UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA

In re:	)	Bankr. No. 22-30008
	)	Chapter 7
KYLE BLAKE RICHARD	)	
SSN/ITIN xxx-xx-8656	)	
	)	
and	)	
	)	
LANA JEAN RICHARD	)	
aka Lana Jean Davis-Richard	)	
aka Lana Jean Davis	)	
aka Lana Jean Dougherty	)	
SSN/ITIN xxx-xx-7436	)	
	)	
Debtors.	)	
	)	
KYLE BLAKE RICHARD and	)	Adv. No. 23-3001
LANA JEAN RICHARD	)	
	)	
Plaintiffs	)	DECISION RE: PLAINTIFFS'
	)	MOTION FOR SUMMARY JUDGMENT
-vs-	)	AND DEFENDANT'S MOTION
	)	FOR SUMMARY JUDGMENT
OAHE FEDERAL CREDIT UNION	)	
	)	
Defendant.	)	

The two matters before the Court are Debtors-Plaintiffs Kyle Blake Richard's and Lana Jean Richard's Motion for Summary Judgment and Defendant Oahe Federal Credit Union's Brief in Opposition to Plaintiffs' Brief in Support of Motion for Summary Judgment and Defendant's Motion for Summary Judgment. The Court has jurisdiction over this adversary proceeding under 28 U.S.C. §1334 and 28 U.S.C. §157(a). This is a core proceeding pursuant to 28 U.S.C. §157(b)(2). The Court enters these findings and conclusions pursuant to Fed.R.Bankr.P. 7052. For the reasons discussed below, the Court will deny Plaintiffs' motion for summary

judgment and will grant Defendant's motion for summary judgment.

FACTS

On June 20, 2022, Debtors-Plaintiffs Kyle Blake Richard and Lana Jean Richard ("Richards") filed a chapter 7 bankruptcy.[1] Defendant Oahe Federal Credit Union ("Oahe FCU") was listed as a secured creditor in Richards' bankruptcy on Schedule D. Richards disclosed the collateral for the secured debt owed to Oahe FCU as a 2017 Chrysler Pacifica ("vehicle") and listed the vehicle on their Schedule A/B. Furthermore, Richards filed their Statement of Intention indicating they intended to reaffirm the debt owed to Oahe FCU secured by the vehicle.

Richards' secured loan with Oahe FCU had an interest rate of 3.45%. The loan agreement between Richards and Oahe FCU contained a provision stating Richards would be in default if they filed for bankruptcy.

On or about July 14, 2022, Oahe FCU sent a proposed reaffirmation agreement to Richards' attorney regarding the debt secured by the vehicle. Neither Richards nor Oahe FCU filed a reaffirmation agreement with the Court. Richards did not reaffirm the secured debt with Oahe FCU.

On September 19, 2022, the Court entered an Order of Discharge. However, Richards' bankruptcy case remains open.

Oahe FCU repossessed the vehicle on November 21, 2022. Prior to repossession, Richards were current in their payments and made their last timely payment to Oahe FCU on approximately November 15, 2022. Furthermore, prior to repossession of the vehicle, Richards' attorney had multiple conversations with Oahe FCU's attorney claiming Richards had not breached their contract with Oahe FCU and asserting the filing of their bankruptcy case did not provide Oahe FCU with sufficient legal justification to repossess the vehicle. Oahe FCU disagrees with both

[1] Bankr. No. 22-30008.

contentions.

On April 27, 2023, Richards filed this adversary proceeding against Oahe FCU. Oahe FCU filed an answer to Richards' complaint on May 8, 2023. Oahe FCU filed its summary judgment motion on June 23, 2023. Richards filed a summary judgment motion of their own on August 22, 2023, and Oahe FCU filed a brief in opposition to Richards' brief in support of their summary judgment motion on August 28, 2023.

DISCUSSION

I. Summary Judgment Standard

Summary judgment is appropriate when there is no genuine issue as to any material fact and the movant is entitled to a judgment as a matter of law. Fed.R.Bankr.P. 7056 and Fed.R.Civ.P. 56(a); McManemy v. Tierney, 970 F.3d 1034, 1037 (8th Cir. 2020). An issue of material fact is *genuine* if the evidence would allow the trier of fact to return a verdict for either party. Rademacher v. HBE Corp., 645 F.3d 1005, 1010 (8th Cir. 2011). A fact is *material* if it might affect the outcome of the case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The Court considers the pleadings, discovery, and any affidavits when reviewing for summary judgment. Wood v. SatCom Marketing, LLC, 705 F.3d 823, 828 (8th Cir. 2013). The Court's function is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Tolan v. Cotton, 572 U.S. 650, 656 (2014) (quoting Anderson, 477 U.S. at 249).

When filing a summary judgment motion, the movant has the burden to show the parts of the record that demonstrate the absence of genuine issues of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); see also Gibson v. American Greetings Corp., 670 F.3d 844, 853 (8th Cir. 2012). The movant meets his burden if he shows the record does not contain a genuine issue of material fact and he points out the part of the record that bears out his assertion. Handeen v.

LeMaire, 112 F.3d 1339, 1346 (8th Cir. 1997). "Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Bank of America v. Armstrong (In re Armstrong), 498 B.R. 229, 233 (B.A.P. 8th Cir. 2013) (quoting Williams v. Marlar (In re Marlar), 252 B.R. 743, 751 (B.A.P. 8th Cir. 2000), and Celotex Corp. v. Catrett, 477 U.S. at 322).

Once the movant has met his burden, then the burden shifts to the non-movant. The non-moving party must advance specific facts to create a genuine issue of material fact to avoid summary judgment. F.D.I.C. v. Bell, 106 F.3d 258, 263 (8th Cir. 1997). However, even if the non-moving party does not oppose the summary judgment motion, the Court must still determine if summary judgment is appropriate as a matter of law on that claim. Canada v. Union Elec. Co., 135 F.3d 1211, 1213 (8th Cir. 1997); see also Feickert v. Wheeler, 2022 WL 899531, at *3 (D.S.D. March 28, 2022).

Further, "[w]here the litigants concurrently pursue summary judgment, each motion must be evaluated independently to determine whether there exists a genuine dispute of material fact and whether the movant is entitled to judgment as a matter of law." St. Luke's Methodist Hosp. v. Thompson, 182 F.Supp.2d 765, 769 (N.D.Iowa 2001). "[T]he filing of cross motions for summary judgment does not necessarily indicate that there is no dispute as to a material fact, or have the effect of submitting the cause to a plenary determination on the merits." Sam's Riverside, Inc. v. Intercon Solutions, Inc., 790 F.Supp.2d 965, 975 (S.D.Iowa 2011) (quoting Wermager v. Cormorant Twp. Bd., 716 F.2d 1211, 1214 (8th Cir. 1983)). The Court reviews the respective summary judgment motions independently. Farmers Cooperative Company v. Ernst & Young, Inc. (In re Big Sky Farms Inc. ex rel. Ernst & Young, Inc.), 512 B.R. 212, 215-16 (Bankr. N.D.Iowa 2014).

Lastly, the matters must be viewed in the light most favorable to the party opposing the motion. F.D.I.C. v. Bell, 106 F.3d at 263; Amerinet, Inc. v. Xerox Corp., 972 F.2d 1483, 1490 (8th Cir. 1992) (quoting therein Matsushita Elec. Industrial Co. v. Zenith Radio, 475 U.S. 574, 587-88 (1986), and citations therein). In addition, the non-moving party is entitled to all reasonable inferences that can be drawn from the evidence without resorting to speculation. P.H. v. School District of Kansas City, Missouri, 265 F.3d 653, 658 (8th Cir. 2001).

II. Richards' Summary Judgment Motion

Violation of Automatic Stay

Richards claim Oahe FCU violated 11 U.S.C. §362(a)(3) through (a)(6) by repossessing the vehicle and, as a result, Oahe FCU should be liable for damages for such willful violation of the automatic stay in accordance with 11 U.S.C. §362(k). Richards argue there are four applicable subsections of 11 U.S.C. §362(a) which each operate as a stay in this matter, as follows:

(3) any act to obtain possession of or exercise control over property of the estate;
(4) any act to create, perfect, or enforce a lien against property of the estate;
(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case; and
(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case.

11 U.S.C. §362(a)(3)-(6).

In order for Richards to prevail on their motion, they need to prove Oahe FCU willfully violated the automatic stay. Marino v. Seeley (In re Marino), 437 B.R. 676, 678 (B.A.P. 8th Cir. 2010). Richards filing their petition in bankruptcy on June 20, 2022, automatically imposed a stay prohibiting Oahe FCU from taking action against Richards and against property of Richards' bankruptcy estate. See 11 U.S.C. §362(a). With respect to acts against Richards, the stay remains in effect until:

(1) the case is closed; (2) the case is dismissed; or (3) a discharge is granted or denied. See 11 U.S.C. §362(c)(2); In re Ernst, 45 B.R. 700, 701 (Bankr. D.Minn. 1985). With respect to bankruptcy estate property, the automatic stay remains in effect until that property is no longer property of the estate. See 11 U.S.C. §362(c)(1).

First, with regard to any acts against Richards, the stay was terminated when the discharge was granted on September 19, 2022. Therefore, repossession of the vehicle on November 21, 2022, did not violate the stay of any acts against Richards as that stay was already terminated. Second, with regard to any acts against property of the estate, "[p]roperty of the estate remains in the estate until it is administered, abandoned, or when the case closes (if the property has been disclosed)." Boisaubin v. Blackwell (In re Boisaubin), 614 B.R. 557, 562 (B.A.P. 8th Cir. 2020).

However, Richards appear to be overlooking an exception to 11 U.S.C. §362(c). The termination of the automatic stay is controlled by 11 U.S.C. §362(c) except as provided in subsection (h). Under 11 U.S.C. §362(h), the stay terminates under subsection (a) if the debtor fails within the time set by 11 U.S.C. §521(a)(2) to timely file a statement of intention indicating the debtor's intent with respect to the personal property and to timely take the action specified in the statement of intention. See 11 U.S.C. §362(h)(1)(A) and (B). Richards did timely file a statement of intention indicating they intended to reaffirm the debt secured by the vehicle. However, Richards did not timely take any action towards reaffirming their debt with Oahe FCU. There was no reaffirmation agreement filed with the Court from either party nor was there any evidence submitted by Richards showing they complied with 11 U.S.C. §362(h)(1)(B). Furthermore, Richards admit they did not reaffirm their debt with Oahe FCU. Therefore, the automatic stay was already terminated with respect to the vehicle under 11 U.S.C. §362(h) as an exception to section 362(c).

In certain circumstances the Court can disapprove a reaffirmation agreement

but still find compliance by the debtor under 11 U.S.C. §362(h). A debt may be reaffirmed under 11 U.S.C. §521(a)(2) and (a)(6) and §524(c) and (m). According to the majority of courts, where the debtor's statement of intention indicates the debtor wishes to retain personal property through a reaffirmation agreement, court approval of the reaffirmation agreement is not required for the debtor to comply with sections 362(h)(1)(B) and 521(a)(6). In re Rhodes, 635 B.R. 849, 854-55 (Bankr. S.D.Cal. 2021). See, e.g., In re Riggs, 2006 WL 2990218 (Bankr. W.D.Mo. Oct. 12, 2006), and In re Moustafi, 371 B.R. 434 (Bankr. D.Ariz. 2007) (courts disapprove of reaffirmation agreements based on undue hardship under 11 U.S.C. §524(m), but still find compliance by debtors); Coastal Fed. Credit Union v. Hardiman, 398 B.R. 161 (E.D.N.C. 2008) (bankruptcy court denied reaffirmation agreement pursuant to 11 U.S.C. §524(c)(6)(A), but still found compliance by debtors).

The Court may even find compliance with 11 U.S.C. §362(h) if the debtor attempted to reaffirm under the original contract terms and the creditor refused to sign a reaffirmation agreement. In re Hinson, 352 B.R. 48, 52 (Bankr. E.D.N.C. 2006). Courts describe the standard for performance of intent in terms of whether factors exist outside of the debtor's control, such as court disapproval or lack of creditor cooperation, frustrated what was otherwise a good faith effort to reaffirm the debt with the creditor. Nuckoles v. Ford Motor Credit Company LLC (In re Nuckoles), 546 B.R. 651, 655 (Bankr. W.D.Va. 2016); Coastal Fed. Credit Union v. Hardiman, 398 B.R. at 182; Dumont v. Ford Motor Credit Co. (In re Dumont), 581 F.3d 1104, 1112 and n.14 (9th Cir. 2009). Other courts describe the burden as follows: "Where the debtor manifests an intent to enter into an agreement (for example, by signing a reaffirmation agreement that a creditor has signed), the debtor has take[n] the action specified in the statement of intention." Coastal Fed. Credit Union v. Hardiman, 398 B.R. at 184-85 (citing House Report 71); In re Husain, 364 B.R. 211, 218-19 (Bankr. E.D.Va. 2007) (debtor need not entirely consummate stated intention but only "take steps to act on an intention to either retain or

surrender") (quotation omitted).

However, Oahe FCU is a credit union and 11 U.S.C. §524(m) does not apply to reaffirmation agreements where the creditor is a credit union. See 11 U.S.C. §524(m)(2). Further, Richards have failed to provide any other factors that may have existed which demonstrate a good faith effort to reaffirm their debt with Oahe FCU or steps they took in an attempt to reaffirm the debt.

In addition, because the Court ruled herein that the automatic stay was already terminated at the time of repossession of the vehicle, it does not need to address the damages argument or the state court arguments brought by Richards. However, nothing in the Court's ruling will restrict Richards from pursuing any non-bankruptcy law remedies they may have against Oahe FCU in state court.

Last, as it relates to Richards' ipso facto clause argument, Richards have again overlooked an important statute relating to reaffirmation agreements. Under 11 U.S.C. §521(d), if Richards failed to timely file a statement of intention indicating their intention with respect to the vehicle and to timely take the action specified in their statement of intention, then nothing shall prevent or limit the operation of a provision in the underlying agreement that has the effect of placing Richards in default under such agreement by reason of Richards filing bankruptcy.

> The significance of §521(d)'s treatment of ipso facto clauses is simply that when a debtor fails to timely take the actions required by §521(a)(6), or §362(h)(1) or (2), the new statutory language eliminates limitations previously imposed by the Bankruptcy Code on the operation of ipso facto clauses. Section 521(d) does not create a new statutory remedy to be used by creditors, and does not write ipso facto clauses into contracts where none exist. Rather, it enables creditors to proceed under contractual default clauses without limitations imposed by the Bankruptcy Code.... Creditors still must ensure that the contract, and their efforts to enforce the terms in it, do not run afoul of any applicable state laws.

In re Riggs, 2006 WL 2990218, at *3 (quoting In re Donald, 343 B.R. 524, 539 (Bankr. E.D.N.C. 2006); see also In re Dumont, 581 F.3d at 1115 (discussing how 11 U.S.C. §521(d) trumps 11 U.S.C. §365(e)'s general prohibition against ipso facto clauses where debtor does not comply with section 362(h)); (the consequences of default under the ipso facto clause are then determined by the contract and state law) Id.; DaimlerChrysler Financial Services Americas, LLC v. Jones (In re Jones), 591 F.3d 308, 312 (4th Cir. 2010) (where contract contains an ipso facto clause and debtor fails to comply with 11 U.S.C. §362(h) or 11 U.S.C. §521(a)(6), the result under section 521(d) is that creditor may take action under the contract as permitted by state law).

It is not Richards' bankruptcy filing that allows Oahe FCU to repossess the vehicle, but instead it is Richards' failure to timely reaffirm, or show good faith efforts or acts toward reaffirming, their debt with Oahe FCU as required under 11 U.S.C. §362(h), thus rendering inoperable any provision of the Bankruptcy Code prohibiting an ipso facto clause, and Oahe FCU was free to act as permitted under the contract and state law. In re Riggs, 2006 WL 2990218, at *3.

Therefore, pursuant to 11 U.S.C. §362(h)(1)(B) and §521(a)(2) and (6), the automatic stay was terminated with respect to the vehicle and Oahe FCU was free to act under the contract as permitted by state law.

Violation of Discharge Order

Richards also argue that Oahe FCU violated the discharge order entered in their bankruptcy case under 11 U.S.C. §524(a)(2) and that this Court should grant civil contempt sanctions against Oahe FCU under section 524(a)(2) and 11 U.S.C. §105(a).

"In the Eighth Circuit, courts have held that a 'willful violation' of the section 524(a)(2) discharge injunction 'will warrant a finding of civil contempt and imposition of sanctions.'" In re Cargill, 2018 WL 3863816, at *2 (Bankr. S.D.Iowa June 22,

2018). "The movant has the burden to show by clear and convincing evidence that the creditor had knowledge of the discharge and willfully violated it by pursuing collection activities." Id.; In re Hebner, 2015 WL 128137, at *3 (Bankr. D.Neb. Jan. 8, 2015). These cases predate the Supreme Court case, Taggart v. Lorenzen, which defined the standard as follows: "A court may hold a creditor in civil contempt for violating a discharge order where there is not a "fair ground of doubt" as to whether the creditor's conduct might be lawful under the discharge order." Taggart v. Lorenzen, 139 S.Ct. 1795, 1804 (2019). However, Oahe FCU is not seeking to collect any money from Richards, nor have Richards provided evidence of Oahe FCU pursuing any collection activities against them post-discharge.

To the contrary, the only action Oahe FCU has taken post-discharge is to repossess the vehicle, and repossession of collateral is an *in rem* action against the debtors' property and, as such, does not implicate the discharge injunction. Courts have held that *in rem* actions to enforce liens do not implicate the injunction:

> Generally, liens not avoided during bankruptcy survive after bankruptcy. Braun v. Champion Credit Union (In re Braun), 152 B.R. 466, 470 (Bankr. N.D.Ohio 1993); Cooper v. Walker (In re Walker), 151 B.R. 1006, 1009 (Bankr. E.D.Ark. 1993); Brouse v. CSB Mortgage Corp. (In re Brouse), 110 B.R. 539, 542 n.5 (Bankr. D.Colo. 1990); Bouchelle v. Southeast Bank of Perry, N.A. (In re Bouchelle), 98 B.R. 81, 82-83 (Bankr. M.D.Fla. 1989); 11 U.S.C. §§524(a)(2) and 727. The liens survive even if the obligation that formed the basis for the lien is discharged. Dillard v. Internal Revenue Service (In re Dillard), 118 B.R. 89, 91-92 (Bankr. N.D.Ill. 1990). A discharge granted under 11 U.S.C. §524(a) affects the debtor's personal liability only; it does not affect the property of the estate from which debts may be satisfied. St. Luke's Hospitals of Fargo, Inc., v. Smith (In re Smith), 119 B.R. 714, 720 (Bankr. D.N.D. 1990); Pfeiffer v. Bormes (In re Bormes), 14 B.R. 895, 898 (Bankr. D.S.D. 1981). If a lien survives bankruptcy and there is property of the estate from which debts may be satisfied, the lien-holding creditor may pursue an *in rem* action to enforce the surviving lien. Id.

In re Hanson, 164 B.R. 632, 634 (Bankr. D.S.D. 1994). See also In re Anderson,

348 B.R. 652, 655 (Bankr. D.Del. 2006) ("Self-help repossession of property is an *in rem* action that would not appear to implicate the discharge injunction."); Davis v. Bank of Iberia (In re Davis), 99 B.R. 732, 733 (Bankr. W.D.La. 1989) (Section "524(a) does not apply to post-discharge enforcement of a valid pre-bankruptcy lien not avoided under the Bankruptcy Code.").

It is Richards' burden to show by clear and convincing evidence that Oahe FCU violated their bankruptcy discharge. In re Hebner, 2015 WL 128137, at *3 (Bankr. D.Neb. Jan. 8, 2015). Richards have offered no evidence to establish Oahe FCU pursued collection of their discharged debt by repossessing their property or in any other way, nor does the record contain any such evidence. Therefore, Richards have failed to carry their burden on this allegation as well.

Lastly, as it relates to Richards' motion, and as a result of this Court finding the automatic stay was terminated with respect to the vehicle and also finding no violation of the discharge injunction by Oahe FCU, Richards are denied their fees and costs. Richards' summary judgment motion is denied.

III. Oahe FCU's Summary Judgment Motion

Oahe FCU seeks summary judgment denying Richards the relief they are requesting against it for willful violation of the automatic stay under 11 U.S.C. §362 and the discharge injunction under 11 U.S.C. §524. Based upon the findings of fact and the conclusions of law stated above, Oahe FCU has met its burden of proving Richards are not entitled to relief under 11 U.S.C. §§362 or 524 and, therefore, Oahe FCU shall be granted summary judgment in its favor.

However, Oahe FCU has failed to prove it is entitled to attorney's fees and has failed to provide any authority for the award of such fees. Therefore, this Court denies Oahe FCU its attorney's fees or costs incurred in this action.

CONCLUSION

For the reasons stated herein, Richards are not entitled to judgment as a matter of law and their motion shall be denied. Further, Oahe FCU is entitled to judgment as a matter of law and its motion shall be approved to the extent stated herein. In addition, the Court denies attorney's fees, costs, and expenses to both sides in both matters. The Court will therefore enter an order denying Richards' motion for summary judgment, granting Oahe FCU's motion for summary judgment, denying each party their costs and attorney fees, and directing entry of judgment for Oahe FCU.

So ordered: November 30, 2023.

BY THE COURT:

Laura L. Kulm Ask
Bankruptcy Judge

NOTICE OF ENTRY
Under Fed.R.Bankr.P. 9022(a)

This order/judgment was entered on the date shown above.

Frederick M. Entwistle
Clerk, U.S. Bankruptcy Court
District of South Dakota

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA

In re:	)	Bankr. No. 22-30008
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Debtors.	)	
	)	
KYLE BLAKE RICHARD and	)	Adv. No. 23-3001
LANA JEAN RICHARD	)	
	)	
Plaintiffs	)	ORDER GRANTING
	)	DEFENDANT'S MOTION FOR
-vs-	)	SUMMARY JUDGMENT AND
	)	DENYING PLANITIFFS' MOTION
OAHE FEDERAL CREDIT UNION	)	FOR SUMMARY JUDGMENT
	)	
Defendant.	)	
	)	

Upon consideration of Defendant Oahe Federal Credit Union's Motion for Summary Judgment (doc. 12) and attendant legal argument and statement of undisputed facts, Debtors-Plaintiffs Kyle Blake Richard's and Lana Jean Richard's Motion for Summary Judgment (doc. 21) and attendant legal argument and statement of undisputed facts, and the record before the Court; and in recognition of and in compliance with the decision entered this day; and for cause shown; now, therefore,

IT IS HEREBY ORDERED Defendant's Motion for Summary Judgment (doc. 12) is granted.

IT IS FURTHER ORDERED Plaintiffs' Motion for Summary Judgment (doc. 21) is denied.

IT IS FURTHER ORDERED each party shall bear their own costs, including attorney fees.

IT IS FURTHER ORDERED a judgment shall be entered for Defendant.

So ordered: November 30, 2023.

BY THE COURT:

Laura L. Kulm Ask
Bankruptcy Judge

NOTICE OF ENTRY
Under Fed.R.Bankr.P. 9022(a)

This order/judgment was entered on the date shown above.

Frederick M. Entwistle
Clerk, U.S. Bankruptcy Court
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