

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EDWARD T. WILLIS, JR. and :  
KAREN WILLIS, HUSBAND AND :  
WIFE, INDIVIDUALLY, JOINTLY, : CIVIL ACTION  
AND ON BEHALF OF OTHERS :  
SIMILARLY SITUATED :  
: :  
: :  
v. :  
: NO. 01-CV-1312  
CHASE MANHATTAN MORTGAGE :  
CORP. and JOHN DOES 1-50 :

**MEMORANDUM**

Padova, J. September , 2001

Plaintiffs, Edward T. Willis, Jr. and Karen Willis, filed this action on March 20, 2001 alleging claims pursuant to § 506(b) of the Bankruptcy Code, 11 U.S.C. § 506(b), breach of contract, misrepresentation, fraudulent misrepresentation, and unfair trade practices. Before the Court is Defendant Chase Manhattan Mortgage Corp.'s ("Chase") Motion to Dismiss the First Amended Class Action Complaint (the "Complaint"). For the reasons which follow, the Motion is granted.

**I. BACKGROUND**

The Complaint alleges the following facts. Plaintiffs are residents of the State of New Jersey who are mortgagors of a home mortgage serviced by Chase. On April 3, 1997, Edward Willis filed for bankruptcy protection under Chapter 13 of the Bankruptcy Code in the District of New Jersey. Karen Willis did not file for bankruptcy protection. At the time of Edward Willis' Chapter 13 filing, and at all pertinent times after the filing of the

petition, Plaintiffs were current on their mortgage. Chase retained counsel to represent it in Edward Willis' Chapter 13 proceeding. On June 22, 2000, Chase filed a proof of claim which included attorney's fees in the amount of \$800. That proof of claim was disallowed in its entirety by the bankruptcy court on August 7, 2000. Edward Willis was discharged from bankruptcy on January 24, 2001. Plaintiffs' February 2001 loan statement from Chase included a charge of miscellaneous fees in the amount of \$867, reflecting attorney's fees and costs related to the bankruptcy, and a charge of attorney's fees of \$50, also related to the bankruptcy.

The Complaint alleges in Count I that Defendants violated 11 U.S.C. § 506(b) by charging Plaintiffs for attorneys fees and costs incurred in Edward Willis' bankruptcy proceeding without first applying for, and obtaining approval of, such fees from the bankruptcy court. The Complaint also alleges that: Chase breached its contract with Plaintiffs by charging them for these attorneys fees (Count II); Chase engaged in unfair trade practices by imposing these fees (Count III); Chase misrepresented and mischaracterized these fees to induce Plaintiffs to pay them (Count IV); and Chase's misrepresentations were fraudulent, intentional, wanton, reckless and/or grossly negligent (Count V).

## II. LEGAL STANDARD

Chase moves to dismiss the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). When determining a Motion to Dismiss pursuant to Rule 12(b)(6), the Court may look only to the facts alleged in the complaint and its attachments. Jordon v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1261 (3d Cir. 1994).<sup>1</sup> The Court must accept as true all well-pleaded allegations in the complaint and view them in the light most favorable to the Plaintiffs. Angelastro v. Prudential-Bache Securities, Inc., 764 F.2d 939, 944 (3d Cir. 1985). A Rule 12(b)(6) motion will be granted when Plaintiffs cannot prove any set of facts, consistent with the complaint, which would entitle them to relief. Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988).

## III. DISCUSSION

### A. 11 U.S.C. § 506(b)

Chase argues that Count I of the Complaint, the only federal claim asserted by Plaintiffs, should be dismissed because Plaintiffs cannot assert a private right of action for violation of 11 U.S.C. § 506(b).

"Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress. The

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<sup>1</sup>Both parties refer to matters outside of the pleadings in their memoranda in support of and in opposition to the Motion to Dismiss. The Court will exclude these matters from its consideration rather than treat this Motion as a Motion for Summary Judgment. Fed.R.Civ.P. 12(b).

judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy." Alexander v. Sandoval, 121 S.Ct. 1511, 1519 (2001) (citations omitted). This inquiry into Congressional intent begins with the text and structure of § 506(b). Id. at 1520. Section 506(b) provides as follows:

To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.

11 U.S.C. § 506(b). The text of § 506(b) does not explicitly evidence intent to create a private right of action for violation of this section. Accordingly, the Court turns to other indicators of Congressional intent to determine whether Plaintiffs may assert a private action pursuant to this statute.

To determine whether Congress intended to create a private right of action, courts use the four-factor test articulated by the Supreme Court in Cort v. Ash, 422 U.S. 66 (1979). Hemispherx Biopharma, Inc. v. Asensio, et al., No.Civ.A. 98-5204, 1999 WL 144109, at \* 7 (E.D.Pa. Mar. 15, 1999). The four factors are:

(1) whether the plaintiff is a member of the class for whose special benefit the statute was enacted; (2) whether there is any explicit

or implicit indication of congressional intent to create or deny a private remedy; (3) whether a private remedy would be consistent with the underlying purpose of the legislative scheme; and (4) whether the cause of action is one traditionally relegated to state law.

Pertuso v. Ford Motor Credit Co., 233 F.3d 417, 421 (6th Cir. 2000) (citing Cort v. Ash, 422 U.S. 66, 78 (1975)).

Examining the four factors in this case, the Court concludes that Congress did not intend to create a private right of action to remedy violations of § 506(b). Section 506(b) confers substantive rights on creditors, not debtors such as Plaintiffs. Therefore, Plaintiffs are not members of the class for whose special benefit § 506(b) was enacted and the first Cort factor does not support Plaintiffs' right to bring a private action pursuant to this statute.

As stated above, § 506(b) does not explicitly indicate Congressional intent to create a private remedy for debtors. Moreover, the Senate and House Reports on the Bankruptcy Reform Act of 1978 indicate that § 506(b) was enacted to codify then current law benefitting creditors:

Subsection (b) codifies current law by entitling a creditor with an oversecured claim to any reasonable fees (including attorney's fees), costs, or charges provided under the agreement under which the claim arose. These fees, costs, and charges are secured claims to the extent that the value of the collateral exceeds the amount of the underlying claim.

S. Rep. No. 95-989, at 68, reprinted in 1978 U.S.C.A.A.N. 5787, 5854; see also H.R. Rep. No. 95-595, at 356-57, reprinted in 1978 U.S.C.A.A.N. 5963, 6312. The legislative history does not demonstrate any Congressional intention to create a private remedy. Consequently, the second Cort factor does not support Plaintiffs' right to bring a private action pursuant to this statute.

The purpose of § 506 of the Bankruptcy Code is to set forth the formula for determining what parts of a creditor's claims are secured and what parts are unsecured. 11 U.S.C. § 506. It does not proscribe the conduct of creditors or impart rights to debtors. Therefore, a private remedy for debtors would not be consistent with the underlying purpose of this section of the Bankruptcy Code and the third Cort factor does not support Plaintiffs' right to bring a private action for violation of this statute.

Only the fourth Cort factor supports Plaintiff's right to bring a private action for violation of this statute. Plaintiffs allege that Chase has violated federal law. Therefore, the cause of action is not one which is traditionally relegated to state law. However, having weighed all of the Cort factors, the Court concludes that Congress did not intend to create a private right of action for debtors to enforce violations of § 506(b).<sup>2</sup>

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<sup>2</sup>Having determined that the Motion to Dismiss will be granted on this basis, the Court need not address Chase's alternative grounds for dismissal of this action.

**11 U.S.C. § 105(a)**

Plaintiffs argue that they can assert a private right of action for violation of § 506(b) derivatively, through § 105(a) of the Bankruptcy Code, 11 U.S.C. § 105(a). Section 105(a) confers statutory contempt powers on the bankruptcy courts:

[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

11 U.S.C. § 105(a). Section 105(a), however, "does not authorize the bankruptcy court to create rights not otherwise available under applicable law." Southern Ry. Co. v. Johnson Bronze Co., 758 F.2d 137, 141 (1985); see also Pertuso v. Ford Motor Credit Co., 233 F.3d 417, 423 (6th Cir. 2000) ("We do not read § 105 as conferring on courts such broad remedial powers. The "provisions of this title" simply denote a set of remedies fixed by Congress. A court cannot legislate to add to them.") (citing Kelvin v. Avon Printing Co., Inc., 1995 WL 734481 (6th Cir. 1995) (unpublished)).

Plaintiffs rely on In re Tate, 253 B.R. 653 (Bankr. W.D.N.C. 2000) and Bessette v. Avco Financial Services, Inc., 230 F.3d 439 (1st Cir.), cert. denied 121 S.Ct. 2016 (2001) to support their argument. However these cases do not provide sufficient support for their position.

Plaintiffs in In re Tate instituted an adversary proceeding against defendant Nationsbanc pursuant to § 506(b), challenging certain attorney's fees charged by defendant. In re Tate, 253 B.R. at 657-58. Nationsbanc moved to dismiss on the basis that the Tates could not assert a private action pursuant to § 506(b). The bankruptcy court did not decide whether the Tates could bring a private action pursuant to Section 506(b) or derivatively through § 105(a). Instead, the court used its statutory contempt power pursuant to § 105(a) to order Nationsbanc to return the fee, thereby preserving the bankruptcy estate. Id. at 668. In re Tate, therefore, does not support the proposition that a private right of action for violating § 506(b) is available through § 105(a).

Bessette v. Avco Financial Services, Inc., 230 F.3d 439 (1st Cir.), cert. denied 121 S.Ct. 2016 (2001), examined whether a district court in the district of Bessette's bankruptcy filing could hear a claim for violation of §§ 362 and 524 of the Bankruptcy Code after Bessette was discharged from bankruptcy. The First Circuit determined that the district court, sitting in bankruptcy, could invoke its equitable powers pursuant to § 105 to decide Bessette's claim or, alternatively, could refer the matter back to the bankruptcy court. Id. at 446. The First Circuit did not, however, find that § 105(a) creates a private right of action for enforcement of other sections of the Bankruptcy Code. Id. at

444-45 (acknowledging that § 105 provides the bankruptcy court with statutory contempt powers but "does not itself create a private right of action" or create substantive rights not found elsewhere in the Bankruptcy Code).

#### **IV. CONCLUSION**

Count I of the Complaint, for violation of 11 U.S.C. § 506(b), is dismissed pursuant to Fed.R.Civ.P. 12(b)(6) because Plaintiffs cannot state a private right of action pursuant to that statute. As the remainder of Plaintiffs' claims are brought pursuant to state law, over which this Court has only supplemental jurisdiction pursuant to 28 U.S.C. § 1367, those claims are also dismissed. Borough of West Mifflin v. Lancaster, 45 F.3d 780, 788 (3d Cir. 1995) ("[W]here the claim over which the district court has original jurisdiction is dismissed before trial, the district court must decline to decide the pendant state claims unless considerations of judicial economy, convenience, and fairness to the parties provide an affirmative justification for doing so.") (citations omitted). An appropriate Order follows.

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O R D E R

**AND NOW**, this        day of September, 2001, in consideration of Defendants' Motion to Dismiss (Docket No. 9), Plaintiffs' response thereto, and Defendants' reply memorandum of law, **IT IS HEREBY ORDERED** that the Motion to Dismiss is **GRANTED**. **IT IS FURTHER ORDERED** that the Clerk of Courts shall **CLOSE** this case for statistical purposes.

BY THE COURT:

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John R. Padova, J.