SO ORDERED,

Judge Selene D. Maddox

United States Bankruptcy Judge

The Order of the Court is set forth below. The case docket reflects the date entered.

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF MISSISSIPPI

IN RE: ISHAM DAVID CONNER **DEBTOR(S).**	**CASE NO.: 13-13032-SDM** **CHAPTER 7**
ISHAM DAVID CONNER	**PLAINTIFF**
V.	**ADVERSARY PROCEEDING 20-01075-SDM**
A. RHETT WISE et al	**DEFENDANT**

ORDER DENYING DEFENDANTS' MOTIONS TO DISMISS (DKT. #9, 13)

THIS CAUSE comes before the Court on the *Motion to Dismiss* filed by Priest & Wise, PLLC and A. Rhett Wise (AP Dkt. #9[1])("the Wise Motion"), the *Motion to Dismiss and Joinder in Motion to Dismiss* filed by Defendant Brightview Federal Credit Union (AP Dkt. #13) ("Brightview's Motion"), and the Plaintiff's *Responses* thereto (AP Dkt. #22 and #23). On

[1]References to court documents entered in the instant adversary proceeding will be denoted in the following format: AP Dkt. #*XX.* Refences to court documents entered in the underlying bankruptcy case will be denoted as: Dkt. #*XX.* References to Proofs of Claim filed in the underlying case will be denoted as: POC #*XX.*

February 23, 2021, the Court conducted a telephonic hearing on these matters before taking them under advisement. The Court is now prepared to rule.

I. JURISDICTION

This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1334(a), 28 U.S.C. §157(a) and the Standing Order of Reference signed by Chief District Judge L.T. Senter and dated August 6, 1984. This is a "core proceeding" under 28 U.S.C. § 157(b)(2)(A)(matters concerning the administration of the estate), (I)(determination as to the dischargeability of particular debts), and (O)(other proceedings affecting the liquidation of assets of the estate or the adjustment of the debtor-creditor relationship).

II. FACTS AND PROCEDURAL HISTORY

The Plaintiff is Isham David Conner ("Conner"), the Debtor in the underlying bankruptcy case. The Defendants include: Brightview Federal Credit Union ("Brightview"), one of Conner's creditors; A. Rhett Wise ("Wise"), an attorney who represented Brightview both in this Court during the pendency of Conner's bankruptcy and in the subsequent state court proceedings which gave rise to this adversary proceeding; and Priest & Wise PLLC ("P&W") which employed Wise and represented Brightview.

Conner filed the underlying bankruptcy case, which was originally a Chapter 13 petition, on July 24, 2013. (Dkt. # 1). His plan was confirmed on November 19, 2013 and included payments to Brightview, whose debt was secured by a 2006 BMW. (Dkt. #30). The plan required Conner to pay Brightview the total amount owed because the BMW was classified as a "910 vehicle" as described in the "hanging paragraph" at the bottom of 11 U.S.C. § 1325(a)[3]. However, the

[3]Except where stated otherwise, all subsequent statutory references are to Title 11 of the U.S. Code.

confirmed plan listed the vehicle's actual value as just $12,980.00, a valuation to which Brightview did not object.[4] *Id.*

At some point after plan confirmation, the BMW broke down while Conner was traveling in Georgia (AP Dkt. #1), and on February 13, 2014, Conner's case was converted to Chapter 7. (Dkt. #37). Among the amended documents filed by Conner post-conversion were Amended Schedules B and D, which both averred that the BMW was to be surrendered to Brightview and asserted that its value was only $12,960.00, and an Amended Statement of Intention stating that the BMW would be surrendered to Brightview with the "debt to be extinguished." (Dkt. #47).

On April 10, 2014, Wise filed a Motion for Relief from Stay seeking abandonment of the BMW and termination of the automatic stay with regard to it. (Dkt. #52). While that motion was subsequently stricken for failure to comply with a Clerk's Request for Corrective Action (Dkt. #55), an agreed order ("the Agreed Order") granting the Motion for Relief was subsequently executed by Wise, the Trustee, and William C. Cunningham ("Cunningham"), who was Conner's bankruptcy attorney at the time. The Agreed Order was entered by the Court on June 13, 2014. (Dkt. #57).

Five days later, Cunningham filed a rather terse motion to withdraw as Conner's attorney which advised the Court that "there has been a breakdown of the client-attorney relationship as Debtor thinks he knows more about the laws and rules of the Court than the attorney." (Dkt. #59). Conner filed a pro se response to Cunningham's withdrawal motion indicating that this "breakdown" resulted from Conner's belief that Cunningham should not have signed the Agreed Order after the associated motion was stricken over a purely procedural matter. (Dkt. #62).

[4]In fact, on its Amended Proof of Claim, Brightview left blank both the line for "Value of Property" and the line stating the "Amount Unsecured." POC #4-2.

Nevertheless, the Court granted Cunningham's motion to withdraw in an order dated August 14, 2014. (Dkt. #65). Conner received his discharge that same day, and the case was closed on September 3, 2014. (Dkt. #64, 68).

Meanwhile, events were taking place in another forum. On July 18, 2014, after the filing of the Order Lifting Stay but prior to discharge, Brightview (through Wise) filed a Complaint for Replevin Without Bond in the County Court of Lowndes County, Mississippi ("the County Court") against Conner for possession of the BMW, damages, costs, and attorney's fees. (AP Dkt. #1). Brightview (again through Wise) later filed a second civil action before the County Court against Conner alleging conversion of the BMW. *Id.* On March 3, 2017, a Final Judgment was filed in the latter case awarding Brightview the sum of $22,279.69 plus interest, a sum which was equal to the Amended Proof of Claim which Brightview filed during the bankruptcy proceedings. *Id*. The Final Judgment, which was submitted to the County Court Judge by Wise, states that "Defendant's actions in abandoning the secured collateral of the Plaintiff were in violation of the contractual agreement between the parties and amount to the wrongful civil conversion of the Plaintiff's collateral." *Id.*

Conner's Complaint avers that he represented himself and was not aware that judgment had been entered against him until he attempted to sell his family residence and discovered the existence of Brightview's judicial lien on it. *Id.* At that time, Conner was forced to satisfy Brightview before the sale could proceed. The Complaint asserts that the BMW was stored at a repair shop in Georgia from the time of the accident until 2019 when it was towed to Mississippi. *Id.* It is presently in Conner's possession. *Id.*

On October 30, 2020, Conner, through his new counsel, Heidi Schneller Milam, filed a *Motion to Reopen Case* so that he could file the instant adversary proceeding. (Dkt. #70). On

December 3, 2020, the Court conducted a telephonic hearing on the matter before orally granting the motion. An order to that effect was prepared in chambers and entered the next day, and in due course, the adversary case commenced.[5] (Dkt. #75, 77).

The Adversary Complaint asserts (1) that Brightview's action against Conner in state court represented a violation of the discharge order for which it should be held in contempt, (2) that Wise's filing of the action on Brightview's behalf is actionable because he knew or should have known about the effect of the discharge order, and (3) that P&W should be held vicariously liable for Wise's acts. Conner seeks a finding of contempt against all three Defendants, an order that the Defendants return the proceeds they received to pay off the County Court judgment plus interest, actual damages, punitive damages, and attorney's fees.

On January 13, 2021, Wise and P&W jointly filed a Motion to Dismiss, arguing (1) that this Court's subject matter jurisdiction ended when the BMW was abandoned from the estate and the automatic stay lifted with regard to it, (2) that the Complaint fails to state a claim for which relief can be granted, and (3) the Court's order allowing the case to be reopened only authorized Conner to file an adversary proceeding against Brightview and not Wise or P&W. In their joint brief, Wise and P&W assert that Brightview was justified in filing the state court action because "Conner did not surrender the car." AP Dkt. #10. Brightview subsequently filed its own motion to dismiss as well as joinder to Wise and P&W's motion to dismiss. (AP Dkt. # 13).

III. DISCUSSION

The Defendants raise three arguments in support of dismissal: (1) one for dismissal for want of subject-matter jurisdiction under Fed. R. Civ. P. 12(b)(1); (2) one for dismissal for failure

[5]Although the express terms of the Court's December 4, 2020 order only authorized Conner to commence an adversary proceeding against Brightview, Conner's Complaint also included Wise and P&W as defendants.

to state a claim upon which relief can be granted under Fed. R. Civ. P. 12(b)(6); and (3) an argument exclusive to Wise and P&W that the Court's Order reopening the case limited Conner to filing an adversary proceeding against Brightview alone. The Court will consider each argument in turn.

A. Rule 12(b)(1)

"When a Rule 12(b)(1) motion is filed in conjunction with other Rule 12 motions, the court should consider the Rule 12(b)(1) jurisdictional attack before addressing any attack on the merits. This requirement prevents a court without jurisdiction from prematurely dismissing a case with prejudice." *In re Martin*, 617 B.R. 866, 872 (Bankr. S.D. Miss. 2020)(quoting *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001). The burden of proof for a Rule 12(b)(1) motion to dismiss is on the party asserting jurisdiction, i.e. Conner, in this case. *Martin*, 617 B.R. at 872. The Court must also accept as true all well-pleaded facts and construe them in the light most favorable to the non-movant. *Id.*

The jurisdiction of any bankruptcy court over a particular case applies to "all civil proceedings arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. § 1334(b); *In re Eastman*, 512 B.R. 832, 837 (Bankr. W.D. Tex. 2009), *as amended* (Apr. 28, 2009). The relevant category for the instant adversary proceedings is "arising under" jurisdiction and includes matters expressly listed in the Bankruptcy Code as "core proceedings." 28 U.S.C. § 157(b)(2). *Stern v. Marshall*, 564 U.S. 462, 473-74 (2011). Under Fifth Circuit precedent, "a proceeding is core under section 157 if it invokes a substantive right provided by title 11 or if it is a proceeding that, by its nature, could arise only in the context of a bankruptcy case." *Matter of Wood,* 825 F.2d 90, 97 (5th Cir. 1987). The Fifth Circuit has held that a claim for violation of the

discharge injunction under § 524 is a core proceeding. *Matter of Nat'l Gypsum Co.*, 118 F.3d 1056, 1064 (5th Cir. 1997).

The Defendants argue that this Court's jurisdiction was stripped away by the entry of the Agreed Order in 2014 which had the effect of abandoning Conner's vehicle from the bankruptcy estate and giving Brightview leave to pursue state law remedies against Conner, which they, in due course, did. The Court is unpersuaded by this argument. Conner's Complaint is explicitly premised on a purported violation of the discharge injunction. The Complaint does not challenge the validity of the state court judgment as the Defendants suggest. Rather, it alleges that the act of commencing the state court action in the manner in which they did violated Conner's substantive rights under the Bankruptcy Code by using the County Court conversion suit as a pretext for bypassing the discharge injunction. Accepting Conner's well-pleaded facts as true, the Court considers this matter to be a core proceeding. Accordingly, jurisdiction is proper, and the Defendants are not entitled to dismissal under Rule 12(b)(1).

B. Rule 12(b)(6)

To survive dismissal under Rule 12(b)(6), Conner's adversary complaint must "state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). In considering whether Conner meets this burden, the Court must construe the complaint liberally in favor of the non-moving party and assume the truth of all well-pleaded facts. *In re Putman*, 519 B.R. 491, 493 (Bankr. N.D. Miss. 2014). Also, the complaint may not rest on mere conclusions, but must assert specific facts, and the claim for relief must also be "plausible." *In re Oxford Expositions, LLC,* 466 B.R. 814, 816 (Bankr.N.D.Miss. 2011) (citing *Bell Atl. Corp. v. Twombly,* 550 U.S. 544 (2007) and *Ashcroft v. Iqbal,* 556 U.S. 662 (2009)). "A plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of

the elements of a cause of action's elements will not do." *Twombly,* 550 U.S. at 555. The Court, in ruling on the sufficiency of Conner's complaint, may rely on (1) the complaint itself and its proper attachments, (2) documents incorporated into the complaint by reference, and (3) matters of which a court may take judicial notice. *Putman*, 519 B.R. at 493.

After reviewing the complaint and the other associated documents, as well as the documents which were filed in the underlying bankruptcy case which the Court deems relevant to its analysis, the Court accepts the following facts as true for purposes of the instant motion:

On July 24, 2013, Conner filed for Chapter 13 bankruptcy and listed Brightview as a secured creditor whose debt was secured by a BMW which he valued at $12,960 at the time of filing, a valuation which the Defendants have never challenged. Brightview entered an Amended Proof of Claim asserting that it was owed $22,279.69 for the BMW, and, due to the operation of the "hanging paragraph" from § 1325(a), the confirmed plan required Conner to pay that amount rather than the BMW's actual value. After confirmation but before conversion, the BMW became inoperable and was left in storage at a repair shop in Atlanta. Conner converted to Chapter 7, and the Agreed Order abandoning the BMW was entered. The Defendants filed a County Court suit for replevin without bond to recover the BMW and, post-discharge, a second suit for civil conversion.

The complaint in the conversion case is not a part of the record presently before the Court, but the Court takes judicial notice of the elements of conversion under Mississippi law: "To make out a conversion, there must be proof of a wrongful possession, or the exercise of a dominion in exclusion or defiance of the owner's right, or of an unauthorized and injurious use, or of a wrongful detention after demand." *Cmty. Bank, Ellisville, Mississippi v. Courtney*, 884 So. 2d 767, 773 (Miss. 2004)(citation omitted). An action for conversion "cannot be maintained without proof that

the defendant either did some positive wrongful act with the intention to appropriate the property to himself, or to deprive the rightful owner of it, or destroyed the property." *Courtney*, 884 So.2d at 773 (citation omitted). Finally, it is well-established under Mississippi law that "[t]he measure of damages for conversion is the fair market value of the property at the time and place of its conversion." *Bender v. N. Meridian Mobile Home Park*, 636 So. 2d 385, 390 (Miss. 1994).

From what the Court can divine from the scant record, a trial was conducted on the suit for conversion during which Conner represented himself with judgment ultimately awarded to Brightview. The Final Judgment *has* been produced to this Court as an exhibit. It was apparently drafted by Wise, and it awarded Brightview damages that were equal to the total amount of the loan balance as set forth in Brightview's Amended Proof of Claim. There is no indication of how the County Court decided that the value of the BMW at the time of conversion was somehow equal to the total debt owed according to Brightview's Proof of Claim rather than the actual value of the BMW as established by the uncontested figure listed in the confirmed plan or an even lesser value given the fact that the car was at that point inoperable. In any event, that Final Judgment was duly entered, a lien was attached to Conner's home, and the damage award was satisfied out of the proceeds from the sale of that home.

Considering the aforementioned facts and well-pleaded allegations in the light most favorable to Conner, the Court concludes that he has met his burden of establishing a plausible claim that the Defendants improperly made use of the state court conversion action to circumvent the discharge injunction. In so concluding, the Court does not address any potential issue or claim preclusion matters implicated by the County Court judgment, as the instant adversary proceeding is premised on legal theory that the mere act of bringing the County Court action under these circumstances violated the discharge injunction. Furthermore, the Court notes that Conner has far

from proven his case, as many disputed facts remain which discovery will no doubt clarify.[6] But at the moment, his burden under *Twombly, Iqbal,* and their progeny is not preponderance of the evidence but simply plausibility on the face of the complaint. Conner has met that burden, and so, the motion to dismiss under 12(b)(6) is denied.

C. Conner's authority to bring claims against Wise and P&W.

Finally, Wise and P&W present a third argument for dismissing the claims against them that does not apply to Brightview. Specifically, they argue that because the order granting Conner's *Motion to Reopen Case* provided that "[t]he Debtor shall have thirty (30) days from December 3, 2020, in which to file an Adversary Case Proceeding against Creditor Brightview Credit Union" without reference to Wise, P&W, or any other potential defendants, Conner lacked authority to bring suit against them. Neither Wise nor P&W presented any other arguments that they were not proper parties besides the failure of the Court's order to expressly include them (and, of course, the §12(b)(1) and §12(b)(6) arguments already addressed).

Conner's original *Motion to Reopen Case* (Dkt. #70) simply stated that "[t]he Debtor needs to reopen his case to file an action for a violation of his discharge" with no reference to which parties would be defendants in the proposed action. During the December 3, 2020, hearing on the motion, the focus of Conner's arguments was on the actions of Brightview, and so, when the Court prepared the order granting Conner's motion, it referred specifically to Brightview as a party against which Conner had thirty days to file suit. In retrospect, had Conner's attorney specifically mentioned Wise and P&W as parties against whom Conner might also have claims, the Court's

[6]Perhaps most notably, Conner's counsel asserted at the hearing on this matter that a representative of Brightview told him bluntly that Brightview did not want the BMW but rather money. This allegation was not a part of the complaint and was not considered by the Court in its deliberations on the instant motion.

order undoubtedly would have included them. Likewise, based on the allegations in the adversary complaint, the Court feels certain it would have ruled favorably on a motion to add Wise and P&W as necessary parties after the filing of the complaint, whether the motion came from Conner or from Brightview. Regardless, it was not the intent of the Court to *limit* Conner to bringing suit against Brightview alone by way of the language used by the Court in the order in question. This argument is without merit.

IV. CONCLUSION

Based on the foregoing analysis, it is hereby ORDERED:

1. That the motion of Wise and P&W for dismissal (AP Dkt. #9) is DENIED, and

2. That the motion of Brightview for dismissal and joinder (AP Dkt. #13) is DENIED.

##END OF ORDER##