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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

In re:) Case No. 02-15274
)
GENERAL L. KIMBROUGH,) Chapter 7
)
Debtor.) Judge Arthur I. Harris

MEMORANDUM OPINION AND DECISION

This matter is before the Court on the motion of Debtor General L. Kimbrough requesting injunctive relief from the City of Elyria's enforcement of various fines and other punishments associated with Kimbrough's criminal conviction after pleading "no contest" to three violations of Elyria's "Dwelling House Code" on August 22, 2002. Kimbrough alleges in his motion that these criminal proceedings were commenced at the request of three of his creditors and, further, that the motivation behind these criminal proceedings, in whole or in part, was the collection of debts owed by Kimbrough. For the reasons that follow, Kimbrough's motion is denied.

PROCEDURAL AND FACTUAL BACKGROUND¹

During the months of July and August of 2001, Kimbrough was hired by

¹ For purposes of this ruling, the Court accepts as true the factual allegations in Kimbrough's motion. See FED. R. BANKR. P. 7012(b); *Miller v. Currie*, 50 F.3d 373, 377 (6th Cir. 1995).

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three different parties to install driveways at their residences in Elyria, Ohio. As contracted, Kimbrough installed driveways for the Kaufman family, Mr. Arthur Ketchum, and Ms. Candice Broadwater. These driveways later cracked due to alleged installation defects. Kimbrough maintains that there were no defects in the installation of the driveways, rather that the manner in which the alleged defects were identified erroneously relied upon "technical improprieties" to arrive at such conclusions.

On February 15, 2002, an official from the Elyria Building Department, Darryl J. Farkas, filed three misdemeanor complaints against Kimbrough in the Elyria Municipal Court, alleging violations of the local Dwelling House Code as a result of the faulty driveway installations. Kimbrough appeared in Elyria Municipal Court on April 11, 2002, and later on May 22, 2002, for preliminary hearings related to the criminal complaints. On May 15, 2002, shortly before the second preliminary hearing, Kimbrough filed for relief under Chapter 7 of the Bankruptcy Code, listing as unsecured creditors the three parties for whom he had installed allegedly defective driveways.

On August 22, 2002, Kimbrough again appeared at the Lorain County Municipal Court where he met with the city prosecutor, the city building inspector,

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and the three driveway creditors. Kimbrough then entered a plea of "no contest" to three counts of violating the Elyria Dwelling House Code, based on the allegedly defective installations. Judge George H. Ferguson then found Kimbrough guilty of the violations and sentenced Kimbrough on each count to a fine in the amount of \$250.00 and 30 days of jail. For each count, \$100.00 of the fine and the entire jail sentence were suspended, with the following conditions of probation: (i) one year of good behavior and (ii) that the driveway work would be "completed and up to code, as verified by [the] Building Department, by Friday, October 11, 2002."

In a letter to the Court dated August 29, 2002, and filed on August 30, 2002,² Kimbrough requested that this Court enjoin the Elyria prosecutor's office, the building department, the Elyria Municipal Court, and the three creditors whose driveway repairs were the subject of Kimbrough's criminal prosecution.

Kimbrough asserted that the criminal prosecution was a violation of the automatic stay because it was allegedly instituted for the purpose of collecting a prepetition debt. Kimbrough's August 29, 2002, letter did not indicate that it was served on anyone other than the Chapter 7 trustee, Mr. Simon. On September 6, 2002, Kimbrough was granted a discharge under Bankruptcy Code § 727. On October 7,

² Docket entry # 14.

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2002, Kimbrough filed a "Notice of Motion for Injunctive Relief," which indicated that a hearing would be scheduled on his motion on October 29, 2002.³ This notice was apparently served on the Elyria prosecutor's office and the three complainants. On October 22, 2002, the City of Elyria filed a memorandum in opposition to Kimbrough's request for injunctive relief.⁴

On October 29, 2002, the Court heard argument from Kimbrough. No one appeared on behalf of the City of Elyria. The Court indicated that it would take Kimbrough's request under advisement. On November 4, 2002, Kimbrough filed and served additional documents,⁵ and on November 6, 2002, the City of Elyria also filed and served additional documents.⁶

LAW

The Court has jurisdiction in this proceeding pursuant to 28 U.S.C. § 1334(b) and Local General Order No.84, entered on July 16, 1984, by the United States District Court for the Northern District of Ohio. This is a “core” proceeding

³ Docket entry # 19.

⁴ Docket entry # 20.

⁵ Docket entry # 21.

⁶ Docket entry # 22.

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pursuant to 28 U.S.C. § 157(b)(2)(I) and (J).

Bankruptcy courts may grant a party injunctive relief pursuant to Bankruptcy Code § 105(a) which provides, in pertinent part, that a "court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]."

Debtors who have been granted a discharge pursuant to Bankruptcy Code § 727 receive the injunctive protection of Bankruptcy Code § 524(a)(2), which provides, in pertinent part, that a discharge "operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor"

A Chapter 7 discharge does not discharge an individual debtor from a debt "to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss" BANKRUPTCY CODE § 523(a)(7).

DISCUSSION

Initially, the Court notes that under Rule 7001(7) of the Federal Rules of Bankruptcy Procedure, a proceeding to obtain an injunction or other equitable

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relief is an adversary proceeding, which is commenced by the filing and service of a summons and complaint.⁷ The City of Elyria has not raised this issue in opposing Kimbrough's motion. Accordingly, the Court will construe Kimbrough's motion as if it were an adversary complaint filed under Bankruptcy Rule 7003. *See, e.g., Haines v. Kerner*, 404 U.S. 519, 520 (1972) (pleadings of pro se litigants should be liberally construed); *In re Fanelli*, 263 B.R. 50, 58 (Bankr. N.D. N.Y. 2001) (noting that "pro se litigant's complaint and supporting papers may be read liberally so as to raise the strongest arguments suggested therein").

In his motion, Kimbrough erroneously requests protection of the automatic stay as provided in Bankruptcy Code § 362. Because Kimbrough has been granted a discharge, the protections of the automatic stay no longer apply. *See* BANKRUPTCY CODE § 362(c)(2)(C). Instead, the question at hand involves whether the discharge injunction of Bankruptcy Code § 524 affects Kimbrough's

⁷ *See, e.g., In re Robertson*, 206 B.R. 826, (Bankr. E.D. Va. 1996) (noting that bankruptcy courts "generally label actions as injunctions when dealing with a demand for an action or a request to forbid an action relating to the rights of parties in ongoing cases, and require that an adversary proceeding be filed"); *In re Catalano*, 155 B.R. 219, 225 (Bankr. Neb. 1993) (holding that "injunctive relief is not usually available without the filing of an adversary proceeding").

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criminal restitution obligation.⁸

Under Section 524(a) of the Bankruptcy Code, a discharge granted under Section 727 operates as an injunction against any action to collect a debt discharged under Section 727. Section 727(b), however, excepts from discharge those debts deemed nondischargeable under Section 523(a), including any debt "to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit." Section 523(a)(7). Therefore, if Kimbrough's fine and restitution obligations under his municipal court conviction are nondischargeable under Section 523(a)(7), then the discharge injunction of Section 524 has no bearing on the restitution and other obligations stemming from Kimbrough's criminal conviction.⁹

⁸ Because Kimbrough's motion is limited to a request for injunctive relief only, the Court will not construe the motion as seeking money damages under Section 362(h) for any actions when the automatic stay was still in effect.

⁹ The court does not believe that Section 105 extends to situations such as this where other provisions of the Bankruptcy Code dictate a specific outcome. *See, e.g., United States v. Noland*, 517 U.S. 535, 543 (1996)(equitable powers cannot contravene policy choices that Congress made in drafting Bankruptcy Code); *In re Highland Superstores, Inc.*, 154 F.3d 573, 578-79 (6th Cir. 1998) ("Bankruptcy courts simply do not have free rein to ignore a statute in the exercise of their equitable powers pursuant to 11 U.S.C. § 105."). In any event, even if Section 105 were applicable, for the reasons stated elsewhere in this decision, the Court does not believe that the equities warrant the granting of injunctive relief for Kimbrough in this case.

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Unfortunately for Kimbrough, the United States Supreme Court has determined that criminal restitution obligations such as those that the Elyria Municipal Court has imposed upon Kimbrough are nondischargeable debts under Section 523(a)(7) of the Bankruptcy Code. *See Pennsylvania Dept. Of Public Welfare v. Davenport*, 495 U.S. 552, 564 (1990), *overruled statutorily on other grounds*, Criminal Victims Protection Act of 1990, Pub. L. No. 101-581, 104 Stat. 2865 (1990); *Kelly v. Robinson*, 479 U.S. 36, 53 (1986) (finding no Congressional intent to alter the longstanding rule of nondischargeability for criminal restitution obligations); *id.* at 53 (though restitution is often payable to a nongovernment victim, such punishment is intended to "focus on the State's interests in rehabilitation and punishment, rather than the victim's desire for compensation"). Accordingly, Kimbrough's motion for injunctive relief must be denied unless this Court can and should set aside Kimbrough's municipal court conviction on the theory that the complainants or the prosecutor's office impermissibly used the criminal prosecution to collect otherwise dischargeable debts, *i.e.*, the complainants' driveway repair bills.

While courts are split on whether an improper motive can ever provide the

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basis for a bankruptcy court to enjoin criminal prosecution of a debtor,¹⁰ this Court need not address that split of authority given the procedural posture of Kimbrough's criminal and bankruptcy cases. At the time that this motion was filed, Kimbrough had already entered a plea of no contest and been adjudged guilty by the Elyria Municipal Court. Because Kimbrough never challenged that decision in state court, he cannot now collaterally attack that judgment and have it set aside by this Court. *See Celotex v. Edwards*, 514 U.S. 300, 313 (1995) ("it is

¹⁰ Compare *In re Gruntz*, 202 F.3d 1074, 1085 (9th Cir. 2000) (noting that § 362 on its face "does not provide any exception for prosecutorial purpose or bad faith" and to allow such an exception "would insert phrases and concepts into the statute that simply are not there"); *In re Hollis*, 810 F.2d 106, 108 (6th Cir. 1987) ("§ 523(a)(7) preserves from discharge *any* condition a state criminal court imposes as part of a criminal sentence.")(citing *Kelly v. Robinson*, 479 U.S. at 50)(emphasis in original); with *In re Daulton*, 966 F.2d 1025, 1028 (6th Cir. 1992)("it is undisputed that the Bankruptcy Code precludes the use of criminal actions to collect debts which have been discharged in bankruptcy."); *In re Fussell*, 928 F.2d, 712, 713 (5th Cir. 1991) (holding that a bankruptcy court may enjoin a state criminal proceeding only if the requisites of *Younger v. Harris* and the Anti-Injunction Act are met); *In re Simonini*, 282 B.R. 604, 620 (W.D. N.C. 2002) (issuing permanent injunction against prosecution of Debtor for bad check debts where prosecution had "debt collection core"); *In re Muncie*, 240 B.R. 725, 727 (Bankr. S.D. Ohio 1999) (finding check cashing business to be in civil contempt for violating automatic stay where business initiated criminal proceeding against debtor for the purpose of collecting debt); *In re McMullen*, 189 B.R. 402, 406-7 (Bankr. E.D. Mich. 1995) (examining whether debtor had shown bad faith on the part of the prosecutor or complaining witness as such may "arguably violate the discharge injunction"); *In re Butler*, 74 B.R. 106, 107 (W.D. Mo. 1985) (finding violation of automatic stay because facts showed "clear case of a criminal prosecution as a guise for a collection effort).

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for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected"); *In re Singleton*, 230 B.R. 533 (6th Cir. BAP 1999)(bankruptcy court lacked subject matter jurisdiction over claim that creditor violated automatic stay after state court determined that automatic stay did not apply and debtor did not appeal state court judgment); *In re Siskin*, 258 B.R. 554, 566 (Bankr. E.D.N.Y. 2001) ("[I]f a debtor believes that the State Court wrongly decided the issue of the applicability of the automatic stay . . . , then the State Court appellate process is available to that debtor and, finally, he or she may seek direct review before the United States Supreme Court."); *In re Weller*, 186 B.R. 467, 471 (Bankr. E.D. Wis. 1995)(under doctrine of res judicata, state court's decision regarding applicability of automatic stay, right or wrong, was binding on bankruptcy court). And while Kimbrough might have challenged his prosecution as a violation of Section 362 in his state municipal court case¹¹ or through an adversary proceeding in this Court, once that

¹¹ See, e.g., *NLRB v. Edward Cooper Painting, Inc.*, 804 F.2d 934, 939 (6th Cir. 1986)(court in which litigation claimed to be stayed is pending has jurisdiction to determine whether proceeding pending before it is subject to automatic stay).

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conviction became a final judgment, it was no longer subject to collateral attack, and this Court must respect that judgment. *See Celotex v. Edwards*, 514 U.S. at 313 (refusing to permit collateral attack on injunction because doing so would "seriously undercut[] the orderly process of law"); *In re Singleton*, 230 B.R. at 536 (noting that federal trial courts may not entertain appellate review of or collateral attack on state court judgment); *In re Weller*, 189 B.R. at 471 (decision of state court, right or wrong, is binding on bankruptcy court with respect to application of automatic stay). Given the longstanding reluctance to have federal courts interfere with state criminal cases, *see, e.g., Kelly v. Robinson*, 479 U.S. at 47, this Court does not believe that Congress intended, under the Bankruptcy Code, for a debtor to be able to plead no contest to criminal charges in state court, allow that conviction go to a final judgment without challenge, and yet still allow that conviction to be subject to collateral attack by a bankruptcy court.¹²

Finally, the fact that Kimbrough entered a plea of "no contest" is irrelevant,

¹² *Cf. Chao v. Hospital Staffing Services, Inc.*, 270 F.3d 374, 383-84 (6th Cir. 2001) (suggesting in *dicta* that if state court and bankruptcy court reached different conclusions as to applicability of automatic stay, bankruptcy court's resolution would control); *In re Benalcazar*, 283 B.R. 514 (Bankr. N.D. Ill. 2002) (state court's erroneous decision that proceeding before it fell within Section 362(b)(4) exception to automatic stay was void and of no effect and was therefore subject to collateral attack in bankruptcy court).

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because such a plea has no bearing on the fact or validity of his conviction. *See generally Olsen v. Correiro*, 189 F.3d 52 (1st Cir. 1999), and cases cited therein.

While evidence of the conviction may be inadmissible under Rules 410 and 803(22) of the Federal Rules of Evidence, such a plea cannot provide the means to collaterally attack the state court conviction in this Court .¹³

Accordingly Kimbrough's motion is denied.

IT IS SO ORDERED.

/s/ Arthur I. Harris 01/13/2003

Arthur I. Harris

United States Bankruptcy Judge

¹³ For all of the reasons stated in this decision, the Court finds no need for an evidentiary hearing on the intentions of the complainants or the intentions of the prosecutor's office in pursuing the criminal prosecution of Kimbrough.