



Honorable Mike K. Nakagawa  
United States Bankruptcy Judge



Entered on Docket  
August 02, 2019

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEVADA

\* \* \* \* \*

|                               |   |                        |
|-------------------------------|---|------------------------|
| In re:                        | ) | Case No.: 10-32582-MKN |
|                               | ) | Chapter 13             |
| ALAN B. WARENSKI and ROBIN B. | ) |                        |
| WARENSKI,                     | ) |                        |
|                               | ) | Date: July 31, 2019    |
| Debtors.                      | ) | Time: 2:30 p.m.        |
|                               | ) |                        |

**ORDER REGARDING MOTION TO DETERMINE CONTEMPT OF COURT  
PURSUANT TO 11 U.S.C. SECTIONS 524 AND 105 AND REQUEST FOR PUNITIVE  
DAMAGES, ATTORNEY’S FEES AND SANCTIONS<sup>1</sup>**

On July 31, 2019, the court heard the Motion to Determine Contempt of Court Pursuant to 11 U.S.C. Sections 524 and 105 and Request for Punitive Damages, Attorney’s Fees and Sanctions (“Contempt Motion”). The appearances of counsel were noted on the record. After arguments were presented, the matter was taken under submission.

**BACKGROUND**

On December 2, 2010, Alan B. Warenski and Robin B. Warenski (“Debtors”) filed a voluntary Chapter 13 bankruptcy petition along with their schedules of assets and liabilities (“Schedules”), statement of financial affairs, and other required information. (ECF No. 1). On their real property Schedule “A,” Debtors listed their residence located at 4705 Victoria Beach Way, in Las Vegas, Nevada (“Residence”). On their Schedule “D,” Debtors listed Citizens Bank

<sup>1</sup> In this Order, all references to “ECF No.” are to the number assigned to the documents filed in the case as they appear on the docket maintained by the clerk of court. All references to “Section” are to the provisions of the Bankruptcy Code, 11 U.S.C. §§ 101-1532. All references to “FRBP” are to the Federal Rules of Bankruptcy Procedure.

1 as having a claim in the amount of \$38,059, secured by a second mortgage against the  
2 Residence.

3 On December 2, 2010, the Bankruptcy Noticing Center served a copy of the Notice of  
4 Chapter 13 Bankruptcy Case (“Bankruptcy Notice”) on creditors and parties-in-interest. (ECF  
5 No. 7). The Bankruptcy Notice established an April 18, 2011, deadline for parties to file proofs  
6 of claims and further scheduled a meeting of creditors under Section 341 for January 18, 2011.

7 On December 5, 2010, a copy of the Bankruptcy Notice, along with a Notice of Hearing  
8 on Confirmation of Chapter 13 Plan and a Proof of Claim form, was served by first class mail on  
9 all creditors in the case, including Citizens Bank. (ECF No. 10).

10 On April 12, 2011, an order was entered providing for the claim of Charter One,  
11 NA/Citizens Bank to be treated as unsecured upon completion of Chapter 13 plan payments and  
12 for its lien against the Residence to be avoided. (ECF No. 40).

13 On May 23, 2011, an order was entered confirming the Debtors’ Chapter 13 plan. (ECF  
14 No. 48).

15 On April 26, 2013, an order was entered confirming the Debtors’ modified Chapter 13  
16 plan #5. (ECF No. 81). Section 5.06 of the confirmed plan provided, *inter alia*, that upon the  
17 Debtors’ receipt of a Chapter 13 discharge, a secured creditor must “release its lien and provide  
18 evidence and/or documentation of such release within 30 days to Debtor(s).”

19 On October 22, 2013, an order was entered confirming the Debtors’ modified Chapter 13  
20 plan #7. (ECF No. 104). Section 5.06 of the confirmed, modified Chapter 13 plan #7, is  
21 identical to the prior confirmed plan.

22 On April 27, 2015, a Discharge of Debtor After Completion of Chapter 13 Plan (“Chapter  
23 13 Discharge”) was entered. (ECF No. 109).

24 On June 12, 2015, a final decree was entered closing the Chapter 13 case. (ECF No.  
25 113).

26 On March 26, 2019, an order was entered granting the Debtors’ ex parte motion to reopen  
27 the case. (ECF No. 116).

28

1 On March 27, 2019, Debtors filed the instant Contempt Motion and noticed it to be heard  
2 on May 1, 2019. (ECF Nos. 117 and 118). Attached to the Contempt Motion is an initial  
3 Declaration of Alan B. Warenski (“Alan W. Declaration”). The Contempt Motion and Notice of  
4 Hearing was served by certified mail on Charter One, NA/Citizens Bank, 1 Citizens Plaza,  
5 Providence, RI 02903.

6 On May 1, 2019, the hearing was conducted on the Contempt Motion at which the court  
7 granted partial relief in the form of an order voiding the second mortgage against the Residence  
8 (“Interim Order”). (ECF No. 127). The written order was entered on June 11, 2019, and also  
9 reflected that the hearing was continued for status purposes to June 19, 2019.

10 On June 19, 2019, the court continued the hearing on the Contempt Motion to July 31,  
11 2019, to permit the Debtors to supplement the evidentiary record.

12 On July 23, 2019, Debtors filed a supplement that includes a supplemental Declaration of  
13 Alan B. Warenski (“Supplemental Alan W. Declaration”), a Declaration of Robin B. Warenski  
14 (“Robin W. Declaration”), and a Declaration of David H. Krieger (“Krieger Declaration”). (ECF  
15 No. 129). All of the declarations are signed under penalty of perjury.

### 16 DISCUSSION

17 Debtors allege that after they received their Chapter 13 discharge on April 27, 2015,  
18 Charter One, NA/Citizens Bank (“Charter One”) failed to release the lien against the Residence  
19 as required by Section 5.06 of their confirmed plan. See Contempt Motion at ¶ 5. Debtors attest  
20 that they first became aware of Chase One’s failure in January 2019. See Alan W. Declaration at  
21 ¶ 9; Robin W. Declaration at ¶ 9.

22 Debtors allege that on January 29, 2019, their counsel mailed a certified letter to Charter  
23 One requesting immediate compliance with the Chapter 13 plan and that Charter One received  
24 that letter on February 8, 2019. Id. at ¶ 8. Attached to the Contempt Motion is an initial  
25 Declaration of Alan B. Warenski in which he attests that his counsel mailed the aforementioned  
26 letter to Charter One. See Alan W. Declaration at ¶ 10. Unfortunately, the declarant has no  
27 personal knowledge that the letter was sent by his counsel and a copy of the January 29, 2019  
28 letter is not attached to the declaration. The Contempt Motion also was not accompanied by a

1 declaration from Debtors' counsel attesting to the transmission of the letter or when the letter  
2 was received by Charter One. The supplemental materials provided by the Debtors also does not  
3 include a copy of the January 29, 2019, letter. It appears that such a letter may have been drafted  
4 by a paralegal employed by Debtors' counsel, but there is nothing confirming receipt of the letter  
5 by Charter One. See Krieger Declaration at ¶ 6, at 2:16-21.<sup>2</sup> Likewise, there is no declaration  
6 submitted by the paralegal attesting to the transmission of the letter.

7 On March 27, 2019, Debtors' counsel filed the instant Contempt Motion, in which the  
8 Debtors request, *inter alia*, an award of attorney's fees incurred in bringing the motion, an award  
9 of actual damages for contempt, an award of punitive damages, an order requiring Charter One  
10 to reconvey the second deed of trust, and an order declaring Charter One's lien released. See  
11 Contempt Motion at 6:13-25.

12 The Contempt Motion was served by certified mail on Charter One in compliance with  
13 FRBP 7004(h). No opposition has appeared in the record, nor did any legal representative of  
14 Charter One appear at the initial hearing on May 1, 2019, nor either of the continued hearings on  
15 June 5, 2019, and July 31, 2019. The evidentiary record before the court therefore consists of the  
16 declarations filed in support of the Contempt Motion, along with other documents filed in this  
17 case.

18 The court having considered the record concludes that Charter One has violated the terms  
19 of the confirmed Chapter 13 plan. The court also concludes that entry of an order enforcing the  
20 terms of the confirmed Chapter 13 plan is necessary and appropriate under Section 105(a).  
21 There is no evidence, however, that Charter One has attempted to collect any claim as a personal  
22 liability of the Debtors. Such an effort would be in violation of the discharge injunction  
23 provided by Section 524(a)(1). Instead, Debtors only allege that after they learned in January  
24 2019 that Charter One had not removed the lien against their Residence, Debtors' counsel made  
25 a demand on Charter One to do so and never received a response from Charter One. The record  
26 indicates that Charter One may have ignored the demand of their counsel, but there is nothing in

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27 <sup>2</sup> The March 6, 2019, time entry for the paralegal confirms service of demand letters,  
28 rather than their receipt. There are no return receipt certificates attached to the Krieger  
Declaration.

1 the record indicating that Charter One has sought to collect the original debt. Moreover, there is  
2 no evidence that Charter One's failure to remove the lien has affected any attempt by the Debtor  
3 to refinance or sell the Residence. Thus, there is no evidence to establish that Charter One has  
4 violated the discharge injunction.

5 The record does establish that Charter One has violated Section 5.06 of the Debtors'  
6 confirmed Chapter 13 plan. As previously mentioned, there is no evidence of any attempt by the  
7 Debtors to refinance or sell the Residence after they received their Chapter 13 discharge.  
8 Debtors acknowledge that they first learned of the violation in January 2019. Any continuing  
9 damage resulting from that violation was addressed at the May 1, 2019 hearing, where the court  
10 ordered that the Charter One lien be removed from the county records. That order is reflected in  
11 the Interim Order that was submitted by Debtors' counsel and which was entered on June 11,  
12 2019. Debtors' counsel presumably has recorded a copy of the Interim Order in the county  
13 records. On this record, the court concludes that any assertion of damages incurred by the  
14 Debtors must be limited to the period between January 2019 and May 1, 2019.<sup>3</sup>

15 Both Debtors attest that as a result of Charter One's failure they suffered stress,  
16 aggravation, fear, worry, see Alan W. Declaration at ¶¶ 11 and 12, anxiety, frustration, emotional  
17 distress, anger, upset, fear, stress, shock, and worry, see Supplemental Alan W. Declaration at  
18 ¶¶ 11, 12, 13, and 14, and stress, anxiety,<sup>4</sup> frustration, loss of sleep, emotional distress, anger,  
19 upset, fear, turmoil, and worry. See Robin W. Declaration at ¶¶ 11, 12, 13, and 14. One of the  
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21 <sup>3</sup> Debtors did include a request for an order pursuant to FRBP 5009(d) declaring the  
22 Charter One claim to be satisfied and releasing the second deed of trust. See Contempt Motion  
23 at 6:5-10. The effective date of FRBP 5009(d) was December 1, 2017, which provides a simple  
24 method for a Chapter 13 debtor to obtain a declaration that a secured claim has been satisfied and  
25 the lien has been released under a confirmed plan. In the instant case, that relief easily could  
26 have been sought on an expedited basis, considerably reducing the time period in which the  
27 Debtors assert that they suffered emotional distress resulting from Charter One's failure to  
28 voluntarily release the lien.

<sup>4</sup> Both Debtors attest that Robin Warenski was prescribed some type of medication to  
control her anxiety as a result of Charter One's failure to remove the lien. See Robin W.  
Declaration at ¶ 11; Supplemental Alan W. Declaration at ¶ 13.

1 joint debtors estimates the value of their emotional distress at between \$3,000 and \$5,000, while  
2 the other estimates the value at between \$5,000 and \$8,000. Compare Supplemental Alan W.  
3 Declaration at ¶ 14 with Robin W. Declaration at ¶ 14. Both of the joint debtors estimate that  
4 they expended seven hours as a result of Charter One's failure to comply with the plan and that  
5 the value of their time as employees at the same company (Standard Restaurant Equipment  
6 Company) was \$26.92 per hour and \$14.00 per hour, respectively. Compare Supplemental Alan  
7 W. Declaration at ¶¶ 15 and 16 with Robin W. Declaration at ¶¶ 15 and 16.<sup>5</sup>

8 Debtors' counsel attests that 16.30 hours were expended in connection with the Contempt  
9 Motion, primarily through paraprofessionals billing at non-attorney rates. See Krieger  
10 Declaration at ¶¶ 6, 7 and 8. Counsel seeks professional fees in the total amount of \$4,162.10, as  
11 well as \$241.50 in costs advanced. Id. at ¶¶ 9 and 10.

12 Based on this record, the court awards actual damages in the amount of \$4,000.00, for the  
13 Debtors' emotional distress. The maximum period of time between the Debtors' discovery of  
14 Charter One's failure to comply and the May 1, 2019, hearing at which the lien was ordered  
15 released, was no more than four months. As discussed at note 3, supra, nothing prevented the  
16 Debtors from filing a motion under FRBP 5009(d) upon discovery of Charter One's failure so as  
17 to limit the emotional impact of the continuing lien. In other words, Debtors could have  
18 mitigated their emotional distress by seeking the relief that was readily available.

19 Although the record is sufficient to award non-pecuniary damages in the form of  
20 emotional distress, it is not sufficient to award pecuniary damages. One of the joint debtors  
21 obtained prescription medicine for the anxiety caused by Charter One's failure to comply with  
22 the confirmed plan, but there is no evidence of the cost incurred for such medication nor any  
23 expenses incurred in seeking medical treatment. Likewise, although the Debtors have proposed  
24 a value of their time based on the hourly rate in which their wages are paid by their common  
25 employer, they have offered no evidence that they actually lost any wages. Whatever value the  
26 Debtors place on their non-working time would be subsumed in their claim for emotional

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27 <sup>5</sup> The Supplemental Alan W. Declaration and the Robin W. Declaration contain an  
28 identical Paragraph 15. Oddly, both declarants state under penalty of perjury that they spent time  
"...comforting my wife and discussion (sic) our financial options..."

1   distress. No additional pecuniary amount will be awarded.<sup>6</sup>

2           Debtors' request for attorney's fees and costs are reasonable under the circumstances.  
3   Debtors' counsel relied primarily on paraprofessionals who billed at a much lower hourly rate.  
4   The costs incurred, including service by certified mail, also were reasonable. The court,  
5   therefore, will allow professional fees in the total amount of \$4,162.10, as well as \$241.50 in  
6   costs advanced.

7           **IT IS THEREFORE ORDERED** that the Motion to Determine Contempt of Court  
8   Pursuant to 11 U.S.C. Sections 524 and 105 and Request for Punitive Damages, Attorney's Fees  
9   and Sanctions, brought by Debtors, Docket No. 117, be, and the same hereby is, **GRANTED** as  
10   provided herein.

11           **IT IS FURTHER ORDERED** that Charter One, N.A./Citizens Bank shall pay the total  
12   amount of \$4,000.00 to Alan B. Warenski and Robin B. Warenski as actual damages for  
13   violation of the confirmed Chapter 13 plan in the above-captioned case. This amount must be  
14   paid to the law firm of Haines & Krieger, LLC, no later than 30 days after entry of this Order.

15           **IT IS FURTHER ORDERED** that Charter One, N.A./Citizens Bank shall pay the  
16   amount of \$4,162.10 in professional fees, and \$241.50 in costs advanced, to counsel for Alan B.  
17   Warenski and Robin B. Warenski. These amounts must be paid to the law firm of Haines &  
18   Krieger, LLC, no later than 30 days after entry of this Order.

19  
20   Copies sent via CM/ECF ELECTRONIC FILING

21   Copies sent via BNC to:  
22   ALAN B. WARENSKI  
23   ROBIN B. WARENSKI  
24   4705 VICTORIA BEACH WAY  
25   LAS VEGAS, NV 89130-5368

26  
27  
28           <sup>6</sup> In their supplement to the Contempt Motion, Debtors withdrew their request for  
punitive damages. Accordingly, none will be considered nor awarded.

1 CHARTER ONE, NA/CITIZENS BANK  
2 ATTN: OFFICER AND/OR MANAGING AGENT  
3 1 CITIZENS PLAZA  
4 PROVIDENCE, RI 02903

4 CHARTER ONE, NA/CITIZENS BANK  
5 ATTN: OFFICER AND/OR MANAGING AGENT  
6 480 JEFFERSON BLVD., RJE 135  
7 WARWICK, RI 02886

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