UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OHIO

In Re:	)	
	)	**CHIEF JUDGE RICHARD L. SPEER**
Jon Martinez	)	
	)	Case No. 99-3258
Debtor(s)	)	
	)	(Related Case: 98-32688)
Jon Martinez	)	
	)	
Plaintiff(s)	)	
	)	
v.	)	
	)	
Sheet Metal Workers	)	
	)	
Defendant(s)	)	

DECISION AND ORDER

This cause comes before the Court upon the Defendant's Motion to Dismiss the Plaintiff's Complaint to Enforce the Discharge Injunction of 11 U.S.C. § 524. In response thereto, the Plaintiff filed a Partial Motion for Summary Judgment. In addition, each of the Parties has filed legal Memorandum in support of their respective positions.

The issues raised in this proceeding are twofold: (1) whether a labor union's constitution operates as an executory contract capable of being assumed or rejected under § 365(d), and if so, (2) can such a contract be assumed postpetition by a union member paying his or her union dues, or in the alternative, does the postpetition payment of union dues create a new contract. Before addressing these issues, however, a brief synopsis of the facts underlying this case is in order.

Martinez v. Sheet Metal Workers
Case No. 99-3258

On June 19, 1998, the Debtor petitioned this Court for relief under Chapter 7 of the United States Bankruptcy Code. At the time the Petition was filed, the Debtor was a member of the Sheet Metal Workers International Association Local Union No. 33, who is the Defendant/Creditor in this action (hereinafter referred to as the "Union"). As a member of the Union, the Debtor was required to pay membership dues.

Approximately one month after filing for bankruptcy relief, the Debtor tendered to the Union his union membership dues for the months of July, August and September. However, the facts of this case show that just prior to tendering his membership dues, the Debtor had accepted, in violation of the Union's Constitution, employment as a sheet metal worker at the Daimler-Chrysler Corporation. As a result, on August 11, 1998, the Union brought disciplinary charges against the Debtor for violating its Constitution.

On or about September 15, 1998, the Debtor submitted a formal notice of resignation as a member of the Union. Nonetheless, the disciplinary action initiated by the Union against the Debtor was continued, and a fine was eventually levied against the Debtor in the amount of Fifty-nine Thousand Five Hundred Seventy and 40/100 dollars ($59,570.40). The Union now seeks to enforce this fine against the Debtor through the state courts. The Debtor, however, has brought the instant action in this Court contending that the fine levied against him was discharged in bankruptcy, and therefore the Union is in violation of the discharge injunction of 11 U.S.C. § 524.[1]

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[1] It appears that the Debtor in his bankruptcy petition inadvertently failed to schedule the Union as a creditor. Thus, it appears that the Union did not get any notice of the Debtor's bankruptcy petition until around December of 1998. Nevertheless, as the Debtor's case was a no asset case, this fact alone does not affect the dischargeability of the debt at issue as in *Zirnhelt v. Madaj (In re Madaj)*, the Sixth Circuit Court of Appeals held that in a no-asset case, in which no claims bar date has been established, all claims are discharged whether scheduled or not as long as the claimant does not have grounds for nondischargeability under §§ 523(a)(2), (a)(4) or (a)(6). 149 F.3d 467, 471 (6th Cir.1998).

LEGAL ANALYSIS

The Union's Motion to Dismiss the Debtor's Complaint is brought pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, which is made applicable to this proceeding by Bankruptcy Rule 7012(b). Under Rule 12(b)(6), a complaint may only be dismissed if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations contained in the complaint. In making this determination, the complaint must be construed in the light most favorable to plaintiff, and its well-pleaded facts must be accepted as true. *Morgan v. Church's Fried Chicken*, 829 F.2d 10, 11 (6th Cir.1987). Conversely, the Debtor seeks partial summary judgment against the Union on the issue of whether the fine imposed against the Debtor was discharged in bankruptcy. Pursuant to Bankruptcy Rule 7056, a summary judgment motion will be granted if, "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

Section § 365(a) of the Bankruptcy Code provides that a trustee may assume or reject any executory contract. Once more, to further bankruptcy's fresh start policy, subparagraph (d)(1) of § 365 makes a presumption that executory contracts are deemed rejected unless they are expressly assumed by the trustee within Sixty (60) days after the bankruptcy petition is filed.[2] The Union while not

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[2] Section 365(a) provides that, "[e]xcept as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor." While § 365(d)(1) provides, "[i]n a case under chapter 7 of this title, if the trustee does not assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor within 60 days after the order for relief, or within such additional time as the court, for cause, within such 60- day period, fixes, then such contract or lease is deemed rejected."

contesting these principles, asserts, as its first point of opposition to the Debtor's Complaint, that its Constitution does not constitute an executory contract within the meaning of § 365, and thus its Constitution cannot be assumed or rejected within the meaning of the statute.

For purposes of § 365, federal law determines whether a contract is executory in nature. *Sparks v. Sparks (In re Sparks)*, 206 B.R. 481, 486 (Bankr. N.D.Ill. 1997). However, issues as to the actual formation and/or existence of a contract are founded solely upon the application of state law. *In re GP Express Airlines, Inc.*, 200 B.R. 222, 227 (Bankr. D.Neb. 1996); *In re Owen- Johnson*, 115 B.R. 254, 258 (Bankr. S.D.Cal. 1990). *See also Butner v. United States*, 440 U.S. 48, 55, 99 S.Ct. 914, 918, 59 L.Ed.2d 136 (1979) (holding property interests in bankruptcy are defined by state law unless some federal interest requires a different result). Accordingly, resolution of the above-stated issue raised by the Union necessarily requires an examination of two issues; namely whether the Union's Constitution did, in fact, establish a contractual relationship between itself and the Debtor, and if such a contractual relationship did exist, whether that contractual relationship was executory within the meaning of § 365.

Under Ohio law, labor unions may bind themselves by their constitutions. 39(A) OHIO JUR.3d *Judgments* § 438. As a consequence, in *Internatl. Bhd. of Elec. Workers v. Smith* it was held that under Ohio law the "provisions set forth in a union's constitution and bylaws, which define punishable conduct and establish the procedures for internal trial and appeal, constitute a contract between the union and its members." 76 Ohio App.3d 652, 660, 602 N.E.2d 782, 787 (1992). In the instant case, as the Debtor was disciplined in accordance with rules and procedures prescribed by the Union's Constitution, the Court can see no reason why the circumstances of the instant case should be distinguished from the holding contained in *Internatl. Bhd. of Elec. Workers v. Smith*. Accordingly, the Court holds that the Union's Constitution created a valid contractual arrangement between the Debtor and the Union, which necessarily leads to the ensuing issue concerning the Constitution's qualification as an executory contract under § 365.

An executory contract, for purposes of § 365, is one in which "performance remains due to some extent on both sides." *Terrell v. Albaugh (In re Terrell),* 892 F.2d 469, 472 (6th Cir.1989). This is opposed to a contract in which one of the parties has completed performance, which, depending upon the circumstances, will either result in a claim against the estate, or will instead emerge as an asset of the estate. In the present case, a review of the Union's Constitution shows that it is replete with examples of performances that remain due by one or both of the Parties, and thus the Constitution fits within the definition of an executory contract under § 365. For instance, in the Union's Constitution, the Union is required to negotiate on behalf of its members and, in addition, it must provide under appropriate circumstance strike benefits. Conversely, the Union's active members are at no time permitted to hold membership in any other union and must also pay dues to the Union on a continual basis.

Nevertheless, the Union argues that even if its Constitution does constitute an executory contract within the meaning of § 365, the Debtor, by paying his membership dues postpetition, either assumed the contract pursuant to § 365(d)(1) or, in the alternative, such an action created a new contract.

Under § 365(d)(1), a contract may only be assumed by an express declaration undertaken by the trustee. *In re Hodgson*, 54 B.R. 688, 690 (Bankr. W.D.Wis. 1985). Thus, as such an action was never taken in this case, the Union's first assertion is not well taken. However, the assertion by the Union that a new contract was formed as a result of the Debtor paying his membership dues does seem to have some merit. Specifically, it seems apparent to the Court that if a labor union's constitution can form a binding contract with its members, then even if such a contract is terminated, a new contract could later be created by a debtor's continued or renewed involvement in the union.[3] In fact,

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[3] The Debtor had argued that without a proper reaffirmation agreement no postpetition contract could have been formed. However, while a reaffirmation must be entered into to make a

if this were not the case, a union, in the absence of an express agreement, would not be obligated to honor any of its commitments to its members who had formerly sought bankruptcy relief, a result which is clearly not in accord with public policy. Nevertheless, the Court must decline to decide this matter as the creation and/or formation of postpetition contracts are non-core matters over which this Court does not have jurisdiction.[4] 28 U.S.C. §§ 1334 & 157; *see also* 11 U.S.C. § 541. Furthermore, as the Supreme Court has held that law suits by unions to collect disciplinary fines are governed by state law, discretionary abstention in this case would also be appropriate pursuant to 28 U.S.C. § 1334(c)(1). *N.L.R.B. v. Boeing Co.*, 412 U.S. 67, 74, 93 S.Ct. 1952, 1957, 36 L.Ed.2d 854 (1973). Nevertheless, as determining the legitimacy of the Union's fine is necessary to adjudicate the Union's Motion to Dismiss, the Court will hold the Union's Motion in abeyance until the Parties have been given a fair opportunity to litigate this issue in state court. However, in order to ensure that this adversary proceeding is resolved in a timely fashion, the Parties will be required to keep the Court informed as to the Status of any state court litigation which seeks to determine the validity of the Union's fine.

Accordingly, it is

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prepetition contract binding after the close of a bankruptcy case, the lack of a reaffirmation agreement does not, in itself, prevent the debtor from entering into new postpetition contractual arrangements.

[4] The only exception to this rule being if the administration of the bankruptcy estate absolutely requires a determination as to the existence of a postpetition contract. *See Ben Cooper, Inc. v. Insurance Co. State of Pennsylvania (In re Ben Cooper, Inc.)*, 896 F.2d 1394, 1400 (2nd Cir. 1990); *Arnold Print Works, Inc. v. Apkin (In re Arnold Print Works, Inc.)*, 815 F.2d 165, 166 (1st Cir. 1987).

ORDERED that the Partial Motion for Summary Judgment submitted by the Plaintiff, Jon Martinez, be, and is hereby, GRANTED to the extent that the fine imposed by the Defendant against the Plaintiff is based upon the prepetition agreement created by the Defendant's Constitution.

It is ***FURTHER ORDERED*** that the Plaintiff and the Debtor submit, either jointly or separately, a Status Report to the Court within One Hundred Eighty (180) days from the entry of this Order.

It is ***FURTHER ORDERED*** that the Clerk, U.S. Bankruptcy Court, hold this matter in abeyance until it has received the Status Report(s) required by the above order.

Dated:

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Richard L. Speer
Chief Bankruptcy Judge