In the United States Bankruptcy Court

for the Northern District of Iowa

GARY WOLTHUIS and
NELDA WOLTHUIS
Debtor(s).

Bankruptcy No. L87-00903S

Chapter 7

DONALD H. MOLSTAD Trustee
Plaintiff(s)

vs.

UNITED STATES OF AMERICA
Office of Personnel Management
Retirement Programs
Defendant(s)

Adversary No. X89-0081S

FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDER RE: TRUSTEE'S APPLICATION FOR RULE TO SHOW CAUSE AND APPLICATION FOR WRIT OF MANDAMUS

The matter before the court is an Application for Rule to Show Cause and Application for Writ of Mandamus filed by the trustee, Donald H. Molstad. Trial was held on November 2, 1989 in Sioux City, Iowa. Briefs were filed, and oral argument was concluded on February 22, 1990. The court now issues its findings of fact and conclusions of law as required by Bankr. R. 7052. This is a core proceeding under 28 U.S. C. § 157(b)(2)(E) .

FINDINGS OF FACT

Debtors Gary and Nelda Wolthuis, husband and wife, filed their joint petition under chapter 7 of the Bankruptcy Code on April 14, 1987. Under Schedule B-2 of their petition, Nelda Wolthuis, an employee of the Agricultural Stabilization and Conservation Service (ASCS) listed her ASCS pension rights as exempt. The parties stipulate that deductions under this pension plan as of the time the Wolthuises filed their petition totaled $7,205.22. The parties also stipulate that at all times material to this action, Nelda Wolthuis was and has remained an employee of ASCS.

An objection to Mrs. Wolthuis' claim of exemption in her pension plan was filed by one of her creditors. Just prior to the hearing on the objections, she withdrew her claim of exemption. As a result of the debtor's withdrawal, the trustee wrote the Iowa State ASCS on November 5, 1987 requesting that it turn over her share of the pension plan. (Plaintiff's exhibit 1) On January 26, 1988, the trustee received a reply from Robert H. Furleigh, the state executive director of the ASCS, accompanied by a memorandum from the acting director of the "midwest area" of the ASCS. According to this memo, the Office of Personnel Management (OPM) had advised the ASCS personnel division that "an employee's interest in retirement benefits can be turned over to a trustee in bankruptcy if the employee waives the right to such benefits." (Plaintiff's exhibit 2). Upon receipt of this correspondence, the trustee mailed a waiver prepared by him to the debtors' attorney requesting that Mrs. Wolthuis sign and return the waiver to the trustee.

Meanwhile, the trustee forwarded a proposed order setting forth details of the turnover to Martin J. McLaughlin, Assistant U.S. Attorney for the Northern District of Iowa. The proposed order stated in pertinent part:

> [t]he Court is advised that the Debtor has an interest in a retirement benefit which was held by the Office of Personnel Management Retirement Programs, Allotment Section, as of April 14, 1987, the date of the filing of the Bankruptcy Petition. The Court is further advised and a review of the files shows that said asset has not been claimed as exempt by the Debtors. The Court further finds and is advised by the Assistant U. S. Attorney, Martin McLaughlin, that the United States of America appears specifically herein for the purpose of consenting to the release of said funds to the Trustee and an entry of an Order turning said funds over to the Trustee in Bankruptcy.

(Plaintiff's exhibit 6). The order directs OPM to turn over to the trustee "the employee benefits which have been accrued and allocated to her" as of the filing of the bankruptcy petition. (Plaintiff's exhibit 6). There is no evidence that McLaughlin and OPM discussed the execution of the order. Subsequent to February 19, 1989, McLaughlin endorsed the order and returned it to the trustee, who filed it with the court. It was executed by the court on March 31, 1988 and filed on April 1, 1988.

The trustee negotiated a settlement agreement with Mrs. Wolthuis whereby she would execute and deliver to the trustee the waiver authorizing the pension to be paid over to the bankruptcy estate in exchange for $1,000.00 from the proceeds of the pension. The trustee would, upon receipt of the pension, keep the $1,000.00 and the debtors would be able to retain certain nonexempt estate property. Notice of this compromise was given to all creditors (plaintiff's exhibit 10) and the settlement was approved by the bankruptcy court on August 1, 1988. (Plaintiff's exhibit 12).

Having obtained Mrs. Wolthuis' waiver and the court order approving the settlement, the trustee, believing that he had fully complied with the requirements set forth in the December 16, 1987 memorandum from the ASCS, wrote to OPM in Washington, D.C. requesting the turnover of Nelda Wolthuis' "funds." (Plaintiff's exhibit 13). Prior to this time, there had been no direct contact between the trustee and OPM. This letter was sent September 14, 1988. Despite this letter and several phone calls, the trustee received no response from OPM with regard to Mrs. Wolthuis' pension until sometime after January 1, 1989. At that time, the trustee was informed telephonically by OPM that they were under no obligation to pay over any of Nelda's pension funds. Consequently, the trustee filed this adversary proceeding in order to compel the turnover of funds held by OPM for the benefit of Nelda Wolthuis.

DISCUSSION

United States of America, on behalf of OPM, argues that this dispute is the result of a nomenclatural misunderstanding between the trustee and ASCS. OPM contends that both parties have been misled by the labeling of Mrs. Wolthuis' pension fund as a retirement "benefit," when, in actuality, it is an "accumulated civil service retirement (CSR) deduction," to which employees are not entitled unless they meet the requirements of 5 U.S.C. § 8342(a). Because Mrs. Wolthuis has continuously held her position with ASCS, she is not entitled to any of these accumulated CSR deductions. Nor is she entitled to a retirement annuity under 5 U.S.C. § 8336. Therefore, although the bankruptcy court's turnover order may eventually entitle the trustee to the trustee is prohibited by statute from collecting them at this time.

The trustee contends that even if he would normally be prevented by statute from collecting these pension funds at this time, OPM should be judicially and equitably estopped from objecting to the enforcement of the turnover order.

I.

The statutes governing retirement annuities for civil servants are found in Title 5, Chapter 83 of the United States Code. Under this program, a percentage of each civil servant's basic pay is withheld by the federal government and deposited in the United States Treasury to the credit of a general retirement fund. 5 U.S.C. § 8334(a). Civil servants who complete at least five years of service become eligible for an annuity. 5 U.S.C. § 8333(a). The payments under the annuity are calculated pursuant to 5 U.S.C. § 8339. Neither the deductions nor the annuity payments are assignable or subject to execution, levy, attachment, garnishment, or other legal process, except under Chapter 83 or as otherwise may be provided by federal laws. 5 U.S.C. § 8346(a).

OPM contends that 11 U.S.C. § 541(c)(2), which enforces nonbankruptcy restrictions on the transfer of a debtor's beneficial interest in a trust, prevents the proceeds of debtor's pension from becoming part of her bankruptcy estate. See

In re Bizon, 28 B.R. 886 (Bankr. D. Md. 1983); aff'd., SSA Baltimore Federal Credit Union v. Bizon, 42 B.R. 338 (D. Md. 1984). In Bizon, the proceeds of the Civil Service Retirement fund were excluded from the bankruptcy estate as a spendthrift trust under Maryland law. Mrs. Wolthuis' rights in her retirement plan would not be excluded as spendthrift trust under Iowa law because, at least to some extent, her rights are created by deductions from her pay. Humprey v. Buckley (In re Swanson), 873 F.2d 1121, 1124 (8th Cir. 1989); DeRousse v. Williams, 181 Iowa 379, 164 N.W. 896 (1917). Although Mrs. Wolthuis' rights under the federal statute are not in the nature of a spendthrift trust under Iowa law, it does not necessarily follow that her payroll deductions are available to her without limitation.

Title 5 U.S.C. § 8342 permits civil servants, under specified circumstances, to obtain their prior deductions in a lump sum:

> Section 8342. Lump-sum benefits; designation of beneficiary; order of precedence
>
> a. Subject to subsection (j) of this section, an employee or member who--
>
> 1. (A) is separated from the service for at least thirty- one consecutive days; or
>
> (B) is transferred to a position in which he is not subject to this subchapter, or chapter 34 of this title, and remains in such position for at least thirty-one consecutive days;
>
> 2. files an application with the office of Personnel Management for payment of the lump sum credit;
> 3. is not reemployed in a position in which he is subject to this subchapter, or chapter 34 of this title, at the time he files the application; and
> 4. will not become eligible to receive an annuity within thirty-one days after filing the application; is entitled to be paid the lump sum credit. The receipt of the payment of the lump sum credit by the employee or Member voids all annuity rights under this subchapter based on the service on which the lump sum credit is based, until the employee or Member is reemployed in the service subject to this subchapter

Subsection (j) requires payment of the lump sum credit to be made only if any current or former spouse of the employee is notified of the application for payment and sets forth the conditions upon which such a payment becomes subject to the terms of a court decree of divorce, annulment, or legal separation.

OPM argues that because Nelda remains employed with the ASCS, she cannot fulfill the requirements of § 8342(a), and therefore, is not at this time entitled to be paid the lump sum credit(fn.1) of her retirement annuity. However, the trustee does not read § 8342(a) as exclusionary; rather, he contends that civil servants may be entitled to payment of a lump sum credit outside of this section. The trustee points to 5 U.S.C. § 8334(d), which states:

> Each employee or Member who has received a refund of retirement deductions under this or any other retirement system established for employees of the Government covering service for which he may be allowed credit under this subchapter may deposit the amount received, with interest. Credit may not be allowed for the service covered by the refund until the deposit is made.

1 The "lump sum credit" means an amount including the retirement deductions from an employee's basic pay. 5 U.S.C. 8331(8).

The trustee reads § 8334 (d) as anticipating undefined situations in which a civil servant may receive refunds of pension contributions while still employed.

The court disagrees with this interpretation. Section 8334(d) does not create new and unspecified procedures for obtaining lump sum benefits. Rather, it merely refers to existing statutes, such as § § 8316 and 8342(a). See e.g. Abubot for Estate of Abubot v United States, 1 Cl. Ct. 296 (1982). When a statute is clear and unambiguous, judicial inquiry is ordinarily at an end. E.E.O.C. v. Home of Economy, Inc., 712 F.2d 356, 357 (8th Cir. 1983). A court interpreting a statute may not depart from its clear meaning. Adams v. Morton, 581 F.2d 1314, 1320 (9th Cir. 1978) ; cert. denied sub nom. Gros Ventre Tribe of Fort Belknap Indian Reservation, Montana v. U.S., 440 U.S. 958 (1979).

To hold that there are other unspecified methods by which a currently employed civil servant may obtain a lump sum credit is to emasculate not only § 8342(a), but also significant portions of the Civil Service Retirement Act in general. Civil service retirement deductions are not truly voluntary; each employee "is deemed to consent and agree to these deductions from basic pay." 5 U.S.C. § 8334(b). Lump sum benefits may only be paid out upon the termination of a civil servant's employment under this Act. Allowing a civil service employee to obtain a lump sum credit while still employed by an agency governed by the Civil Service Retirement Act effectively permits civil servants to "opt out" of a previously mandatory retirement program by permitting them to demand a lump sum credit of their contributions any time they desire. Congress made deductions for the Civil Service Retirement Fund mandatory and specifically limited civil service employees access to these deductions in order to avoid this type of drain on the retirement fund.

The case of Murphy v. Office of Personnel Management, 26 M.S.P.R. 388 (1985) is instructive. In that case, an employee's request for a refund of retirement contributions was rejected because, despite her change in government jobs, she remained covered by the Civil Service Retirement Act throughout her employment. This case clearly conflicts with the trustee's argument that an employee is eligible to obtain a refund for retirement contributions while remaining employed and subject to the civil Service Retirement Act.2

II.

Mrs. Wolthuis was statutorily barred from obtaining a refund of her retirement contributions up through the date her bankruptcy petition was filed because of her continuing employment with ASCS. But the trustee contends that regardless of statutory requirements, the government should be judicially and equitably estopped from objecting to the court's turnover order.

2 It is worth noting that the Merit System's Protection Board in the case also refused to estop OPM from enforcing the eligibility requirements because the employee had relied upon information furnished to her by the Department of Justice. "Because the eligibility requirement of 5 U.S.C. § 8342 is clearly a substantive legal requirement, rather than a procedural requirement, and because it allows for no administrative discretion on the part of OPM, equitable estoppel does not obtain." Murphy v. OPM, 26 M.S.P.R. at .

Judicial estoppel is an equitable remedy created to protect the integrity of the judicial process. Unlike equitable estoppel, it requires no reliance or prejudice for a party to invoke it. Total Petroleum, Inc. v. Davis, 822 F.2d 734, 737 (8th Cir. 1987). Although the Eighth Circuit has never applied judicial estoppel, it has stated that the doctrine only applies to cases in which the judicial forum or process has been abused. "As we read the case law, this is tantamount to a knowing misrepresentation to or even fraud on the court." Total Petroleum, Inc. v. Davis, 822 F.2d at 737, n.6. The court did not explicitly accept or reject judicial estoppel, but it did note that the doctrine is not followed in a majority of jurisdictions because "of its vague definition and partly because of a perceived conflict with the rule allowing parties to plead alternative legal theories." Id.

Assuming that judicial estoppel is a valid doctrine in the Eighth Circuit, it is inapplicable in this case. There is no showing that OPM intentionally misled the trustee as to what could or would be turned over or when. In the words of the warden in the movie Cool Hand Luke, "What we have here is a failure to communicate." The trustee and OPM never communicated directly. OPM's involvement in advising the trustee of the availability of Mrs. Wolthuis' "benefits" was attenuated by the involvement of others not employed by OPM. It is not surprising that there is now a dispute between the trustee and OPM over the meaning of the order. However, OPM's actions do not approach any level of abuse which would permit application of the doctrine of judicial estoppel.

Equitable estoppel prevents a party "from denying a state of facts that he has previously asserted to be true if the party to whom the representation was made has acted in reliance on the representation and will be prejudiced by its repudiation." Total Petroleum, Inc. v. Davis, 822 F.2d at 737. Until recently, the doctrine of equitable estoppel could not be asserted against the government at all, and even today it is well settled that the government may not be estopped on the same terms as any other litigant. Green v. U. S. Dept. of Labor, 775 F.2d 964, 970 (8th Cir. 1985). The Eighth Circuit Court of Appeals has consistently ruled that in order for a private party to assert the defense of equitable estoppel against the federal government, it must demonstrate both the presence of the traditional elements of estoppel and that the government engaged in "affirmative misconduct." Green v. U. S. Dept. of Labor, 775 F.2d at 970. See also Boyd v. Bowen, 797 F.2d 624, 628 (8th Cir. 1986); U. S. v. Manning, 787 F.2d 431, 437 (8th Cir. 1986). Equitable estoppel against a federal agency does not lie where "an applicant has simply received misinformation on which he relied to his

detriment." Leimbach v. Califano, 596 F.2d 300, 305 (8th Cir. 1979).

> [W]hatever form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority.

Leimbach v. Califano, 596 F.2d at 305 quoting Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 384 (1947).

Although the Eighth Circuit has not defined "affirmative misconduct," it is clear that delay, negligence, and misinformation on the part of the government, even if they result in prejudice, do not rise to the level of affirmative misconduct required before equitable estoppel may be asserted against the United States. Green v. U. S. Dept. of Labor, 775 F.2d at 970; Leimbach v. Califano, 596 F.2d at 305.

Although the trustee has demonstrated reliance upon ASCS's January 26, 1988 communication and the turnover order signed by the United States Attorney, and although some prejudice has occurred as a result, the trustee has failed to demonstrate facts sufficient to constitute affirmative misconduct, and therefore the doctrine of equitable estoppel cannot be applied in this case.

III.

Although neither judicial estoppel nor equitable estoppel can be applied against OPM in this case, the fact remains that the court entered an order, consented to by the parties, which requires OPM to turn over to the trustee Mrs. Wolthuis' accrued and allocated pension benefits. The court must now address the meaning and effect of this order.

The trustee contends that regardless of statutes prescribing the turnover of Nelda Wolthuis' accrued pension contributions, the April 4, 1988 order requires OPM to release these funds to the trustee. Therefore, the United States has obligated itself to the turnover. The United States contends that contrary to the trustee's interpretation, the order requires only that the United States "shall turn over . . . the employee benefits which have been accrued and allocated to her as of April 14, 1987." According to statute, no such benefits have accrued to Nelda Wolthuis at this time. Therefore, the argument goes, there are no benefits for OPM to turn over to the trustee, and the United States is in full compliance with the order. Alternatively, OPM argues that to the extent the order requires immediate turnover of lump sum benefits, it is contrary to law and thus OPM is entitled to relief from the judgment under Bankr. R. 7060(b).

It is clear to the court that the parties consenting to this order never actually came to any mutual understanding as to what it was they were agreeing. The trustee seems to have intended the order to compel the turnover of Nelda Wolthuis' federal pension contributions. Whether this intent was ever actually conveyed to OPM is another matter. The trustee did not directly contact OPM on the matter until after the ink on the consent order had dried. Rather, the trustee initially addressed the issue in a letter to the ASCS office in Des Moines, Iowa. This letter appears to have been channeled to the state executive director of the ASCS, who in turn forwarded the matter to the regional office of the ASCS. The regional office contacted the ASCS's personnel division, which finally relayed the information to OPM.

By the time the trustee's inquiry reached OPM, it was fourth or fifth-hand information. OPM responded generally to ASCS, not to the trustee, stating simply that "an employee's interest in retirement benefits can be turned over to a trustee in bankruptcy if the employee waives the right to such benefits." (Plaintiff's exhibit 2.) OPM did not specifically address what interest Nelda Wolthuis actually had in her retirement benefits. Indeed, as stated above, this court finds she had no interest in retirement benefits that could immediately be turned over to the trustee.

However, the trustee perceived the message as a consent by OPM to the turnover of Nelda's federal pension fund contributions. He mailed Assistant U. S. Attorney Martin McLaughlin a proposed order for the turnover of the pension benefits and informed him that OPM "would turn over the proceeds to me upon consent of the Debtor and an order of the Court providing that the funds be turned over." (Plaintiff's exhibit 4.) McLaughlin requested a copy of the ASCS letter summarizing OPM's response, and upon receiving it, apparently concurred with the trustee's interpretation and approved the order. There is no evidence before the court as to whether McLaughlin ever contacted OPM regarding this matter at any time before the signing of the order.

Given the tenuous foundation upon which this order is based, conflict over the meaning of the order comes as no surprise. The pursuit of Nelda Wolthuis' pension fund contributions has been flawed from the beginning. No adversary was ever filed regarding the matter. No process was served. No direct contact between OPM and the trustee occurred prior to the order. To the court's knowledge, no contact between the U. S. Attorney and OPM took place prior to the order.

The enforcing court has the inherent power to interpret a decree when its language is vague or confusing. Monsanto Co. v. Ruckelshaus, 753 F.2d 649, 653 (8th Cir. 1985); E.E.O.C. v. Safeway Stores, Inc., 611 F.2d 795, 798 (10th Cir. 1979), cert. denied sub nom. Courtwright v. E.E.O.C., 446 U.S. 952 (1980). "Where a judgment is susceptible of two interpretations, it is the duty of the court to adopt the one which renders it more reasonable, effective and conclusive in the light of the facts and the law of the case." Ridley v. Phillips Petroleum Co, 427 F.2d 19, 23 (10th Cir. 1970) quoting Pen-Ken Gas & Oil Corp. v. Warfield Natural Gas Co., 137 F.2d 871, 885 (6th Cir. 1943), cert. denied 320 U.S. 800 (1944). Furthermore, judgments shall be interpreted so as to give effect to the intention of the court, not to that of the parties. U.S. v. 60.22 Acres of Land, More or Less, Situated in Klickitat County, State of Wash., 638 F.2d 1176, 1178 (9th Cir. 1980), cert. denied sub nom, Dickey Farms, Inc. v. U.S., 451 U.S. 985 (1981).

The intention of the court through the April 1, 1988 order was to permit the trustee to step into the shoes of Nelda Wolthuis with respect to her rights to and interest in contributions made to the federal pension plan through April 14, 1987. The court certainly did not intend the order to become a vehicle by which federal regulations limiting access to pension fund contributions could be circumvented. The trustee can acquire no more rights to an interest in property than the debtor enjoyed when the bankruptcy petition was filed. In re Huff, 61 B.R. 678, 684 (N.D. Ill. 1986). Consequently, the April 1, 1988 order entitles the trustee to precisely the same rights to Nelda Wolthuis' retirement plan as she herself had as of April 14, 1987. The trustee is, therefore, bound by the access limitations to her pension benefits set forth in 5 U.S.C. § 8342.

CONCLUSION

The April 4, 1988 order does not entitle the trustee at this time to force the turnover of Nelda Wolthuis' pension fund contributions accruing through April 14, 1987. The court concludes that OPM is not in violation of the order and judgment. Because the trustee cannot force the immediate turnover of the funds, he may choose to simply abandon the estate's claim to the payments. Mutual of Omaha Ins. Co. v. Baron (In re Johnson), No. C88-4155, Adv. No. A88-0032S (N.D. Iowa, Sept. 29, 1989). Or the trustee may solicit offers for the purchase of the estate's interest in Nelda Wolthuis' pension fund in order to facilitate the expeditious administration of the estate. In re Dennison, 84 B.R. 846, 848 (Bankr. S.D. Fla. 1988).

Because the court has interpreted the disputed order favorably to OPM, it is not, in the court's view, necessary to deal with OPM's argument that it is entitled to relief from the judgment under Bankr. R. 7060(b).

ORDER

IT IS ORDERED that trustee's Application for Rule to Show Cause and Application for Writ of Mandamus is denied.

SO ORDERED ON THIS 13th DAY OF APRIL, 1990.

William L. Edmonds
Chief Bankruptcy Judge