UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA

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| In Re:<br><br>**RONALD DIXON CRANFORD,**<br><br>Debtor. | Case No. 91-30669<br>Chapter 13 |
| **RONALD DIXON CRANFORD,**<br><br>Plaintiff,<br><br>v.<br><br>**N.C. DEPARTMENT OF REVENUE,**<br><br>Defendant. | Adversary Proceeding<br>No. 92-3064 |

**ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION**

This matter is before the court on the debtor's Motion for a Preliminary Injunction to enjoin the North Carolina Department of Revenue from pursuing criminal charges against the debtor. The court finds that the debtor has not met its burden of proof to warrant a preliminary injunction and therefore the Motion is denied.

BACKGROUND FACTS

In November, 1984 the debtor formed and operated a business known as Orion Systems. The business was later incorporated and the debtor became an officer of the corporation. The debtor ceased operations of Orion Systems in December, 1990. While Orion Systems was operating, the debtor was responsible for filing all state tax forms. The debtor alleged that due to an accounting mistake, sales taxes for the North Carolina Department of Revenue ("NCDR") were misappropriated. The debtor claims that

the misappropriation was not willful. On March 19, 1991 the debtor filed this Chapter 13 petition and listed the NCDR as a creditor. Subsequent to the filing, the debtor was investigated and charged by the NCDR for alleged embezzlement of state and county property. The debtor now seeks a preliminary injunction to enjoin the NCDR's criminal prosecution.

DISCUSSION

Section 362 of the Bankruptcy Code stays most legal actions commenced against the debtor, however, § 362(b)(1) specifically excepts criminal proceedings from the automatic stay. 11 U.S.C. § 362(b)(1). Notwithstanding the provisions of the Bankruptcy Code, a federal court may grant a preliminary injunction to enjoin a state criminal court proceeding if the movant can satisfy three requirements: first, that the relief sought falls within an exception to the Anti-Injunction Act, 28 U.S.C. § 2283;[1] second, that the movant has met the standards in Younger v. Harris, 401 U.S. 37, 43-46, 91 S.Ct. 746, 750-52 (1971) for authority to enjoin the action; and, third that in the particular circumstances of the case the injunction is proper as set forth in the four-part standard of Blackwelder Furniture Co. v. Seilig Mfg. Co., 550 F.2d 189, 196 (4th Cir. 1977). Failure to meet any one of the three requirements is fatal to the request for a

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[1] The Anti-Injunction Act, 28 U.S.C. § 2283, provides:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

preliminary injunction. In this instance, because the debtor has failed to meet the third requirement the Motion for a Preliminary Injunction is denied.

The court notes at the outset that § 105 of the Bankruptcy Code[2] has readily been construed as an exception to the Anti-Injunction Act that is "expressly authorized by Act of Congress." Fussell v. Price, (In re Fussell), 928 F.2d 712, 716 (5th Cir. 1991); S.Rep. No. 989, 95th Cong., 2d Sess., reprinted in 1978 U.S. Code Cong. & Admin. News 5787, 5815 (Section 105 "is also anauthorization [sic], as required under 28 U.S.C. 2283, for a court of the United States to stay the action of a State court").

The Anti-Injunction Act is only one of three barriers to federal court injunctions - the movant must also satisfy the Younger and Blackwelder standards. Younger stands for the proposition that the principles of equity and comity prevent federal courts from interfering with pending state court criminal actions except in "unusual circumstances." 401 U.S. at 57, 91 S.Ct. at 755. A state court criminal proceeding may be enjoined only if the party requesting the relief can show that the party stands to suffer irreparable injury that is "both great and immediate," and that the threatened injury relates to his "federally protected rights ... [which] cannot be eliminated by his defense against a single criminal prosecution." 401 U.S. at 47, 91 S.Ct at 751;

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[2] Section 105, entitled Power of Court, gives the bankruptcy court broad power to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."

Cf. Cinema Blue of Charlotte, Inc. v. Gilchrist, 887 F.2d 49, 52-54 (4th Cir. 1989) (applying Younger abstention where the defendants'/movants' constitutional defenses could be adequately addressed by their defense in the state criminal action and where none of the exceptions to Younger abstention was present). The Court in Younger stressed that the mere "cost, anxiety, and inconvenience of having to defend against a single criminal prosecution" is not sufficient to constitute irreparable injury. 401 U.S. at 47, 91 S.Ct. at 751. Absent the "usual prerequisites of bad faith and harassment" there are very limited circumstances when a federal court should act to enjoin a state criminal prosecution.

Although the court has serious doubt that an exception to the Younger abstention doctrine would be appropriate in the present case, the denial of the Motion for Preliminary Injunction rests on other grounds.

The final hurdle to overcome in pursuit of a preliminary injunction is the satisfaction of the standards outlined in Blackwelder Furniture Co. v. Seilig Mfg. Co., 550 F.2d 189 (4th Cir. 1977). Blackwelder made clear that a court must measure a motion for preliminary injunction by a balance of hardships test. Id. at 194; Rum Creek Coal Sales, Inc. v. Caperton, 926 F.2d 353, 359 (4th Cir. 1991).

In so doing, a court must consider four factors:

1. the likelihood of irreparable harm to the plaintiff if the preliminary injunction is denied,

2. the likelihood of harm to the defendant if the requested relief is granted,

3. the likelihood that the plaintiff will succeed on the merits, and

4. the public interest.

Rum Creek, 926 F.2d at 359. These factors do not stand alone; rather, the factors must be seen as flexible and interrelated. Blackwelder, 550 F.2d at 196. However, of the four factors, irreparable harm to plaintiff and the harm to defendant are the most important. Rum Creek, 926 F.2d at 359. Where irreparable harm may only be characterized as "possible," the other factors then become more decisive. Blackwelder, 550 F.2d at 195. Stated another way, the importance of probability of success increases as the probability of irreparable injury diminishes. Id. The public interest must always be considered. Id. However, that factor is often treated by the courts in a very cursory manner, and does not often alter the outcome dictated by a sound consideration of the other factors. Rum Creek, 926 F.2d at 367.

The evidence presented at the hearing indicated that the "irreparable injury" that the debtor would suffer absent an injunction would be the monetary and time consuming burden of defending himself in the criminal proceeding. This does not constitute the irreparable harm referred to in Blackwelder. If such hardships did constitute irreparable injury, almost all criminal prosecutions against debtors would have to be enjoined - most debtors have financial difficulties and time constraints.

The harm resulting from the delay of the criminal prosecution to the NCDR is at least as great. The debtor made no attempt to indicate when, or if, he would ever have the time or money to defend the criminal action. The State's interest is not limited to restitution, there is also a penal element of the prosecution. The costs and problems associated with delay combined with the State's interest in pursuing alleged criminal acts outweigh the harm to the debtor to defend this action.

The debtor's likelihood of success on the merits, in this context, refers to the debtor's ability to fund a successful Chapter 13 Plan. See generally, 2 Collier on Bankruptcy, 15th ed., P. 105.02, at 8; Wilner Wood Products Co. v. State of Maine (In re Wilner Wood Products Co.), 23 C.B.C. 1060, 1062 (Bankr. D. Maine 1990). There was little, if any, evidence of such ability; however, even assuming that the debtor could fund a Chapter 13 Plan, the balance of the hardships does not weigh in favor of granting a preliminary injunction.

The public interest in this instance concerns not only the debtor's estate, but the broader public interest to see that alleged violations of State laws are properly addressed, and as such, does not tip the scales decidedly in favor of the requested relief.

The injury to the debtor and the NCDR, the likelihood of success, and the public interest taken together do not support the debtor's request for a preliminary injunction.

The debtor mistakenly relied on Seidelman v. Texas District

Attorney, (In re Seidelman), 57 Bankr. 149 (Bankr. D. Md. 1986) in support of the requested relief. In Seidelman, the debtor and his wife filed a Chapter 7 petition and received a discharge pursuant to their petition. Prior to discharge an unsecured creditor, whose claim was ultimately discharged in the Chapter 7, brought a criminal action against the male debtor alleging that the debtor intentionally hindered the enforcement of the creditor's interest in collateral that secured a debt to that creditor. The creditor did not attend the meeting of creditors nor did it file any pleadings regarding its claim in the bankruptcy estate. The debtor sought a preliminary injunction to enjoin the criminal prosecution alleging that the prosecution was brought in bad faith. Seidelman, 57 Bankr. at 150-52. The Bankruptcy Court agreed and stated that "[b]ased upon the [creditor's] failure to enforce its rights against the debtors in the bankruptcy court, coupled with the apparently-groundless criminal charges filed against [the debtor] ... this Court concludes as a matter of law that the prosecution was brought in bad faith, and as such, should be enjoined by this court." Id. at 155.

In Seidelman, the debtor satisfied the Younger standard for injunction by proving that the prosecution was brought in bad faith. The irreparable injury was to be free from "harassment by a malevolent creditor" and to protect the validly issued discharge in bankruptcy. Seidelman, 57 Bankr. at 155. The debtor

in the present case has alleged no such bad faith prosecution or irreparable injury.

CONCLUSION

A preliminary injunction to enjoin a state court criminal action will be granted in limited circumstances. The injunction must qualify as an exception to the Anti-Injunction Act, and the standards set forth in Younger and Blackwelder must be established to warrant such relief. Section 105 of the Bankruptcy Code is recognized as an exception to the Anti-Injunction Act, however in this instance, the debtor has failed to satisfy the requirements of Blackwelder to warrant a preliminary injunction. The court does not reach the Younger analysis.

It is therefore **ORDERED** that the debtor's motion for a preliminary injunction is hereby **DENIED**.

This the ___ day of June, 1992.

George R. Hodges
United States Bankruptcy Judge