UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	)	CHAPTER 7
KEVIN WRIGHT BUCKLEY,	)	CASE NO. **12-65335** – MHM
Debtor.	)	
KEVIN WRIGHT BUCKLEY,	)	
Plaintiff,	)	**ADVERSARY PROCEEDING NO. 14-5330**
v.	)	
MIHIR C. PATEL, ROOPAL PATEL,	)	
Defendants.	)	

ORDER GRANTING JUDGMENT ON THE PLEADINGS

This adversary proceeding is before the court on Defendants' *Motion for Judgment on the Pleadings* filed January 12, 2014 (Doc. No. 5). Plaintiff filed a complaint initiating this adversary proceeding October 20, 2014, alleging that Defendants acted in bad faith by filing a police report and seeking criminal prosecution in an attempt to collect a debt in violation of the Discharge Order issued in Plaintiff's Chapter 7 Case, No.12-65335 (Doc. No. 1 at 30-31). Plaintiff also alleges that Defendants are barred by judicial estoppel from pursuing any claims against Plaintiff with regard to the debt based on the fact that Defendants failed to allege a claim against Plaintiff through the use of an adversary proceeding during Plaintiff's Chapter 7 bankruptcy case (Doc. No. 1 at 35). Defendants now argue that Plaintiff failed to state a claim.

STANDARD OF REVIEW

Pursuant to Federal Rule of Civil Procedure 12(c), incorporated in Federal Rule of Bankruptcy Procedure 7012(b), a court should grant a motion for judgment on the pleadings when no material facts are disputed and the moving party is entitled to judgment as a matter of law. FED. R. BANKR. P. 7012(b); *Cannon v. City of West Palm Beach*, 250 F.3d 1299, 1301 (11th Cir. 2001). A Rule 12(c) motion filed by the defendant challenges the sufficiency of the complaint like a motion under Rule 12(b)(6). *See In re Dorsey*, 497 B.R. 374, 382 (Bankr. N.D. Ga. 2013). Accordingly, Rule 12(c) employs the same legal standard as Rule 12(b)(6). *Id.* This standard requires that for a defendant's motion to be granted, when viewing the pleadings in the light most favorable to the non-moving party, the complaint must contain no set of facts that support "a claim to relief that is plausible on its face." *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

FACTUAL BACKGROUND

The material facts in this adversary proceeding are not in genuine dispute. Plaintiff was a general building contractor operating as a company under Kevin Buckley Builders, Inc. ("Builders") (Doc. No. 1. at 7). Defendants entered into a Contract with Builders November 27, 2011 to improve Defendant's real property (Doc. No. 1 Exhibit "A"), ("Contract").

Plaintiff deposited Defendants' check in the amount of $50,000.00 into Builders' bank account as an initial deposit November 29, 2011 (Doc. No. 1 Exhibit "C"). Defendants wired an additional $50,000.00 to Builders' bank account January 9, 2012, pursuant to the terms of the Contract (Doc. No. 1 Exhibit "C"). Defendants' attorney issued a letter to Plaintiff January 25, 2012, alleging breach of the parties' Contract (Doc. No. 1 Exhibit "B").

Builders filed Chapter 7 case no. 12-53727 February 10, 2012. The case was closed March 30, 2012.

Defendants and their attorney met with two investigators from Cobb County Sheriff's Office alleging theft by Plaintiff February 29, 2012 (Doc. 1 at 17). Defendants' attorney provided investigators documentation regarding Builders' Chapter 7 bankruptcy case filing (Doc. 1 Exhibit "C"). Following the meeting, investigator Bozich of the Cobb County Sheriff's Department commenced an investigation, which included: (1) issuing subpoenas for Plaintiff's bank statements; (2) obtaining copies of subcontractors' liens filed on Defendants' property; and (3) contacting subcontractors to determine if they received payment from Plaintiff (Doc. 1 Exhibit "C").

Plaintiff filed a personal Chapter 7 case, no. 12-65335, June 19, 2012 and received a discharge October 9, 2012. The deadline for filing a complaint under 11 U.S.C. § 523(c), alleging that debt is excepted from discharge, or U.S.C.§ 727(a) asserting that the discharge should be denied, was September 17, 2012. Defendants took no action to object to the discharge under either provision.

Investigator Bozich obtained a warrant on Plaintiff January 27, 2014, for theft by conversion of payment (Doc. 1 Exhibit "C"). Plaintiff was indicted October 3, 2013 by a grand jury in Cobb County, Georgia for one count of Theft of Conversion of Payments for Real Property Improvements under O.C.G.A. § 16-8-15 (Doc. No. 1 Exhibit 'D").

DISCUSSION

Plaintiff asserts Defendants violated the discharge injunction by meeting with Cobb County investigators to pursue criminal prosecution of Plaintiff. 11 U.S.C. §524(a)(2) 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." Sanctions can be issued against a creditor who willfully violates the discharge injunction. 11 U.S.C. §105. In order to be in held in contempt of the discharge injunction the creditor must: (1) know the injunction was invoked; and (2) intend the actions to violate the injunction. *Matter of Faust*, 270 B.R. 310, 315 (Bankr. M.D. Ga. 1998). "While the discharge injunction is broad, it is not absolute. Neither the automatic stay nor the discharge injunction bars the commencement or continuation of a criminal investigation or prosecution by the state." *Otten v. Majesty Used Cars, Inc.*, 2013 WL 1881736, *16 n.10 (Bankr. E.D. N.Y. 2013); 11 U.S.C. § 362 (b)(1); *Kelly v. Robinson*, 479 U.S. 36, 47-48(1986); *Younger v. Harris*, 401 U.S. 37, 43-44 (1971).

Defendants did not violate the discharge injunction by meeting with investigators February 29, 2012 because no discharge order was entered on the docket in either Plaintiff's or Builders' case at the time. Builders did not receive, nor was it entitled to, a discharge in Chapter 7 case no. 12-53727: pursuant to 11 U.S.C. §727(a) (1) "the court shall grant the debtor a discharge unless… the debtor is not an individual." Builders is not an individual and, thus, is not entitled to receive a discharge. Although Plaintiff was entitled to and did receive a discharge in his personal Chapter 7 case, no. 12-65335, the Discharge Order was not entered on the docket until October 9, 2012, which was approximately 6 months after Defendants met with Cobb County investigators.

Furthermore, Defendants' act of reporting Plaintiff's alleged crime after receiving notice of Builders' bankruptcy filing is not a violation of the automatic stay pursuant to 11 U.S.C. § 362. The criminal proceeding is against Plaintiff, not his company, and the automatic stay did not take effect in Plaintiff's personal bankruptcy case until June 19, 2012, approximately three and half months after Defendants met with Cobb County investigators.

Plaintiff further alleges that the continuation of the criminal prosecution is solely to collect a debt in violation of this Court's Discharge Order in Plaintiff's personal Chapter 7 case. In *Barnette v. Evans,* the Eleventh Circuit Court of Appeals adopted a two–prong test for determining whether a bankruptcy court should enjoin a state criminal prosecution on the grounds that it will frustrate the bankruptcy judge's jurisdiction to

discharge a debt. *Barnette v. Evans*, 673 F.2d. 1250, 1252 (11th Cir. 1982) (reversing bankruptcy court's injunction where debtor was indicted for theft by deception for writing bad checks). First, the debtor must show the prosecution is brought in bad faith. *Id.; See, e.g., Tenpins Bowling, Ltd. v. Alderman (In the Matter of Tenpins Bowling, Ltd.),* 32 B.R. 474,480 (Bankr.M.D.Ga.1983) (discussing the application of *Barnette).* Second, the debtor must establish that it would be no defense to the criminal prosecution that the prosecution was brought for the purpose of collecting a dischargeable debt. *Id.; See, e.g., In re Perry,* 312 B.R. 720, 726 (Bankr. M.D. Ga. 2004).

Plaintiff provided no evidence to support a finding that the prosecution was brought in bad faith. See *Sheppard v. Piggly Wiggly (In re Sheppard)*, 2000 WL 33743081 (Bankr.M.D.Ga.2000) (finding Respondent acted in bad faith when Respondent personally swore out a warrant post-petition for Debtor's arrest as a consequence of Debtor's having written a bad check pre-petition). Unlike the respondent in *Sheppard*, Defendants in this case did not take any action to pursue the criminal prosecution of Plaintiff except for meeting with investigators. Rather, it was the State that decided to continue the prosecution by conducting its own investigation, obtaining a warrant, and submitting the evidence to grand jury. "It is the prosecutor's discretion, not the whims of the complaining witness that determines whether a criminal case will proceed." *In Re Smith*, 301 B.R. 96, 102 (Bankr. M.D. Ga. 2003).

Furthermore, the alleged crime in this case is more than failure to pay a debt. Theft by conversion of payments for property improvements requires an "intent to defraud," which is more than a mere failure to pay a debt. O.C.G.A. § 16-8-15(a). The statute provides, "a failure to pay for material or labor furnished for such property improvements shall be prima-facie evidence of intent to defraud." O.C.G.A. § 16-8-15 (b). Whether the debt is dischargeable has no bearing on whether Plaintiff is criminally liable for his conduct. "A debtor cannot utilize bankruptcy to discharge criminal liability, a criminal judgment, or a criminal restitution order." *Otten v. Majesty Used Cars, Inc.*, 2013 WL 1881736, *16 n.10 (Bankr. E.D. N.Y. 2013) (citing to *Kelly v. Robinson*, 479 U.S. 36, 50 (1986)).

Judicial Estoppel

Plaintiff further alleges Defendants are barred by judicial estoppel from pursuing any claims against Plaintiff with regard to the debt based on the fact that Defendants failed to make an appearance or allege a claim against Plaintiff through the use of an adversary proceeding during Plaintiff's Chapter 7 bankruptcy case. The doctrine of judicial estoppel was created to protect the "integrity of the judicial process" by preventing "a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another." *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001). In *New Hampshire*, the Supreme Court noted the following factors in determining whether to employ the doctrine of judicial estoppel: (1) whether a party's

later position is "clearly inconsistent" with its earlier position; (2) whether the party succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create "the perception that either the first or the second court was misled"; and (3) whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. *New Hampshire v. Maine*, 532 U.S. 742, 750-751 (2001), *see also Jaffe v. Bank of America, N.A.*, 395 Fed. Appx. 583, 587 (11th Cir. 2010) (reciting the same factors). The court may consider the facts of each particular case, as these factors are not "inflexible prerequisites." *New Hampshire*, 532 U.S.at 750-751 (2001).

First, the State of Georgia is the party asserting a position in the criminal prosecution, not Defendants. Even if we consider Defendants to be the party asserting a position in the criminal proceeding, Defendants' position in the criminal proceeding is not "clearly inconsistent" with an earlier position taken in Plaintiff's bankruptcy proceedings. A party's allegedly inconsistent positions must have been "made under oath in a prior proceeding." *Barger v. City of Cartersville, Ga.*, 348 F.3d 1289, 1293 (11th Cir. 2003). Defendants took no any action in Plaintiff's bankruptcy case and thus, did not allege an inconsistent position under oath in a prior bankruptcy proceeding. Furthermore, Defendants did not succeed in persuading a court to accept an earlier inconsistent position because they took no action during Plaintiff's bankruptcy proceedings. "Absent

success in a prior proceeding, a party's later inconsistent position introduces no risk of inconsistent court determinations and thus, poses little risk to judicial integrity." *New Hampshire v. Maine*, 532 U.S. 742, 750-751 (2001).

CONCLUSION

After reviewing all filings in this matter and considering the facts in a light most favorable to the non-moving party, Defendants are entitled to judgment on the pleadings on all issues advanced in Plaintiff's complaint. Accordingly, it is hereby

ORDERED that the Motion is ***granted.***

IT IS SO ORDERED, this the 13th day of February 2015.

MARGARET H. MURPHY
UNITED STATES BANKRUPTCY JUDGE