069 (9th Cir. 2002), where the court
17 found it was not necessary to assert a counterclaim for § 105
18 sanctions because such sanctions are a part of the relief a court
19 can grant independent of any formal demand in a party's
20 pleadings.

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1 Echoing the concerns of the Walls court, in In re Startec
2 Global Comm'n Corp., 292 B.R. 246, 253-54 (Bankr. D.MD 2003), the
3 court noted:

4 Generally, enforcement of a court's order by
5 contempt power is the sole province of the
6 court that originated the order. . . .

6 Just as modification or vacatur of an
7 order must be sought from the originating
8 court, . . . request for the enforcement must
9 be addressed to the originating court. If
10 parties could apply to another tribunal, or
11 arbitrator, to determine whether an order of
12 another court has been breached, or should be
13 enforced, and by what means, an improper
14 collateral attack on the order effectively
15 would be permitted. . . . Therefore, this
16 court, and this court only, has the power to
17 enforce its own order and sanction violations
18 by civil contempt.

13
14 Conclusion

15 For all the foregoing reasons, Wells Fargo's motion to
16 dismiss should be, and hereby is granted. Counsel for Wells
17 Fargo shall prepare and lodge a proposed separate form of
18 judgment of dismissal within twenty (20) days of the date of
19 entry of this Order.

20 IT IS SO ORDERED.

21 DATED: JAN 30 2008

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PETER W. BOWIE, Chief Judge
United States Bankruptcy Court