

FILED

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

97 SEP -3 PM 4: 02

U.S. BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA

IN RE:

Frederick W. Von Cannon f/d/b/a
Makeway Productions,

Debtor.

C/A No. 96-73809

Adv. Pro. No. 96-8320

Frederick W. Von Cannon f/d/b/a
Makeway Productions,

Plaintiff,

JUDGMENT

v.

Chapter 7

David P. Schwacke in his Official Capacity as
Solicitor of the Ninth Judicial Circuit,

Defendant.

Based upon the Findings of Fact and Conclusions of Law as recited in the attached Order of the Court, judgment shall be entered in favor of the Defendant and the Defendant, the Solicitor of the Ninth Judicial Circuit of the State of South Carolina shall not be enjoined from continuing criminal prosecution against the Debtor.


UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
September 3, 1997.

ENTERED

SEP 04 1997

J.G.S.

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FOR THE DISTRICT OF SOUTH CAROLINA

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Frederick W. Von Cannon f/d/b/a
Makeway Productions,

Plaintiff,

ORDER

v.

Chapter 7

David P. Schwacke in his Official Capacity as
Solicitor of the Ninth Judicial Circuit,

Defendant.

THIS MATTER is before the Court pursuant to the Debtor's Complaint seeking an injunction pursuant to 11 U.S.C. § 524¹ to prevent the Solicitor of the Ninth Judicial Circuit of the State of South Carolina from continuing "bad check" criminal prosecution against the Debtor. Based upon the evidence presented at the trial of this matter, the Court makes the following Findings of Fact and Conclusions of Law:

¹ Further references to the Bankruptcy Code, 11 U.S.C. § 101, *et seq.* shall be by section number only.



ENTERED

SEP 04 1997

J.G.S.

FINDINGS OF FACT

On March 30, 1996 the Debtor tendered a check in the sum of \$1,461.00 to A.J. Rowe d/b/a Cajun Papa ("Mr. Rowe") for services provided related to a concert that the Debtor was promoting. The Debtor testified that the check was for services provided by Mr. Rowe, that Mr. Rowe performed the services to the Debtor's satisfaction and that the Debtor knew at the time he presented the check that he did not have sufficient funds in the checking account to cover the check. Thereafter, the Debtor stopped payment on the check. Mr. Rowe then made numerous contacts with the Debtor to obtain the money in place of the payment upon which payment had been stopped; however, after Mr. Rowe no longer believed that he would be paid for the check by the Debtor, he then swore out a warrant for the criminal charge of "Stopping Payment on a check with Fraudulent Intent" pursuant to § 34-11-80 of the South Carolina Code.

After the issuance of the criminal warrant, the Debtor filed his Chapter 7 bankruptcy petition on May 31, 1996 and in his schedules listed the debt to Mr. Rowe. The Debtor was subsequently granted a discharge. After receiving his discharge, the Debtor was then advised that the Solicitor's Office of the Ninth Judicial Circuit still intended to go forward with the criminal prosecution of the bad check charges. The Debtor then filed this adversary proceeding against the Solicitor and Mr. Rowe to enjoin the criminal proceedings pursuant to § 524 of the Bankruptcy Code. Pursuant to a consent order of August 14, 1997, which states that Mr. Rowe did not continue to take an active part in the continued prosecution of the criminal proceedings, Mr. Rowe was dismissed as a defendant.

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CONCLUSIONS OF LAW

Section 524(a)(2) "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 such debt as a personal liability of the debtor, whether or not discharge of such debt is waived." 11 U.S.C. § 524(a)(2). The Debtor takes the position that because his debt to Mr. Rowe was discharged in his Chapter 7 case, the Solicitor's continued prosecution of the Debtor on bad check charges arising from this debt is in violation of the post-discharge injunction. For the following reasons, and especially because of the stipulation that the criminal proceedings were pending at the time of the filing of the Chapter 7 petition, the Court disagrees. The general rule is that state criminal proceedings should not be impeded absent bad faith, harassment, and extraordinary circumstances. Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.ed.2d 669 (1971).

Following Younger v. Harris two lines of cases have ensued: First, (the majority) those which require a determination of the "principal motivation" for the prosecution. If the principal motivation of the prosecutor or complainant is to collect a discharged debt, an injunction should lie. See e.g., In re Delay, 48 B.R. 282 (W.D. Mo. 1984); Matter of Butler, 74 B.R. 106 (W.D. Mo. 1985); In re Whitaker, 16 B.R. 917 (Bkrtcy. M.D. Tenn. 1982); In the Matter of Ohio Waste Service, Inc., (Bkrtcy. S.D. Ohio, W.D. 1982); Johnson v. Lindsey, (Bkrtcy. M.D. Fla. 1981); In re Schultz, Case No. 82-01089, Complaint No. 82-0934 (Bkrtcy. D. S.C. 11/24/82); In re Lake, 11 B.R. 202 (Bkrtcy. S.D. Ohio 1981). Second: the cases which have espoused what is sometimes called the Eleventh Circuit Rule -- that when the prosecution has been pursued in "bad faith", an injunction should lie.

Frank v. Grainger (In re Frank), 88-0125, C-88-0262, slip op. at p.6 (Bkrtcy. D.S.C. 2/3/89)

(JBD) aff'd C.A. 2:89-0564-1 (D.S.C. 6/19/89).

The burden of proving entitlement to an injunction rests upon the Debtor.



Next to consider is whether it should be incumbent on the Debtor to prove that the prosecution is in bad faith, or whether the Prosecutor should instead be required to establish his good faith. In this regard, it bears emphasizing that the law presumes that public officials conduct themselves in good faith. See, e.g., Linan-Faye Construction Co. v. Housing Authority of the City of Camden, 49 F.3d 915, 924 (3d Cir.1995); Hoffman v. United States, 894 F.2d 380, 385 (Fed.Cir.1990); see also 31A C.J.S., Evidence § 126 (1995) ("It is presumed that all persons act in good faith.... [B]ad faith will not be presumed but must be proved."). Consistent with this rule, as well as with the Federalism concept underlying Younger, supra p. 404, courts routinely assign the burden of proof to the party seeking injunctive relief when the issue of bad faith on the part of the state-court prosecutor is raised in this or other contexts. See, e.g., Davis, 691 F.2d at 179-80 (prosecution relating to a debt discharged in bankruptcy); In re Scott, 166 B.R. 779, 783-85 (D.Mass.1994) (same); see also, e.g., Younger, 401 U.S. at 54, 91 S.Ct. at 755 (state statute prohibiting "syndicalism" claimed to be contrary to the First and Fourteenth Amendments); United States v. Mullins, 22 F.3d 1365, 1373 (6th Cir.1994) (allegation of selective prosecution based on political association); Fitzgerald v. Peek, 636 F.2d 943, 945 (5th Cir.), cert. denied, 452 U.S. 916, 101 S.Ct. 3051, 69 L.Ed.2d 420 (1981) (per curiam) (prosecution alleged to be in retaliation for criticism of local officials); Turner v. LaBelle, 251 F.Supp. 443, 447 (D.Conn.1966) (allegation that prosecution was designed to "discourage civil rights activity"). Accordingly, the Debtor must prove that the prosecution is in bad faith. See also Perez v. Ledesma, 401 U.S. 82, 85, 91 S.Ct. 674, 677, 27 L.Ed.2d 701 (1971) ("Only in cases of proven harassment or prosecutions undertaken by state officials in bad faith ... and perhaps in other extraordinary circumstances where irreparable injury can be shown is federal injunctive relief against pending state prosecutions appropriate." (emphasis added)).

In re McMullen, 189 B.R. 402 (Bkrtcy.E.D. Mich. 1995).

Also see In re Taylor, 8 B.C.D. 692, 16 B.R. 323, 5 C.B.C.2d 1201 (Bkrtcy. D.Md. 1981), rev'd on other grounds, 11 C.B.C.2d 1028 (D.Md. 1984) (the burden of proof of showing that the bad check proceeding is not a criminal proceeding excepted from the stay under

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§362(b)(1) is upon the Debtor).

In this case, as in the In re Frank opinion, the Debtor has failed to show either that the principal motivation was to collect a discharged debt or that the prosecution has acted in bad faith.

While it was clear that the Solicitor would seek restitution as part of any sentencing if the Debtor is found guilty, a penalty provided under state law, it is also clear by stipulation in this case that the original complainant, Creditor Rowe, is not continuing to act to collect the debt owed him but it is the Solicitor who has control over the pending prosecution. There was no evidence presented that the repayment of this debt was the Solicitor's principal motivation for the prosecution or that the Solicitor was acting in bad faith. Since the Debtor has not met his burden, the Court finds for the Defendant and the Defendant, the Solicitor of the Ninth Judicial Circuit of the State of South Carolina, shall not be enjoined from continuing criminal prosecution against the Debtor.

AND IT IS SO ORDERED.


UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
September 3, 1997.

