IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

In re

Case No. 00-30531

DONALD A. TANGWALL

Debtor

DONALD TANGWALL, Cestui que
Trust of The Butch Family
Preservation Trust

Plaintiff

v.

Adv. Proc. No. 02-3139

MARK PLOE and LINDA PLOE

Defendants

MEMORANDUM ON MOTION TO DISMISS

APPEARANCES:

DONALD A. TANGWALL
576 Foothills Plaza Drive
Maryville, Tennessee 37801
Plaintiff/Debtor, *Pro se*

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Knoxville, Tennessee 37901
Attorneys for Defendants Mark Ploe and Linda Ploe

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

This matter is before the court pursuant to a Motion to Dismiss filed by the Defendants, Mark Ploe and Linda Ploe, for failure to state a claim upon which relief can be granted. *See* FED. R. CIV. P. 12(b)(6). The Plaintiff, Donald Tangwall (Debtor), did not respond to the Motion within the time directed by the court and does not oppose the Motion. *See* E.D. Tenn. LBR 7007-1.[1] The court will nonetheless address the issues raised by the Defendants' dismissal motion.

This is a core proceeding. 28 U.S.C.A. § 157(b)(2)(A) (West 1993).

I

This Chapter 7 bankruptcy case was commenced by the Debtor, *pro se*, on February 11, 2000. The present adversary proceeding arises from a Civil Warrant filed by the Debtor on July 23, 2002, in the Blount County General Sessions Court, No. V0008678 (the Blount County litigation). In the Blount County litigation, the Debtor sought damages in connection with an alleged violation by the Defendants of the automatic stay provisions of 11 U.S.C.A. § 362(a) (West 1993 & Supp. 2002). The Blount County litigation was removed to this court by a Notice of Removal of State Court Action to Bankruptcy Court filed by the Defendants on August 12, 2002. *See* 28 U.S.C.A. § 1452 (West 1994).

On August 26, 2002, the Defendants filed a Motion to Dismiss and Memorandum in Support of Motion to Dismiss with supporting exhibits. The Defendants seek to dismiss the

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[1] Local Rule 7007-1 provides, in material part, that ?[u]nless the court directs otherwise, the opposing party shall respond within twenty days after the filing of the motion. . . . A failure to respond shall be construed by the court to mean that the respondent does not oppose the relief requested by the motion." Here, the court, by an Order entered on August 27, 2002, reduced the Debtor's response time to fourteen days.

Debtor's action based, in part, upon a Settlement Agreement and General Release dated January 22, 2002 (the Release), and entered into between the Debtor and the Defendants, mutually releasing the parties from all claims against each other, including the alleged contempt which formed the basis for the Blount County litigation.[2] The Release was negotiated to resolve the ?Motion to Find Attorney Patrick Stapleton, interested party Mark Ploe and Lynn [sic] Ploe in contempt of court, damages, and for return of property per Bankruptcy rule [sic] 4001(a)(3)" filed by the Debtor on September 14, 2001 (Motion for Contempt). The court approved the terms of

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[2] Paragraph 2L. of the Release provides:

> TANGWALL agrees to dismiss with prejudice his contempt proceedings against the Ploes in Bankruptcy Court.

Paragraph 4. of the Release provides:

> The PLOES for themselves and each of their predecessors, successors, heirs, assigns, executors, administrators, agents, or any other representatives, hereby release and forever discharge TANGWALL individually and in his capacity as Trustee and/or beneficiary of the Butch Family Preservation Trust and as an officer, director, or employee of GOODRICH, from any and all claims, demands, rights, causes of action, judgments, executions, damages, liabilities, costs or expenses (including attorney fees or court costs) which the PLOES have or might have, with are known or unkown [sic], which arise directly or indirectly from events or circumstances existing as of the date of this General Release. The PLOES agree that this provision is intended as a complete, full and final release of any and all claims the PLOES may have and that no claims are reserved.

Paragraph 7. of the Release provides:

> TANGWALL, for himself and each of his predecessors, successors, heirs, assigns, executors, administrators, agents, or any other representatives, hereby releases and forever discharges the PLOES individually and in their capacity as Trustees and/or Beneficiaries of the Butch Family Preservation Trust and/or officer, director, or employee of GOODRICH, . . . from any and all claims, demands, rights, causes of action, judgments, executions, damages, liabilities, costs or expenses (including attorney fees or court costs) which TANGWALL has or might have, which are known or unkown [sic], which arise directly or indirectly from events or circumstances existing from the beginning of time to the date of entry of a final order in all of the Bankruptcy Trustee's proceedings against any of the parties of this General Release. TANGWALL agrees that this provision is intended as a complete, full and final release of any and all claims TANGWALL may have and that no claims are reserved.

the Release pursuant to its Order of Partial Dismissal of Motion to Find Contempt entered on January 25, 2002 (Order of Partial Dismissal). The Release was also subsequently incorporated into the Notice of Settlement in Full With Creditors Mark Ploe and Lynn [sic] Ploe filed by the Debtor with this court on February 7, 2002.[3]

II

The Defendants' Motion to Dismiss was filed pursuant to FED. R. CIV. P. 12(b)(6) for failure to state a claim upon which relief can be granted. Rule 12(b)(6) is made applicable to bankruptcy proceedings pursuant to FED. R. BANKR. P. 7012. When considering a motion under Rule 12(b)(6), the court should not rely upon any documents other than the pleadings. FED. R. CIV. P. 12(b); *Stangel v. I.R.S. (In re Stangel)*, 222 B.R. 289, 291 (Bankr. N.D. Tex. 1998). However, although the court generally considers only the allegations contained in the complaint, ?matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint, also may be taken into account." *Nieman v. NLO, Inc.*, 108 F.3d 1546, 1554 (6th Cir. 1997) (*quoting* 5A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1357 (2d ed. 1990)).

The following documents were attached to the Defendants' Motion to Dismiss: (1) the Release dated January 22, 2002; (2) Notice of Settlement in Full With Creditors Mark Ploe and

[3] ?Lynn Ploe" and ?Linda Ploe" are the same person.

Lynn Ploe filed in the Debtor's Chapter 7 case number 00-30531 on February 7, 2002;[4] and (3) the Debtor's Motion for Contempt filed in his case on September 14, 2001. These documents are public records in the Debtor's bankruptcy case and, as such, may be considered by the court. *See* FED. R. OF EVID. 201.

When deciding a motion under Rule 12(b)(6), the court ?must construe the complaint in the light most favorable to the plaintiff, accept all the factual allegations as true, and determine whether the plaintiff can prove a set of facts in support of its claims that would entitle it to relief." *Bovee v. Coopers & Lybrand, C.P.A.*, 272 F.3d 356, 360 (6th Cir. 2001); *see also Prater v. City of Burnside, Ky.*, 289 F.3d 417, 424 (6th Cir. 2002) (*quoting Jackson v. City of Columbus*, 194 F.3d 737, 745 (6th Cir. 1999) *overruled in part on other grounds by Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 122 S. Ct. 992, 152 L.Ed.2d 1 (2002)). However, the court is not required to accept legal conclusions or unwarranted factual inferences as true. *Mich. Paytel Joint Venture v. City of Detroit*, 287 F.3d 527, 533 (6th Cir. 2002) (*quoting Morgan v. Church's Fried Chicken*, 829 F.2d 10, 12 (6th Cir. 1987)).

Here, it is necessary that the court determine if the Debtor has alleged facts that, if accepted as true, would entitle him to relief. Because the Debtor is alleging similar facts to those alleged in a prior litigation, the court must determine if the doctrine of res judicata is applicable to the Blount County litigation.

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[4] An additional copy of the Release was attached to this document along with copies of the various dismissal orders referenced in the Release.

III

?The doctrine of res judicata, or claim preclusion, provides that a final judgment on the merits of an action precludes the ‹parties or their privies from re-litigating issues that were or could have been raised' in a prior action." *Kane v. Magna Mixer Co.*, 71 F.3d 555, 560 (6th Cir. 1995) (*quoting Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398, 101 S. Ct. 2424, 2428, 69 L.Ed.2d 103, 108 (1981)). Res judicata extinguishes ?all rights of the plaintiff to remedies against the defendant with respect to all or any part or the transaction, or series of connected transactions, out of which the action arose." *J.Z.G. Res., Inc. v. Shelby Ins. Co.*, 84 F.3d 211, 215 (6th Cir. 1996) (*quoting* RESTATEMENT (SECOND) JUDGMENTS § 24 (1982)). Res judicata is based upon the following four elements:

> (1) a final decision on the merits by a court of competent jurisdiction; (2) a subsequent action between the same parties or their privies; (3) an issue in the subsequent action which was litigated or which should have been litigated in the prior action; and (4) an identity of the causes of action.

Kane, 71 F.3d at 560 (*citing Sanders Confectionery Prods., Inc. v. Heller Fin., Inc.*, 973 F.2d 474, 480 (6th Cir. 1992)).

The Debtor is attempting to re-litigate his Motion for Contempt in the Blount County litigation. First, the Blount County litigation is filed against the Defendants, who were also among those named in the Motion for Contempt.[5]

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[5] In the Blount County litigation, the Debtor attempted to distinguish himself by filing suit as ?Donald Tangwall, Cestui que Trust of The Butch Family Preservation Trust," rather than ?Donald Tangwall, Debtor." However, this court has already informed the Debtor that it does not recognize the legal distinctions that he has asserted in each of his separate actions. *See Farmer v. Butch Family Preservation Trust (In re Tangwall)*, No. 01-3083, slip op. at 14, n. 12 (Bankr. E.D. Tenn. June 12, 2002) (?Being the beneficiary of a trust does not elevate the Debtor, in that capacity, to the status of a separate entity."). Once again, this court rejects such an attempt. Black's Law Dictionary defines ?cestui
(continued...)

Second, the allegations contained in the Motion for Contempt mirror those contained in the Blount County litigation. The Motion for Contempt alleges, in part, the following facts:

> 1. On March 20, 2000 this honorable court entered an order lifting the automatic stay permitting the respondents to this motion to prosecute their claim for real property located at 642 Wears Valley Rd, Townsend, Tenn.
>
> 2. On March 21, 2000 the respondents executed a writ of possession against Donald Tangwall improperly removing Donald Tangwall from the possession of his home.

Similarly, the Civil Warrant filed by the Debtor in the Blount County litigation states the following, in part:

> Plaintiff was removed from his leasehold of 642 Wears Valley Rd. Townsend [sic] TN in case #V0002689 on 3-21-00 in violation of bankruptcy automatic stay section 362.

Not only were the factual allegations based on the same events, but also, the Debtor sought similar relief in both actions. The following relief was sought in the Motion for Contempt:

> Wherefore the petitioner requests the following relief.
> 1. An order to return the petitioners [sic] property unlawfully taken or destroyed from 642 Wears Valley Rd, [sic] Townsend, Tenn.
> 2. Money judgment against the respondents jointly and severally for damages and emotional distress which the petitioner suffered as a result of the wrongful disposition of his residence in an amount that this court deems just.

In the Blount County litigation, the Debtor requested the following relief from the General Sessions Court:

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[5](...continued)
que trust" as ?[t]he beneficiary of a trust." BLACK'S LAW DICTIONARY 229 (6th ed. 1994). Accordingly, the ?cestui que trust" title is simply another way for the Debtor to claim his alleged beneficiary status at issue in his bankruptcy case.

> Wherefore plaintiff prays to be restored to poss. [sic] of property and damages for rent in the amount of 14.400 [sic] and cost. [sic] and other just relief.

In both actions, the Debtor has brought suit against the Defendants. Both actions reference March 21, 2000 as the date of the alleged injury. The subject matter of both actions is real property located at 642 Wears Valley Road in Townsend, Tennessee. Both actions deal with an alleged violation of the automatic stay. The Debtor seeks a return of the real property in both actions, along with money damages. Clearly, these actions arise out of the same transaction and are based on the same operative facts. In essence, this is the same lawsuit, brought in different forms and in different courts. It is not necessary that every single element of the Blount County litigation mirror those in the Motion for Contempt. It is obvious that the Debtor was attempting to circumvent the Order of Partial Dismissal when he filed the Blount County litigation.

The Order of Partial Dismissal entered on January 25, 2002 is a final judgment, subject to the doctrine of res judicata. Rule 41(a)(2) of the Federal Rules of Civil Procedure provides for voluntary dismissal of a lawsuit and states that an order voluntarily dismissing an action is without prejudice ?*[u]nless otherwise specified in the order.*" FED. R. CIV. P. 41(a)(2) (emphasis added). Conversely, ?[a] voluntary dismissal with prejudice operates as a final adjudication on the merits and has a res judicata effect." *Warfield v. AlliedSignal TBS Holdings, Inc.*, 267 F.3d 538, 542 (6th Cir. 2001) (*citing Harrison v. Edison Bros. Apparel Stores, Inc.*, 924 F.2d 530, 534 (4th Cir. 1991)). A dismissal with prejudice is defined as ?an adjudication on the merits, and final disposition, barring the right to bring or maintain an action on the same claim or cause. It is res judicata as to every matter litigated." BLACK'S LAW DICTIONARY 469 (6th ed. 1990).

The Debtor voluntarily entered into the Order of Partial Dismissal as a result of the Release executed on January 22, 2002, resolving the Debtor's Motion for Contempt against the Defendants. The Order plainly states that the Debtor dismissed the Motion for Contempt as to the Defendants *with prejudice*. Accordingly, the Order of Partial Dismissal entered on January 25, 2002 is a final judgment, on the merits, and is res judicata.

Furthermore, the Debtor voluntarily entered into the Release dated January 22, 2002, whereby he released the Defendants from ?*any and all* claims, demands, rights, causes of action, . . . damages, . . . which TANGWALL *has or might have*, with are known or unkown [sic], which arise directly or indirectly from events or circumstances existing from the beginning of time . . . TANGWALL agrees that this provision is intended as a complete, full and final release of any and all claims TANGWALL may have and that no claims are reserved." (emphasis added). As such, he is bound by the terms therein. ?Once concluded, a settlement agreement is binding, conclusive, and final as if it had been incorporated into a judgment." *Bostick Foundry Co. v. Lindberg, a Div. of Sola Basic Indus., Inc.*, 797 F.2d 280, 283 (6th Cir. 1986) (*citing Clinton St. Greater Bethlehem Church v. City of Detroit*, 484 F.2d 185, 189 (6th Cir. 1973)). Courts should uphold compromise and settlement agreements when there is no dispute as to the terms thereof, absent proof of fraud or duress. *Re/Max Internat'l, Inc. v. Realty One, Inc.*, 271 F.3d 633, 650 (6th Cir. 2001).

The court has not been shown any evidence of a dispute as to the terms of the Release, nor has it been provided with any proof of fraud or duress as to the parties' entry of the Release.

Correspondingly, the court finds that the Release entered into between the Debtor and the Defendants is binding, thus precluding any action by the Debtor against the Defendants for any claim or prospective cause of action.

IV

After examining the ?complaint" in the light most favorable to the Debtor, the court finds that this adversary proceeding should be dismissed for failure to state a claim upon which relief can be granted. The basis for this action mirrors the basis for the previous action in the Debtor's September 14, 2001 Motion for Contempt which he voluntarily dismissed, with prejudice, by the Order of Partial Dismissal dated January 25, 2002. This voluntary dismissal with prejudice had a res judicata effect as discussed previously and cannot be re-litigated. Because the Order of Partial Dismissal entered on January 25, 2002 is a final judgment on the subject of the alleged violations of the automatic stay by the Defendants, the Blount County litigation removed to this court on August 12, 2002, is precluded by the doctrine of res judicata. For the foregoing reasons, the Defendants' Motion to Dismiss will be granted.

An order consistent with this Memorandum will be entered.

FILED: September 11, 2002

BY THE COURT

/s/

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

In re

Case No. 00-30531

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Debtor

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Plaintiff

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Adv. Proc. No. 02-3139

MARK PLOE and LINDA PLOE

Defendants

<u>O R D E R</u>

For the reasons stated in the Memorandum on Motion to Dismiss filed this date, the court directs that the Defendants' Motion to Dismiss filed August 26, 2002, is GRANTED. The Plaintiff's action, commenced in the General Sessions Court for Blount County, Tennessee, on July 23, 2002, which was removed to the bankruptcy court pursuant to 28 U.S.C.A. § 1452 (West 1999), is DISMISSED.

SO ORDERED.

ENTER: September 11, 2002

BY THE COURT

/s/

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE