Dated: January 31 2006

Mary Ann Whipple
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:	)	Case No.: 04-34649
	)	
Paul V. Justen, Jr., and	)	Chapter 7
Linda M. Justen,	)	
	)	Adv. Pro. No. 05-3422
Debtors.	)	
	)	Hon. Mary Ann Whipple
Paul V. Justen, Jr., et al.,	)	
	)	
Plaintiffs,	)	
v.	)	
	)	
State of Ohio,	)	
	)	
Defendant.		

MEMORANDUM OF DECISION AND ORDER DENYING MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

This matter is before the court on Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction ("Motion") [Doc. # 5]. The court held a hearing on January 20, 2006, at which counsel for the parties attended in person. Plaintiffs seek an order enjoining the state criminal prosecution of Plaintiff Paul Justen. For the reasons that follow, the Motion will be DENIED.

FACTUAL AND PROCEDURAL BACKGROUND

The following facts are set forth in the Motion for Temporary Restraining Order, the affidavit of Paul Justen and the court record[1]:

Plaintiff/Debtor, Paul V. Justen ("Justen"), served as President and owner of Service Products Insulation and Fire Barrier Corporation ("Service Products"). Service Products employed individuals represented by the International Association of Heat & Frost Insulators and Asbestos Workers' Local No. 45 ("Local 45"). Service Products' agreement with Local 45 required Service Products to provide certain payroll information and make certain payments to Local 45.

On June 8, 2001, Service Products filed a petition for relief under Chapter 11 of the Bankruptcy Code. [Case No. 01-33707]. Local 45 filed a proof of claim in that case in the amount of $17,281.84. [*Id.*, Claim No. 18].On August 12, 2002, the court confirmed Service Products' Chapter 11 plan and on October 1, 2003, the case was closed.

On May 24, 2004, a representative from Local 45 filed a criminal complaint with the Toledo Police Department, allegedly claiming that Service Products failed to pay it certain deductions from employee paychecks and that such failure constituted theft. Justen acknowledges that Service Products incurred a debt owed to Local 45 for unpaid dues. [Motion for TRO, Ex. A, ¶4]. Based on the complaint filed by Local 45, Justen was indicted for theft under Ohio Revised Code § 2913.02(A)(2) and (B) on August 27, 2004. According to Justen, on the date of his arrest, a business manager for Local 45 told Justen that he was "just trying to collect his money." [*Id.*, ¶ 7]. And on April 27, 2005, another business manager for Local 45 told him that if he accepted an apprenticeship teaching position, his salary would be applied to the debt owed to the union and, although "it would be the choice of the State of Ohio as to whether the criminal charges for theft would be dropped," Local 45 would not "push the issue." [*Id.*, ¶ 8].

On June 3, 2004, after the criminal complaint was filed but before his indictment, Justen, together with his wife, filed a Chapter 7 bankruptcy petition. [Case No. 04-34649]. On August 23, 2004, they amended their Schedule F to include the claim of Local 45. [*Id.*, Doc. # 17]. The deadline for filing a complaint objecting to discharge or to determine dischargeability of a debt under 11 U.S.C. § 523(a)(2), (4) or (6) in Justen's personal bankruptcy case was September 27, 2004. *See* 11 U.S.C. § 523(c); Fed. R. Bankr.

[1] The court takes judicial notice of the contents of its case docket and the Debtors' schedules. Fed. R. Bankr. P. 9017; Fed. R. Evid. 201(b)(2); *In re Calder*, 907 F.2d 953, 955 n.2 (10th Cir. 1990).

P. 4007(c). No such complaint was filed and the court entered an order of discharge on September 29, 2004. [*Id.*, Doc. # 21]. A final decree was issued and the case was closed on October 5, 2004. [*Id.*, Doc. # 23].

On July 7, 2005, Justen filed a motion to reopen the case and a motion to enjoin the State of Ohio from prosecuting him for theft. The court granted the motion to reopen the case. But because the state criminal proceedings had subsequently been dismissed, the court denied as moot the motion to enjoin the State of Ohio. [*Id.*, Doc. # 44]. Thereafter, the case was closed again.

However, on September 16, 2005, the State of Ohio again presented the case to a grand jury and an indictment against Justen was reissued. On November 16, 2005, this court granted a second motion to reopen Justen's bankruptcy case. [*Id.*, Doc. # 54]. And on December 1, 2005, Plaintiffs filed a Complaint for Preliminary and Permanent Injunction to Enjoin State Criminal Proceedings as to Paul V. Justen, Jr. [Case No. 05-3422, Doc. #1]. The complaint names as defendant the "State of Ohio, c/o Lucas County Prosecutor." Plaintiffs filed the instant Motion for Temporary Restraining Order and Preliminary Injunction on January 11, 2006, seeking an order enjoining the state criminal proceeding.

LAW AND ANALYSIS

The court must consider the following four factors when determining whether to issue a temporary restraining order or preliminary injunction: "(1) whether the movant has a 'strong' likelihood of success on the merits; (2) whether the movant would otherwise suffer irreparable injury; (3) whether issuance of a preliminary injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of a preliminary injunction." *Summit County Democratic Central and Executive Comm. v. Blackwell*, 388 F.3d 547, 550 (6th Cir. 2004). These considerations are factors to be balanced, not prerequisites that must be met. *Frisch's Restaurant, Inc. v. Shoney's Inc.*, 759 F.2d 1261, 1263 (6th Cir. 1985).

In this case, Plaintiffs seek an order enjoining state criminal proceedings against Justen. In addressing Plaintiffs' motion, the court must consider the Supreme Court's recognition "that the States' interest in administering their criminal justice systems free from federal interference is one of the most powerful of the considerations that should influence a court considering equitable types of relief." *Kelly v. Robinson*, 479 U.S. 36, 49 (1986) (citing *Younger v. Harris*, 401 U.S. 37, 44-45 (1971). The court notes, however, that the Anti-Injunction Act, 28 U.S.C. § 2283, which generally prohibits a federal court from granting an injunction to stay proceedings in a state court, excepts from that prohibition the issuance of an injunction by a federal court if "expressly authorized by Act of Congress, or where necessary in aid of its

jurisdiction, or to protect or effectuate its judgments." Courts have found that the Bankruptcy Code's provision that "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title," 11 U.S.C § 105(a), provides Congressional authorization to enjoin state criminal proceedings when necessary to protect the integrity of bankruptcy courts and laws. *See, e.g., Howard v. Allard*, 122 B.R. 696, 700 (W.D. Ky. 1991); *Berg v. Turow (In re Berg)*, 172 B.R. 894, 897 (Bankr. E.D. Wis. 1994) (explaining that § 105(a) together with the § 524 discharge injunction provides an exception to the Anti-Injunction Act). In addition, the Supreme Court has recognized a judicial exception to the longstanding policy against federal court interference with state court proceedings evidenced by the statute "where a person about to be prosecuted in a state court can show that he will, if the proceeding in the state court is not enjoined, suffer irreparable damages." *Younger v. Harris*, 401 U.S. 37, 43 (1971).

With these principles in mind, the court first considers the likelihood of Plaintiffs' success on the merits of their complaint for preliminary and permanent injunction. Plaintiffs argue that Local 45 instituted state criminal proceedings by filing a criminal complaint during the pendency of Plaintiffs' Chapter 7 bankruptcy case in order to collect the debt owed to it by Justen and that the state criminal proceeding is being used to collect a debt that has been discharged in bankruptcy.

Plaintiffs first argument raises the issue of whether Local 45 violated the automatic stay imposed when Plaintiffs filed their petition for bankruptcy relief. *See* 11 U.S.C § 362. In *Ohio Waste Serv, Inc. v.. Fra-Mar Tire Serv., Inc.*, 23 B.R. 59 (Bankr. S.D. Ohio 1982), cited by Plaintiffs, an officer of the plaintiff company caused a check to be written against insufficient funds and the check was dishonored. After the creditor's objection to confirmation of plaintiff's Chapter 11 plan was overruled, the creditor referred the matter for investigation to the state prosecutor's office, believing that a criminal prosecution could be used as a vehicle to compel payment by the debtor. The bankruptcy court enjoined the criminal prosecution against plaintiff's principal since "[n]either the investigation leading up to the prosecution, nor the prosecution itself would have been commenced but for the action taken by [the creditor]," which the court found was in direct violation of the automatic stay. *Id.* at 60; *see also Batt v. American Rent-All (In re Batt)*, 322 B.R. 776, 779 (Bankr. N.D. Ohio 2005) (explaining that creditors may not employ the criminal judicial process as a means of avoiding the automatic stay where their primary motive is collection of a debt). The court found that [w]hile there is no way to recall that action, to vindicate the statute it is necessary to prevent so far as possible any consequences from accruing as a result of that action." *Id.* Relying on its power under § 105 to issue any order necessary to carry out the provision of the Bankruptcy Code, it enjoined the

state criminal proceeding. In this case, unlike the situation presented in *Ohio Waste,* Local 45 filed a criminal complaint *before* Justen filed his Chapter 7 bankruptcy case. Thus, actions of Local 45's agent did not violate the automatic stay imposed in Plaintiffs' bankruptcy case, at least with respect to the filing of the criminal complaint itself as contended by Justen. Local 45 was, at that time, acting within its rights to file a criminal complaint, as there was no bankruptcy case pending and no bankruptcy discharge had been entered as to Justen. Although Justen was not indicted until several months after Plaintiffs filed their bankruptcy petition, the commencement or continuation of a criminal action is not subject to the automatic stay provisions of the Bankruptcy Code. *See* 11 U.S.C. § 362(b)(1). Consequently, unlike *Ohio Waste,* there is no need in this case to fashion a remedy to prevent consequences from accruing as a result of a violation of the automatic stay.

Plaintiffs' second argument, that the state criminal proceeding is being used to collect a debt that has been discharged in bankruptcy, raises the issue of whether the criminal prosecution of Justen violates the discharge injunction imposed under 11 U.S.C. § 524(a)(2).[2] That section provides that the discharge of a debt "operates as an injunction against the commencement or continuation of an action . . . or an act, to collect [or] recover . . . such debt as a personal liability of the debtor." 11 U.S.C. § 524(a)(2). The Bankruptcy Code "does not exclude criminal prosecution from the discharge injunction if the prosecution involves an action to collect a discharged debt." *Evans v. Bank of Eureka Springs (In re Evans)*, 245 B.R. 852, 855 (Bankr. W.D. Ark. 2000); *Berg v. Turow (In re Berg)*, 172 B.R. 894, 897 (Bankr. E.D. Wis. 1994); *Brinkman v. City of Edina (In re Brinkman)*, 123 B.R. 318, 322 (Bankr. D. Minn. 1991). Section 524 contains no provision that excepts criminal prosecution from the § 524(a)(2) discharge injunction.

Two circumstances exist where courts have found that a criminal prosecution violates the discharge injunction. First, a violation occurs where the state statute under which an individual is prosecuted simply criminalizes a debtor's failure to pay the debt in question. *In re McMullen*, 189 B.R. 402, 405 (Bankr. E.D. Mich. 1995) (stating that a violation occurs if the alleged crime is in substance merely the failure to pay the debt); *In re Kilpatrick*, 160 B.R. 560, 570 (Bankr. E.D. Mich. 1993) (concluding that a state cannot criminalize a debtor's refusal to honor an obligation that constitutes a dischargeable claim under federal

[2] The issue the court must decide, at least with respect to Plaintiffs' second argument, is whether the continuation of Justen's criminal prosecution is prohibited by the existing discharge injunction imposed under § 524(a)(2). Thus, it is more accurate to characterize the relief sought with respect to this argument as declaratory rather than injunctive. *See In re McMullen*, 189 B.R. 402, 404 (Bankr. E.D. Mich. 19995). As noted in *McMullen*, however, "[f]rom a practical standpoint, . . . a determination that the prosecution is contrary to § 524(a)(2) would be tantamount to issuing an injunction." *Id.*

bankruptcy law); *Evans*, 245 B.R. at 857. Thus, "the Prosecutor must allege something more than the fact that the Debtor failed to pay the . . . debt" to insure that he does not violate the discharge injunction. *McMullen*, 189 B.R. at 405. In *McMullen*, the court found that the requirement of an "intent to defraud" in the criminal statute involved "clearly fits the bill because it targets conduct which is inherently reprehensible and which distinguishes the . . . debt from 'ordinary' debts." *Id.* The court, however, did not find that an allegation of fraud was required in order to remove prosecution under any statute from the mandates of the discharge injunction. *See id.* (stating that "[n]o real purpose would be served in attempting to generically define what that 'something more' must be" that the prosecutor must allege).

The Ohio statute under which Justen is indicted provides that "[n]o person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services . . . [b]eyond the scope of the express or implied consent of the owner or person authorized to give consent. . . ." Ohio Rev. Code § 2913.02(A)(2). As Plaintiffs argue, the Ohio statute does not require proof of fraud. Nevertheless, the purpose of the statute is to punish conduct other than simply failing to pay a debt. It punishes an individual for certain conduct taken with the purpose of depriving another of that person's own property. Like the statute at issue in *McMullen*, the Ohio statute targets conduct that is morally reprehensible and describes conduct that is distinguishable from simply failing to pay an ordinary debt. Section 2913.02(A)(2) does not simply criminalize Justen's failure to pay a debt.

The discharge injunction may also be violated if the prosecutor pursues prosecution for the purpose of collecting a debt discharged in bankruptcy or to impose sanctions for failure to pay such a debt rather than to deter crime or to punish or rehabilitate the accused. *McMullen*, 189 B.R. at 406; *Evans*, 245 B.R. at 856. However, a prosecutor has broad discretion in deciding whether or not to pursue a certain charge, *State v. Filchock*, 116 Oho App. 3d 572, 577 (1996), and "[w]here there is a legitimate motivation, the prosecution will not be enjoined because the bankruptcy courts 'were not created as a haven for criminals,'" *id.* at 857 (quoting *Barnette v. Evans*, 673 F.2d 1250, 1251 (11th Cir. 1982)). In this regard, the court notes that the law generally presumes that public officials conduct themselves in good faith and that it is Plaintiffs' burden to prove otherwise. *Id.* at 856; *McMullen*, 189 B.R. at 406.

Plaintiffs' brief in support of their Motion for Temporary Restraining Order and their argument at the hearing on the motion advance arguments relating primarily to the conduct of Local 45's agents rather than that of the Prosecutor. Specifically, Plaintiffs rely on the following facts: Local 45's business agent filed a criminal complaint against Justen; it was allegedly the first time Local 45 ever instituted a criminal

proceeding against an employer to collect payment on a debt; a business manager for Local 45 told Justen the purpose in filing the criminal complaint was to collect the debt owed to the Union; and in a post-discharge conversation, another business manager told Justen to apply for an apprenticeship teaching position so that the salary could be applied to the debt he owed the Union. If true, Plaintiffs may well succeed in proving that the agents of Local 45 filed the criminal complaint for the sole purpose of collecting a debt owed by Justen. However, as discussed above, the criminal complaint was filed before Plaintiffs filed their bankruptcy petition and, thus, such act does not serve as a basis for enjoining Justen's criminal prosecution under the statute-vindication reasoning articulated in *Ohio Waste*.[3] Moreover, the business manager's motive may not be imputed to the state prosecutor absent some evidence showing that the prosecutor is acting on behalf of Local 45 rather than on behalf of the citizens of the state in proceeding with the criminal case. *See Swain v. Dredging, Inc. (In re Swain)*, 325 B.R. 264, 269 (B.A.P. 8th Cir. 2005) (stating that a prosecutor acts on behalf of the citizens of the state and finding no agency relationship where the prosecuting attorney was not acting on behalf of nor subject to the control of the victim or complaining witness); *McMullen*, 189 B.R. at 412-13 (rejecting the argument that the motive of the complaining witness may be automatically imputed to the prosecutor). For example, a court may conclude that a prosecutor has some motive other than enforcing the state's criminal statutes and rehabilitating an offender for the benefit of society where "the evidence against the defendant is such that there is little likelihood of a guilty verdict being rendered" or where "there is a 'cozy' relationship between the prosecutor and the creditor who could stand to financially benefit from prosecution." *Id.* at 411. In other words, in order to impute a creditor's motive for filing a criminal complaint to the prosecutor, the record must show that the prosecution was undertaken as a favor to the creditor. Plaintiffs offer no evidence or argument suggesting that the prosecutor is acting solely for the benefit of Local 45.

Plaintiffs also argue that because the prosecutor may seek restitution in the criminal proceeding,[4]

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[3] Plaintiffs may also succeed in proving that Local 45's business manager violated the discharge injunction by encouraging Justen to take a position with the Union in order to pay off the debt. To the extent that Justen personally owed any debt to Local 45, that debt was discharged in Plaintiffs' bankruptcy case. However, Plaintiffs offer no evidence connecting Local 45's arguably coercive tactic to the state prosecutor.

[4] The indictment alleges theft of property valued between $5,000 and $100,000. [Def. Ex. B]. As such, the crime alleged under Ohio Revised Code § 2913.02(A)(2) is a fourth degree felony. Ohio Rev. Code § 2319.02(B)(2). A court imposing sentence upon a felony offender may impose financial sanctions that include restitution to the victim of the crime. Ohio Revised Code § 2929.18(A)(1).

the purpose of the prosecution is to collect a discharged debt. In *Kelly v. Robinson*, 479 U.S. 36 (1986), the Court found that a criminal restitution obligation was a fine or penalty payable for the benefit of the State under 11 U.S.C. § 523(a)(7) and thus was not subject to discharge in a Chapter 7 proceeding. *Id.* at 53 . The Court rejected the notion that restitution was for compensation of the victim, explaining that "the decision to impose restitution generally does not turn on the victim's injury, but on the penal goals of the State and the situation of the defendant" and that "the obligation is rooted in the traditional responsibility of a state to protect its citizens by enforcing its criminal statutes and to rehabilitate an offender by imposing a criminal sanction intended for that purpose." *Id.* at 52. Courts have found that restitution orders are excepted from discharge under § 523(a)(7) whether the restitution was ordered before or after the bankruptcy proceeding commenced. *United States v. Vetter*, 895 F.2d 456, 459 (8th Cir. 1990); *McMullen*, 189 B.R. at 409; *O'Malley v. Rarer (In re O'Malley)*, 90 B.R. 417, 421 (Bankr. D. Minn. 1988). In *McMullen*, the court rejected the argument that § 527(a)(7) is applicable only if restitution is imposed prepetition. *McMullen*, 189 B.R. at 409. The court reasoned that such a reading of the statute would result in an unseemly race to the court and "would mean that a governmental unit's rights can survive a voluntary chapter 7 only to the extent that it can secure an order imposing restitution before the bankruptcy case is commenced." *Id.* In light of *Kelly* and its progeny, Justen's liability on a debt for restitution that may be imposed in his criminal case, even if based upon prepetition conduct, was not discharged in his bankruptcy case.

In light of the foregoing, and on the evidence before it, the court cannot conclude that there is a strong likelihood that Plaintiffs will succeed in proving that the purpose of the prosecution is to collect a discharged debt in violation of the discharge injunction.[5] No evidence has been presented that would indicate that the criminal case was commenced in violation of the automatic stay or that its continuation violates the discharge injunction.

The second factor the court must consider is whether Justen will suffer irreparable injury if the

[5] The court also notes that, according to the assistant county prosecutor, the underlying allegations upon which Justen's indictment for theft under Ohio Revised Code § 2913.02(A)(2) is based include the facts that he exerted control over funds withheld from the pay of employees of Service Products that went beyond the scope of their consent and that those funds at all times remained the property of the employees. Thus, presumably, any restitution that might be ordered will be used to reimburse those employees rather than Local 45. Debts owed to the employees of Service Products, however, were neither listed nor scheduled in Plaintiffs' Chapter 7 bankruptcy case. As such, to the extent that Justen owed a prepetition debt to Service Products' employees based on his wrongdoing as alleged in the criminal proceeding, Plaintiffs have not shown that the debt was discharged in his Chapter 7 case. *See* 11 U.S.C. § 523(a)(3).

criminal prosecution is not enjoined. Plaintiffs argue that Justen will suffer irreparable injury since, in addition to substantial financial costs in defending the charges against him, he faces a felony conviction and incarceration. In *Younger*, the Supreme Court discussed the type of injury necessary to warrant enjoining a state criminal prosecution. *Younger*, 401 U.S. at 46. The Court explained as follows:

> [I]n view of the fundamental policy against federal interference with state criminal prosecutions, even irreparable injury is insufficient unless it is "both great and immediate." Certain types of injury, in particular, the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution, could not be themselves be considered 'irreparable' in the special legal sense of that term. Instead, the threat to the plaintiff's federally protected rights must be one that cannot be eliminated by his defense against a single criminal prosecution.

Id. As discussed above, in this case, Justen has failed to show that any federally protected right is threatened by the state prosecution and so has failed to show injury that justifies this court enjoining the state criminal proceeding.

Finally, while the court does not believe a restraining order would cause substantial harm to others, it finds that the public interest would not be served by entering a temporary restraining order. In light of the strong policy against federal interference in state criminal matters, together with Plaintiffs' failure to show that any interest protected under the Bankruptcy Code has been compromised by his criminal prosecution, the court finds that all of the factors discussed above weigh against granting a temporary restraining order.

THEREFORE, for the foregoing reasons, good cause appearing,

IT IS ORDERED that the Motion for Temporary Restraining Order and Preliminary Injunction be, and hereby is, **DENIED, without prejudice.**