In the United States Bankruptcy Court

for the Northern District of Iowa

Western Division

TREVOR MALCOLM PHILLIPS
Debtor(s).

Bankruptcy No. 97-50453S
Chapter 7

TREVOR MALCOLM PHILLIPS
Plaintiff(s)

vs.

UNITED STATES OF AMERICA
Internal Revenue Service and
STATE OF CALIFORNIA FRANCHISE TAX BOARD
Defendant(s)

Adversary No. 97-9091S

ORDER RE: MOTION TO DISMISS

On May 28, 1997, Debtor Trevor Malcolm Phillips brought this action to determine the dischargeability of claims for federal income and California state taxes for several tax years. On July 25, 1997, the State of California Franchise Tax Board filed a motion to dismiss pursuant to Fed. R.Civ. P. 12(b)(1), Fed. R.Bankr. P. 7012. Telephonic hearing was held February 20, 1998. Maria L. DeAngelis represented defendant State of California. Molly M. Williams appeared for Phillips.

The State of California contends that this court lacks subject matter jurisdiction over it because of its Eleventh Amendment right of immunity from suit. California states that it does not consent to the jurisdiction of this court and has not waived its immunity. It argues that 11 U.S.C. § 106(a), purporting to abrogate the state's immunity in bankruptcy proceedings, is unconstitutional pursuant to the United States Supreme Court's decision in Seminole Tribe of Florida V. Florida, 517 U.S. 44, 116 S.Ct. 1114 (1996).

The Eleventh Amendment renders unconsenting states immune from suits by individuals. Federal courts lack jurisdiction over such suits. Seminole Tribe, 116 S.Ct. at 1122. There are two exceptions to a state's immunity under the Eleventh Amendment. Congress may abrogate the right by statute, or the state itself may waive the right. Rose v. United States Dept. of Education (In re Rose), 214 B.R. 372, 374 (Bankr. W.D. Mo. 1997); Koehler v. Iowa College Student Aid Commission (In re Koehler), 204 B.R. 210, 214 (Bankr. D. Minn. 1997). Phillips has not identified any conduct by California which the court could construe as a waiver of its Eleventh Amendment right, and concedes that waiver is not at issue in this matter.

The issue is whether Congress effectively abrogated the right of immunity by enactment of 11 U.S.C. § 106(a). The court must determine whether Congress "unequivocally expressed its intent to abrogate the immunity" and whether Congress "acted pursuant to a valid exercise of power." Seminole Tribe, 116 S.Ct. at 1123. The first requirement is satisfied by § 106(a) itself, which provides:

> Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to the following: (1) Sections ... 523 ... of this title.

11 U.S.C. § 106(a) (1).

The Supreme Court held in Seminole Tribe that legislation enacted pursuant to the Indian Commerce Clause (U.S. Const. art. I, § 8, cl. 3) was not a valid exercise of Congress' power to abrogate Eleventh Amendment immunity. Seminole Tribe, 116 S.Ct. at 1119. Although Seminole Tribe specifically addressed Congress' power under the Indian Commerce Clause, the Court's decision applies to legislation enacted pursuant to other provisions of Article I. "The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction." Seminole Tribe, 116 S.Ct. at 1131-32; see also Sacred Heart Hospital of Norristown v. Commonwealth of Pennsylvania (In re Sacred Heart Hospital of Norristown), 133 F.3d 237, 243 (3d Cir.1998) ("there is simply no principled basis to distinguish the Bankruptcy Clause from other Article I clauses").

Article I, § 8, clause 4, grants Congress the power "[t]o establish ... uniform Laws on the subject of Bankruptcies throughout the United States." The overwhelming majority of cases considering the issue have held that 11 U.S.C. § 106(a) was enacted pursuant to the Bankruptcy Clause of Article I, and that, after Seminole Tribe, § 106(a) is unconstitutional as an effort to abrogate states' immunity. *See*, *e.g.*, Sacred Heart, 133 F.3d at 245; State of Louisiana v. PNL Asset Mgmt. Co. LLC (Matter of the Estate of Fernandez), 123 F.3d 241, 243-44 (5th Cir. 1997); Schlossberg v. State of Maryland (In re Creative Goldsmiths of Washington, D.C., Inc.), 119 F.3d 1140, 1145 (4th Cir. 1997), *petition for cert. filed* (Feb. 18, 1998) (No. 97-1363); Rose, 214 B.R. at 374; Koehler, 204 B.R. at 215 & n.8.

After Seminole Tribe, the only source of authority for Congress to abrogate a state's Eleventh Amendment immunity is § 5 of the Fourteenth Amendment, the Enforcement Clause. Sacred Heart, 133 F.3d at 242. Section 5 states that "Congress shall have power to enforce, by appropriate legislation, the provisions of this article." The substantive provisions of the Fourteenth Amendment relevant here are found in § 1:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. art. XIV, § 1.

Phillips urges the court to follow a minority line of cases upholding 11 U.S.C. §106(a) on the ground that Congress enacted that section pursuant to § 5 of the Fourteenth Amendment. He cites Wyoming Dept. of Transp. v. Straight (In re Straight), 209 B.R. 540 (D. Wyo. 1997).

The opinion in Straight relied heavily on decisions from the two other courts holding § 106(a) constitutional pursuant to § 5 of the Fourteenth Amendment, Headrick v. State of Georgia (In re Headrick), 203 B.R. 805 (Bankr. S.D. Ga. 1996), and a pre-Seminole Tribe decision, Mather v. Oklahoma Employment Sec. Comm'n (In re Southern Star Foods. Inc.), 190 B.R. 419 (Bankr. E.D. Okla. 1995).In Southern Star Foods, the court took a very broad view of Congress' authority under the Enforcement Clause.

> Congress' exercise of its basic national legislative powers under any of the provisions of Article I will usually (if not invariably) implicate "the privileges or immunities of citizens of the United States ... life, liberty or property ... due process of law ... [or] the equal protection of the laws." ... Article I of the Constitution gives the national government power to legislate on the subject of bankruptcy; and the national government has done so, by creating the complex of privileges and immunities, rights and liabilities, found in the Bankruptcy Code.

Southern Star Foods, 190 B.R. at 426. The court listed in generalized terms the "privileges," "immunities," and "liberty and property" interests created by bankruptcy law. *Id*. The court then concluded that § 106(a) was a valid abrogation of states' immunity even though bankruptcy laws are "enacted pursuant to Article I," because they are "enforceable through the Fourteenth Amendment." *Id*. The court in Headrick stated similarly that Congress was empowered by the Fourteenth Amendment to enforce the rights provided by the bankruptcy laws. The court equated those rights with "privileges and immunities." 203 B.R. 805, 809.

This view of Congress' authority to abrogate Eleventh Amendment immunity is not tenable, especially in light of the Seminole Tribe decision. Creative Goldsmiths, 119 F.3d at 1146-47. The Enforcement Clause is not a Plenary power. *Id*. at 1146 (Congress does not have a "substantive, non-remedial power under the Fourteenth Amendment"). Legislation enacted pursuant to § 5 must have a connection to the enforcement of rights provided in § 1 of the Fourteenth Amendment. Estate of Fernandez, 123 F.3d at 245; Creative Goldsmiths, 119 F.3d at 1146; *see also* Raper v. state of Iowa, 115 F.3d 623, 624 (8th Cir. 1997) (Congress did not abrogate immunity from actions under Fair Labor Standards Act; FLSA overtime provisions do not serve "Fourteenth Amendment purpose"). "To cede to Congress the power to pass general, substantive legislation which abrogates state sovereign immunity, pursuant to the Enforcement Clause, would render Eleventh Amendment state sovereign immunity meaningless and eviscerate the fundamental construct of federalism in our constitutional form of government." Estate of Fernandez, 123 F.3d at 245.

The provisions of the Bankruptcy Code do not implicate Fourteenth Amendment rights. In re NVR L.P, 206 B.R. 831, 839-43 (Bankr. E.D. Va. 1997) (discussing Due Process, Equal Protection, and Privileges and Immunities Clauses). Bankruptcy discharge is not a constitutional right; nor does it constitute a "privilege or immunity" under § 1 of the Fourteenth Amendment. Sacred Heart, 133 F.3d at 244-45 & n.11; In re NVR, 206 B.R. at 841-42. Section 106(a) of the Bankruptcy Code was not enacted pursuant to the Enforcement Clause of the Fourteenth Amendment. Sacred Heart, 133 F.3d at 245; Estate of Fernandez, 123 F.3d at 245; Creative Goldsmiths, 119 F.3d at 1147 (no evidence Congress intended to "preserve the core values specifically enumerated" in the Fourteenth Amendment); Rose, 214 B.R. at 376; In re NVR L.P., 206 B.R. at 843. The State of California's motion to dismiss should be granted.

During the hearing on this motion, counsel for Phillips cited Koehler v. Iowa College Student Aid Commission (In re Koehler), 204 B.R. 210 (Bankr. D. Minn. 1997), and argued that Phillips' adversary proceeding is the same type of action as the first count in Koehler. The court in Koehler noted:

> ICSAC does not assert that this Court lacks subject matter jurisdiction over Count One of the Complaint, which seeks prospective declaratory relief. *See Ex parte*Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908) (prospective injunctive relief available against state officials).

Koehler, 204 B.R. at 213 n.1. Phillips has not named a state official as a defendant. This court expresses no opinion whether a bankruptcy dischargeability complaint may be brought as an Ex parte Young action.

ORDER

IT IS ORDERED that the motion to dismiss is granted. The complaint is dismissed against the State of California Franchise Tax Board.

SO ORDERED THIS 17th DAY OF MARCH 1998.

William L. Edmonds
Chief Bankruptcy Judge