

In re:	:	CHAPTER 13
	:	
GERALD E. THOMPSON,	:	
	:	
Debtor.	:	Bankruptcy No. 02-12586 (KJC)
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GERALD E. THOMPSON,	:	
Plaintiff,	:	
	:	
v.	:	Adv. No. 02-807
	:	
ROBERT HEWITT,	:	
Defendant.	:	

BY: KEVIN J. CAREY, UNITED STATES BANKRUPTCY JUDGE.

BACKGROUND

- (1) Sometime in August 2001, criminal proceedings were commenced in the Superior Court of Cape May County, NJ (the “NJ Court”) against the plaintiff on the charge of theft by deception (the “NJ Criminal Case”);
- (2) On August 27, 2001, the plaintiff filed a chapter 13 bankruptcy case in this Court, that was later converted to a chapter 7 case (Bky. No. 01-32128);
- (3) The plaintiff listed the defendant as a creditor in his bankruptcy schedules for bankruptcy case no. 01-32128;

- (4) On February 6, 2002, the plaintiff received a discharge in his chapter 7 case;
- (5) On February 21, 2002, the plaintiff filed a second chapter 13 petition before this Court, commencing the above-captioned bankruptcy case;
- (6) On April 12, 2002, the plaintiff entered a guilty plea and the NJ Court sentenced the plaintiff to five years of probation, restitution of \$22,785, plus costs, and ordered the plaintiff to pay \$500 per month beginning on May 17, 2002, which payments were to be made to the probation office (the “Restitution Payments”);
- (7) The plaintiff contends that the NJ Court has ordered the plaintiff to provide for Restitution Payments in his chapter 13 plan or be subject to further proceedings before the NJ Court, which the plaintiff suggests could result in his possible incarceration;¹
- (8) On July 18, 2002, the plaintiff filed this adversary proceeding against the defendant seeking “an order directing the Defendant to cease and desist from prosecuting the NJ Case or be subject to actual and punitive damages suffered by the [plaintiff] and an award of reasonable attorneys’ fees and any costs incurred in vindicating same;”²

¹In support of the contention that the NJ Court had ordered the plaintiff to provide for the Restitution Payments in his chapter 13 plan, the plaintiff offered only Exhibit B to the plaintiff’s complaint, a copy of a computer printout listing two violation of probation hearings scheduled for hearing before the NJ Court on July 12, 2002, which includes handwritten notes. It is impossible to conclude from an examination of Exhibit B that this exhibit supports the plaintiff’s contentions, so I need not address the issue of whether a state court, under these circumstances, possesses the authority to enter such an order in light the bankruptcy court’s exclusive jurisdiction to consider confirmation of a chapter 13 plan. 28 U.S.C. §§157(b)(2)(L), 1334; 11 U.S.C. §1325.

²The plaintiff’s initial request for relief sought an order which included injunctive relief against the NJ Court itself. Upon prompting from this Court that the plaintiff consider *this* Court’s authority to enjoin a state court from acting under these circumstances, the plaintiff chose to limit his request to injunctive relief against the defendant. See Order dated July 18, 2002.

- (9) On July 18, 2002, the plaintiff filed the Motion and requested that it be heard on an expedited basis;
- (10) On July 25, 2002, an evidentiary hearing was held to consider the Motion, at which the defendant appeared and participated *pro se*.

DISCUSSION

Because a preliminary injunction is an extraordinary remedy, it is granted only if (1) the plaintiff is likely to succeed on the merits; (2) denial will result in irreparable harm to the plaintiff; (3) granting the injunction will not result in irreparable harm to the defendant; and (4) granting the injunction is in the public interest. *The Nutrasweet Co. v. Vit-Mar Enterprises, Inc.*, 176 F.3d 151, 153 (3d Cir. 1999). Failure to establish any element renders a preliminary injunction inappropriate. *Id.* Here, plaintiff failed to establish parts (1), (2) and (4) of this test.

First, the plaintiff has not shown a likelihood that he would succeed on the merits. The plaintiff argues that any obligation arising out of the criminal proceedings was discharged in his chapter 7 case and, therefore, any action to enforce the criminal restitution obligation violates 11 U.S.C. §524(a)(3). However, state court criminal restitution awards are not discharged in a chapter 7 bankruptcy case. *Kelly v. Robinson*, 479 U.S. 36, 107 S.Ct. 353, 93 L.Ed.2d 216 (1986). The plaintiff's reliance on *Rashid v. Powel (In re Rashid)*, 210 F.3d 201 (3d Cir. 2000) is misplaced, since the *Rashid* Court was considering the dischargeability of a *federal* criminal restitution obligation arising from the Victim and Witness Protection Act ("VWPA"), 18 U.S.C. §1336. The *Rashid* Court noted that it was not faced with the same federalism concerns that were present in the *Kelly* case. *Rashid*, 210 F.3d at 208, n.3.

Alternatively, the debtor argues that the automatic stay in place from his current chapter

13 filing prevents further criminal proceedings to enforce the restitution obligation. Bankruptcy Code §362(b)(1) expressly excepts the continuation of the state court criminal proceeding from the reach of the automatic stay - - even if the criminal proceeding's purpose is to collect a debt or enforce payment of a criminal restitution obligation. *Gruntz v. Los Angeles (In re Gruntz)*, 202 F.3d 1074, 1085-87 (9th Cir. 2000)(overruling *Hucke v. Oregon*, 992 F.2d 950 (9th Cir. 1993)); *Bryan v. Rainwater*, 254 B.R. 273, 278 (N.D.Ala. 2000).

Second, the plaintiff has not proved irreparable harm. The only evidence that the debtor is likely to be imprisoned by the NJ Court for failure to make Restitution Payments is the debtor's bare assertion that it will do so. The debtor presented no order, no transcript, and no other evidence of any kind that imprisonment was likely under the circumstances.

The plaintiff also maintains that he cannot afford to pay the restitution imposed as part of his sentence; rather, he can afford to make payments only to his mortgagee. The plaintiff's alleged financial inability to make the Restitution Payments is a matter left first to the NJ Court for consideration; moreover, at the July 25, 2002 hearing, the defendant stated that he would not oppose reduction of the monthly payments required by the restitution award if requested by the plaintiff.

Finally, the debtor also fails to meet the fourth prong of the test for a preliminary injunction. Enjoining state criminal proceedings is contrary to the public interest of allowing a state to protect its citizens by prosecuting criminal actions. Criminal prosecution of a debtor is brought on behalf of all citizens of the state, not just a particular creditor. *Gruntz*, 202 F.3d at 1086 citing *Davis v. Sheldon (In re Davis)*, 691 F.2d 176, 178-79 (3d Cir. 1982). See also *Kelly*, 479 U.S. at 362-63 ("Because criminal proceedings focus on a State's interests in rehabilitation

and punishment, rather than the victim's desire for compensation, we conclude that restitution orders imposed in such proceedings operate for the benefit of the State. Similarly, they are not assessed for ... compensation of the victim.")(internal quotation marks omitted). Nor would an injunction further the purposes of the Bankruptcy Code. By enacting §362(b)(1), "Congress has specifically subordinated the goals of economic rehabilitation and equitable distribution of assets to the states' interest in prosecuting criminals." *Gruntz*, 202 F.3d at 1086.

For the foregoing reasons, the Motion will be denied. An appropriate order follows.

BY THE COURT:

KEVIN J. CAREY
UNITED STATES BANKRUPTCY JUDGE

Dated: August 13, 2002

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

In re:	:	CHAPTER 13
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GERALD E. THOMPSON,	:	
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Debtor.	:	Bankruptcy No. 02-12586 (KJC)

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GERALD E. THOMPSON,	:	
Plaintiff,	:	
	:	Adv. No. 02-807
v.	:	
	:	
ROBERT HEWITT,	:	
Defendant.	:	

ORDER

AND NOW, this 13th day of August, 2002, upon consideration of plaintiff's "Motion For A Preliminary Injunction" (the "Motion"), and the defendant's opposition thereto, and for the reasons set forth in the foregoing Memorandum, it is hereby **ORDERED** and **DECREED** that the Plaintiff's Motion is **DENIED**.

BY THE COURT:

KEVIN J. CAREY
UNITED STATES BANKRUPTCY JUDGE

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