

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT
Richmond, Virginia

ALAN J. CILMAN,
Appellant

v.

MARIN COUNTY DISTRICT ATTORNEY,
Et al.
Appellees.

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CASE No. 03-1776
Adversary Proceeding No.
081114-RGM
03-CV-272 (District Court)
Case No. 01-12387-RGM

BRIEF OF APPELLEE
Department of Child Support Services,
Successor in interest to
Marin County District Attorney

Tex Ritter, Supervising Child Support Attorney¹
Licensed to practice law in the State of California²
7655 Redwood Blvd.
Novato, CA 94945
(415) 499-3036

¹ Admitted to the 4th Circuit Court of Appeals 2003

² Appearing pursuant to Pub.L 103-394, Title IV, § 304(g), 108 Stat. 4134

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Statement of basis of Appellate Jurisdiction

This case arises as an appeal from the decision of the Honorable Robert G. Mayer, United States Bankruptcy Judge entered 9-30-2002 dismissing the complaint in an adversary proceeding. Jurisdiction is based upon 28 U.S.C. § 158(a) and the Federal Rules of Bankruptcy Procedure, Rules 8001 *et seq.*

Statement of Issues Presented

1. The Bankruptcy Court correctly dismissed the adversary proceeding.
 - a. The Bankruptcy Court Order of Dismissal is sustainable under Prosecutorial Absolute Immunity as all actions stated in the complaint were allegedly committed by the District Attorney for Marin County.
 - b. The Bankruptcy Court Order of Dismissal is sustainable under a finding that the Department of Child Support Services is acting as an “arm” of the State and thus entitled to 11th Amendment Immunity.
 - c. The Bankruptcy Court Order of Dismissal is supported by the record and application of law as Appellant fails to state a claim upon which relief can be granted.
 - d. Appellant’s non-core proceeding against California or state agencies of California must be filed in California and not in Virginia.
2. When the district court reviews a bankruptcy court's decision, the district court applies the “clearly erroneous” standard of review to findings of fact and *de novo* standard of review to conclusions of law. *In re Daniels-Head & Associates* (9th Cir. 1987) 819 F.2d 914, 919.
3. The trial court’s decision to dismiss an adversary proceeding will be overturned only if appellant establishes that the court committed a clear abuse of discretion. *In re Popa* (1997) 214 B.R. 416, 418.

APPELLEE’S OPENING BRIEF

The District Attorney’s Office for the County of Marin, State of California³ and the Department of Child Support Services for the County of Marin, State of California⁴ (hereinafter collectively referred to as “the District Attorney”), file their Brief of the appellee.

PRELIMINARY STATEMENT

Tex Ritter is a Deputy Child Support Attorney (and former Deputy District Attorney) for the Marin County Department of Child Support Services which is a Child Support Agency. Tex Ritter is admitted to practice in California only. A Child Support Agency in a Bankruptcy proceeding, appears pursuant to Pub.L 103-394, Title IV, § 304(g), 108 Stat. 4134, which states: “Child Support creditors or their representatives shall be permitted to appear and intervene without charge, and without meeting any special local court rule requirement for attorney appearances, in any bankruptcy case or proceeding in any bankruptcy court or district court of the United States if such creditors or representatives file a form in such court that contains information detailing the child support debt, its status, and other characteristics.” Therefore, it is respectfully requested that this Court allow Tex Ritter to appear in this matter to represent the Marin County District Attorney’s office and the Marin County Department of Child Support Services.

The Department of Child Support Services is the successor in interest to the Marin County District Attorney (hereinafter referred to as the “DCSS”). The Department of Child Support Services became an entity separate from the District Attorney on July 1, 2002.

³ The Office of the District Attorney is a governmental entity. It is the office of the local prosecutor.

⁴ The Department of Child Support Services (“DCSS”) is the successor in interest for child support services for Marin County effective 7-1-2002. All activities alleged to have occurred before July 1, 2002 would have been handled by the District Attorney. All action on or after July 1, 2002, the correct Defendant would be the Department of Child Support Services.

The new agency maintains the same rights and responsibilities as those previously assigned to the District Attorney. The DCSS is a governmental entity and as arm of the State of California. California Family Code §§ 17303 *et seq.* and §§ 17400 *et seq.*

This Appellee's Brief is for representation of both entities, including the Department of Child Support Services where erroneously sued as the District Attorney. *See explanation on page 9, infra.*

The DCSS respectfully requests that the Appeal be heard on the pleadings, or that it be allowed to appear telephonically if oral argument is necessary, or that the Attorney General for the State of Virginia be allowed to specially appear on it's behalf for argument on appeal.

PROCEDURAL STATEMENT OF THE CASE

On June 1, 2001, Mr. Cilman ("Appellant") filed for bankruptcy under Chapter 7, and on September 19, 2001, granted discharge of his nondischargeable debts. On April 18, 2002, Appellant filed a Motion to Reopen his bankruptcy case to file this adversary proceeding. On May 28, 2002, the Court granted his motion to reopen. The nature of the adversary proceeding was a request for declaratory relief that the child support debt was discharged in bankruptcy; violation of the automatic stay, 11 U.S. C. § 362; violation of the discharge provisions of 11 U.S. C. § 524(a); 42 U.S. C. §1983 action; and a claim for declaratory relief for harassment.

On August 1, 2002, the Clerk of the Bankruptcy Court issued a summons and notice of adversary proceeding to the District Attorney⁶. The summons was accompanied by a Complaint filed by Appellant and directed the District Attorney to submit a motion or answer thereto by September 3, 2002 or face judgment by default.

⁶ Appellant actually sought to sue the Department of Child Support Services.

The DCSS responded to Appellant's Complaint by moving to dismiss it under Fed. R. Bank. P. 7012(b) and Fed. R. Civ. P. 12(b)(1) and 12(b)(6). The Motion to Dismiss was heard on 9-24-2002 and the Order dismissing the adversary proceeding was entered on 9-30-2002. The Virginia Department of Social Services, also responded with a Motion to Dismiss and the Order dismissing the adversary proceeding dismissed them as defendants as well, this appeal followed.

STATEMENT OF FACTS

Mr. Cilman (Appellant) and the former Ms. Cilman lived in Marin County, California. They separated in 1989 causing Ms. Cilman to file for divorce and request and receive a child support order obligating Mr. Cilman to pay child support. In June 1989, Ms. Cilman, not having received support from Mr. Cilman, applied for and received Aid to Families with dependent Children ("AFDC" or welfare, now know as Temporary Assistance to Needy Families). She assigned her rights to collect child support to the County of Marin, District Attorney.

At the time, Appellant was not living with his children.

On December 26, 1989, the County of Marin and Mr. Cilman entered into a Stipulated Order. The Order states: "2. That the Respondent, ALAN J. CILMAN, shall pay to the COUNTY OF MARIN as and for reimbursement of AFDC funds provided by said County for the **support** of the Respondent's minor child, Zachery M. Cilman, born March 10, 1986, during the period of June 1989 through November 30, 1989, the sum of ...\$3,867.00." Plaintiff's Exhibit A, page 3, lines 8-13. Emphasis added for effect. The current balance owing with accumulated interest is \$9,706.83 as of March 31, 2003.

In June 2001, Appellant filed a Chapter 7 Bankruptcy proceeding.

Appellant denies that he owes such payments. In the alternative, he contends that any child support debt he might have owed was discharged in bankruptcy and now on appeal, for the first time, avers that the Uniform Interstate Family Support Act, 42 U.S.C. § 651 *et seq.*, is unconstitutional.

SUMMARY OF ARGUMENT

The District Attorney for Marin County is entitled to absolute immunity.

The DCSS is an “arm” of the State of California, and as such, is shielded from this adversary proceeding by virtue of sovereign immunity, as embodied in the Eleventh Amendment to the Constitution of the United States of America.

The Plaintiff fails to state a claim upon which relief can be granted. Child Support is not discharged in bankruptcy.

Plaintiff’s non-core proceedings may not be filed against a California governmental entity when it took no action in Virginia and there is no showing of joint or several liability between defendants. All acts alleged to have taken place in Virginia are alleged to have been taken by a Virginia entity, not a California entity and therefore, the non-core proceedings must be filed in a California court against a California governmental entity.

The appropriate standards of review are “clearly erroneous” with respect to findings of fact and *de novo* review with respect to conclusions of law.

An order of dismissal of an adversary proceeding will only be upset on appeal based upon a showing of an abuse of discretion.

Accordingly, the DCSS respectfully submits that the Bankruptcy Court properly dismissed the adversary proceeding, and therefore, respectfully requests this Court affirm the Order to Dismiss Appellant’s adversary proceeding.

ARGUMENT

1. The Bankruptcy Court properly dismissed the Adversary Proceeding.

A. THE DISTRICT ATTORNEY AS THE PUBLIC PROSECUTOR IS ENTITLED TO ABSOLUTE IMMUNITY.

Imbler v. Pachtman (1976) 424 U.S. 409. "...[T]hey [courts having addressed the issue of prosecutorial immunity] are virtually unanimous that a prosecutor enjoys absolute immunity from 42 U.S.C. § 1983 suits for damages when he acts within the scope of his prosecutorial duties." *Id.* At 420.

Prosecutorial immunity extends to all official duties of the public prosecutor in the discharge of official duties. At all times alleged in the Adversary proceeding, the child support matters and actions of the District Attorney were official duties, required by statute in California, for the public prosecutor to discharge. Thus, the District Attorney is entitled to absolute immunity. *Cooper v. Parrish* (6th Cir. 2000) 203 F.3d 937.

"[T]he prosecutors in this case may still be absolutely immune even though the alleged constitutional violations occurred when the officials were pursuing a civil action. Indeed, as long as the prosecutors were functioning in an enforcement role and acting as advocates for the state in initiating and prosecuting judicial proceedings, they are entitled to an absolute immunity defense." *Id.* at 947.

See California Family Code § 17305 describing the transition of child support duties and functions from the District Attorney to the Department of Child Support Services. *See also* California Welfare & Institutions Code § 11475.1, repealed by the enactment of Family Code § 17300 *et seq.* Prior to 7-1-2002, in Marin County, the District Attorney was required to participate in all child support functions.

B. APPELLANT'S ADVERSARY PROCEEDING IS BARRED BY THE ELEVENTH AMENDMENT.

The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of

the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” It is “an explicit limitation of the judicial power of the United States,” *Missouri v. Fiske* (1933) 290 U.S. 18, 25, and when properly invoked, deprives federal courts of jurisdiction to hear suits against the states, *see Pennhurst State School & Hosp. v. Halderman* (1984) 465 U.S. 89, 119-120.

It is firmly established that the immunity provided by the 11th Amendment prohibits the prosecution of suits filed in a federal forum by a state’s own citizens. *See, e.g., Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc.* (1993) 506 U.S. 139, 144; *Harter v. Vernon* (4th Cir. 1996) 101 F.3d 334, 337. The Supreme Court of the United States has explained:

[T]he entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a state without consent given: not one brought by citizens of another State . . . because of the Eleventh Amendment; and not even one brought by its own citizens, because of the fundamental rule of which the Amendment is but an exemplification.

Ex Parte New York (1921) 256 U.S. 490, 497; *accord Seminole Tribe of Florida v. Florida* (1996) 517 U.S. 44.

Furthermore, the Supreme Court has recognized that the Eleventh Amendment applies not only to the states, but also to state agencies acting as “arms” of the state. *Florida Dep’t of State v. Treasure Salvors, Inc.* (1982) 458 U.S. 670, 684; *see also Mt. Healthy City Board of Ed. v. Doyle* (1977) 429 U.S. 274, 280; *Ram Ditta v. Maryland Nat’l Capital Park & Planning Comm’n* (4th Cir. 1987) 822 F.2d 456, 457. The District Attorney is an appropriate “arm” of the state and the successor, the Department of Child Support Services is an agency under the authority of the State of California Department of Child Support Services. California Family Code § 17300 *et seq.*

The most salient inquiry when determining whether an agency is an arm of the state is whether a judgment against it will be satisfied by the state's treasury. *See, e.g., Hess v. Port Auth. Trans-Hudson Corp.* (1994) 513 U.S. 30.

The salaries, expenses, and other allowances of the District Attorney are paid out of the public fiske. The District Attorney is, therefore, entitled to Eleventh Amendment protection. *See, e.g., Edelman v. Jordan* (1974) 415 U.S. 651 (Department of Public Aid of Illinois immune). The salaries, expenses and other allowances of the DCSS are paid by the State of California through a direct grant to the local government.

This said, the immunity is not absolute, *see Thorpe v. Virginia State Univ.* (E.D. Va. 1998) 6 F.Supp.2d 507, 510, and as interpreted in this circuit, is not implicated by all federal proceedings, *see NVR Homes, Inc. v. Clerks of the Circuit Courts for Anne Arundel County, Maryland (In re NVR, LP)* (4th Cir. 1999) 189 F.3d 442, 450. While the United States Supreme Court has ruled that a state may waive its immunity, and consent to federal jurisdiction, *Atascadero State Hosp. v. Scanlon* (1985) 473 U.S. 234, 238, the holding in that case has been overruled by Congress' enactment of 42 U.S.C. § 2000d-7 in 1986 specifically excluding 11th Amendment immunity from title IX and title VI actions.. Congress may abrogate sovereign immunity if it has "unequivocally expresse[d] its intent" to do so and has acted "pursuant to a valid exercise of power," *Green v. Mansour* (1985) 474 U.S. 64, 68. Furthermore, in *Ex parte Young* (1908) 209 U.S. 123, the Supreme Court carved out a narrow exception to immunity that allows suits for injunctive or declaratory relief to proceed against *individual* state officials to remedy ongoing violations of federal law. *See South Carolina State Ports Authority v. Federal Maritime Comm'n* (4th Cir. 2001) 243 F.3d 165, 170, *aff'd* (2002) 122 S. Ct. 1864.

Appellant cites *Maryland v. Antonelli Creditors' Liquidating Trust* (4th Cir. 1997) 123 F.3d 777 in support of his allegation that local agencies or “arms” of the state are not entitled to 11th Amendment immunity. However, the holding in the *Maryland v. Antonelli* case is quite the opposite. The court held that the taxing agencies might have been entitled to 11th Amendment immunity, but based upon the fact that the state agencies were just creditors opposing a plan of reorganization, they could not present an 11th Amendment defense because the proceeding in bankruptcy was not a suit brought against a state by a private party. *Id. at* 786. A confirmation order in a Chapter 11 proceeding was not a suit for which a state could present an 11th Amendment defense.

“While resolution of an adversary proceeding against a state depends on court jurisdiction over that state, the power of the bankruptcy court to enter an order confirming a plan, including a provision interpreting 11 U.S.C. § 1146(c), derives not from jurisdiction over the state or other creditors, but rather from jurisdiction over debtors and their estates.” *Id. at* 787.

Mt. Healthy City School Dist. Bd. of Ed. v. Doyle (1977) 429 U.S. 274 is likewise not instructive in this case as the court found that under Ohio law, the School District had powers in excess of the state and local powers not subject to state scrutiny and was not, therefore, an “arm” of the state. Appellant has cited no California authority to support his decision and stated no facts to show that the Marin County District Attorney and the Department of Child Support Services did not act as an “arm” of the State in enforcing the child support laws. He is unable to do so.

However, as demonstrated below, Appellant’s adversary proceeding is a suit against a nonconsenting arm of the State of California, for which Congress has not effectively waived sovereign immunity. Moreover, the narrow exception to immunity crafted by the Supreme Court in *Ex parte Young* is inapplicable to this suit.

1. Appellant’s Adversary Proceeding Is a Suit.

While the Supreme Court’s “recognition of sovereign immunity has not been limited to the suits described in the text of the Eleventh Amendment,” *Idaho v. Coeur d’Alene Tribe of Idaho* (1997) 521 U.S. 261, 267 (1997), the Fourth Circuit has held that not all bankruptcy proceedings implicate the amendment’s proscription, *see, e.g., Virginia v. Collins (In re Collins)* (4th Cir. 1999) 173 F.3d 924, 929. Thus, in this circuit, neither a motion to reopen a Chapter 7 bankruptcy, *see id.*, nor a proceeding to adopt a Chapter 11 plan of reorganization is a “suit” of the sort proscribed by sovereign immunity, *see Maryland v. Antonelli Creditor’s Liquidating Trust* (4th Cir. 1997) 123 F.3d 777, 786-87.

“However, each of these proceedings must Be distinguished from the case in which a debtor, a trustee or other private person files an adversary action against the state in the bankruptcy court, causing the bankruptcy court to issue process summoning the state to appear. Such an adversary proceeding would be a suit “prosecuted against one of the United States” and adjudication of that suit would depend on the court’s jurisdiction over the state, implicating the Eleventh Amendment’s limitation on federal judicial power.” *Id.*

Appellant has filed an adversary proceeding against an arm of the State of California, causing this Court to issue process summoning it to appear. If the DCSS failed to timely respond to the Summons and Complaint, it faced judgment by default. Moreover, to grant the relief that Appellant seeks, this Court would have to exercise jurisdiction over the State Treasury of California and the County treasury of the County of Marin and the District Attorney. Beyond a doubt then, this adversary proceeding is a suit “prosecuted against one of the United States” that, absent abrogation or exception, is barred by sovereign immunity. In consequence whereof, Appellant’s claims, whether brought under the Bankruptcy Code, *see Schlossberg v. Maryland (In re Creative Goldsmiths of Washington, D.C., Inc.)* (4th Cir. 1997) 119 F.3d 1140, 1147, or 42 U.S.C. § 1983, *see Will v. Michigan Dep’t of State Police*, (1989) 491 U.S. 58, 63, are barred.

2. Congress Has Not Abrogated Eleventh Amendment Immunity in Adversary Proceedings.

Though Congress purported to abrogate the states' Eleventh Amendment immunity in adversary proceedings by enacting 11 U.S.C. § 106, it is firmly established in this circuit, *see, e.g., Collins*, 173 F.3d at 927-28, and in others, *see, e.g., Sacred Heart Hosp. of Norristown v. Pennsylvania*, (3rd Cir. 1998) 133 F.3d 237, 245, that this attempt at abrogation was “unconstitutional and ineffective.” *Schlossberg*, 119 F.3d at 1147. The Bankruptcy Clause of the Constitution, art. I, § 8, cl. 4, does not vest Congress with the authority to abrogate sovereign immunity. 119 F.3d at 1145-46. Moreover, § 106 was not enacted pursuant to a lawful exercise of Congress' enforcement power under § 5 of the Fourteenth Amendment, 119 F.3d at 1146-47. Thus, sovereign immunity bars this Court from exercising jurisdiction over this nonconsenting Defendant, unless Appellant can avail himself of an exception to the Eleventh Amendment.

3. *Ex parte Young* Does Not Apply to this Adversary Proceeding.

The *Ex parte Young* doctrine, often described as a “fiction,” *see, e.g., Lytle v. Griffith* (4th Cir. 2001) 240 F.3d 404, 409, permits a federal court to enjoin a state official from an ongoing violation of federal law. The relief *Young* affords is prospective in nature. *See, e.g., Edelman*, 415 U.S. at 678. The majority of the relief Appellant seeks is, by contrast, retrospective, that is, he seeks monetary damages for past alleged violations of the Bankruptcy Code and § 1983. *Young* simply does not afford him this type of relief. *Id.*

Moreover, while Appellant's request for declaratory and injunctive relief are prospective in nature, the narrow exception carved out in *Young* is, nevertheless, unavailable to him. Appellant's adversary proceeding is against a state agency acting as an arm of the State of California, and is not, as required by *Young*, against individual state officials.

**C. APPELLANT FAILS TO STATE A CLAIM UPON WHICH RELIEF
CAN BE GRANTED**

The Bankruptcy Court's Dismissal of the adversary proceeding should be affirmed for reasons other than just application of the 11th Amendment. The reviewing court must uphold the dismissal if other grounds exist to support the order of dismissal.

A long line of cases make it clear that Appellant's child support debt is not discharged in bankruptcy. *In re Mojica* (E.D. N.Y. 1983) 30 B.R. 925. *Mojica* dealt with almost the exact same facts herein. An ex-wife went on public assistance, the County got an order for reimbursement of support, and the debtor filed bankruptcy. The Court indicated that the debt, even the assigned debt to the County, was not discharged in bankruptcy. As the allegations in Appellant's adversary complaint relate to violation of the stay, violation of the discharge and declaration of dischargability of debt, he fails to state a claim.

"Under this section it was well established that if a husband abandoned his wife he retained a moral and legal duty of support and debts incurred for such maintenance and support were nondischargeable without any requirement that the debt arise from a specific decree or agreement." *Id.* At 927.

There are many cases involving the exact same result. As the debt is nondischargeable, there is no violation of the automatic stay. All actions taken to enforce the child support debt were proper. Including the suspension of the debtor's driver's license. Appellant can not state a claim for violation of stay or discharge with respect to this debt.

**D. APPELLANT'S NON-CORE CLAIMS AGAINST CALIFORNIA
MUST BE FILED IN CALIFORNIA AS NO ACTIONS ARE
ALLEGED TO HAVE BEEN TAKEN BY CALIFORNIA OR
CALIFORNIAN ENTITIES IN VIRGINIA.**

Appellant alleges that the Virginia Department of Social Services took action against him in Virginia. He does not allege that any California entity took any such action or that there is joint or several liability or *respondeat superior* liability between Virginia and California.

Therefore, all non-core claims contained in Counts 4 and 5 must be brought in California against a California governmental entity, if at all.

2. The “Clearly Erroneous” Standard of Review is Applicable in this Case.

The correct standard for review by the district court of a bankruptcy court’s decision is the “clearly erroneous” standard to finding of fact and *de novo* standard of review to conclusions of law. *In re Daniels-Head & Associates* (9th Cir. 1987) 819 F.2d 914, 919.

The court’s record does not indicate any findings of fact and Appellant requested none. The reviewing court must then look to see if there is any application of facts that would support the conclusion of law. The only conclusion of law is that the case be dismissed. One possible ground for the dismissal was that the Adversary Proceeding was barred by the 11th Amendment. There are numerous facts in support of that conclusion. Therefore, the decision must be upheld.

3. Dismissal will be overturned only upon showing of an abuse of discretion.

The trial courts decision to dismiss an adversary proceeding will only be overturned if Appellant establishes that the court committed a clear abuse of discretion. *In re Popa* (1st Cir BAP 1997) 214 B.R. 416, 418. Appellant makes absolutely no showing that the lower court abused it’s discretion in dismissing the adversary proceeding.

CONCLUSION

Appellant's claims for monetary relief are clearly barred by prosecutorial immunity, the Eleventh Amendment, his failure to state a claim upon which relief can be granted and his failure of jurisdiction over a California entity for actions taken in California. Accordingly, Appellant's adversary Complaint is properly barred and this court should affirm the decision of the lower court.

WHEREFORE, the Department of Child Support Services (erroneously sued as the District Attorney) of the County of Marin, ask the Court to affirm the Order of Dismissal of the adversary proceeding with prejudice.

DATED: April 3, 2003

DEPT. OF CHILD SUPPORT SERVICES
DISTRICT ATTORNEY
COUNTY OF MARIN
STATE OF CALIFORNIA
7655 Redwood Blvd.
Novato, CA 94945
(415) 507-4068
(415) 507-4150 fax
tritter@co.marin.ca.us

TEX RITTER
Deputy Child Support Attorney
California Bar # 123072

CERTIFICATE

I certify that, on April 3, 2003, a true copy of the foregoing pleading was sent by mail to:

Alan J. Cilman
507 Valley Drive
Vienna, VA 22180
Plaintiff *pro se*

KEVIN O. BARNARD
Office of the Attorney General
900 East Main Street
Richmond, VA 23219

Tex Ritter
Supervising Deputy Child Support Attorney