BENCH RULING ON DEFENSE OF FAILURE TO STATE A CLAIM

All right, thank you. So I'm just going to go ahead and read my ruling here into the record. This is my bench ruling on the defense of failure to state a claim. What I have before me today is the defendant's brief supporting its defense of failure to state a claim and the plaintiff's response in opposition. I have reviewed the complaint and the exhibits and, based on well-established precedent, take judicial notice of pertinent docket entries and papers in this AP and the underlying case. This AP and the underlying case, and for the reasons I'll explain, I find the plaintiff alleges sufficient facts to state her claims and proceed to discovery.

Rule 12(b)(6) Standard

Rule 12B6 requires dismissal of a complaint if it fails to state a claim upon which relief can be granted. For the purposes of assessing the defense a failure to state a claim facts within the complaint are accepted as true and construed in the light most favorable to the plaintiff. As we know, under Twombly, the complaint's factual allegations must be enough to raise a right to relief beyond the speculative level and must nudge the plaintiff's claim across the line from conceivable to plausible, across the line from conceivable to plausible. Iqbal further explains that a claim is plausible when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the debtor is liable for the alleged misconduct.

Factual Background

So briefly, here the facts from the complaint. On January 11, 2018, the plaintiff and her husband filed a petition for relief under Chapter 13 of the Bankruptcy Code. At all relevant times, the plaintiff was, and remains, the owner of record on real property located at 1845 Light Street, Winston-Salem, North Carolina. Plaintiff listed the property on Schedule A with a value of $54,000, and it was encumbered by a mortgage held by the defendant's predecessor, Bayview Loan Servicing, listed on Schedule D, in the amount of $75,000.

The confirmed plan originally provided that the mortgage creditor would continue to receive ongoing mortgage payments directly from the plaintiff. The plan was later modified, though, to provide for installment payments from the trustee as well as the curing of a small post-petition arrearage. In June 2023, the trustee filed a notice of final cure stating the plaintiff had cured any arrearages and was current on post-petition mortgage payments through June 2023. The defendant filed a response a week later, agreeing that any default had been cured but that she was still due for the June payment.

The defendant's response prompted the trustee to file a motion for determination of file no cure under Rule 3002.1H. I entered an order on August 11, 2023. I'll call it the deemed current order. Finding any arrears were cured and based on the defendant's representations to the trustee that the plaintiff's mortgage account was current through July 2023, with the next direct payment due in August. Plaintiff and her husband received discharges in October and the case was closed.

Meanwhile, during a call the plaintiff placed to SPS to set up her direct payments, the plaintiff alleges she was incorrectly told that her account was passed due for June 2023. And, despite

representations of its attorneys leading up to the deemed current order, plaintiff alleges the defendant applied her July 24, 2023 check to the amount owed for June rather than for July. Plaintiff alleges defendant then deducted funds from the plaintiff's escrow account and applied them to the amount owed for July. Plaintiff further alleges that in a subsequent call to the defendant just prior to her discharge, defendant informed her that it would only remove the bankruptcy status on her account if she reaffirmed the mortgage loan.

Collectively, the plaintiff states that the defendant's conduct caused her pecuniary loss in the form of an unwarranted escort efficiency, additional attorney's fees, expenses accrued interest, disrupted cash flow, as well as increased blood pressure, stress and exacerbated medical conditions.

Claims for Relief

Plaintiff asserts three claims for relief in her complaint violations of the discharge injunction, violations of automatic stay, violations of federal law of bankruptcy, procedure 3002.1 and violations of the North Carolina Debt Protection Act, NCDCA. The defendant followed its answer, which included the defense that the complaint or certain requests or counts in the complaint do not state a claim upon which relief can be granted.

Analysis of Claims

So now I turn to the claims. First, as to the alleged violation of the discharge injunction, I just note that the defendant does not, either in its answer or in the brief, seek to dismiss the plaintiff's claim for violation of the discharge injunction under 524I, next violation of 3002.1.

Rule 3002.1 Claim

So subdivision G of that rule requires that within 21 days after the notice of final cure is served, the claim holder must file and serve a statement that indicates whether the claim holder agrees the debtor has paid in full the amount required to cure any default on the claim and the debtor is otherwise current on all payments and itemizes the required cure or post-petition amounts, if any, that the claim holder contends remain unpaid as of the statement state.

If a secured creditor fails to file a response with the necessary information set forth in subsection subdiv, subdivision I provides that the court may preclude the creditor from presenting the omitted information in any form as evidence in a contested matter or adversary proceeding, unless the court determines the failure was substantially justified or is harmless. Justified or is harmless, the court may also award other appropriate relief, including reasonable expenses and attorney fees caused by the failure.

The plaintiff alleges that the defendant failed to itemize the post-petition amount that it contended remained unpaid and failed to provide accurate information about the status of the mortgage. The plaintiff asserts that such failures were not substantially justified nor harmless and requests that under 3,002.1i, the court preclude the defendant from presenting inaccurate and

omitted information in any form as evidence in this AP and award the plaintiff other appropriate relief, including reasonable expenses and attorney fees.

The defendant argues that plaintiff's 3002.1 claim fails to state a claim for three separate reasons. First, it alludes that, without elaboration to well-established rule of law, that bankruptcy rule 3002.1 does not provide a private right of action. The decision cited by the defendant did determine that the language award other appropriate relief in 3002.1. I.2 does not provide for a private right of action. I.2 does not provide for a private right of action. However, this holding, which has not been considered or adopted by this court, only impacts the type of recoverable damages, specifically Tolstrup, Harlow and DeWitt decisions found. 3002.1i does not allow for the recovery of actual or compensatory damages beyond the attorney fees and expenses clearly provided for in the rule. Here the plaintiff is not seeking anything beyond what Rule 3,002.1 explicitly provides evidence preclusion and reasonable expenses and attorney fees caused by the failure, which constitute recoverable damages, even in those cited cases that have found the rule does not create a private right of action.

Defendant also argues that 3002.1i only applies if the creditor outright fails to make the required filing, not if it simply makes an inaccurate filing. Although 3002.1 g does not state the supplement must be accurate, I agree with Judge Black, as stated in the Harlow decision, that filing a notice containing incorrect statements can be as damaging as failing to file such notice timely when required and can constitute a violation of Rule 3002.1, for which relief is available. Given the importance and mandatory nature of the supplement, I agree there is an implicit requirement that the information the mortgage creditor provides be accurate, and I'll cite the Farrell case 580BR181, South Carolina 2017, for additional support on that statement.

Defendant's third and final argument is harder to pin down, but it appears to be a Resch-Dudakata-type argument because the plaintiff did not seek sanctions under 3002.1i when the trustee filed the motion for determination of final cure and I entered the deemed current order. She is now foreclosed from doing so. I disagree with that reasoning. Not only was the plaintiff unaware of the full extent of the defendant's alleged misapplication of payments, but the representations that the defendant's counsel made to the trustee, the debtor and me regarding the status of the mortgage allayed any concerns at the time that would have prompted a sanctions motion. More importantly, the rule itself does not contain language that would foreclose the filing of a sanctioned motion at this juncture. In fact, the advisory committee note to rule 3002.1 seems to envision just such an occurrence, ie a debtor moving to reopen a case to seek sanctions against a mortgage claim holder who is seeking to recover amounts that should have been but were not disclosed under the rule. Given all this, and as the plaintiff's allegations are taken as true for the purposes of this motion, I find the plaintiff has plausibly pled her cause of action under 3002.1.

Automatic Stay Violation Claim

Now I turn to the plaintiff's request for sanctions under 362K for violations of the automatic stay. Under subsection K, an individual injured by any willful violation of the stay shall recover actual damages, including costs and attorney fees, and inappropriate circumstances may recover

punitive damages. As to establish the claim, the plaintiff must allege that a violation occurred, that the violation was committed willfully and that the violation caused actual damages.

The defendant disputes whether the plaintiff has plausibly pled a claim for violation of 362. Numerous courts have concluded that misapplication of Chapter 13 plan payments is a cause of action for violation, under which operates as a stay of any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate. I agree with that reasoning, especially in instances such as this, where there is no question that the payments constitute property of the estate covered by the automatic stay.

The Bankruptcy Code's default rule under 1327B is that, except as otherwise provided in the plan or the order confirming the plan, the state property vests in the debtor at confirmation. In that scenario, as the Fourth Circuit recently stated in Trantham, estate property would no longer be protected from creditors. However, that is not the situation we have here, where, according to nonstandard plan provision section 9, all property of the state shall continue to be property of the estate following confirmation until the earlier of discharge, dismissal or conversion of the case. Because of that provision in the plan at issue here, we don't need to tangle with which of the five different approaches to the concept of vesting in Chapter 13 applies in this circuit. Instead, all of the plaintiff's pre-confirmation property as well as post-confirmation property under 1306 was estate property uncovered by the automatic stay.

As a result, the alleged misapplication of payments based on the pre-petition contractual terms rather than the terms of the plaintiff's confirmed plan while the automatic stay was in effect can constitute an improper act to exercise control over the property of the state in violation of 362. But the defendant asserts the complaint contains no allegation the plaintiff knew of the alleged payment misapplications or that they were communicated to her and in no way connects the alleged misapplication of payments on a contractual basis to an alleged misapplication of payments on the Chapter 13 post-petition basis.

I agree, as the First Circuit described in Mann v Chase Manhattan, that internal bookkeeping entries that are in no manner communicated to the debtor, the debtor's other creditors, the bankruptcy court or any third party would not be axed to exercise control in violation of 36283. However, the complaint alleges the defendant went far beyond simply maintaining for its own internal purposes a record of payments applied on a hypothetical contractual basis plaintiff before her discharge and during the ongoing Chapter 13 case that she was in default on payments and then attempted to collect a payment from the plaintiff it knew the trustee had already made. Because the complaint alleges the defendant acted to exercise improper control over estate property through misapplying mortgage payments and then communicating the resulting inaccurate balance to the plaintiff. I find the plaintiff has stated a plausible claim for alleged violation of automatic stay.

On a final note I'll say the defendant is correct that Williams concerns violation of A6 rather than A3, but it appears the complaint here also plausibly pleads a violation of A6 based on the defendant's attempt to convince the plaintiff to reaffirm her mortgage. Although simply sending a letter to the debtor offering to reaffirm a debt does not violate 362 A6, as long as the letter is non-threatening and non-coercive, the complaint here alleges that the defendant told the plaintiff

he would only remove the bankruptcy status on her mortgage account if she reaffirmed the mortgage loan. Depending on the evidence produced at trial, such actions could prove sufficiently threatening or coercive to constitute violations of A6.

North Carolina Debt Collection Act Claim

In her final count the plaintiff alleges the defendant violated provisions of the North Carolina Debt Collection Act by, among other things, attempting to collect a debt by unfair threat, coercion, fraudulent, deceptive or misleading representation or any unconscionable means. The defendant challenges this count only in one respect that the plaintiff has not alleged any actual debt collection activity, merely the filing of a proof of claim in the bankruptcy case, which does not constitute debt collection under the North Carolina general statutes In this case. We have the Scurlock case agreeing with that, we have the Sherlock case agreeing with that. The defendant is correct that federal courts, including this one, have consistently ruled that filing a proof of claim in bankruptcy court cannot solely form the basis for illicit debt collection actions under the FDCPA or analogous state laws.

But here the plaintiff alleges instances in which the defendant attempted to collect a debt it knew already had been paid through direct communication with the debtor, outside the formal claims process in the bankruptcy case. Such direct attempts can constitute an attempt to collect a debt sufficient to meet the required element for a claim under the NCDCA. I find, then, that the complaint's factual allegations, taken as a whole and true, plausibly plead a claim under the NCDCA.

Conclusion

So, collectively, for the reasons stated, I'll enter a short order incorporating, by reference, and consistent with this bench ruling and consistent with this bench ruling. So, with that said, I actually, as I was thinking just now, don't know the procedural. The parties have already entered it into a scheduling memorandum in order correct In this case, that is correct.

All right. So I don't know if you need extensions of time or if you've been proceeding, but either way, if you can confer and get to me, you know, either in agreed order with any extensions of time or perhaps you're fine. But just proceed on through the discovery process and we'll see where that gets us. Where that gets us, I will say you know, I don't know that there are huge, huge amounts of damages that I see from the allegations. But you know that again also would be something that we learn more about in discovery. But as far as technically pleading the causes of actions, I think that, as I said, that's been done here, all right. Any other questions or comments?