



IT IS ORDERED as set forth below:

Date: April 05, 2007

Paul W. Bonapfel
U.S. Bankruptcy Court Judge

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

| | | |
|-------------------|---|----------------------------|
| IN THE MATTER OF: | : | CASE NUMBER: A05-83719-PWB |
| | : | |
| RONALD L. KELLY, | : | |
| | : | IN PROCEEDINGS UNDER |
| | : | CHAPTER 7 OF THE |
| Debtor. | : | BANKRUPTCY CODE |
| _____ | : | |
| | : | |
| WILLIE MORRIS and | : | |
| WILLIAM BYNUM, | : | |
| | : | |
| Plaintiffs | : | ADVERSARY PROCEEDING |
| | : | NO. 06-6369 |
| v. | : | |
| | : | |
| RONALD L. KELLY, | : | |
| | : | |
| Defendant. | : | |

**ORDER DENYING MOTION TO DISMISS
AND SCHEDULING STATUS CONFERENCE**

The Plaintiffs, who allege they are former employees of the Debtor and companies operated by the Debtor, seek a determination that the Debtor's discharge should be denied pursuant to 11 U.S.C. § 727(a)(2), (a)(3), (a)(4)(A), (a)(4)(B), (a)(4)(D), and (a)(5), and that their claims

under the Fair Labor Standards Act (“FLSA”) should be excepted from discharge pursuant to 11 U.S.C. §§ 523(a)(2) and (a)(6). The Debtor moves to dismiss the Plaintiffs’ complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, made applicable to this proceeding by Rule 7012 of the Federal Rules of Bankruptcy Procedure. The basis for the Debtor’s argument appears to be that the Plaintiffs are not entitled to relief under FLSA and, if so, they are not creditors in his case. If the Plaintiffs are not creditors in his case, they cannot bring a compliant objecting to discharge or objecting to the dischargeability of their debts. *See* 11 U.S.C. § 727(c)(1); § 523(c)(1).

When considering a Rule 12(b)(6) motion, the Court must consider the complaint in a light most favorable to the plaintiff. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). A complaint should not be dismissed unless it is clear that the plaintiff can prove no set of facts in support of his claim which would give him relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

The Debtor contends that the Plaintiffs have failed to state a claim upon which relief may be granted under FLSA because they were independent contractors, not employees of the Debtor and his companies. As independent contractors, the Plaintiff contends, they are not entitled to the protection afforded by FLSA. The Debtor represents that under FLSA, courts determine whether an individual is an employee or an independent contractor by applying an “economic realities” test, a fact sensitive determination that considers multiple factors in the relationship between the employer and the employee/independent contractor as set forth in *Freund v. Hi-Tech Satellite, Inc.*, 182 F. App’x 782 (11th Cir. 2006). In support of his contention that the Plaintiffs fail this test, the Debtor has attached discovery responses and the Debtor’s affidavit.

The Court concludes that this is an inquiry not suited for a Rule 12(b)(6) motion. The purpose of a Rule 12(b)(6) motion is not to “attempt to refute the complaint or to present a different

set of allegations.” *Sanner v. Board of Trade*, 62 F.3d 918, 925 (7th Cir. 1995). Instead, it is for the limited circumstance where a plaintiff can prove no set of facts to support his claim.

Typically, a court does not consider evidence offered by a defendant who seeks dismissal of a complaint pursuant to Rule 12(b)(6). The allegations of the complaint are deemed true and the defendant seeks dismissal because the facts as stated in the complaint fail to state a claim as a matter of law.

A court may consider evidence in connection with a Rule 12(b)(6) motion and, thus, treat the motion to dismiss as a motion for summary judgment, but only if the court has given all parties the reasonable opportunity to present all material made pertinent by a summary judgment motion. The court did not request that the parties proceed on a summary judgment track and does not deem it appropriate to do so at this early stage of the case. Here, the Plaintiffs’ claims may turn on whether they were employees or independent contractors under FLSA, a fact-sensitive determination. Discovery has not commenced in this adversary proceeding, and had not been completed in the District Court case at the time this proceeding was filed. Thus, none of the parties is completely capable of addressing the FLSA issues at this stage. Regardless of whether the Plaintiffs may ultimately prevail on their claims, the Court concludes the complaint sufficiently states claims for relief to survive a Rule 12(b)(6) motion.

Nevertheless, the factual issue of whether the Plaintiffs are employees or independent contractors for purposes of FLSA, among other potential issues, must be resolved in order for the Court to determine issues under § 523 and/or § 727. It appears that the Plaintiffs’ District Court case, *Bynum et al. v. Kelly*, 1:04-CV-3402-GET, is currently stayed based upon the filing of the Debtor’s bankruptcy case. Because it is in the interest of all parties to resolve these issues expeditiously, the Court will schedule a status conference to consider (1) pretrial procedures and

discovery, if needed; and (2) whether it is appropriate to modify the automatic stay to permit the parties to proceed in the District Court case to resolve issues of liability under FLSA. Accordingly, it is

ORDERED that the Debtor's motion to dismiss is DENIED. It is further

ORDERED AND NOTICE IS HEREBY GIVEN that the Court shall hold a status conference on May 15, 2007, at 11:00 a.m., in Courtroom 1401, U.S. Courthouse, 75 Spring Street, S.W., Atlanta, Georgia, to consider (1) pretrial procedures and discovery, if needed; and (2) whether it is appropriate to modify the automatic stay to permit the parties to proceed in the District Court case to resolve issues of liability under FLSA.

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