

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NORTH CAROLINA
NEW BERN DIVISION

IN RE:

JASON COREY BORNMAN

DEBTOR.

CASE NO. 15-04676-5-DMW
CHAPTER 7

JASON COREY BORNMAN)
)
)
 Plaintiff,)
)
 vs.)
)
 THOMPSON PUMP AND)
 MANUFACTURING COMPANY, INC.)
)
 Defendant.)
)

AP NO. 16-_____-5-DMW

COMPLAINT AND MOTION FOR CONTEMPT AND SANCTIONS
(JURY TRIAL DEMANDED)

NOW COMES JASON COREY BORNMAN (“Plaintiff”), by and through his undersigned counsel of record, complaining of THOMPSON PUMP AND MANUFACTURING COMPANY, INC. (“Defendant”), by alleging and asserting as follows:

INTRODUCTION AND NATURE OF THE ACTION

1. This is an action commenced by Plaintiff against Defendant seeking compensatory, statutory, treble and punitive damages, attorneys’ fees and expenses, declaratory relief pursuant to 28 U.S.C. § 2201 and the imposition of sanctions, pursuant to § 105(a) and the Court’s inherent powers, to redress the following: (A) Defendant’s willful violations of Federal Rule of Bankruptcy Procedure 9037 and other applicable federal and state laws; and (B)

Defendant's willful or, in the alternative, negligent failure to comply with applicable North Carolina law including, but not limited to, the North Carolina Unfair and Deceptive Trade Practices Act, N.C. Gen. Stat. § 75-1.1 *et seq.* (the "UDTPA") and the North Carolina Identity Theft Protection Act, N.C. Gen. Stat. § 75-60 *et seq.* (the "NCITPA").

JURISDICTION AND VENUE

2. This adversary proceeding relates to the chapter 7 bankruptcy proceeding, which was previously commenced by Plaintiff on August 31, 2015 (the "Petition Date"), in the United States Bankruptcy Court for the Eastern District of North Carolina (the "Court") and assigned Case No. 15-04676-5-DMW (the "Bankruptcy Case").

3. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 151, 157 and 1334, as well as the authority to hear and adjudicate said matter pursuant to the General Order of Reference entered by the United States District Court for the Eastern District of North Carolina on August 3, 1984.

4. The claims for relief asserted herein, each constitute a "core proceeding," as that term is defined under 28 U.S.C. § 157(b), and the Court has jurisdiction to enter a final and dispositive Order in this matter pursuant to Budget Service Co. v. Better Homes of Virginia, 804 F.2d 289 (4th Cir. 1986). To the extent the Court may find this to be a non-core proceeding, Plaintiff consents to the entry of a final order in this matter by the Bankruptcy Court, in accordance with 28 U.S.C. § 157(c)(2).

5. Jurisdiction is proper pursuant to 28 U.S.C. § 1334, in that this proceeding arises in or, in the alternative, is related to the Bankruptcy Case previously commenced by Plaintiff under chapter 7 of the Bankruptcy Code.

6. This Court has supplemental jurisdiction to hear all the claims for relief based upon North Carolina law and applicable non-bankruptcy federal law pursuant to 28 U.S.C. § 1367.

7. Venue properly lies in the United States Bankruptcy Court for the Eastern District of North Carolina in accordance with 28 U.S.C. §§ 1391(b), 1408 and 1409, as all of the actions complained of and giving rise to the claims for relief set forth herein, arose in this judicial district within which Plaintiff resides and Defendant is present and regularly conducts its business operations and affairs.

IDENTIFICATION OF THE PARTIES

8. Plaintiff is a citizen and resident of Carteret County, North Carolina, and filed a voluntary petition seeking relief under chapter 7 of the Bankruptcy Code.

9. Upon information and belief, the Defendant is a Florida corporation that is a manufacturer and provider of dewatering and construction pumps, pumping equipment and engineering expertise for dewatering, bypass, and emergency pumping applications with offices in North Carolina, Delaware, Florida, Georgia, Kansas, Louisiana, Maryland, Mississippi, Rhode Island, South Carolina, and Virginia.

10. The Proof of Claim filed by the Defendant, docketed as Claim No. 27, in the Plaintiffs' underlying bankruptcy case, lists a noticing address of P.O. Box 291370, Port Orange, Florida 32129. This address corresponds with the Defendant's 2015 Business Corporation Annual Report filed with the North Carolina Secretary of State.

11. The Defendant's 2015 Annual Report lists its registered agent in North Carolina as Tim Creech with a mailing address of P.O. Box 10444, Goldsboro, North Carolina 27532-

0444 and registered office street address as 2963 US Highway 13 North, Goldsboro, North Carolina 27534-7327. The 2015 Annual Report lists is Principal Office Street Address as 4620 City Center Drive, Port Orange, Florida 32129-4121.

FACTUAL BACKGROUND AND ALLEGATIONS

12. Plaintiff's company, prior to the Petition Date, executed a Credit & Account Application date June 6, 2014 ("Application") with Defendant in order to rent and or purchase equipment, as represented by the proof of claim, Claim No. 27, in the amount of \$21,503.08, that was filed by Defendant in the Bankruptcy Case (the "Proof of Claim"). This Application required Plaintiff to personally guaranty payment of invoices.

13. Upon information and belief, the Proof of Claim, and the amount allegedly owed by Plaintiff on the Petition Date is for equipment provided by Defendant pursuant to the approved Application. Attached to the Proof of Claim, without redaction, was certain personal identification information relating to Plaintiff, including, without limitation, his complete social security number and his company's Federal Identification Number.

14. The Proof of Claim, which was filed by Defendant on February 19, 2016, utilizing the Court's Case Management Electronic Case Filing (CM/ECF) system, is a public document that is generally available to anyone registered with the Public Access to Court Electronic Records (PACER) system maintained by the Administrative Office, as well as through other systems and third-party providers.

15. On February 23, 2016, Plaintiff filed an Ex-Parte Motion to Seal Proof of Claim ("Motion to Seal"), seeking an Order from the Court restricting the Proof of Claim and Plaintiff's personal identification information from public view.

16. Notwithstanding the Motion to Seal, and due to the Defendant's willful or, in the alternative, negligent, failure to redact Plaintiff's private information from the Proof of Claim, the Proof of Claim was published and was available for viewing by any persons or entities which have access to PACER and to the CM/ECF systems from February 19, 2016, through February 24, 2016.

17. Upon information and belief, and notwithstanding the Motion to Seal, the Plaintiff's private information may still be available for viewing via one of the third-party providers to either the CM/ECF or PACER systems.

18. Upon information and belief, at all times relevant herein, the Defendant has maintained a "Privacy Policy" with respect to its past and present customers, including Plaintiff, which is designed to prevent disclosure of certain private and personal information including, but not limited to, an individual's social security number.

19. Plaintiff never consented to the release of his private, non-public information into the public record or to any third party.

20. As a result of Defendant's actions, the Plaintiff has been and continues to be exposed to an increased likelihood that his identity will be stolen and his credit further damaged.

21. Defendant's actions in disclosing Plaintiff's private information on the Proof of Claim was in violation of applicable federal and North Carolina law.

22. Such disclosure was also contrary to federal law, including but not limited to, Chapter 94 of the Gramm-Leach-Bliley Act (hereinafter "the GLBA"), which provides, in material part, that "each financial institution has an affirmative and continuing obligation to respect the privacy of its customers and protect the security and confidentiality of those

customers' nonpublic personal information." 15 U.S.C. § 6891(a) (2006).

MOTION FOR CONTEMPT AND SANCTIONS

(11 U.S.C. § 105 and Federal Rule of Bankruptcy Procedure 9037)

23. Plaintiff incorporates herein, by reference, all of the allegations contained in this pleading as if fully set forth herein.

23. Section 105(a) of the Bankruptcy Code vests bankruptcy courts with the inherent authority to issue any Order or rule that will prevent an abuse of process and protect the integrity of the bankruptcy system. 11 U.S.C. § 105(a).

24. Federal Rule of Bankruptcy Procedure 9037 provides, in part, as follows:

(a) REDACTED FILINGS. Unless the court orders otherwise, in an electronic or paper filing made with the court that contains an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual, other than the debtor, known to be and identified as a minor, or a financial-account number, a party or nonparty making the filing may include only:

- (1) the last four digits of the social-security number and taxpayer identification number;
- (2) the year of the individual's birth;
- (3) the minor's initials; and
- (4) the last four digits of the financial-account number

Fed. R. Bankr. P. 9037(a).

25. Defendant, under Fed. R. Bankr. P. 9037, had an affirmative duty to redact all but the last four digits of Plaintiff's social security number, taxpayer identification number, and other account-related information.

26. Prior to initiation of this action, Plaintiff was not required to request that Defendant seal the Proof of Claim, as Defendant should not need to be coerced to comply with

its affirmative duties.

27. Official Form 410, Proof of Claim Form adopted for use by United States Bankruptcy Courts, which was utilized by Defendant in filing the Proof of Claim, specifically instructed Defendant that “**Filers must leave our or redact** information that is entitled to privacy on this form or on any attached documents. Attach redacted copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements.”

28. The instructions that accompany Official Form 410 specifically direct creditors filing proofs of claims:

a. Attach redacted copies of any documents that show that the debt exists, a lien secures the debt, or both. (See the definition of *redaction* on the next page.) (page 1, 1st column)

b. **A Proof of Claim form and any attached documents must show only the last 4 digits of any social security number, individual’s tax identification number, or financial account number, and only the year of any person’s date of birth.** See Bankruptcy Rule 9037. (page 1, 2nd column)

c. **Information that is entitled to privacy:** A *Proof of Claim* form and any attached documents must show only the last 4 digits of any social security number, an individual’s tax identification number, or a financial account number, only the initials of a minor’s name, and only the year of any person’s date of birth. If a claim is based on delivering health care goods or services, limit the disclosure of the goods or services to avoid embarrassment or disclosure of confidential health care information. (page 2, 1st column)

d. **Redaction of information:** Masking, editing out, or deleting certain information to protect privacy. Filers must redact or leave out information entitled to **privacy** on the *Proof of Claim* form and any attached documents. (page 2, 1st column)

29. Proofs of claim filed in a bankruptcy case are “public records and open to examination by an entity at reasonable times without charge.” 11 U.S.C § 107(a).

30. By disclosing Plaintiff's private information in the Proof of Claim, which was a public court filing accessible by millions of individuals, entities and users worldwide, Defendant knowingly and willfully violated Fed. R. Bankr. P. 9037.

31. As a direct and proximate result of the foregoing willful actions of Defendant, Plaintiff has suffered significant damages including, but not limited to, the costs, expenses and attorneys' fees associated with filing the Motion to Seal and the prosecution of this action.

32. Accordingly, and by virtue of the foregoing, Plaintiff is entitled to an award of sanctions against Defendant, on account of its course of conduct, including but not limited to, the costs associated with future credit monitoring, reasonable attorneys' fees and expenses incurred by Plaintiff in connection with the prosecution of this matter and protecting his personal identification information pursuant to § 105 of the Bankruptcy Code.

FIRST CLAIM FOR RELIEF

(Violation of North Carolina Identity Theft Protection Act)

N.C. Gen. Stat. §§ 75-1.1 and 75-62

33. Plaintiff incorporates herein by reference all the allegations contained in this pleading as if fully set forth herein.

34. Defendant is a "business" as that term is defined in N.C. Gen. Stat. § 75-61(1).

35. Plaintiff is a "consumer," as defined under N.C. Gen. Stat. § 75-61(2),

36. Likewise, Plaintiff is an individual, who pursuant to N.C. Gen. Stat. § 75-61(9), fall within the definition of "person."

37. By failing to redact the Proof of Claim it filed in the Bankruptcy Case, Defendant intentionally communicated, or otherwise made available, Plaintiff's social security number to the general public in direct violation of N.C. Gen. Stat. § 75-62(a).

38. Defendant did not obtain any prior express consent from Plaintiff for such disclosure; as a result, the subsequent unauthorized inclusion of the Plaintiff's social security number on the Proof of Claim violated N.C. Gen. Stat. § 75-62(a)(6).

39. Plaintiff's social security number was not redacted on the Proof of Claim.

40. The publication and communication of Plaintiff's social security number was not for an internal verification, administrative, investigative, for any other permissible purpose under the GLBA, or pursuant to a court order, warrant, subpoena, or required by law.

41. Defendant's conduct and actions complained of herein, were malicious, intentional and willful, as demonstrated by its failure to adhere to its affirmative duty to redact Plaintiff's social security number from the Proof of Claim.

42. Defendant's actions, as described and alleged herein, were acts and practices that affected commerce.

43. Defendant's actions and pattern of conduct was grossly negligent and/or willful, rendering it liable for misusing, communicating, publishing and otherwise disseminating the personal identification information of Plaintiff to the general public via the CM/ECF and PACER systems, which was not authorized by Plaintiff nor permitted by applicable law.

44. As a direct and proximate result of the foregoing conduct, Plaintiff is entitled to recover from Defendant compensatory damages which shall be trebled pursuant to N.C. Gen. Stat. § 75-16 and reasonable costs and attorneys' fees, as provided in N.C. Gen. Stat. § 75-16.1.

SECOND CLAIM FOR RELIEF
(Violation of North Carolina Identity Protection Act)
N.C. Gen. Stat. §§ 1-539.2C and 75-66

45. Plaintiff incorporates herein by reference all the allegations contained in this pleading as if fully set forth herein.

46. Defendant, by failing to redact Plaintiff's personal identification information from the Proof of Claim, broadcasted and published said personal identification information to the public, in violation of N.C. Gen. Stat. § 75-66(a).

47. Plaintiff, by virtue of N.C. Gen. Stat. § 75-66(e), is a "person" who is entitled to sue Defendant for civil damages pursuant to the provisions of N.C. Gen. Stat. § 1-539.2C.

48. Under N.C.G.S. § 1-539.2C(a), Plaintiff as a person injured by Defendant's violations of the NCIPA, as described above, is entitled to have and recover statutory damages from Defendant of not less than \$500, and not more than \$5,000 per violation or, in the alternative, damages in an amount equal three times the amount of any actual damages suffered, whichever is greater.

49. Additionally, and on account of Defendant's course of conduct and violations of the NCIPA, Plaintiff is entitled to have and recover from Defendant his reasonable attorneys' fees, as provided under N.C. Gen. Stat. 1C-539.2C.

THIRD CLAIM FOR RELIEF

(Violation of the North Carolina Unfair and Deceptive Trade Practices Act)
N.C. Gen. Stat. § 75-1.1

50. Plaintiff incorporates herein by reference all of the allegations contained in this pleading as if fully set forth herein.

51. Defendant's actions, pattern of conduct and continued publication of Plaintiff's personal identification information in violation of the NCITPA, as set forth herein, constitute unfair and deceptive trade practices under N.C. Gen. Stat. §§ 75-1.1.

52. In accordance with N.C. Gen. Stat. § 75-62(d), Defendant's violations of the NCITPA, as described herein, also constitute *per se* violations of the UDTPA.

53. On account of its violation of UDTPA, Plaintiff is entitled to have and recover from Defendant an award of treble damages N.C. Gen. Stat. § 75-16, and their reasonable attorneys' fees pursuant to N.C. Gen. Stat. § 75-16.1.

FOURTH CLAIM FOR RELIEF

(In the Alternative – Negligence)

54. Plaintiff incorporates herein by reference all of the allegations contained in this pleading as if fully set forth herein.

55. At all times relevant to this action, Defendant owed an affirmative duty to Plaintiff to not to misuse, misappropriate, sell, publicize, publish, or otherwise disseminate to the general public, Plaintiff's personal identification information, including his social security number.

56. Defendant, in addition, owed a duty to Plaintiff to exercise reasonable care, skill and diligence in the handling of certain private and personal information belonging to Plaintiff, including his social security number and other identification information.

57. Defendant breached its duty to Plaintiff, and was otherwise negligent as stated above, which includes the failure to redact the attachments that were made part of the Proof of Claim that contained Plaintiff's entire social security number.

58. As a direct and proximate result of Defendant's negligence, Plaintiff has suffered financial harm and other such damages, which were reasonably foreseeable to Defendant and are anticipated to continue in the future.

59. Plaintiff, on account of the foregoing, is entitled to have and recover from

Defendant actual damages in an amount to be determined at trial on account of Defendant's misconduct and negligence.

PRAYER FOR RELIEF

WHEREFORE, and based upon the foregoing, Plaintiff prays for an Order granting the following relief:

1. That in accordance with 11 U.S.C. § 105, the Court find the Defendant in contempt for its violation of Federal Rule of Bankruptcy Procedure 9037, and impose sanctions on account of said violation in an amount equal to the actual damages incurred by Plaintiff in connection with the actions outlined above, including but not limited to, the reasonable attorneys' fees incurred;

2. That the Court award Plaintiff, and order Defendant to remit, punitive damages on account of its willful and malicious violations of the Federal Rules of Bankruptcy Procedure and applicable federal and North Carolina law, in an amount the Court may deem appropriate under the circumstances of this case;

3. That Plaintiff has and recovers from Defendant, treble the amount of their actual damages, pursuant to N.C. Gen. Stat. §§ 75-62(d), 75-1.1 and 75-16, and in addition that Plaintiff be awarded his reasonable attorneys' fees pursuant to N.C.G.S. § 75-16.1;

4. That Plaintiff has and recovers from Defendant the greater of, the statutory damages of not less than FIVE HUNDRED DOLLARS (\$500.00), and not more than FIVE THOUSAND DOLLARS (\$5,000.00) per violation of N.C. Gen. Stat. § 75-66(a), or three times the amount of any actual damages suffered by Plaintiff due to such violation, along with the payment of Plaintiff's reasonable attorneys' fees;

5. For a jury trial on all issues so triable; and
6. For such other and further relief as this court deems just and proper.

Respectfully submitted this, the 17th day of March, 2016.

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