

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE  
SOUTHERN DISTRICT OF GEORGIA  
Augusta Division

IN RE:	)	Chapter 13 Case
	)	Number <u>90-12123</u>
MARGIN BURTON MURRAY_____	)	
Debtor	)	
_____	)	
MARGIN BURTON MURRAY,	)	
Plaintiff	)	
vs.	)	Adversary Proceeding
	)	Number <u>94-01016A</u>
STATE OF GEORGIA,	)	
Defendant	)	

**ORDER**

Margin Burton Murray, the plaintiff in this adversary proceeding and debtor in the underlying Chapter 13 case, alleges a violation of the discharge injunction of 11 U.S.C. § 524 by the defendant, State of Georgia. The defendant asserts that the complaint is barred by the doctrine of sovereign immunity. Both parties request a determination whether taxes due for certain years were discharged in the underlying Chapter 13 case. Based upon the following, I find that the doctrine of sovereign immunity bars this court from deciding plaintiff's complaint of violation of the discharge injunction. Additionally, I find that plaintiff's 1989

tax liability was paid in full through the plan and discharged, taxes due for 1986 were also discharged, but 1990 income taxes were not discharged.

This complaint involves a core proceeding in the plaintiff's re-opened Chapter 13 case over which this court has jurisdiction pursuant to 28 U.S.C. § 1334 and 11 U.S.C. § 157.

Plaintiff received a discharge on February 10, 1994 of all her dischargeable debts on completion of payments under a confirmed Chapter 13 plan. As part of the discharge, those creditors whose claims were discharged were enjoined by operation of 11 U.S.C. § 524<sup>1</sup> from any act to collect a discharged debt as a personal liability of the debtor. Notwithstanding this injunction, the State of Georgia attempted a post-discharge garnishment for claimed tax liabilities for tax years 1986, 1989 and 1990.<sup>2</sup> The plaintiff now seeks a finding that this garnishment violated the discharge injunction, a cause of action which the defendant asserts may not be entertained due to the bar of sovereign immunity granted in the

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<sup>1</sup>11 U.S.C. § 524 provides in pertinent part:

(a) A discharge in a case under this title-- . . .

(2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived; . . . .

<sup>2</sup>The parties have since agreed that taxes for 1989 were paid in full through the plan.

Eleventh Amendment to the United States Constitution.<sup>3</sup> Plaintiff asserts that sovereign immunity does not prohibit actions such as this where only prospective relief is sought. This assertion is incorrect.

I have previously determined that suits against the United States of America acting through the Internal Revenue Service (IRS) seeking money damages for violations of the discharge injunction by the IRS are barred by sovereign immunity. In re Brown, 159 B.R. 1014 (Bankr. S.D. Ga. Dalis, J. Sept. 20, 1993) and In re Hardy, 161 B.R. 320 (Bankr. S.D. Ga. Dalis, J. Sept. 20, 1993) aff'd Hardy v. United States of America, No. CV193-186 (S.D. Ga. filed Aug. 22, 1994). Brown and Hardy are factually indistinguishable from this case and control. Plaintiff attempts to distinguish this case based on the type of relief sought contending that as no money damages are requested, but rather only declaratory and injunctive relief plus ancillary attorney fees, sovereign immunity does not block the jurisdiction of this court to hear this matter. A new twist on an old theory, but one which does not change the result: sovereign immunity applies.

Plaintiff presents as authority for this assertion In re

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<sup>3</sup>United States Constitution, Amendment XI provides:

The Judicial power of the United States shall not be construed to extend to any suit in law or in equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Whitefield, 165 B.R. 867 (Bankr. M.D. Tenn. 1994), where the court, citing the Supreme Court cases of Milliken v. Bradley, 433 U.S. 269, 97 S.Ct. 2749, 53 L.Ed.2d 745 (1977), Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974) and Ex parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed.2d 714 (1908), found that sovereign immunity does not extend to suits seeking declaratory or injunctive relief and then awarded attorney fees ancillary to securing such relief. I respectfully disagree with the Whitefield interpretation of these three Supreme Court cases. "[I]f a state is the real party in interest and has not consented to suit, a federal court will dismiss the action under the Eleventh Amendment, regardless of the nature of the relief sought." Wright, Miller and Cooper, Federal Practice and Procedure 2d § 3524. The Supreme Court has explicitly rejected the suggestion that suits seeking only prospective relief against states are not barred by the Eleventh Amendment:

It would be a novel proposition indeed that the Eleventh Amendment does not bar a suit to enjoin the State itself simply because no money judgment is sought . . . the Eleventh Amendment by its terms clearly applies to a suit seeking an injunction, a remedy available only in equity. To adopt the suggested rule, limiting the strictures of the Eleventh Amendment to a suit for money judgment, would ignore the explicit language and contradict the very words of the Amendment itself. Edelman did not embrace, much less imply, any such proposition.

Cory v. White, 102 S.Ct. 2325, 2329, 457 U.S. 85, 90-91, 72 L.Ed.2d 694 (1982).

Both plaintiff and the Whitefield court fail to note that in Milliken v. Bradley, Edelman v. Jordan, and Ex parte Young, all supra, relief is sought not against the state but against state officials. This distinction is critical. Ex parte Young and the cases following it allow prospective relief and ancillary attorney's fees in suits to prospectively restrain actions not of states but of state officials which are unconstitutionally undertaken under color of state law. Cory v. White, supra, quoting Worcester County Trust Co. v. Riley, 302 U.S. 292, 296, 58 S.Ct. 185, 189, 82 L.Ed.2d 268, \_\_\_ (1937). The Ex parte Young doctrine does not, as plaintiff suggests, limit the immunity of the sovereign depending on the relief sought, but rather disallows such immunity to a state official acting in violation of federal law. Whitefield departs from this rule and, in light of Cory v. White, I decline to follow it.

Plaintiff also asserts authority for the proposition that where only prospective relief is sought, attorney's fees in pursuit of that relief are not barred by the sovereign immunity granted by the Eleventh Amendment. The Supreme Court has authorized an award of attorney's fees associated with obtaining declaratory or injunctive relief. See, e.g., Missouri v. Jenkins, 491 U.S. 274, 278, 109 S.Ct. 2463, 2466, 105 L.Ed.2d 229 (1989); Hutto v. Finney, 437 U.S. 678, 695, 98 S.Ct. 2565, 2575-76, 57 L.Ed.2d 522 (1978). Unlike in the instant case, in these cases the issue of sovereign immunity with regard to the availability of prospective relief had

been decided in plaintiff's favor, leaving for resolution only the issue of allowing attorney's fees ancillary to that relief. In this case the plaintiff failed to secure the relief sought; therefore, attorney's fees incurred in seeking the relief barred by sovereign immunity are not recoverable.

Defendant has correctly asserted that this court lacks subject matter jurisdiction to hear plaintiff's claim against the State of Georgia regardless of the nature of the claim or the relief sought. This court is without subject matter jurisdiction to determine whether the post-discharge garnishment violated the discharge injunction.

The parties also seek a determination whether the plaintiff's tax liabilities for 1986, 1989, and 1990 were discharged in the Chapter 13 case. This court has the authority to make this determination. 11 U.S.C. § 505(a)(1).<sup>4</sup> The limitations of § 505(a)(2) do not apply. Subsection (2)(A) refers to situations where there has been a contested proceeding concerning the tax or penalty at issue and subsection (2)(B) refers to the right of the estate to a tax refund. Under §505, this court has subject matter jurisdiction to determine the dischargeability of plaintiff's 1986,

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<sup>4</sup>11 U.S.C. § 505(a)(1) provides:

Except as provided in paragraph (2) of this subsection, the court may determine the amount or legality of any tax, fine or penalty relating to a tax, or any addition to tax, whether or not previously assessed, whether or not paid, and whether or not contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction.

1989, and 1990 tax liabilities.

Plaintiff's tax liability for additional 1986 income taxes, assessed September, 1991, has been discharged. Bankruptcy Code § 1328(a) provides that

[a]s soon as practicable after completion by the debtor of all payments under the plan, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title, except any debt--  
(1) provided for under section 1322(b)(5) of this title;  
(2) of the kind specified in paragraph (5), (8), or (9) of section 523(a) of this title; or  
(3) for restitution included in a sentence on the debtor's conviction of a crime.

The exceptions from discharge do not include any tax claims. Thus if the defendant's claim was "provided for" in the plan, liability for such was discharged. Defendant was listed as a creditor in plaintiff's schedules, received notice of plaintiff's bankruptcy, and filed a proof of claim. Defendant's proof of claim was filed after its assessment of additional 1986 income taxes but failed to include that assessment. Defendant made claims of \$1,625.29 as priority unsecured and \$53.17 as general unsecured for 1989 income taxes only.

Where a governmental unit is scheduled as a creditor for a prepetition tax debt, the government must, like any other creditor, file a proof of claim for such debt because that debt will

be discharged.

The statutes allow any prepetition tax debt to be discharged by providing for it in the plan and completing the plan. Unassessed prepetition tax debts are treated like other unfixed prepetition debts. A creditor with notice of the case has to file a proof of claim in order to be paid under the plan or the debt will be discharged without payment.

In re Ryan, 78 B.R. 175, 180 (Bankr. E.D. Tenn. 1987).

As in the instant case, in Ryan the governmental unit claimed that since the prepetition tax liability was determined postpetition the liability was non-dischargeable as a §1305 claim (applying to taxes that become due payable during the pendency of the bankruptcy case). The Ryan court rejected that argument based on a review of the Report of the Commission on Bankruptcy Laws of the United States, finding that the Commission did not intend taxes that "become payable" postpetition to include a prepetition tax liability not assessed until after filing. Id. at 181. In the instant case, the mere fact that the 1986 liability was assessed postpetition did not alter the time at which those taxes became due and did not thereby qualify them as a § 1305 claim pursuable post-discharge. More importantly, this liability was assessed by the State of Georgia before it filed its proof of claim allowed in this case. The failure to include the liability in the proof of claim was Georgia's not the debtor's. There exists no basis for excepting this tax liability from the discharge.

The parties agree in their respective briefs that plaintiff's tax liability for 1989 was provided for by the plan, paid in full, and discharged.

Defendant contends in its brief that the parties have agreed that plaintiff's tax liability for 1990 was not discharged. Plaintiff has not addressed this issue. The 1990 tax liability was not discharged. Plaintiff filed a tax return for 1990 but failed to include payment of the admitted tax liability. This tax liability became "due and owing" at the close of the 1990 tax year during the pendency of plaintiff's Chapter 13 case, filed November 30, 1990. This tax liability falls under the scope of §1305, which addresses the filing and allowance of postpetition claims:

- (a) A proof of claim may be filed by any entity that holds a claim against the debtor--
  - (1) for taxes that become payable to a governmental unit while the case is pending; .
  - . . .

11 U.S.C. § 1305. Section 1305 permits but does not require that taxes becoming due and payable during the debtor's Chapter 13 case be the subject of a proof of claim in the case. A discharge granted in a chapter 13 case would not relieve the debtor of liability on a postpetition claim, unless the debt had been provided for by the plan. 5 Collier on Bankruptcy ¶1305.01[2], at 1305-3 (L. King 15th Ed. 1994). Since the Georgia Department of Revenue did not elect to exercise its option under § 1305 and file a proof of claim for the 1990 tax liability which became due during the pendency of the chapter 13 case, the 1990 tax liability was not

"provided for" by the plan and therefore was not discharged.  
Accord, In re Hester, 63 B.R. 607 (Bankr. E.D. Tenn. 1986).

It is therefore ORDERED that the relief requested by the plaintiff for defendant's alleged discharge violation is denied as barred by sovereign immunity;

Further ORDERED that the plaintiff's personal liability for 1986 and 1989 State of Georgia taxes was discharged in the plaintiff's Chapter 13 case; and

Further ORDERED that the plaintiff's personal liability for 1990 State of Georgia taxes was not discharged in the plaintiff's Chapter 13 case.

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JOHN S. DALIS  
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia  
this 30th day of September, 1994.