


Honorable Mike K. Nakagawa
United States Bankruptcy Judge



Entered on Docket
March 18, 2022

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

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In re:)	Case No.: 11-13184-MKN
)	Chapter 7
WAYNE ALAN HADDAD and DEBRA)	
ANN HADDAD,)	
)	Date: December 1, 2021
Debtors.)	Time: 2:30 p.m.
)	

ORDER ON NEWREZ LLC dba SHELLPOINT MORTGAGE SERVICING’S MOTION TO COMPEL INDEPENDENT MEDICAL EVALUATION¹

On December 1, 2021, the court heard the Motion to Compel Independent Medical Evaluation (“First IME Motion”), brought by secured creditor NewRez LLC dba Shellpoint Mortgage Servicing in the above-captioned case. The appearances of counsel were noted on the record. After arguments were presented, the matter was taken under submission.

BACKGROUND

On March 8, 2011, Wayne Alan Haddad and Debra Ann Haddad (“Debtors”) filed a voluntary Chapter 7 petition along with their schedules of assets and liabilities and statement of financial affairs. The case was assigned for administration to Chapter 7 panel trustee David Rosenberg.

On June 8, 2011, Debtors received their Chapter 7 discharge. (ECF No. 17).

¹ In this Order, all references to “ECF No.” are to the numbers assigned to the documents filed in the case as they appear on the docket maintained by the clerk of the court. All references to “Bankruptcy Rule” are to the Federal Rules of Bankruptcy Procedure. All references to “Civil Rule” are to the Federal Rules of Civil Procedure.

1 On January 30, 2013, a final decree was entered and the Chapter 7 case was closed.
2 (ECF No. 25).

3 On May 19, 2015, an order was entered reopening the case and retroactively annulling
4 the automatic stay as of April 30, 2012, with respect to the real property located at 7527 Alamo
5 Summit Drive, Las Vegas, Nevada 89129. (ECF No. 36).

6 On June 11, 2015, a final decree was entered re-closing the Chapter 7 case. (ECF No.
7 39).

8 On April 8, 2021, an order was entered granting Debtors' ex parte request to reopen the
9 Chapter 7 case. (ECF No. 42).

10 On April 12, 2021, Debtors filed a Motion for Sanctions Against Newrez LLC d/b/a
11 Shellpoint Mortgage Servicing for Violation of Debtors' Discharge Injunction ("Sanctions
12 Motion"). (ECF No. 44). The motion is accompanied by the Declaration of Wayne Alan
13 Haddad ("First Wayne Declaration"). (ECF No. 45). The Sanctions Motion was noticed to be
14 heard on May 12, 2021. (ECF No. 47).

15 On May 12, 2021, respondent Newrez LLC d/b/a Shellpoint Mortgage Servicing
16 ("Shellpoint") filed an opposition ("Sanctions Opposition"). (ECF No. 56).

17 On May 19, 2021, Debtors filed a reply. (ECF No. 57).

18 On July 13, 2021, the parties filed a discovery plan requiring all discovery to close by
19 January 11, 2022 ("Discovery Deadline"). (ECF No. 62).

20 On October 29, 2021, Shellpoint filed the instant First IME Motion supported by the
21 Declaration of Nicholas E. Belay, Esq. ("Belay Declaration"). (ECF Nos. 66 and 67). The
22 motion seeks to compel Debra Haddad to attend an independent medical examination ("IME")
23 pursuant to Civil Rule 35. Attached as Exhibits 3 and 4 are copies of the curriculum vitae of the
24 psychiatrist and separate psychologist proposed to conduct the IME. The motion was noticed to
25 be heard on December 1, 2021. (ECF No. 68).

26 On November 4, 2021, an order was entered approving a stipulation to extend the
27 Discovery Deadline to April 11, 2022. (ECF No. 71). The hearing on the Sanctions Motion was
28 continued to May 18, 2022.

1 On November 15, 2021, Shellpoint filed a separate, Second IME Motion supported by
2 another Belay Declaration. (ECF Nos. 73 and 74). The Second IME Motion seeks to compel
3 Wayne Haddad to attend an IME. Attached as Exhibits 4 and 5 are copies of the curriculum
4 vitae of the psychiatrist and separate psychologist proposed to conduct the IME. The motion was
5 noticed to be heard on December 15, 2021. (ECF No. 75).²

6 On November 17, 2021, Debtors filed an opposition to the First IME Motion (“First IME
7 Opposition”) along with a supporting Declaration of Debra Haddad (“Debra Declaration”).
8 (ECF Nos. 77 and 78).

9 On November 24, 2021, Shellpoint filed a reply (“Reply”) to the First IME Opposition.
10 (ECF No. 80). In its Reply, Shellpoint asserts that the examination of the psychiatrist will take
11 about two hours while the examination of the psychologist will take about four hours.

12 Additionally, Shellpoint specifies that the scope of the requested examination will address only
13 an evaluation of: “(1) whether Ms. Haddad suffered her claimed ailments due to Shellpoint’s
14 alleged conduct; and (2) whether Ms. Haddad’s alleged ailments will continue in the future.”

15 Reply at 8:6-8.

16 On December 1, 2021, Debtors filed an opposition to the Second IME Motion along with
17 a supporting Declaration of Wayne Haddad. (ECF Nos. 82 and 83).

18 DISCUSSION

19 The prayer of the Sanctions Motion seeks to hold Shellpoint in civil contempt for
20 allegedly violating the discharge injunction. See Sanctions Motion at 13:14-15. As a remedy for
21 civil contempt, Debtors also seek an “award of damages and attorneys fees and costs to the
22
23

24 ² On the same date, in a separate, individual Chapter 11 proceeding entitled Jose Jaime
25 Vera and Prisila Mendez-Delgado, Case No. 14-13093-ABL, Shellpoint filed a similar IME
26 Motion to conduct discovery in connection with a similar sanctions motion. The individual
27 debtors in that case sought in excess of \$1 million in damages for their “stress and anguish”
28 resulting from Shellpoint’s alleged violation of the discharge injunction. Shellpoint proposed to
have the IME conducted by the same psychiatrist and psychologist identified in the Haddad
proceeding. On December 8, 2021, Shellpoint’s motion was granted without opposition and the
court permitted the examination to proceed.

1 Debtors” as well as “such other and further relief as is just and proper.” *Id.* at 13:16-17
2 (emphasis added). In support of that remedy, Debtors allege, *inter alia*, that:

3 Over the years, the Debtors have suffered significant stress and anguish
4 due to the regular and constant harassment from Shellpoint regarding the
5 Property. Ms. Haddad has experienced difficulty sleeping and an increase
6 in migraine headaches. She has also suffered from abnormal heart
7 function due to the ongoing stress. In December 2016, the Debtors
8 purchased their new home in Tualatin, Oregon. The Debtors believed that
9 once the filing of the bankruptcy case was completed, they would no
10 longer be harassed. However, the Debtors were defendants in the State
11 Court Litigation, and now continue to receive letters from Shellpoint
12 stating that an amount is still owing.

13 Sanctions Motion at ¶ 42 (emphasis added).

14 In support of the Sanctions Motion, Wayne Haddad attests, *inter alia*, that:

- 15 • Although my wife and I received our Discharge in 2011, we have continued
16 to receive harassing letters, and experience significant difficulties
17 financially from the affects of Shellpoint’s failure to transfer the Property
18 from my wife and I.
- 19 • Over the year, my wife and I have suffered significant stress and anguish
20 due to the regular and constant harassment from Shellpoint regarding the
21 Property. My wife has experienced difficulty sleeping and an increase in
22 migraine headaches. She has also suffered from abnormal heart function
23 due to the ongoing stress. In December 2016 my wife and I purchased our
24 new home in Tualatin, Oregon. My wife and I believed that once the filing
25 of the bankruptcy case was completed and we received our Discharge, we
26 would no longer be harassed, and would have a fresh start. However, we
27 continue to receive letters from Shellpoint stating that an amount is still
28 owing.

See First Wayne Declaration at ¶¶15 and 16 (emphasis added).³

In opposition to the First IME Motion, Debtor Debra Haddad attests, *inter alia*, that:

- I have not alleged a cause of action for intentional or negligent infliction
of emotional distress. I do not allege that I have suffered a specific or
diagnosable mental or psychiatric injury or disorder.
- I do not intend to present expert testimony to support my claim of
emotional distress. My husband and I have alleged an ongoing pattern of
regular harassment by Shellpoint, which has not yet ceased, has caused
us significant stress and anguish which has caused us significant stress and

³ Paragraph 42 of the Sanctions Motion essentially mimics Paragraph 16 of the First
Wayne Declaration.

1 anguish which has caused me to experience difficulty sleeping, increased
2 migraine headaches, requiring medication for treatment, anxiety, chest
3 pain and shortness of breath.

- 4 • I have presented medical records for the sole purpose of demonstrating
5 that my symptoms of emotional distress (difficulty sleeping, migraine
6 headaches, anxiety, chest pains, shortness of breath) were not linked by
7 my medical providers to any diagnosable physical or mental condition.⁴
- 8 • While my symptoms are continuing, that is because harassment by
9 Shellpoint has not stopped since we filed our papers with the Court
10 seeking the Court's assistance i[n] ending Shellpoint's harassment. They
11 have sent letters to us on June 7, 2021, August 21, 2021, September 24,
12 2021 and October 14, 2021.
- 13 • I believe that if Shellpoint's harassment stops that my symptoms that have
14 manifested in connection with my emotional distress will improve over
15 time.
- 16 • Other than the symptoms associated with the emotional distress that I
17 experience from Shellpoint's ongoing harassment, I believe that I am in
18 good mental and physical health.

19 See Debra Declaration at ¶¶ 3, 4, 5, 6, 7, and 8 (emphasis added).

20 In response to the Sanctions Motion, Shellpoint denies that it violated the discharge
21 injunction by engaging in conduct that would support a finding of civil contempt under the
22 standards articulated in Taggart v. Lorenzen, 139 S.Ct. 1795 (2019) (requiring a finding that the
23 creditor did not have an objectively reasonable basis for concluding that its conduct might be
24 lawful). See Sanctions Opposition at 3:21 to 9:18. Moreover, Shellpoint expressly disputes
25 whether the Debtors can establish a "causal connection between th[e] significant harm and the
26 violation." Sanctions Opposition at 11:17-19, citing Dawson v. Washington Mutual Bank, F.A.
27 (In re Dawson), 390 F.3d 1139, 1148 (9th Cir. 2004) (emphasis added).

28 By their Sanctions Motion, Debtors do not seek only a declaration that Shellpoint
violated the discharge injunction. Shellpoint disputes even that proposition. If there is an
ongoing violation, Debtors surely would seek an order to enforce the discharge injunction in

⁴ It is not clear what medical records have been produced. It is not clear whether any
privileges have been asserted in connection with such records. It is not clear whether any
privileges have been waived. Those types of concerns, if any, must be raised separately by the
parties. See, e.g., Vanessa Bryant v. County of Los Angeles, Case No. CV-20-09582-JFW-E
(C.D. Cal. Nov. 15, 2021), Civil Minutes on Defendant County of Los Angeles' Motion to
Compel Production of Documents.

1 some fashion. Typically, injunctions are enforced by holding the offending party in contempt of
2 the court's authority and imposing a criminal or civil sanction. Criminal contempt sanctions
3 typically are designed to punish the offender through incarceration or fines or both. Civil
4 contempt sanctions typically are designed to coerce the offender to comply, or compensate for
5 the injury caused by the conduct, rather than to punish the offender. Because punitive sanctions
6 for violation of the discharge injunction are not available from bankruptcy courts in this circuit,
7 see generally Knupfer v. Lindblade (In re Dyer), 322 F.3d 1178, 1192-93 (9th Cir. 2003),
8 Debtors pray for an "award of damages and attorneys fees and costs" to compensate for the
9 alleged violation rather than to punish Shellpoint for its alleged conduct. In other words, Debtors
10 are asking the court to find that Shellpoint violated the discharge injunction and to remedy that
11 violation by awarding monetary damages.

12 As a civil remedy for misconduct, damages can be awarded for both economic and non-
13 economic injuries. Economic damages typically are capable of specific proof of monetary loss,
14 e.g., lost wages, repair costs of injured property, etc. Non-economic damages typically are not
15 subject to specific proof of monetary loss, e.g., pain and suffering, loss of enjoyment of life, etc.
16 Emotional distress is but a type of injury for which non-economic damages may be awarded.⁵
17 Because individuals experience such non-economic injuries differently, they are allowed to
18 testify as to their subjective, individual experiences in order for the trier of fact to determine an
19 appropriate monetary award.⁶ Injured individuals also are allowed, but not required, to offer
20 corroborating testimony and evidence. Because such subjective evidence is permitted, the
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22 ⁵ As previously mentioned, Debra Haddad attests that she has not alleged a cause of
23 action for intentional or negligent infliction of emotional distress. That observation was repeated
24 at the hearing on the IME Motion. The observation is immaterial, however, because it conflates
25 the form of the remedy and the underlying basis for the remedy. Emotional distress damages are
26 commonly sought by individuals injured through conduct that is not based on the law of torts.
27 See, e.g., America's Servicing Co. v. Schwartz-Tallard (In re Schwartz-Tallard), 438 B.R. 313,
321-23 (D. Nev. 2010) (affirming emotional distress damages based on automatic stay violation).
Thus, the absence of a tort cause of action for emotional distress is irrelevant.

28 ⁶ See, e.g., In re Kim Michele Vanamann, 561 B.R. 106, 127-28 & n.42 (Bankr. D. Nev. 2016); In re Erik and Renee Sundquist, 566 B.R. 563, 589-90 (Bankr. E.D. Cal. 2017).

1 alleged wrongdoer also is permitted to challenge the credibility of such direct testimony as well
2 as the corroborating testimony and evidence.⁷

3 In this instance, Debtors seek an award of damages and do not specify whether such
4 damages are economic, non-economic, or both. In their Sanctions Motion, they allege non-
5 economic damages were sustained in the form of “significant stress and anguish” due to the
6 conduct of Shellpoint. In support of the Sanctions Motion, however, Wayne Haddad attests that
7 due to the conduct of Shellpoint the Debtors have experienced “significant difficulties
8 financially” as well as “significant stress and anguish.” In opposition to the First IME Motion,
9 Debra Haddad attests that the conduct of Shellpoint has caused them “significant stress and
10 anguish” which further caused her to experience various physical manifestations.

11 The Sanctions Motion is a contested matter under Bankruptcy Rule 9014(a). Various
12 civil discovery rules, including Bankruptcy Rule 7035, apply under Bankruptcy Rule 9014(c).
13 Bankruptcy Rule 7035 incorporates Civil Rule 35. Under Civil Rule 35(a)(1), the court may
14 order a party whose mental or physical condition is in controversy to submit to an examination
15 by a suitably licensed or certified examiner. See generally Charles Alan Wright and Arthur M.
16 Miller, FEDERAL PRACTICE & PROCEDURE: CIVIL, § 2234.1 (3rd ed. 2021). Under Civil Rule
17 35(a)(2), the request for such an examination must be made on a showing of “good cause” and
18 on proper notice. Id., citing, e.g., Schlagenhauf v. Holder, 379 U.S. 104 (1964). The request is
19 permissive and is subject to the court’s discretion. Additionally, the request must specify the
20 time, place, manner, conditions, and scope of the examination, as well as the person or persons
21 who will perform the examination. Under Civil Rule 35(b), various conditions are prescribed for
22 the provision of any copy of the report prepared by the examiner.

23 In this instance, Debtors apparently have chosen to seek both economic and non-
24 economic damages. They were not required to do so. Debtors have placed their mental
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26 ⁷ Occasionally, the corroborating evidence is provided at trial by the alleged wrongdoer
27 rather than the debtor seeking emotional distress damages. See, e.g., In re Sundquist, 566 B.R. at
28 590 & n.58 (responding bank’s own exhibits included the personal journal entries depicting the
individual debtor’s emotional state and physical manifestations).

1 conditions in controversy, however, by alleging and attesting that Shellpoint’s alleged conduct
2 was and perhaps still is the actual cause of their “significant stress and anguish.”⁸ As previously
3 mentioned, Shellpoint specifically contests that its alleged conduct is the actual cause or perhaps
4 the proximate cause of the alleged injury. There is no indication in the record that the Debtors
5 have withdrawn their request for an award of non-economic damages. As a result, their mental
6 conditions remain in controversy.

7 Under these circumstances, the court concludes that good cause exists to permit the
8 medical examination of Debra Haddad requested by Shellpoint as specified in this order.

9 **IT IS THEREFORE ORDERED** that the Motion to Compel Independent Medical
10 Evaluation brought by secured creditor NewRez LLC dba Shellpoint Mortgage Servicing,
11 Docket No. 66, be, and the same hereby is, **GRANTED**.

12 **IT IS FURTHER ORDERED** that the counsel for Shellpoint and the Debtors shall
13 prepare and submit an agreed order setting forth the date, time and place for the examinations to
14 be conducted by the psychiatrist and psychologist identified in the subject motion. The
15 examination of the psychiatrist must be completed within two hours and the examination of the
16 psychologist must be completed within four hours. The examination is limited to an evaluation
17 of: (1) whether Debra Ann Haddad suffered her claimed ailments due to Shellpoint’s alleged
18 conduct; and (2) whether Debra Ann Haddad’s alleged ailments will continue in the future.
19 Copies of any written report must be made available, subject to all applicable privileges, in
20 accordance with Federal Rule of Civil Procedure 35(b). The agreed order must include the
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23 ⁸ Debtors do not dispute the qualifications of the proposed psychiatrist and psychologist.
24 Debtors do attempt to minimize the controversy by characterizing their damages as merely a
25 “garden variety” plea of anguish and stress. They allege, however, that Shellpoint continues to
26 violate the discharge injunction and that their symptoms will not stop until Shellpoint stops.
27 Debtors attest that they will not present expert testimony, but such testimony is not even required
28 to determine the amount of a non-economic damage award and more likely would be material to
the issue of causation. Debtors do not attest that they will limit the amount of any requested
damage award. While Debtors may be entitled to request the type and amount of damages that
they can prove, Shellpoint likewise is entitled to try to disprove any damages that the Debtors
request. It goes both ways.

1 foregoing limitations and requirements, and shall be submitted to the court no later than 14
2 calendar days from the date of entry of the instant order.

3 Copies sent via BNC to all parties

4 Copies sent via BNC to:
5 WAYNE A. HADDAD
6 DEBRA A. HADDAD
7 10427 HICKORY BARK ROAD
8 LAS VEGAS, NV 89135

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