

MAR 22 2007

UNITED STATES BANKRUPTCY COURT
 NORTHERN DISTRICT OF GEORGIA
 ATLANTA DIVISION

| | | |
|-----------------------------------|---|-----------------------------------|
| In re: | : | BANKRUPTCY CASE NUMBER |
| | : | |
| JOHN MICHAEL DIERKES, | : | 05-60983-MGD |
| | : | |
| Debtor, | : | CHAPTER 7 |
| _____ | : | |
| JOHN MICHAEL DIERKES, | : | ADVERSARY CASE NUMBER |
| | : | |
| Plaintiff, | : | 05-06022-MGD |
| v. | : | |
| CRAWFORD ORTHODONTIC CARE, | : | |
| P.C., | : | |
| | : | |
| Defendant. | : | |
| _____ | : | |
| CRAWFORD ORTHODONTIC CARE, | : | ADVERSARY CASE NUMBER |
| P.C., | : | |
| | : | |
| Plaintiff, | : | 05-06122-MGD |
| v. | : | (Consolidated under 05-06022-MGD) |
| JOHN MICHAEL DIERKES, | : | |
| | : | |
| Defendant. | : | |
| _____ | : | |

ORDER

The above-styled adversary proceedings are before the Court on Crawford Orthodontic Care, P.C.'s ("Crawford") Motion for Summary Judgment regarding its claim against John Michael Dierkes ("Debtor" or "Dierkes") (Docket No. 28) and Crawford's Motion for Summary Judgment regarding Dierkes' claims against Crawford (Docket No. 31).¹ The issues before the Court on summary judgment are (1) whether Dierkes is entitled to damages for

¹ Unless otherwise indicated, docket number citations refer to the docket in Adversary Proceeding No. 05-06022-MGD.

violations of the automatic stay pursuant to 11 U.S.C. § 362(h) (Adversary Proceeding No. 05-06022-MGD); (2) whether Crawford is entitled to a judgment against Dierkes on a promissory note (Adversary Proceeding No. 05-06122-MGD); and (3) whether Dierkes' is entitled to damages for breach of contract (Dierkes' Counterclaim, Adversary Proceeding No. 05-06122-MGD). For the reasons set forth herein, Crawford's Motion for Summary Judgment on Dierkes' claim for damages under § 362(h) is **GRANTED** and Crawford's Motion for Summary Judgment on its promissory note action and Dierkes' counterclaim for breach of contract is **DENIED** and the claims are **REMANDED** to the State Court of Fulton County.

I. FACTS

The material facts, as set forth in Crawford's Statements of Undisputed Facts (Docket No. 33) and admitted to in Dierkes' Statement of Undisputed Facts (Docket No. 36) (the "Statements"), are as follows: Dierkes purchased an orthodontic practice from Crawford on June 11, 1999, and Dierkes executed a promissory note in the amount of \$61,500 as consideration for the sale. (Statements, ¶¶ 1-3). Crawford subsequently filed a lawsuit against Dierkes in the State Court of Fulton County alleging that Dierkes defaulted on the promissory note and also filed an action to repossess the equipment and furnishings that secured the note in the State Court of Cobb County. Dierkes defaulted in the Cobb County repossession action, but answered the Fulton County suit, disputing Crawford's allegation that Dierkes had defaulted on the note and asserting that non-payment was excused by Crawford's breach of the contract. (*Id.*, ¶¶ 4-5; *See* Dierkes' Answer, Defenses and Counterclaim, Adversary Proceeding No. 05-06122-MGD Docket No. 1, Exhibit B).

In his counterclaim, Dierkes alleged that Crawford breached the contract by failing to disclose correct account receivable balances, by failing to forward to Dierkes insurance payments on those balances, by failing to disclose the nature of certain relationships between Crawford and its patients, by contacting patients and urging them to continue treatment with Crawford after Crawford's sale of the business to Dierkes, and by including a defective air compressor as part of the sale. (Statements, ¶¶ 7, 10, 13, 16, and 18). The purchase agreement between the parties does not contain a non-solicitation provision prohibiting Crawford from

contacting its former patients or provide warranties regarding the condition of any equipment sold with the dental practice, but it is disputed whether the agreement makes warranties regarding account receivable balances or the nature of Crawford's relationship with patients. (*Id.*, ¶¶ 8, 11, 14, 15, and 19).

Dierkes filed his bankruptcy case on January 17, 2005, and then instituted an adversary proceeding seeking the turnover of property that was repossessed from his business on behalf of Crawford on January 6, 2005, and damages related thereto. (*Id.*, ¶¶ 23 and 24). Dierkes' Complaint asserted that Dierkes had an ownership interest in the repossessed property. (*Id.*, ¶ 25). Neither the Complaint nor Dierkes' Brief Opposing Summary Judgment allege that the repossessed property was owned by anyone other than Dierkes, but Dierkes asserts that "two other individuals" notified Crawford of their ownership interest during the repossession process. (*Id.*, ¶ 26).

Dierkes asserts that genuine issues of material fact remain regarding whether Crawford breached the purchase agreement by (1) selling accounts receivable to Dierkes that Crawford knew to be uncollectible; (2) listing incorrect and improper "expected time of treatment" dates on patient records without making corresponding purchase price adjustments; (3) selling equipment to Dierkes that Crawford knew to be in disrepair without disclosing the same; and (4) collecting payments from third parties on behalf of patients after selling the accounts receivable to Dierkes. (Dierkes' Statement at 4-5).

II. PROCEDURAL HISTORY

Given the complicated history of Dierkes' bankruptcy case and the adversary proceedings before the Court, and the profound impact that history has on this Court's ruling, a detailed recitation of the procedural posture is warranted.

A. Bankruptcy Case No. 05-60983-MGD

Dierkes filed a petition for relief under Chapter 13 of the Bankruptcy Code on January 17, 2005, Bankruptcy Case No. 05-60983-MGD. Shortly thereafter, Dierkes filed a complaint for turnover of property and the Court ordered Crawford to turnover certain equipment and

furnishings used in Debtor's dental practice. Subsequent to the Court's order authorizing conditional turnover, and Crawford's compliance with that order, Crawford filed a motion for relief from the automatic stay regarding the subject property. After the Court's final order approving the turnover, the parties entered into a consent order denying relief from the stay in which Debtor agreed to make adequate protection payments to Crawford, with the intention of repaying his debt to Crawford during the course of his Chapter 13 case. (Bankruptcy Docket Nos. 12 and 19).

After the parties entered into the February 17, 2005 adequate protection consent order, Crawford filed its secured proof of claim regarding the subject equipment and furnishings in the amount of \$57,440.10 on April 4, 2005. (Proof of Claim No. 13). Debtor objected to the claim on September 1, 2005, on the basis that Debtor was no longer indebted to Crawford on the subject promissory note due to alleged breaches of contract by Crawford. (Bankruptcy Docket No. 54). Debtor filed a second objection to Crawford's claim on January 12, 2006, requesting that the Court void Crawford's security interest in the subject equipment and furnishings on the basis that Crawford's financing statement expired and was not continued pursuant to O.G.C.A. § 11-9-515. (Bankruptcy Docket No. 74). Debtor's objections to Crawford's claim were pending when Debtor's case was voluntarily converted to Chapter 7 on February 27, 2006.²

Upon conversion to Chapter 7, Angelyn M. Wright was appointed Chapter 7 Trustee (the "Trustee"). On October 28, 2006, after abandoning Debtor's claims against Crawford (and Debtor's home), the Trustee filed a Report of No Distribution, indicating that no property was available for distribution from Debtor's estate. Debtor received his Chapter 7 discharge and the bankruptcy case was closed on December 14, 2006.

² At the time of conversion to Chapter 7, Debtor's case was pending under Chapter 11 of the Bankruptcy Code. The Chapter 13 case was converted to Chapter 11, on Debtor's Motion, on May 26, 2005.

B. Adversary Proceeding Nos. 05-06022-MGD and 05-06122-MGD

On January 20, 2005, Dierkes commenced Adversary Proceeding No. 05-06022-MGD by filing a complaint against Crawford seeking the turnover of property and actual and punitive damages and attorney's fees pursuant to 11 U.S.C. § 362(h). Dierkes' complaint alleged that, pre-petition, Crawford repossessed property of Dierkes' bankruptcy estate that was used to operate Dierkes' dental office and that Crawford refused to turnover the property when notified of Dierkes' bankruptcy petition. On January 21, 2005, the Court entered an order directing conditional turnover of the subject property (Docket No. 5) and on February 15, 2005, the Court entered an order determining that the repossessed equipment and furnishings were in fact property of the estate subject to turnover pursuant to 11 U.S.C. § 542 (Docket No. 11). Crawford complied with the Court's initial turnover order and the property thereafter remained in Debtor's possession.

On April 12, 2005, Crawford commenced Adversary Proceeding No. 05-06122-MGD by filing a Notice of Removal of its state court action against Dierkes on the promissory note executed by Dierkes and the counterclaims Dierkes brought against Crawford for breach of contract and tortious interference with contractual relations. On the motion of Crawford, the two pending adversary proceedings were consolidated for procedural purposes under Adversary Case No. 05-06022-MGD on September 7, 2005.

Following the conversion of Debtor's bankruptcy case to Chapter 7, a status conference regarding Dierkes' bankruptcy case and the two pending adversary proceedings was held on May 11, 2006. At the conference, the Trustee represented to the Court that she was still in the process of evaluating Debtor's estate, but would most likely dismiss or abandon the claims that Debtor brought against Crawford. On July 17, 2006, the Chapter 7 Trustee filed her Notice of Abandonment of Debtor's § 362(h) damage claims set forth in Adversary Proceeding No. 05-06022-MGD and Debtor's counterclaims against Crawford set forth in Adversary Proceeding No. 05-06122-MGD. (Bankruptcy Docket No. 112).

C. The Motions Currently Before the Court

After initially filing and then withdrawing its motions for summary judgment in Debtor's bankruptcy case, Crawford filed the Motions for Summary Judgment currently before the Court in Adversary Proceeding No. 05-06022-MGD on January 13, 2006.³ (Docket Nos. 28 and 31). Crawford's Motions seek summary judgment in its favor regarding Debtor's § 362(h) claim for damages (Adversary Proceeding No. 05-06022-MGD) and regarding Crawford's claim against Debtor on the promissory note and Debtor's counter claim for breach of contract and tortious interference (Adversary Proceeding No. 05-06122-MGD).

Debtor timely filed his Motion in Opposition to Crawford's Motions for Summary Judgment, along with his brief and statement of undisputed facts, on January 24, 2006. Dierkes' Brief in Opposition asserts that summary judgment is not appropriate on Crawford's promissory note claim because Dierkes' has raised and proven a failure of consideration defense. (Docket No. 35, Dierkes' Brief at 6-7). Dierkes further asserts that his breach of contract claims against Crawford should survive summary judgment because genuine issues of material fact exist. (Id. at 7-9). Dierkes then states that he "hereby formally abandons the remaining claims set forth in his Answer and Counterclaim." (Id. at 9). The Court therefore deems Dierkes' claim against Crawford for tortious interference with contractual relations, set forth in Dierkes' Answer and Counterclaim, dismissed and will not rule thereon.

III. STANDARD APPLICABLE TO MOTIONS FOR SUMMARY JUDGMENT

Rule 56(c) of the Federal Rules of Civil Procedure, applicable herein by Rule 7056 of the Federal Rules of Bankruptcy Procedure, provides that summary judgment shall be rendered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the 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." *See also, Celotex Corp. v. Catrett*,

³ Crawford contemporaneously filed its briefs in support of summary judgment and statements of undisputed facts. (Docket Nos. 29, 30, 32, and 33).

477 U.S. 317, 323 (1986); *Maniccia v. Brown*, 171 F.3d 1364, 1367 (11th Cir. 1999). In reviewing a motion for summary judgment, the court must view the record and all inferences therefrom in a light most favorable to the non-moving party. See *WSB-TV v. Lee*, 842 F.2d 1266, 1270 (11th Cir. 1988). “The party seeking summary judgment bears the initial burden to demonstrate to the [trial] court the basis for its motion for summary judgment and identify those portions of the pleadings, depositions, answers to interrogatories, and admissions which it believes show an absence of any genuine issue of material fact If the movant successfully discharges its burden, the burden then shifts to the non-movant to establish, by going through the pleadings, that there exist genuine issues of material fact.” *Hairston v. Gainesville Sun Publ’g. Co.*, 9 F.3d 913, 918 (11th Cir. 1993), *reh’g denied*, 16 F.3d 1233 (11th Cir. 1994). The non-movant may not simply rest on his pleadings, but must show, by reference to affidavits or other evidence, that a material issue of fact remains. Fed. R. Civ. P. 56.

**IV. CRAWFORD’S MOTION FOR SUMMARY JUDGMENT ON
DIERKES’ CLAIM FOR DAMAGES FOR VIOLATIONS OF THE
AUTOMATIC STAY**

As set forth in the facts detailed above, and indicated by the absence of any assertion by Dierkes that a dispute remains, there is no dispute as to the material facts surrounding Dierkes’ complaint for turnover and prayer for damages related thereto.⁴ It follows that summary judgment is appropriate on this issue.⁵

⁴ In its brief, Crawford states that Dierkes “has done nothing to advance [his] claim” for money damages. (Crawford’s Brief, Docket No. 32, at 4). This statement is largely true in that Dierkes has made no allegations regarding actual damages suffered as a result of Crawford’s actions, nor has he requested any amount certain for attorneys fees related to bringing his turnover complaint. None of the pleadings filed by Dierkes since his initial complaint address his § 362(h) claim, including his Brief in Opposition to Crawford’s Motions for Summary Judgment. It is possible that Dierkes intended to abandon his claim for damage, as he abandoned his claim for tortious interference with contractual relations, with his statement that he “hereby formally abandons the remaining claims set forth in his Answer and Counterclaim.” However, Dierkes’ claim for damages was set forth in his complaint against Crawford (Adversary Proceeding No. 05-06022-MGD), not in his Answer or Counterclaim, thus the claim remains before the Court.

⁵ Though the Trustee’s abandonment of Dierkes’ breach of contract claims against Crawford affects this Court’s jurisdiction over those claims (*See infra* section IV), the Court retains subject matter jurisdiction over Dierkes’ § 362(h) claim, which arises under Title 11.

On January 6, 2005, pursuant to an order entered by the State Court of Cobb County, certain collateral covered by the security agreement executed by Dierkes was repossessed with the assistance of the Fulton County Marshall's office. On January 17, 2005, Dierkes filed his petition for relief under chapter 13 of the Bankruptcy Code, and on January 20, he filed the complaint seeking the turnover of the equipment and furnishings and damages related thereto. Dierkes' claim for damages is asserted under 11 U.S.C. § 362(h) as in effect on January 17, 2005 when this Chapter 13 case was filed.⁶ That section provided:

An individual injured by any wilful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and in appropriate circumstances, may recover punitive damages.

Section 362(h) creates a statutory remedy for individuals who are injured by a violation of the automatic stay. As set out above, the language of the section provides that the injured individual "shall recover" actual damages, indicating that the intention was to make the award of actual damages mandatory upon the finding of a wilful violation. *Ramirez v. Fuselier (In re Ramirez)*, 183 B.R. 583, 587 (B.A.P. 9th Cir. Ariz. 1995). However, before reaching the issue of damages, a court must first determine whether there was any violation of the stay and, if so, whether such violations were wilful.

11 U.S.C. § 362 provides in pertinent part:

(a) [A] petition filed under section 301, 302, or 303 of this title ... operates as a stay, applicable to all entities, of -

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor ...;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate; [and]

⁶ On October 17, 2005 the Bankruptcy Code was amended and the text of this provision was changed slightly and was renumbered as 11 U.S.C. § 362(k).

(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 under this title.

The Court has previously ruled that the subject equipment and furnishings repossessed by Crawford are property of the estate, thus § 362(a) applies.⁷ (Docket No. 11). Clearly, if Crawford had repossessed the subject property after Dierkes filed his bankruptcy petition, such actions would have constituted violations of the automatic stay. However, the undisputed facts make it clear that Crawford legally repossessed the subject property pre-petition, as authorized by order of the State Court of Cobb County. An emergency hearing on Dierkes' complaint for turnover was held the day the complaint was filed, the Court entered an order directing turnover of the property, and Crawford turned over the subject property. Any violation of the stay by retaining possession after request for turnover was technical and short-lived and there is no evidence that it was wilful. There being no wilful violation of the stay, Dierkes' claim for damages under § 362(h) fails as a matter of law and Crawford is entitled to summary judgment in its favor.

V. CRAWFORD'S MOTION FOR SUMMARY JUDGMENT ON ITS PROMISSORY NOTE ACTION AND DIERKES' COUNTER CLAIM FOR BREACH OF CONTRACT

On August 20, 2004, Crawford filed suit against Dierkes in the State Court of Fulton County, seeking a judgment for the amount due under the promissory note (Fulton County

⁷ After allowing the parties to submit briefs on the issue of whether Dierkes had an interest in the repossessed equipment and furnishings at the time he filed his bankruptcy petition, such that the subject property would be considered property of the estate subject to turnover, the Court entered an order determining that the subject equipment and furnishings were in fact property of the estate. (Docket No. 11). In Crawford's brief in support of its motion for summary judgment, and in Dierkes' response thereto, the parties discuss whether Dierkes changed his position on the ownership of the subject property, later asserting that the property belonged to his wife. Crawford alleges that Dierkes changed his position knowing that if the property were ruled to be Dierkes', the repossession was legal and thus there was no violation of the stay for which damages could be recovered. (Crawford's Brief, Docket No. 32, at 17-18). Dierkes responds to these allegations by explaining that his claimed possessory interest is not inconsistent with other individuals' ownership interests. (Dierkes' Brief, Docket No. 35, at 11). Nonetheless, the Court has previously analyzed the ownership of the subject property and will not revisit its ruling that the subject property is property of the estate.

State Court Civil Action No. 04VS071090). Dierkes filed his Answer and Counterclaim, alleging breaches of contract and tortious interference with contractual relations, on September 30, 2004. Dierkes filed his bankruptcy petition on January 17, 2005, and on April 12, Crawford commenced Adversary Proceeding No. 05-06122-MGD by filing a Notice of Removal of the state court litigation.

The Trustee abandoned Dierkes' claims against Crawford on July 17, 2006, abandoning any interest the estate had in those claims and revesting such interests in Dierkes. This brings into question whether this Court retains jurisdiction over the claims. *See VonGrabe v. Mecs (In re Vongrabe)*, 332 B.R. 40, 43 (Bankr. M.D. Fla. 2005). While neither party has raised the issue, presumably because the motions for summary judgment before the Court were filed before Dierkes converted his case to Chapter 7 (and before Dierkes' estate was fully administered and the bankruptcy case was closed), the Court has a duty to consider its subject matter jurisdiction throughout the proceedings. *See Kontrick v. Ryan*, 540 U.S. 443, 455, 124 S. Ct. 906, 915 (2004).

A. Subject Matter Jurisdiction

Pursuant to 28 U.S.C. § 1334(b), the district courts have "original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." In the Northern District of Georgia, the District Court has referred all proceedings within its bankruptcy jurisdiction to the bankruptcy judges. 28 U.S.C. § 157; LR 83.7, N.D. Ga. This confers full judicial power to the bankruptcy court with respect to "core" proceedings as defined by 28 U.S.C. § 157(b)(2) and limited power with respect to "non-core" proceedings. *In re Lemco Gypsum, Inc.*, 910 F.2d 784, 787 (11th Cir. 1990). For subject matter jurisdiction to exist with respect to "non-core" or "related to" proceedings, some nexus must exist between the title 11 case and the related civil proceeding. *Id.* The appropriate test for determining whether a civil proceeding is so related is "whether the outcome of the proceeding could conceivably have an effect on the estate being administered in bankruptcy" or "alter the debtor's rights, liabilities, options, or freedom of action...and which in any way impacts upon the handling and administration of the bankrupt estate." *Id.*

at 788 (quoting *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3rd Cir. 1984)).

The claims set forth in Adversary Proceeding No. 05-06122-MGD are state law claims, removed to this Court from the State Court of Fulton County. Because they are not claims arising under title 11, they must be “related to” the bankruptcy proceeding for this Court to have jurisdiction over the claims. Crawford’s promissory note action against Dierkes’ is one and the same as Crawford’s claim against Dierkes’ bankruptcy estate.⁸ The adversary proceeding, therefore, is essentially an action to allow Crawford’s claim against Debtor’s bankruptcy estate. At the time the proceeding was commenced, Dierkes’ bankruptcy case was under Chapter 13 (and then briefly Chapter 11) and the allowance or disallowance of Crawford’s claim, and the determination of Dierkes’ counterclaims against Crawford, would have had an effect on the administration of Dierkes’ bankruptcy estate such that this Court had “related to” subject matter jurisdiction over the proceedings.

However, in the process of converting Dierkes’ case to Chapter 7 and Dierkes subsequently receiving his discharge, this Court lost its subject matter jurisdiction over the proceedings. Once the Trustee abandoned Dierkes’ claims against Crawford, filed her report of no distribution, and Dierkes’ discharge was issued, the outcome of the claims and counterclaims set forth in Adversary Proceeding No. 05-06122-MGD could no longer have an effect on the administration of the bankruptcy estate – the estate had already been fully administered. Because the Trustee abandoned Dierkes’ claims, any recovery by Dierkes will not be distributed to his creditors through his estate and because the estate has already been fully administered, any recovery by Crawford will not affect the allocation of assets to other creditors. The resolution of these claims can have no effect on the estate and this Court, therefore, has no subject matter jurisdiction over them and cannot rule thereon.

B. Abstention

To the extent that this Court could conceivably have jurisdiction over these claims,

⁸ Crawford filed a proof of claim in Dierkes’ bankruptcy case (Proof of Claim No. 13) for the same amount as the judgment Crawford sought in state court and this adversary proceeding.

the Court concludes that abstention is appropriate in this case. 28 U.S.C. § 1334(c)(1) provides that:

“nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.”

Other bankruptcy courts in this circuit have considered the following factors when considering “discretionary” or “permissive” abstention under § 1334(c)(1):

- (1) The extent to which state law issues predominate over bankruptcy issues;
- (2) the difficulty of unsettled nature of the applicable law;
- (3) the presence of a related proceeding commenced in state court or other non-bankruptcy court;
- (4) the basis of bankruptcy jurisdiction, if any, other than 28 U.S.C. § 1334;
- (5) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case;
- (6) the substance rather than form of an asserted “core” proceeding;
- (7) the feasibility of severing state law claims from core bankruptcy matters to all judgments to be entered in state court with enforcement left to the bankruptcy court;
- (8) the burden of the bankruptcy court’s docket;
- (9) the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties;
- (10) the existence of a right to a jury trial; and
- (11) the presence in the proceeding of non-debtor parties.

See, e.g., Twyman v. Wedlo, Inc., 204 B.R. 1006, 1016 (Bankr. N.D. Ala. 1996); *Wood v. Ghuste (In re Wood)*, 216 B.R. 1010, 1014 (Bankr. M.D. Fla. 1998).

While the issues presented in the adversary proceeding in question are not particularly difficult or unsettled questions of law, the claims consist solely of state law issues (as they were originally brought in state court), there is no basis for jurisdiction independent from § 1334, and there is no longer a related bankruptcy case pending. In short, there is no reason to allow these state law claims to proceed in this Court where Debtor’s estate has been fully

administered and his bankruptcy case is closed.

C. Remand

Adversary Proceeding No. 05-06122-MGD was commenced by the removal of the parties' state court litigation pursuant to 28 U.S.C. § 1452(a), which provides that:

“[a] party may remove any claim or cause of action in a civil action...to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title.”

Subsection (b) of that Section goes on to state that:

“[the] court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground.”

Seeing that this Court has no subject matter jurisdiction over the claims in questions, and to the extent that jurisdiction exists the Court abstains, the Court concludes that remanding the claims to the State Court of Fulton County is appropriate pursuant to 28 U.S.C. § 1452(b).

D. The Effect of Dierkes' Discharge on Future State Court Litigation

As stated above, Crawford's promissory note action against Dierkes is one and the same with Crawford's proof of claim filed in Dierkes' bankruptcy case. Though Dierkes' objections to Crawford's claim were pending at the time the case was converted to Chapter 7, Dierkes lost standing to object to Crawford's claim upon conversion.⁹ The Chapter 7 Trustee did not object to Crawford's claim, and in fact abandoned Dierkes' claims against Crawford, thus Crawford's proof of claim was allowed as filed. There were no assets available for distribution to Dierkes' creditors and his debts, including his debt to Crawford which was listed as a disputed claim on Schedule D, were discharged pursuant to 11 U.S.C. § 727.

Once a debtor receives a discharge, § 524 voids judgments against debtors based on

⁹ Where no surplus will exist after distributing the debtor's estate, a Chapter 7 debtor lacks standing to object to a proof of claim because they are insolvent and thus have no pecuniary interest in the estate. *See, e.g., In re George*, 23 B.R. 686 (Bankr. S.D. Fla. 1982); *In re Silverman*, 37 B.R. 200 (S.D.N.Y. 1982); *Willemain v. Kivitz*, 764 F.2d 1019 (4th Cir. 1985); *Caserta v. Tobin*, 175 B.R. 773 (S.D. Fla. 1994).

pre-petition debts and “operates as an injunction against the commencement or continuation of an action... to collect, recover, or offset any [discharged] debt as a personal liability of the debtor.” 11 U.S.C. § 524; *See also Ford v. Darracott (In re Ford)*, 35 B.R. 277, 278 (Bankr. N.D. Ga. 1983) (Norton, J.). A creditor, however, may be able to set off or recoup its claim against a debtor under certain circumstances.

Section 553 of the Bankruptcy Code provides that a creditor may “offset a mutual debt owing by such creditor to the debtor that arose before the commencement of the case under this title against a claim of such creditor against the debtor that arose before the commencement of the case.” Though the language of § 524(a)(2) suggests that a creditor may not “offset” a debtor’s pre-petition debt post-discharge, the majority of courts conclude that discharge does not bar subsequent setoff when raised as a defense to a debtor’s claims against the creditor. *Collier on Bankruptcy*, 15th Ed. Rev. P. 553.08; *See, e.g., In re Ford*, 35 B.R. at 280; *Anthem Life Ins. Co. v. Izaguirre (In re Izaguirre)*, 166 B.R. 484, 493 (Bankr. N.D. Ga. 1994) (Massey, J.); *In re Jones*, 289 B.R. 188, 192-93 (Bankr. M.D. Fla. 2002). In *Ford*, the Court reasoned that the sections are not in conflict because the defensive use of § 553 does not violate the “spirit” of § 524(a)(2) as a total prohibition of debt collection efforts. Other courts have circumvented the perceived conflict by characterizing the setoff as a right of recoupment, which is not codified in the bankruptcy code. *See, e.g., Brown v. General Motors Corp.*, 152 B.R. 935 (W.D. Wis. 1993). Under the former theory the focus is on the nature of the recoupment or setoff as a *defense* to the debtor’s claim, which merely adjusts the claim of the debtor, whereas under the latter theory, the focus is on the exclusion of the right of recoupment from the definition of a “claim” or “debt,” thus bringing it outside the scope of § 542. Whether justified on either theory, the law is clear that a creditor may use its pre-petition claims against a debtor to defend itself in a post-discharge action by debtor to recover from the creditor based on claims arising from the same transaction. Recoupment will not violate § 524(a)(2) where it merely reduces the claim of the debtor-plaintiff. *See*

Izaguirre, 166 B.R. at 493.

Dierkes' pre-petition obligation to Crawford on the promissory note was discharged in bankruptcy. Crawford, therefore, may not pursue its promissory note action against Dierkes, as such action would clearly violate the discharge injunction. However, in the event that Dierkes pursues his claims against Crawford for breach of contract, Crawford may raise its claim against Dierkes defensively, in an effort to reduce any recovery by Dierkes.¹⁰

VI. CONCLUSION

Crawford's pre-petition repossession of Debtor's equipment and furnishings was lawful and Crawford timely complied with the Court's order directing Crawford to turnover the property. No wilful violation of the stay occurred and thus an award of damages is not warranted. Following the Trustee's abandonment of Dierkes' claims against Crawford and the full administration of Dierkes' estate, this Court no longer has subject matter jurisdiction over Crawford's promissory note action or Dierkes' counterclaims for breach of contract. To the extent this Court may retain jurisdiction over such claims, abstention and remand are appropriate. Accordingly, it is

ORDERED that Crawford Orthodontic Care, P.C.'s Motion for Summary Judgment with respect to Dierkes' claim for damages under 11 U.S.C. § 362(h) is hereby **GRANTED**.

IT IS FURTHER ORDERED that Crawford Orthodontic Care P.C.'s Motion for Summary Judgment on its promissory note action against Dierkes' and Dierkes'

¹⁰ Other than noting that Crawford filed a secured proof of claim in the amount of \$57,440.10, which was not disallowed, this Court has made no findings on the validity or merits of either party's claims. Also noting that a creditor's secured claim should be reduced by any value or proceeds received through repossession or foreclosure, this Court has made no findings on the value of either party's claims.

counterclaim for breach of contract is **DENIED** and the claims are **REMANDED** to the State Court of Fulton County.

The Clerk shall serve a copy of this Order upon the parties on the attached distribution list.

SO ORDERED this the 22nd day of March, 2007.



MARY GRACE DIEHL
UNITED STATES BANKRUPTCY JUDGE

Distribution List

A. Keith Logue
3423 Weymouth Court
Marietta, GA 30062

Robert W. Hughes
Hughes & Associates, P.C.
Suite B
2415 West Park Place Boulevard
Stone Mountain, GA 30087

John A. Lockett III
McGuire Woods LLP
The Proscenium, Suite 2100
1170 Peachtree Street
Atlanta, GA 30309

John Michael Dierkes
305 Broadmeadow Cove
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