IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

IN RE: JOHNNY JR. AND CHERYL GATEWOOD, Debtors **No. 5:13-bk-73363**
Ch. 13

JOHNNY JR. AND CHERYL GATEWOOD **PLAINTIFFS**

v. **5:14-ap-7068**

CP MEDICAL LLC **DEFENDANT**

ORDER GRANTING SUMMARY JUDGMENT
IN FAVOR OF CP MEDICAL LLC
AND DISMISSING COMPLAINT

Before the Court is the debtors' *Motion For Summary Judgment* filed on November 21, 2014, and creditor CP Medical LLC's [CP Medical] response filed on December 18, 2014. Also before the Court is CP Medical's *Defendant's Cross-Motion For Summary Judgment and Brief in Support Thereof* filed on December 19, 2014, and the debtors' response filed on January 6, 2015. For the reasons stated below the Court denies the debtors' motion for summary judgment, grants CP Medical's motion for summary judgment, and dismisses the debtors' complaint with prejudice.

Case History

The debtors filed their voluntary chapter 13 petition and a proposed plan on October 7, 2013. The debtors listed on Schedule F–Creditors Holding Unsecured Nonpriority Claims–creditor Springdale Emergency Group LLC. The claim was listed as a claim against Mr. Gatewood in the amount of $1478.00 and was not identified as being contingent, unliquidated, or disputed. On October 8, 2013, the Clerk of the Court issued her *Notice of Chapter 13 Bankruptcy Case, Meeting of Creditors, & Deadlines*. On page one of the notice, the deadline to file a proof of claim was listed *for all creditors* as February 5, 2014. On page two of the notice, the following statement was included under the heading "Claims":

> If you do not file a Proof of Claim by the "Deadline to File a Proof of Claim" listed on the front side, you might not be paid any money on your claim from other assets in the bankruptcy case. To be paid, you must file a Proof of Claim even if your claim is listed in the schedules filed by the debtor. Filing a Proof of Claim submits the creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain.

On October 24, 2013, Quantum3 Group LLC, as agent for CP Medical, filed its Proof of Claim for an unsecured debt in the amount of $357.00. Quantum3 Group LLC listed on Line 3a. of the proof of claim "Springdale Emergency Group LLC" as the name under which the debtor may have scheduled the account. The creditor attached to the proof of claim its "Bankruptcy Rule 3001(c) Account Information," which included the date of service, February 27, 2011, and the last transaction date, also February 27, 2011.[1]

On November 6, 2014, the debtors filed their amended *Complaint For Violation of the Fair Debt Collection Practices Act*. In it, they allege that CP Medical violated the Fair Debt Collection Practices Act [FDCPA], 15 U.S.C. §§ 1692–1692p, by filing a claim in the debtors' bankruptcy case that was based on a debt that was no longer enforceable "due to the expiration of the statute of limitations" pursuant to Arkansas Code § 16-56-106.[2] According to the debtors, by filing a claim in the debtors' bankruptcy case (even

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[1] The Court notes that the creditor attempted to withdraw its claim on January 15, 2015. Under Rule 3006, if an adversary proceeding is filed against a creditor after the creditor filed a proof of claim, the creditor may not withdraw the claim except on order of the court after proper notice and a hearing. Fed. R. Bankr. P. 3006. Even had the creditor withdrawn its claim in accordance with the rule, because the issue before the Court is premised on the creditor's initial filing of the proof of claim and an alleged violation of non-bankruptcy law, the proceeding is still ripe.

[2] The Arkansas Code states:

> No action shall be brought to recover charges for medical services performed or provided after March 31, 1985, by a physician or other medical service provider after the expiration of a period of two (2) years from the date the services were performed or provided or from the date of the most recent partial payment for services, whichever is later.

The Court is making no finding whether the Arkansas statute is a statute of limitation or a statute of duration or repose. The expiration of a statute of limitation does not extinguish

though the debtors listed the creditor on Schedule F of their petition as holding an undisputed claim and the Clerk's notice of the bankruptcy filing listed a date for which *all creditors* could file a Proof of Claim), the creditor engaged in a "false, deceptive, misleading, unfair and unconscionable debt collection practice which is proscribed by the FDCPA." The creditor filed its answer to the amended complaint on November 18, 2014, in which it admitted that (1) it filed a claim on October 24, 2013, (2) the original debt was for medical services, and (3) the debtors never made a payment on the debt. It denied the remaining allegations because, according to the creditor, they called for conclusions of law.

On November 21, 2014, the debtors filed their *Motion For Summary Judgment*. This Court's General Order No. 37 requires the annexation to a motion for summary judgment "a separate and concise statement of the material facts as to which it contends there is no genuine dispute to be tried." No such statement was attached or filed with the debtors' motion. On December 11, 2014, the debtors filed their *Brief in Support of Motion For Summary Judgment*. On December 18, 2014, the creditor filed its *Defendant's Memorandum of Law and Response to Plaintiffs' Motion For Summary Judgment*. The following day, on December 19, 2014, the creditors filed their *Defendant's Cross-Motion For Summary Judgment and Brief in Support Thereof*. Likewise, no statement of material facts was annexed to the creditor's motion. The debtors filed their *Response to Cross Motion For Summary Judgment* on January 6, 2015. Neither party filed a reply to the other parties' responses.

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the substantive right itself, just the right to enforce a remedy. *Refco, Inc. v. Heinhold Commodities, Inc.*, 746 S.W.2d 375, 376 (Ark. 1988). A statute of repose or duration, on the other hand, provides a date upon which the substantive right itself no longer exists. *Id.*; *Ray & Sons Masonry Contractors, Inc. v. U.S. Fid. & Guar. Co.*, 114 S.W.3d 189, 217 (Ark. 2003).

Under the FDCPA, an action to enforce a liability created by the statute may be brought within one year from the date on which the violation occurs. 15 U.S.C. § 1692k(d). The Court finds it ironic that the debtors' complaint, which is based on a statute of limitation argument, was filed more than one year after the date the alleged violation occurred.

Jurisdiction

The Court has jurisdiction over this matter under 28 U.S.C. § 1334(b), (e) and 28 U.S.C. § 157, and it is a core proceeding under 28 U.S.C. § 157(b)(2)(C). Because the debtor's complaint was filed as a result of CP Medical's proof of claim, the Court has the authority to enter a final order in this matter.[3] The following opinion constitutes findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052.

Summary Judgment

Federal Rule of Bankruptcy Procedure 7056 provides that Federal Rule of Civil Procedure 56 applies in adversary proceedings. Rule 56 states that summary judgment shall be rendered "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(a). In the case before the Court, both the debtors and the creditor have filed motions for summary judgment. The debtors' burden is to establish the absence of a genuine issue of material fact and to show that they are entitled to judgment as a matter of law. *Canal Ins. Co. v. ML & S Trucking, Inc.*, No. 2:10-CV-02041, 2011 WL 2666824, at *1 (W.D. Ark. July 6, 2011); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (citing to

[3] Under *Stern*, to determine whether non-Article III judges had the authority to enter final orders related to state law counterclaims, the Supreme Court stated that a court should question "whether the action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process." *Stern v. Marshall*, 131 S. Ct. 2594, 2618 (2012). Some courts refer to this as *Stern*'s two-prong test to determine bankruptcy court authority. If either prong is met, the bankruptcy court has the constitutional authority to enter a final order. *Murphy v. Felice* (*In re Felice*), 480 B.R. 401, 417 (Bankr. D. Mass. 2012) (citing *Burns v. Dennis* (*In re Se. Materials, Inc.*), 467 B.R. 337, 348 (Bankr. M.D.N.C. 2012)). In this case, the debtors' counterclaim against CP Medical–in the form of an adversary proceeding–was the direct result of CP Medical's proof of claim filed in the debtors' bankruptcy case on October 24, 2013. The first prong is satisfied because the debtors' adversary proceeding is premised on CP Medical's proof of claim filed pursuant to 11 U.S.C. § 501. The second prong is satisfied because, as will be clear from this order, the disallowance of CP Medical's claim would properly require adjudication by this Court.

former Fed. R. Civ. P. 56(c)); *Nat'l Bank of Commerce of El Dorado, Ark. v. Dow Chem. Co.*, 165 F.3d 602 (8th Cir. 1999). The creditor's burden is not the same as the debtors' burden. Because the debtors have the burden of proving a violation of the FDCPA at trial, the creditor just needs to show that the debtors cannot sustain that burden. *Calderone v. United States*, 799 F.2d 254, 258-59 (6th Cir. 1986). Regardless, the Court must view the facts in the light most favorable to the debtors in this instance. *In re Collins Sec. Corp.*, 145 B.R. 277, 282 (E.D. Ark. 1992) (citing *Windon Third Oil and Gas v. FDIC*, 805 F.2d 342, 346 (10th Cir. 1986)); *Canada v. Union Elec. Co.*, 135 F.3d 1211, 1212-13 (8th Cir. 1997); *Ferguson v. Cape Girardeau Cty.*, 88 F.3d 647, 650 (8th Cir. 1996).

Findings of Fact and Conclusions of Law

The issue before the Court is whether a creditor violates the FDCPA when it files a claim in bankruptcy for a debt that is either time-barred by a statute of repose or for which the debtor could defend based on the affirmative defense of statute of limitations. Two federal statutes are at issue in this case–the FDCPA and the bankruptcy code, both of which relate to the potential payment of a debt. The statutes can be read together because they address unrelated, but similar, activities. *Randolph v. IMBS, Inc.*, 368 F.3d 726, 730 (7th Cir. 2004) (finding that the statutes overlap but each has coverage the other lacks); *Middlebrooks v. Interstate Credit Control, Inc.*, 391 B.R. 434, 437 (D. Minn. 2008) (FDCPA and bankruptcy code "overlap but generally coexist peaceably").

FDCPA

According to the FDCPA, "[a]busive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy." 15 U.S.C. § 1692(a). The purpose of the FDCPA is to "'eliminate abusive debt collection practices by debt collectors [and] to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged.'" *McIvor v. Credit Control Serv., Inc.*, 773 F.3d 909, 913 (8th Cir. 2014) (quoting FDCPA at 15 U.S.C. § 1692(e)). A debt collector is defined under the act as

"any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. § 1692(a)(6). Filing a proof of claim may be an attempt to collect a debt either directly or indirectly that is owed or asserted to be owed or due to another. *See Crawford v. LVNV Funding, LLC*, 758 F.3d 1254, 1261 (11th Cir. 2014); *Lewallen v. Green Tree Servicing, L.L.C.*, 487 F.3d 1085, 1091 (8th Cir. 2007) ("When a creditor files a proof of claim before the bankruptcy court, this amounts to a civil action to collect the debt") (citing *Coxson v. Commonwealth Mortgage Co. of Am., L.P.* (*In re Coxson*), 43 F.3d 189, 193-94 (5th Cir. 1995)); *but see McMillen v. Syndicated Office Sys., Inc.* (*In re McMillen*), 440 B.R. 907, 912 (Bankr. N.D. Ga. 2010) (stating that filing a proof of claim "is not an effort to collect a debt from the debtor, who enjoys the protections of the automatic stay"). The Court finds that for the limited purpose of this order, the creditor, CP Medical, and its agent, Quantum3 Group LLC, are debt collectors under the FDCPA.

The debtors' complaint against CP Medical is based on an alleged violation of the FDCPA. Although the debtors do not cite to a specific section of the FDCPA that CP Medical allegedly violated, § 1692e contains the language that the debtors attempt to mirror in their complaint: "A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt." 15 U.S.C. § 1692e. The statute then lists 16 non-exclusive, specific types of conduct that violate the FDCPA, none of which are alleged in the debtors' complaint. Reading the debtors' complaint in the light most favorable to the debtors, the debtors may be attempting to fit CP Medical's conduct under subsection (2)(A): "The false representation of the character, amount, or legal status of any debt"; or subsection (5): "The threat to take any action that cannot legally be taken or that is not intended to be taken."

According to the Eighth Circuit, a complaint under the FDCPA must allege that a debt

collector's actions were both "false, deceptive, or misleading" and "in connection with the collection of any debt." *McIvor*, 773 F.3d at 913. The only allegation in the debtors' complaint that approaches this two-stage requirement is paragraph 11:

> That by filing a claim seeking payment through the bankruptcy case upon a debt which was time-barred under applicable law, Defendant engaged in a false, deceptive, misleading, unfair and unconscionable debt collection practice which is proscribed by the FDCPA.

The debtors meet the first of the two-stage allegation by including the allegation that CP Medical engaged in a false, deceptive, and misleading debt collection practice. However, the debtors did not include in their complaint the phrase "in connection with the collection of any debt." Reading the complaint broadly, however, the Court finds that the debtors (barely) meet the required allegation by stating that the creditor was "seeking payment through the bankruptcy case" and was engaged in "debt collection." Those allegations are minimally sufficient for the purposes of a motion for summary judgment and the requirement that the Court view the facts in the light most favorable to the debtors.

Proof of Claim

When a debtor files for relief under the bankruptcy code, the Clerk of the Court issues a notice of bankruptcy filing and mails the notice to all creditors that are listed in the debtor's petition and schedules. In a chapter 7 case, the notice includes a statement that creditors do not need to file a proof of claim unless the chapter 7 trustee later files a notice of assets, at which time creditors would have at least 90 days within which to file a proof of claim. In a chapter 13 case, because the cases are asset cases, the notice of bankruptcy filing includes a deadline to file a proof of claim–90 days after the first set date for the meeting of creditors. The purpose of filing a proof of claim is to share in any distribution that may be made in the case. *In re Dwiggins*, 359 B.R. 717, 723 (Bankr. W.D. Ark. 2007) (citing 4 Collier on Bankruptcy ¶ 501.01[1], at 501-4 (15th ed. rev.) (2005)).

According to the bankruptcy code, a claim, "proof of which is filed under section 501 of

this title, is deemed allowed, unless a party in interest . . . objects." 11 U.S.C. § 502(a). If a party in interest objects to a claim, then the court shall determine the amount of such claim as of the date of the filing of the petition, unless one of nine enumerated exceptions apply. 11 U.S.C. § 502(b)(1)-(9); *Dove-Nation v. eCast Settlement Corp.* (*In re Dove-Nation*), 318 B.R. 147, 150 (B.A.P. 8th Cir. 2004). The nine exceptions found in § 502(b) are "the sole grounds for objecting to a claim and [§ 502(b)] directs the court to allow the claim unless one of the exceptions applies." *Id.* In the case before the Court, the debtors did not object to CP Medical's claim. Instead, they filed their complaint under the FDCPA alleging that CP Medical violated the act by filing a proof of claim in an attempt to collect a potentially time-barred debt. The Court is not aware of any allegation in the debtors' complaint that CP Medical's proof of claim included false, deceptive, or misleading representations. The claim states on the attachment that the debt was incurred in February 2011 and that the last transaction date was also February 2011. To the extent the statute to which the debtors refer in their complaint is either a statute of limitations or a statute of repose, the debtors could have objected to CP Medical's claim under § 502(b). Instead, the debtors' sole argument is that the filing of a proof of claim for a debt that is potentially time-barred is a violation of the FDCPA.

The Court disagrees with the debtors' position. In 2001, the Eighth Circuit held that "in the absence of a threat of litigation or actual litigation, no violation of the FDCPA has occurred when a debt collector attempts to collect on a potentially time-barred debt that is otherwise valid." *Freyermuth v. Credit Bureau Serv., Inc.*, 248 F.3d 767, 771 (8th Cir. 2001).[4] Under the FDCPA, a creditor can ask a debtor for a voluntary payment without violating the FDCPA. *See Dubois v. Ford Motor Credit Co.*, 276 F.3d 1019 (8th Cir. 2002). The only action taken by CP Medical in this instance is the filing of its proof of claim to share in any distribution made to listed creditors. CP Medical filed its proof of claim only after CP Medical received a notice of the debtors' bankruptcy case because

[4] As noted earlier, the Court is not making a determination whether the Arkansas statute is a statute of limitation or a statute of repose.

the debtors included CP Medical (through Springdale Emergency Group, LLC) as an unsecured creditor with an undisputed claim in the amount of $1478.00. There is no allegation that CP Medical either began or threatened any litigation and, in fact, any litigation would have been prohibited by the automatic stay had CP Medical attempted to collect the debt while the debtors were in bankruptcy.

The FDCPA and the bankruptcy code may overlap but they serve different purposes. The bankruptcy code covers all persons and all activities in bankruptcy, including debt collectors. The FDCPA covers all activities by debt collectors, including those that affect debtors in bankruptcy. *Randolph*, 368 F.3d at 731. Both statutes serve their respective purposes. Part of the FDCPA's stated purpose is to help debtors avoid bankruptcy because of the abusive, deceptive, and unfair collection practices of debt collectors. When the bankruptcy "nevertheless occurs, the debtor's protection and remedy remain under the Bankruptcy Code." *In re Chaussee*, 399 B.R. 225, 236 (B.A.P. 9th Cir. 2008) (citing *Kokoszka v. Belford*, 417 U.S. 642, 651 (1974), which stated that despite the Consumer Credit Protection Act's goal to prevent consumers from entering bankruptcy, if bankruptcy did occur, the debtor's protection and remedy remained under the Bankruptcy Act [now the Code]); *but see Randolph*, 368 F.3d at 731 (distinguishing *Kokoszka* because the statutes at issue in that case did not conflict and further stating that the FDCPA regulates debt collector behavior while the bankruptcy code determines who gets paid what). When the debtors make a decision to proceed under the protection of the bankruptcy code, they should not be able to "'bypass the procedural safeguards in the Code in favor of asserting potentially more lucrative claims under the FDCPA.'" *Simmons v. Roundup Funding, LLC*, 622 F.3d 93, 96 (2d Cir. 2010) (quoting *Gray-Mapp v. Sherman*, 100 F. Supp. 2d 810 (N.D. Ill. 1999)); *see also Middlebrooks*, 391 B.R. at 437 ("'allowing a bankrupt debtor to assert an FDCPA claim could potentially undermine the Bankruptcy Code's specific provisions for administration of the debtor's estate'" quoting *Molloy v. Primus Auto. Fin. Servs.*, 247 B.R. 804, 820 (C.D. Cal. 2000)). The bankruptcy code provides a process through which a debtor can object to an unenforceable debt under § 502(b):

> [T]he Bankruptcy Code itself contemplates a creditor filing a proof of claim on a time-barred debt and the Bankruptcy Court disallowing such claim after objection from the debtor. *It is difficult for this Court to understand how a procedure outlined by the Bankruptcy Code could possibly form the basis for a violation under the FDCPA.*

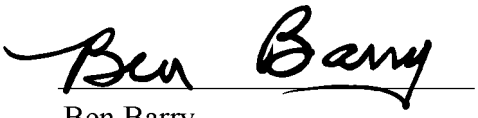
B-Real, LLC v. Rogers, 405 B.R. 428, 431 (Bankr. M.D. La. 2009) (emphasis added).

The Second Circuit stated the relationship between the FDCPA and the bankruptcy code succinctly: "The FDCPA is designed to protect defenseless debtors and to give them remedies against abuse by creditors. There is no need to protect debtors who are already under the protection of the bankruptcy court, and there is no need to supplement the remedies afforded by bankruptcy itself." *Gray-Mapp*, 100 F. Supp. 2d at 96. If a creditor files a time-barred claim, such as the debtors allege happened in this instance, the code provides its own remedies. The debtors could simply object to the proof of claim under one of the exceptions provided in § 502(b) or could proceed under Rule 9011 arguing, perhaps, that the claim was not warranted by existing law. *See, e.g., In re Chaussee*, 399 B.R. at 240 (citing cases).

Conclusion

The Court holds that the FDCPA is not the controlling statute after a debtor files a voluntary petition under the bankruptcy code. The bankruptcy code has a procedure with which to deal with claims that a debtor believes are barred by either a statute of limitations or a statute of repose. The debtors in this case presented no facts from which the Court could determine they were entitled to a judgment as a matter of law. However, assuming for the sake of argument that all of the facts stated in the debtors' complaint are true, for the reasons stated in this order, the debtors are still not entitled to judgment as a matter of law and the Court denies their motion for summary judgment. Conversely, the Court finds that CP Medical has met its burden of showing that the debtors cannot sustain their burden of proof at trial and CP Medical is entitled to an entry of summary judgment as a matter of law. Ergo, the Court grants CP Medical's motion for summary judgment and dismisses the debtors' complaint with prejudice.

IT IS SO ORDERED.



Ben Barry
United States Bankruptcy Judge
Dated: 02/06/2015

cc: John B. Buzbee, attorney for CP Medical
Forrest L. Stolzer, attorney for the debtors