Dated: July 02 2010

Mary Ann Whipple
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:	)	Case No.: 08-34739
	)	
Adel A. Kamal,	)	Chapter 7
	)	
Debtor.	)	Adv. Pro. No. 09-3325
	)	
Adel A. Kamal,	)	Hon. Mary Ann Whipple
	)	
Plaintiff,	)	
v.	)	
	)	
Downtown Toledo Parking Authority, et al.,	)	
	)	
Defendants.	)	
	)	

MEMORANDUM OF DECISION AND ORDER

This adversary proceeding is before the court on a motion for summary judgment [Doc. # 9] filed by Defendant Downtown Toledo Parking Authority ("DTPA"), doing business under the registered trade name ParkSmart,[1] Plaintiff's opposition [Doc. # 10] and supplemental memorandum [Doc. # 13], and

[1] Although Plaintiff has also named ParkSmart as a defendant in this proceeding, the court takes judicial notice of filings with the Ohio Secretary of State showing that ParkSmart is the registered trade name of DTPA as asserted by DTPA in its motion. *See* Fed. R. Bankr. P. 9017; Fed. R. Evid. 201(b)(2). Plaintiff does not contend otherwise.

DTPA's reply [Doc. # 11] and supplemental memorandum [Doc. # 12]. In his complaint, Plaintiff alleges that DTPA has violated the discharge injunction in effect after entry of a discharge in Plaintiff's Chapter 7 case by placing, and refusing to remove, a "hold" on Plaintiff's driver's license and automobile registration due to unpaid parking tickets issued by DTPA. DTPA moves for summary judgment and dismissal of Plaintiff's complaint in its entirety.

The district court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §1334(b) as a civil proceeding arising under Title 11. This proceeding has been referred to this court by the district court under its general order of reference. 28 U.S.C. § 157(a); General Order 84-1 of the United States District Court for the Northern District of Ohio. Proceedings to determine whether the automatic stay or discharge injunction have been violated are core proceedings that the court may hear and determine. 28 U.S.C. § 157(b)(1) and (b)(2)(I) and (O). For the reasons that follow, DTPA's motion for summary judgment will be granted.

FACTUAL BACKGROUND

Plaintiff filed for bankruptcy relief under Chapter 7 of the Bankruptcy Code on September 8, 2008. Neither DTPA nor ParkSmart were included as creditors in Plaintiff's bankruptcy schedules. [Case No. 08-34739, Doc. # 1].[2] Nevertheless, the Chapter 7 trustee entered a no asset report on October 31, 2009, and no distributions were made to creditors in Plaintiff's bankruptcy case.[3] [*Id.*, Doc. # 15]. An Order of Discharge was entered on December 31, 2008. [*Id.*, Doc. # 21].

DTPA is a non-profit corporation under § 501(c)(3) of the Internal Revenue Code. [Doc. # 1, Complaint, ¶ 4; Doc. # 4, Answer, ¶ 4]. It is a separate and distinct entity from the City of Toledo. [Complaint, ¶ 5; Answer, ¶ 5]. DTPA, among other duties, issues parking tickets in the City of Toledo. [Complaint, ¶ 16; Answer, ¶ 16]. Those tickets are entitled "Parking Invoice." [*Id.*]. According to Debora Gregory, the Toledo Parking Violations Bureau Financial Manager, every month, DTPA performs a system

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[2] 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); *St. Louis Baptist Temple, Inc. v. Fed. Deposit Ins. Corp.*, 605 F.2d 1169, 1171-72 (6th Cir. 1979) (stating that judicial notice is particularly applicable to the court's own records of litigation closely related to the case before it).

[3] Due to the fact that Plaintiff's bankruptcy case was a no-asset case, DTPA's apparent lack of notice of the case is not a factor in determining whether its claim is nondischargeable. *See Zirnhelt Madaj (In re Madaj),* 149 F.3d 467 (6th Cir. 1998) (holding that unscheduled debt owed by Chapter 7 debtors was discharged in no-asset case, even though creditors did not learn of case until after entry of discharge order).

query for violators with more than three unpaid citations that are older than ninety days. [Doc. # 9, Ex. 1, Gregory Aff. ¶5; *see* Ohio Rev. Code § 4521.10(A)(2)]. After entry of judgment against the violator, the violator's file is sent to the Ohio Bureau of Motor Vehicles. [*Id.* at ¶ 6; *see* Ohio Rev. Code § 4521.10(B)(1)]. The Ohio Bureau of Motor Vehicles then enters the violator into the Drivers with Excessive Tickets Excluded from Registration ("D.E.T.E.R.") program. [*Id.* at ¶ 7]. The Ohio Bureau of Motor Vehicles informs the violator that he has been entered into the program and must contact the individual parking agency to pay fines before registration will be allowed. [*Id.* at ¶ 8]. Checks written to pay a parking citation issued by DTPA are made payable to ParkSmart Toledo Parking Violations Bureau. [Complaint, ¶ 17; Answer, ¶ 17]. The funds received and processed by DTPA are deposited into the City of Toledo's Regular Account on a daily basis. [*Id.* at ¶ 9].

Twenty-five citations issued to Plaintiff by DTPA for parking violations in the City of Toledo remain outstanding. [*Id.* at ¶3]. Plaintiff currently owes $610.00 as a result of those citations, [*Id.* ¶ 4], all of which were issued by DTPA prior to September 8, 2008, the date Plaintiff filed his Chapter 7 petition, [Complaint, ¶ 15; Answer, ¶ 15]. A "hold" on Plaintiff's license plate renewal and registration with the Ohio Bureau of Motor Vehicles has resulted from the unpaid parking tickets issued to Plaintiff. [Complaint, ¶¶ 14, 15; Answer, ¶¶ 14, 15].

On May 7, 2010, Plaintiff presented a cashier's check in the amount of $630.00 as full payment of his outstanding parking violations and, thereafter, was provide a D.E.T.E.R. system clearance. [Doc. # 12, Ex. 5, Gregory Suppl. Aff. ¶ 3-4]. The $630.00 included $615.00 in outstanding fines and $15.00 allocated to the Ohio Bureau of Motor Vehicles for removal of the "hold." [*Id.* at ¶ 4]. However, after being submitted for payment, the cashier's check was returned stamped "RETURN REASON-C STOP PAYMENT." [Id. at ¶ 5]. After being notified of the stop payment being placed on the cashier's check, the Ohio Bureau of Motor Vehicles determined that the license plates obtained by Plaintiff in reliance on his D.E.T.E.R. clearance were obtained erroneously or fraudulently, and the D.E.T.E.R. block was reinstated. [Id. at ¶ 6-8]. DTPA admits that it has refused to cause the "hold" to be removed until all parking invoices are paid. [Complaint, ¶ 19; Answer, ¶¶ 13, 19].

LAW AND ANALYSIS

I. Summary Judgment Standard

Under Rule 56 of the Federal Rules of Civil Procedure, made applicable to this proceeding by

Federal Rule of Bankruptcy Procedure 7056, summary judgment is proper only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In reviewing a motion for summary judgment, however, all inferences "must be viewed in the light most favorable to the party opposing the motion." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-88 (1986). The party moving for summary judgment always bears the initial responsibility of informing the court of the basis for its motion, "and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits if any' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Where the moving party has met its initial burden, the adverse party "may not rest upon the mere allegations or denials of his pleading but . . . must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine issue for trial exists if the evidence is such that a reasonable factfinder could find in favor of the nonmoving party. *Id.*

II. DTPA Has Not Violated the Discharge Injunction

In his complaint, Plaintiff alleges that DTPA has violated the discharge injunction imposed under 11 U.S.C. § 524(a) by refusing to remove the "hold" on Plaintiff's license plate and registration renewal until the parking citations issued by it are paid. Section 524(a) provides that a bankruptcy 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 [discharged] debt as a personal liability of the debtor. . . ." However, DTPA argues that, as a matter of law, no violation of the discharge injunction has occurred because the debts at issue are non-dischargeable debts under 11 U.S.C. § 523(a)(7). The court agrees.

Under § 523(a)(7), which is self-executing, a Chapter 7 discharge does not discharge an individual debtor from any 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. . . ." Thus, there are three requirements for a debt to be excepted from discharge under § 523(a)(7): (1) the debt must be a fine, penalty or forfeiture, (2) the debt must be payable to and for the benefit of a governmental unit, and (3) the debt cannot constitute compensation for actual pecuniary loss. *Kelly v. Robinson*, 479 U.S. 36, 51 (1986); *Stevens v. Comm'l Collection Serv., Inc. (In re Stevens)*, 184 B.R. 584, 585 (Bankr. W.D. Wash. 1995). Such debts are nondischargeable whether they are denominated civil or criminal under local law. *See Pa. Dept. of Public Welfare v. Davenport*, 495 U.S. 552, 561-562 (1990).

As to the first and third requirement, it is generally accepted that traffic and parking fines imposed

by a municipality are penal in nature since they are imposed to facilitate the city government's regulation of traffic and parking and not a compensation for pecuniary loss. *See, e.g., Caggiano v. Office of the Parking Clerk of Boston (In re Caggiano)*, 34 B.R. 449, 450 (Bankr. D. Mass. 1983); *City of Chicago v. Gallagher (In re Gallagher)*, 71 B.R. 138, 139 (Bankr. N.D. Ill. 1987); *Stevens*, 184 B.R. at 586. In this case, it is clear that the parking fines at issue are penal in nature. The City of Toledo (the "City") has conferred "limited police powers" upon traffic aides employed by DTPA, which powers include the issuing of parking tickets in the City. Toledo Mun. Code § 129.08. All fines collected by DTPA are deposited into a City financial account. Although Plaintiff asserts, without evidentiary support, that DTPA's employees are not deputized and do not have police powers and, thus, argues that amounts owed for citations issued by its employees do not constitute a fine for purposes of § 523(a)(7), the Toledo Municipal Code clearly provides otherwise.

Plaintiff also argues that a factual issue exists as to what portion of the debt owed is a penal sanction and what portion is a surcharge to compensate for pecuniary loss and that only the penal sanction is nondischargeable. In response, DTPA offers the supplemental affidavit of Gregory stating that of the $630.00 required to be paid in order to clear the block placed on Plaintiff's license and registration renewal privileges, $615.00 is owed for outstanding fines and $15.00 for removal of the block by the Ohio Bureau of Motor Vehicles. As discussed above, Plaintiff has failed to demonstrate a genuine issue of fact regarding the penal nature of the $615.00. With respect to the $15.00 fee for removal of the block, even assuming that the fee is not a penalty, there is no evidence that the fee is imposed by DTPA or that it is a prepetition fee that was discharged in Plaintiff's Chapter 7 case. The earliest such a fee could have been owed by Plaintiff is the date on which the block or "hold" was placed on Plaintiff's renewal privileges. Only then would a fee be imposed to remove the block. There is no evidence or allegation that the hold was imposed prepetition. The discharge injunction under 11 U.S.C. § 524(a) applies only to acts to collect prepetition debts discharged in Plaintiff's bankruptcy case. Thus, Plaintiff's allegations in his complaint and the evidence of record puts only attempts to collect the debt owed for the outstanding parking fines in issue, which, as explained above are imposed to facilitate the City's regulation of traffic and parking and not to compensate for pecuniary loss. Thus, the court concludes that the amounts owed for the parking violations in this case are fines or penalties within the meaning of § 523(a)(7).

The second requirement under § 523(a)(7) is that the debt be "payable to and for the benefit of a governmental unit." The Sixth Circuit has held that the plain and unambiguous language of the statute

requires that the fine or penalty be both payable to *and* for the benefit of a governmental unit. *Hughes v. Sanders*, 469 F.3d 475, 479 (6th Cir. 2006). There is no dispute that the prepetition debt owed by Plaintiff for parking violations is payable for the benefit of the City. The parking fines collected and processed by DTPA are deposited into a City account. However, because payment of the parking citations are to be made to ParkSmart and because ParkSmart is owned and operated by DTPA, which is a legal entity separate and distinct from the City, Plaintiff argues that DTPA cannot satisfy the requirement that the debt be "payable to" a governmental unit.

DTPA, on the other hand, argues that § 101(27) of the Bankruptcy Code defines the term "governmental unit" broadly and that it falls within that definition. That subsection provides the following definition:

> The term "governmental unit" means "United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States . . ., a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government.

11 U.S.C. § 101(27). Thus, the requirement that the fine be payable to a governmental unit is satisfied if it is payable either to the City or to a "department, agency, or instrumentality" of the City.

There is no bright line rule or specific test for ascertaining whether an entity is an instrumentality of government. However, legislative history suggests that Congress intended to define "governmental unit" broadly and sheds some light on the meaning of "instrumentality":

> 'Governmental unit' [is defined] in the broadest sense. The definition encompasses the United States, a state, commonwealth, district, territory, municipality, or foreign state, and a department, agency, or instrumentality of any of those entities. 'Department, agency, or instrumentality' does not include an entity that owes its existence to state action, such as the granting of a charter or a license but that has no other connection with a state or local government or the federal government. The relationship must be an active one in which the department, agency, or instrumentality is actually carrying out some governmental function.

H.R. Rep. No. 595, 95th Cong., 1st Sess. 311, reprinted in 1978 U.S. Code Cong. & Ad. News 5963, 6268; S. Rep. No. 989, 95th Cong., 2d Sess. 24, reprinted in 1978 U.S. Code Cong. & Ad. News 5787, 5810.

Thus, according to the legislative history, the entity must have an active relationship with the government entity and carry out some governmental function. *T I Fed. Credit Union v. DelBonis*, 72 F.3d 921, 931 (1st Cir. 1995); *see United States v. State of Mich.*, 851 F.2d 803, 806 (6th Cir. 1998) (finding a "significant factor in determining whether a particular entity is a federal instrumentality is whether it

performs an important governmental function"); *Mount Olivet Cemetery Assoc. v. Salt Lake City*, 164 F.3d 480, 487 (10th Cir. 1998) (finding cemetery association was not a federal instrumentality where it did not perform a significant governmental function). If the entity's purpose reflects goals and activities which augment the government's provision of some public function, the inquiry next focuses on the extent to which the government controls the implementation of those functions. *In re Las Vegas Monorail Co.*, – B.R. –, No. BK-S-10-104640-BAM, 2010 WL 1857241, *16 (Bankr. D. Nev. April 26, 2010). As one court explained:

> This inquiry is necessary because many entities have public functions-the Red Cross and other charities come to mind-but are not instrumentalities of the State because of the lack of any State process to control their activities. If there is State control coupled with public function, then the nature and extent of that control determine whether the entity is an instrumentality. In this regard, the type of control is critical. If the control retained or exercised is necessary or designed to allow the State to manage its finances . . . the entity is an instrumentality. If the control, however, is more akin to oversight or regulation, then the entity is not an instrumentality.

Id.; *see In re Marcano*, 288 B.R. 324, 335 (Bankr. S.D.N.Y. 2003) (finding nominally private tenant's association an instrumentality of the city where pervasive entwinement of the city in the workings and composition of the association existed). Other factors considered include whether the entity is organized for profit and is engaged in its own commercial activity, *United States v. Boyd*, 378 U.S. 39, 45 (1964) (in suit to recover state sales and use taxes, finding that contractor was using the property in connection with its own commercial activities was a "vital" consideration in its determination that contractor was not a federal instrumentality); and whether the entity's revenues are added to the coffers of the government, *Mount Olivet Cemetery Assoc.*, 164 F.3d at 487.

Section 4521.05(D) of the Ohio Revised Code provides that "[a] municipal corporation . . . that establishes a parking violations bureau . . . may contract with any governmental or nongovernmental entity to provide services in processing, collecting, and enforcing parking tickets issued by law enforcement officers and civil judgments and default civil judgments entered pursuant to this chapter." The City has established the City of Toledo Parking Violations Bureau and has granted the Director of Finance authority to contract with any non-governmental entity to provide the services set forth in § 4521.05(D). *See* Toledo Mun. Code § 309.02(a) and (d). Although DTPA asserts that it is authorized by these provisions to process, collect and enforce parking violations, its contract with the City is not of record in this case.

Nevertheless, applying the factors set forth above, the evidence that is before the court is sufficient

to support a finding that DTPA's activities of issuing parking tickets and collecting fines for the parking violations reflect an important public function – facilitating the City's regulation of traffic and parking – and that implementation of this function is controlled by the City so as to render DTPA an instrumentality of the City. The authority to issue parking tickets in the City is conferred on DTPA's employees by city ordinance. *See* Toledo Mun. Code § 129.08. Although Plaintiff argues that DTPA's demand letter for payment labeled "parking invoice" suggests a commercial transaction distinguishable from a parking ticket issued by a governmental entity, that label is insufficient to create a factual issue regarding the public function nature of DTPA's activities in light of evidence before the court to the contrary. It is undisputed that DTPA is a non-profit corporation and that it is responsible for collecting the funds paid for parking tickets issued by it. It is also undisputed that DTPA deposits on a daily basis the funds received and processed by it into a City account. On this evidence, a reasonable factfinder could find that DTPA is an instrumentality of the City such that DTPA is a "governmental unit" within the meaning of § 523(a)(7).

DTPA also cites *Stevens v. Commercial Collection Service, Inc. (In re Stevens)* in support of its argument that the "payable to a governmental unit" requirement is met in this case. In *Stevens*, the court rejected an argument that this requirement was not met where the plaintiff's debt owed to the county for traffic fines was payable to the defendant collection service rather than to the county. The court found that pursuant to its contract with the county, the defendant was the county's agent for purposes of collection and the county received all of the funds collected by the defendant. *Stevens*, 184 B.R. at 586. The court rejected the plaintiff's argument that a debt payable to an agent for the benefit of its principal is no longer payable to the principal. *Id.* The court found such an interpretation "contrary to general agency principles and creates no legally meaningful distinction for purposes of Section 523(a)(7)." *Id.*; *see In re Games*, 213 B.R. 773, 776 (Bankr. E.D. Wash. 1997).

In this case, the facts supporting a finding that DTPA is an instrumentality of the City also support a finding that it acts as an agent of the City in collecting traffic fines. Thus, under either theory, the undisputed evidence shows that the prepetition debt owed by Plaintiff for parking violations is a debt payable to a governmental unit.

CONCLUSION

DTPA having met its initial burden under Rule 56, and Plaintiff having failed to set forth facts showing that there is a genuine issue for trial, the court will grant DTPA's motion for summary judgment.

THEREFORE, for the foregoing reasons, good cause appearing,

IT IS ORDERED that DTPA's motion for summary judgment [Doc. # 9] be, and hereby is, **GRANTED.** A separate judgment on the complaint in accordance with this Memorandum of Decision will be entered.