

Dated: January 9, 2013



*Eileen W. Hollowell*

Eileen W. Hollowell, Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF ARIZONA

In re:	)	Chapter 7
	)	
JOSE BLANCO and	)	Case No. 4:10-bk-34085-EWH
RAMONA BLANCO,	)	
	)	
Debtors.	)	
_____	)	
	)	
JOSE BLANCO and	)	Case No. 4:11-ap-01812-EWH
RAMONA BLANCO,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	
BENEFICIAL MORTGAGE CO. OF	)	
ARIZONA,	)	
	)	
Defendant.	)	<b>MEMORANDUM DECISION</b>
_____	)	

**I. INTRODUCTION**

Jose and Ramona Blanco ("Plaintiffs") seek recovery of damages for actions committed by Beneficial Mortgage Company of Arizona ("Defendant") which Plaintiffs allege constitute a willful violation of the bankruptcy discharge injunction. The Court agrees with Plaintiff and will allow recovery of certain fees for the reasons explained in the balance of this decision.

## II. FACTUAL AND PROCEDURAL HISTORY<sup>1</sup>

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2 Plaintiffs filed a Chapter 7 voluntary petition on October 22, 2010. Plaintiffs  
3 appeared pro se and entered into a reaffirmation agreement (“the Original Reaffirmation  
4 Agreement”) with Defendant, which holds a purchase-money security interest in  
5 Plaintiffs’ residence. Defendant prepared the terms of the Original Reaffirmation  
6 Agreement without any input from Plaintiffs, and it explained those terms in a letter to  
7 Plaintiffs dated November 17, 2010: Plaintiffs would reaffirm the outstanding loan  
8 amount, \$145,568.68, and pay it off at an interest rate of 5.25%, which represented a  
9 modification from the original interest rate of 10.29%. The letter stated that Plaintiffs  
10 would pay \$437.37 per month for 283 months.  
11

12  
13 Jose Blanco (“Mr. Blanco”) signed the Original Reaffirmation Agreement on  
14 November 23, 2010. Defendant signed it on November 30, 2010 and filed it<sup>2</sup> with the  
15 Court on the same day. The Court held a hearing on the Original Reaffirmation  
16 Agreement on January 11, 2011, and Plaintiffs were discharged on February 24, 2011.  
17

18 In March 2011, after the entry of Plaintiff’s discharge, Defendant requested that  
19 Plaintiffs sign an amended reaffirmation agreement (“the Second Reaffirmation  
20 Agreement”) which increased the total amount reaffirmed to \$150,137.25 and nearly  
21 doubled the monthly payment to \$863.35. Both Plaintiffs signed the Second  
22 Reaffirmation Agreement and filed it with the Court on March 4, 2011.  
23

24 The Court entered an Order on March 21, 2011 (“the Reaffirmation Order”) which  
25 approved the Original Reaffirmation Agreement and rejected the Second Reaffirmation

26 <sup>1</sup> Unless otherwise indicated, all chapter and section references are to the Bankruptcy Code, 11 U.S.C.  
27 §§ 101-1532. All “Rule” references are to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

28 <sup>2</sup> Notwithstanding that § 524(c)(6)(B) does not require court approval of a reaffirmation agreement  
between a pro se party and a creditor whose consumer debt is secured by real property, Defendant filed  
the Reaffirmation Agreement with the Court and triggered a hearing under § 524(d).

1 Agreement because it was entered into by the parties after Plaintiffs' discharge. The  
2 Court also directed Defendant to file terms of a loan modification reflected in the  
3 Original Reaffirmation Agreement. Defendant failed to abide by the Reaffirmation  
4 Order—it did not produce the loan-modification terms, it did not credit Plaintiffs' account  
5 with monthly mortgage payments remitted in accordance with the Original Reaffirmation  
6 Agreement, and it continually sought to enforce the terms of the Second Reaffirmation  
7 Agreement by making phone calls and sending letters to Plaintiffs.  
8

9           After several months of these collection efforts, Plaintiffs retained counsel and  
10 filed a complaint ("the Complaint") on October 5, 2011 which alleged that Defendant's  
11 conduct constituted contempt of a court order, violation of the discharge injunction, and  
12 breach of the Original Reaffirmation Agreement. Plaintiffs sought a temporary  
13 restraining order and injunction ordering Defendant to abide by the Original  
14 Reaffirmation Agreement, cease any efforts seeking to collect amounts due under the  
15 Second Reaffirmation Agreement, provide an accounting of the mortgage loan ("the  
16 Loan") balance, and recalculate the amount due on the Loan in accordance with the  
17 Original Reaffirmation Agreement. Plaintiffs also requested compensatory damages,  
18 punitive damages, and attorney's fees for the time spent attending to Defendant's  
19 collection efforts and the emotional and physical harm it caused.  
20  
21

22           At a hearing on November 2, 2011, the parties stipulated that Defendant would  
23 not pursue any collections or take steps toward foreclosure unless authorized by the  
24 Court. Defendant argued that the terms of the Original Reaffirmation Agreement  
25 reflected a clerical error and asked the Court for leave to file a Motion for Relief from  
26 Judgment ("the Motion") that would request that the Court declare the Second  
27  
28

1 Reaffirmation Agreement valid and enforceable. The Court permitted Defendant to file  
2 the Motion and ordered that Defendant provide an accounting of Plaintiffs' tendered  
3 mortgage payments under the Original Reaffirmation Agreement.  
4

5 Defendant filed the Motion on December 12, 2011. At a hearing on the matter  
6 held February 2, 2012, the Court denied the Motion, ruling that any error in the Original  
7 Reaffirmation Agreement was not the product of clerical mistake. An order to that effect,  
8 entered on February 28, 2012, further provided that the Original Reaffirmation  
9 Agreement was enforceable and binding on the parties.  
10

11 The Court held an evidentiary hearing on November 9, 2012 to address the  
12 remaining issue—whether Defendant willfully violated Plaintiffs' discharge injunction and  
13 Court orders. Defendant's counsel elected to appear by telephone and did not put on  
14 evidence or cross examine Plaintiffs' witnesses.<sup>3</sup> Plaintiff submitted a number of  
15 exhibits, including the Original and Second Reaffirmation Agreements, Loan billing  
16 statements, internal records maintained by Defendant, and Defendant's  
17 correspondence with Plaintiffs.  
18

19 Plaintiffs testified individually and called their daughter ("Daughter"), who  
20 assisted them through the reaffirmation process, to testify about her interaction with  
21 Defendant.<sup>4</sup> Plaintiffs both claimed that Defendant's actions had caused them emotional  
22 distress—Mr. Blanco testified that he had experienced problems sleeping and anxiety at  
23 work due to the emotional strain; Ramona Blanco ("Mrs. Blanco") said that she had to  
24 take an increased dosage of anxiety medication. Daughter testified that she had lost  
25

26 \_\_\_\_\_  
27 <sup>3</sup> The Court conditioned Defendant's counsel's telephonic appearance on counsel not participating in the  
28 evidentiary portion of the hearing but did permit counsel to present oral argument at the conclusion of the hearing.

<sup>4</sup> Plaintiffs' abilities to speak English are limited. Therefore, Daughter primarily interacted with Defendant.

1 hours of work time while on the phone wrangling with Defendant, and that Defendant  
2 had caused both Plaintiffs to experience anxiety, emotional anguish, and diminished  
3 health. No medical records were offered into evidence regarding Plaintiffs' emotional  
4 distress. Nor did Plaintiffs introduce records documenting Daughter's lost time at work.  
5

### 6 **III. ISSUE**

7 Did Defendant willfully violate the discharge injunction?

### 8 **IV. JURISDICTIONAL STATEMENT**

9 Jurisdiction is proper under 28 U.S.C. §§ 1334 and 157(b)(2)(A).  
10

### 11 **V. DISCUSSION**

#### 12 A. Willful Violation of the Discharge Injunction

13 Section 524 of the bankruptcy code provides that discharge "operates as an  
14 injunction against the commencement or continuation of" any action to collect, recover,  
15 or offset any discharged debt "as a personal liability of the debtor." 11 U.S.C. §  
16 524(a)(2). "A party [that] knowingly violates the discharge injunction can be held in  
17 contempt under [S]ection 105(a) of the bankruptcy code." ZiLOG, Inc. v. Corning (In re  
18 ZiLOG, Inc.), 450 F.3d 996, 1007 (9th Cir. 2006). The party seeking contempt sanctions  
19 "has the burden of proving, by clear and convincing evidence, that the sanctions are  
20 justified," and must demonstrate two elements: (1) the creditor knew the discharge  
21 injunction was applicable; and (2) the creditor intended the actions which violated the  
22 injunction. Id. (internal quotation omitted). "...[T]he focus of the court's inquiry in  
23 contempt proceedings under § 105(a) is not on the subjective belief or intent of the  
24 offending creditor in complying with the injunction but on whether, in fact, the creditor's  
25 conduct complied with the injunction at issue." In re Moreno, 479 B.R. 553, 570 (Bankr.  
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1 E.D. Cal. 2012) (citing Knupfer v. Lindblade (In re Dyer), 322 F.3d 1178, 1191 (9th Cir.  
2 2003)).

3 Plaintiffs entered into the Original Reaffirmation Agreement with Defendant  
4 pursuant to § 524(d) and then received a discharge. Despite longstanding Ninth Circuit  
5 law that post-discharge reaffirmation agreements are unenforceable,<sup>5</sup> Defendant  
6 vigorously sought to enter into and enforce the Second Reaffirmation Agreement.  
7 Based on the evidence, there is no question that Defendant knew about the discharge  
8 and nevertheless pursued its collection effort. This evidence satisfies the two prongs of  
9 the ZiLOG test, and the Court finds that Defendant willfully violated the discharge  
10 injunction.  
11

12  
13 B. Remedies

14 Plaintiffs have requested that the Court award them actual damages, punitive  
15 damages, and attorneys' fees. All three are available in this case under Nash v. Clark  
16 Cnty. Dist. Attorney's Office (In re Nash), 464 B.R. 874, 880 (9th Cir. BAP 2012) (citing  
17 Espinosa v. United Student Aid Funds, Inc., 553 F.3d 1193, 1205 n.7 (9th Cir. 2008))  
18 (“[i]f a bankruptcy court finds that a party has willfully violated the discharge injunction,  
19 the court may award actual damages, punitive damages and attorney's fees to the  
20 debtor.”) However, Plaintiffs failed to provide adequate evidence regarding the amount  
21 of their damages other than the fees, including attorney’s fees, which they incurred as a  
22 result of Defendant’s post-discharge misfeasance.  
23  
24

25 In particular, Plaintiffs’ evidence of emotional distress was very vague. Mr.  
26 Blanco testified that Defendant’s conduct caused him to suffer a lack of sleep and  
27 general anxiety, but he did not testify that he had lost income or incurred expenses as a  
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<sup>5</sup> Bankr. Receivables Mgmt. v. Lopez (In re Lopez), 345 F.3d 701, 707-09 (9th Cir. 2003)

1 result of those conditions. Mrs. Blanco testified that Defendant's conduct exacerbated  
2 an existing anxiety disorder, but no evidence was presented from which the Court could  
3 determine how severely the extant condition worsened. The evidence did demonstrate  
4 that Daughter spent hours on the phone with Defendant trying to resolve the  
5 reaffirmation problems, but it did not provide an hourly rate of Daughter's employment  
6 from which the Court could calculate a damages award.

8 Punitive damages cannot be awarded based on this record, either. While punitive  
9 damages may be awarded when a creditor willfully violates the discharge injunction,  
10 Dyer, 322 F.3d 1178, the appropriate punitive sanctions are limited to civil penalties  
11 designed to provide compensation or coerce compliance. Id. at 1192. As explained  
12 previously, Plaintiffs have not provided enough evidence for the Court to calculate a  
13 specific compensatory remedy, and the record does not reflect that Defendant's actions  
14 were so flagrant that a "relatively mild non-compensatory fine[]" is warranted. Id.  
15 (internal quotation marks omitted).

18 The evidence introduced at trial, along with the record, does entitle Plaintiffs to  
19 recover for their attorney's fees and costs, along with any other costs they may have  
20 incurred, either in the form of charges wrongfully assessed under the Original  
21 Reaffirmation Agreement or the mailing and copying costs necessitated by  
22 communicating with Defendant. Not only is this award aligned with common practice in  
23 the Ninth Circuit,<sup>6</sup> but it also is merited because Plaintiffs were forced to retain counsel  
24 when Defendant failed to abide by the Original Reaffirmation Agreement.

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<sup>6</sup> Moreno, 479 B.R. at 570.

1 **VI. CONCLUSION**

2 Defendant willfully violated the discharge injunction by pursuing Plaintiffs and  
3 insisting upon post-discharge execution of the Second Reaffirmation Agreement.  
4 Defendant then attempted to enforce it so aggressively that Plaintiffs had to retain  
5 counsel in order to stop Defendant's unlawful conduct. Therefore, Plaintiffs are directed  
6 to file and serve on Defendant within 21 days a detailed statement of their allowed  
7 damages. Defendant shall have 10 days to file any objection to the amount. Thereafter,  
8 the Court will issue a judgment awarding Plaintiffs their damages.  
9

10 Dated and signed above.

11  
12 Notice to be sent through  
13 the Bankruptcy Noticing Center  
14 to the following:

14 Jose Blanco  
15 Ramona Blanco  
16 2233 E. Dakota St.  
17 Tucson, AZ 85706

17 German Yusufov  
18 Yusufov Law Firm, PLLC  
19 515 E. Broadway Blvd., Ste. 1600  
20 Tucson, AZ 85711

20 Beneficial Mortgage Co. of Arizona  
21 c/o the Corporation Trust Company  
22 Corporation Trust Center  
23 1209 Orange St.  
24 Wilmington, DE 19801

24 Joseph D. Dorsey  
25 Leonard J. McDonald  
26 Tiffany & Bosco  
27 2525 E. Camelback Rd., 3<sup>rd</sup> Fl.  
28 Phoenix, AZ 85016