

Anderson, hereinafter collectively referred to as (the “State”), and Michael Thompson appeared on behalf of the Debtor, Jason Derek Troff (“Troff”). After considering the argument of counsel and the pleadings before it, the Court issues the following order.

FINDINGS OF FACT

1. On August 25, 1997, Troff was convicted of arson in the Third District Court for the State of Utah.
2. As part of his criminal sentence, Troff was ordered to pay restitution in the amount of \$239,969.00.
3. In October 2001, the Third District Court terminated Troff's remaining probation and turned the restitution portion of the criminal sentence over to the Office of State Debt Collection.
4. When restitution payments were made by Troff, the State turned all of the money over to the victim of the crime.
5. On February 4, 2003, Troff filed for protection under Chapter 7 of the United States Bankruptcy Code.
6. Troff properly listed the State of Utah in his bankruptcy schedules and statements, and the State does not dispute that it received notice of Troff's bankruptcy.
7. On May 15, 2003, Troff was granted a Chapter 7 discharge.
8. After the discharge was entered, the State attempted to collect the restitution debt believing that it had not been discharged.
9. On April 1, 2005, Troff filed an adversary proceeding in this Court seeking a determination that his debt to the State had been discharged.

10. The issue was argued on cross motions for summary judgment and this Court, by order dated March 8, 2005 (the “Order”), granted Troff’s motion for partial summary judgment ruling that the restitution debt was discharged as a part of Troff’s Chapter 7 bankruptcy proceeding.
11. The State appealed the Order to the United States District Court for the District of Utah and now seeks a stay of judgment pending appeal.
12. In support of its motion for stay pending appeal, the State argues that the Order affects the practices of state agencies that are not parties to this action, namely the Board of Pardons, the Department of Corrections, the Office of Crime Victims Reparation and victims' rights committees (the “State Agencies”), implying that the State Agencies have, in the past, treated all state court restitution orders as nondischargeable in Chapter 7 bankruptcy.
13. The State argues that an appeal of the Order has been taken to the United States District Court, and this is the first time a bankruptcy court judge in the State of Utah has ruled that a court ordered restitution debt is dischargeable in a debtor’s Chapter 7 bankruptcy proceeding.
14. At the hearing on the motion for stay pending appeal, the State represented that even if the stay pending appeal were granted, the State would take no action against Troff to enforce restitution payments during the pendency of the appeal.
15. Troff opposes the motion arguing that the State has not met the burden required of a party seeking a stay pending appeal, that the State Agencies mentioned by the State are not parties to this controversy, and that the State Agencies are not bound by the Order.

OPINION

The Factors to be considered by a court in determining whether to grant a stay pending appeal¹ are: (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will suffer irreparable injury unless the stay is granted; (3) whether granting the stay will result in substantial harm to the other parties to the appeal; and (4) the effect of granting the stay upon the public interest. In re Lang, 305 B.R. 905 (10th Cir. BAP 2004).

As to the first factor, the Court believes it is unlikely that the State will prevail on the merits of the appeal. Congress knew how to draft a statute that would make restitution orders nondischargeable² and in so doing chose not to include state court restitution orders in the Bankruptcy Code section which makes restitution orders nondischargeable when issued under title 18 of the United States Code. Instead, Congress enacted § 523(a)(7) which requires a governmental unit to interpret the language of a fine or penalty and to assess facts surrounding the fine or penalty such as: to whom the debt is paid, for who's benefit the payment is made, and

¹The factors required to be considered with respect to a stay pending appeal are essentially the same as are required for a preliminary injunction. Ordinarily, a party seeking a preliminary injunction must satisfy a four-part test showing (1) that it has a substantial likelihood of prevailing on the merits; (2) that it will suffer irreparable harm unless the preliminary injunction is issued; (3) that the threatened injury outweighs the harm the preliminary injunction might cause the opposing party; and (4) that the preliminary injunction if issued will not adversely affect the public interest. Federal Lands Legal Consortium v. United States, 195 F.3d 1190, 1194 (10th Cir. 1999).

²11 U.S.C. § 523(a)(13) provides that all orders of restitution issued under title 18, United States Code are nondischargeable. Congress could have easily drafted this section to include all state court restitution orders.

whether the debt is compensation for an actual pecuniary loss³.

Based upon the above and the reasoning contained in the Order, the Court finds it unlikely that the State will prevail on appeal. The State has not satisfied the first factor required under Lang. The Court acknowledges that even having failed to satisfy the first factor, it may still be possible⁴ for the State to prevail in its motion for a stay pending appeal under the more lenient standard announced in Prairie Band of Potawomi Indians v. Pierce, 253 F.3d 1234 (10th Cir. 2001), however, to prevail, the State must satisfy all of the other three factors.

With respect to the second factor, irreparable harm, when analyzed, the State's argument militates in favor of denying the motion for stay pending appeal rather than granting it. The State's argument implies that in the past, agencies for the State of Utah have treated all state court restitution orders as a nondischargeable in bankruptcy regardless of the substance of the restitution order and the facts surrounding it. The Court finds that putting a state agency on notice that it must consider the requirements of the Bankruptcy Code is not irreparable injury. In fact, requiring state agencies to observe the requirements of the bankruptcy laws may benefit the

³Section 523(a)(7) operates automatically to except a debt from Chapter 7 discharge without the need to file a complaint or bring an adversary proceeding. Other debts which are automatically excepted from Chapter 7 discharge include: certain tax debts; creditors not listed in debtor's bankruptcy schedules; alimony and support payments; student loans; debts for death or personal injury caused by debtor's operation a motor vehicle while intoxicated; and orders of restitution issued under title 18 of the United States Code.

⁴Under certain circumstances, the requirements for a preliminary injunction (and thus motions for stay pending appeal) may be modified to a more lenient test. If the party seeking the preliminary injunction can establish the last three factors, then the first factor becomes less strict - - i.e., instead of showing a substantial likelihood of success, the party need only prove that there are questions going to the merits so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation. Prairie Band of Potawomi Indians, v. Pierce, 253 F.3d 1234 (10th Cir. 2001).

State⁵. Moreover, a state agency seeking to collect on behalf of a victim might consider the appropriateness of filing a timely complaint pursuant to § 523(a)(6)⁶.

With respect to the third factor, the Court finds that because of the State's representation that it would take no action against Troff to collect the restitution debt during the pendency of the appeal, granting the stay pending appeal would not result in substantial harm to Troff.

With respect to the fourth factor, public interest, the Court finds, as a matter of law, that the Order does not bind any State Agency which was not a party to this bankruptcy proceeding, and that the State's argument that numerous state agencies are affected by the Order is misplaced. Based upon the State's argument, the Court is concerned that were this Court to grant the motion for a stay pending appeal, the State Agencies may interpret the granting of a stay pending appeal as a signal that they are free to treat all state court restitution orders as nondischargeable in bankruptcy without the need to consider the requirements of 11 U.S.C. § 523(a)(7). It is not in the public interest for the State Agencies to ignore the provisions of 11 U.S.C. § 523(a)(7) or any other federal law. If the State Agencies choose to ignore the reasoning of the Opinion, they are free to do so, but this Court will not issue a stay pending appeal that

⁵ Section 362(h) provides that an individual injured by any willful violation of the automatic stay shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages. A finding of willfulness requires only that the defendant knew of the automatic stay and that the defendant's actions which violated the stay were intentional. Whether the party believed in good faith that it had a right to the property is not relevant to whether the act was "willful" or whether compensation must be awarded. *In re Diviney*, 225 B.R. 762 (10th Cir. BAP 1998).

⁶Some debts, such as the willful and malicious injury by the debtor to property of another, require that an adversary complaint be timely filed in order for the debt owed to the victim to be determined nondischargeable. Arson is a classic example of a willful and malicious injury to property.

encourages the State Agencies to ignore the provisions of § 523(a)(7).

The State has failed to meet its burden with respect to the first, second and fourth factors described in In re Lang, and has failed to meet the more lenient formulation announced in Prairie Band of Potawami Indians. Because the State has not met its burden, the motion for stay pending appeal must be denied.

For the above reasons, and other good cause, it is hereby

ORDERED that the State's motion for stay pending appeal is DENIED.

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ORDER SIGNED