UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

WALTER J. JOHNSON,

Appellant

-vs-

COUNTY OF MONROE CHILD SUPPORT ENFORCEMENT UNIT AND NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE,

Appellees

DECISION and ORDER

00-CV-6019

FILED
U.S. DISTRICT COURT
W.D.N.Y. ROCHESTER
2000 OCT 13 AM 11:18
CLERK, U.S. DISTRICT COURT
SERVICE TO WESTERN NEW YORK
000-2000

APPEARANCES

For the Appellant: Walter J. Johnson, *Pro Se*
P.O. Box 90911
Rochester, New York 14609

For the Appellees: Marie C. D'Amico, Esq.
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39 West Main Street
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Introduction

This case is before the Court on appellant's notice of appeal from all parts of a decision and order in bankruptcy case No. 98-22592 filed by the Honorable John C. Ninfo, II, U.S. bankruptcy Judge on December 3, 1999. In that decision, Judge Ninfo denied the debtor's request for an order pursuant to section 11 U.S. Code § 362(h)

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awarding him compensatory or punitive damages against appellants for willful violation of the automatic stay provided for in 11 U.S. Code § 362(a). Following a review of the briefs filed by the parties in this appeal, the contents of the record on appeal, and the parties' oral arguments, this Court affirms Judge Ninfo's decision and order.

Background

Judge Ninfo's decision of December 3, 1999, extensively reviewed the chronological history of appellant's bankruptcy case and, will not be repeated in detail here. Following an evidentiary hearing on September 29, 1999, Judge Ninfo made findings of fact and conclusions of law. Judge Ninfo found that prior to February 3, 1999, appellant's bankruptcy attorney never orally or in writing notified the County of Monroe, the County Support Unit, or the Department of Taxation that appellant had filed for bankruptcy. Decision and Order, *In re: Walter J. Johnson* (W.D.N.Y. Bankruptcy Court, No. 98-22592, Dec. 3, 1999) (hereinafter "slip opinion") at 14. Further, Judge Ninfo found that appellant's bankruptcy attorney never had a conversation with a representative of the County Support Unit regarding appellant's pre-petition support arrearages and never notified the County Support Unit that appellant's Chapter 13 plan provided for the payment of those arrearages by the Trustee. *Id.* Judge Ninfo also found that as a result of an oral notice appellant gave the representative of the state tax department on October 30, 1998, the Department of Taxation filed with the bankruptcy court a proof of claim, dated October 26, 1998, for unpaid 1994 income taxes and then, on August 4, 1998, the County of Monroe

filed a proof of claim for unpaid real estate taxes; however, the Support Collection Unit of the State Department of Taxation had no record of ever having received documentary proof from appellant that he had filed bankruptcy. *Id.* at 15. Judge Ninfo determined that the state Support Collection Unit learned of the bankruptcy on or about May 3, 1999, from the Monroe County Support Unit's notation to an automated collection database. *Id.* at 15. Judge Ninfo also concluded that appellant had provided no proof of any of the damages he claimed resulted from the state's or county's actions. Id. at 15-16. Further, appellant failed to provide any proof that a $3,000 check deposited by him on December 28, 1999, was ever paid over to the county or state. In fact, the proof in the record on appeal shows conclusively just the opposite, that is, the money was used to pay checks written on appellant's checking account. Appellant appeared in this Court on April 20, 2000, seeking a temporary restraining order. During his argument, plaintiff presented to the Court his banking statement (# 12) from Fleet Bank, account number 0515632222, dated January 11, 1999. That statement, which, at plaintiff's request, the Court considered on oral argument for this appeal, shows conclusively that plaintiff was able to draw funds against the December 28, 1998 check he alleges was seized by the respondents.

With regard to proof of damages, Judge Ninfo found the appellant, "simply asserted that the $3,257.13 collected by pre-petition obligation by the Department of Taxation should not have been collected. However, all of those monies were applied or re-applied to non-dischargeable post-petition support obligations that were due and

unpaid by [appellant] to Joyce Johnson, and which benefitted [appellant] directly, dollar for dollar." Slip opinion at 21.

Judge Ninfo found from his review of the evidence that Joyce Johnson's failure to advise the County Support Unit of appellant's bankruptcy filing, knowing that the support unit was taking steps to collect pre-petition arrearages on her behalf, was a willful violation of the automatic stay provided for in 11 U.S. Code § 362. *Id.* at 23. However, because appellant's section 362(h) motion did not name Joyce Johnson as a respondent and appellant failed to prove any damages, Judge Ninfo denied him any relief against her. With respect to the New York State Department of Taxation, Judge Ninfo found that any actions taken by the department before it received formal proof of appellant's bankruptcy filing did not constitute a willful violation of the automatic stay. *Id.* at 26-27. Moreover, Judge Ninfo found that, once again, appellant failed to prove any actual damages and that the department ceased all collection activities when it received confirmation of the bankruptcy from the County Support Unit.

However, Judge Ninfo concluded that the County of Monroe's Support Unit had sufficient knowledge by February 3, 1999, of appellant's bankruptcy and, thereafter, could no longer insist upon receiving written confirmation and proceeded at its own peril. He specifically found that the County Support Unit's "failure to take any action to immediately insure that the Department of Taxation terminated its collection activities constituted a willful violation of the Stay." *Id.* at 31. Nevertheless, because

appellant did not prove any actual damages, Judge Ninfo did not award him any actual or punitive damages. *Id.* at 31.

Appellant's Arguments on Appeal

In his brief on appeal, filed with the bankruptcy court on January 3, 2000, appellant raises four arguments. He argues that the bankruptcy court erred when it permitted appellee New York State Department of Taxation and Finance to withdraw their motion for sovereign immunity, which contained "evidence" that appellant was apparently relying upon to prove his section 362(h) motion. In his second point, appellant argues that the bankruptcy court drew the wrong conclusion from the evidence with regard to whether appellees had constructive notice of appellant's bankruptcy proceeding prior to June 1999. Appellant's third point raises, apparently for the first time, the issue of whether appellees violated appellant's Fourth[1] Amendment right to due process. Finally, in his fourth point, appellant asks if the bankruptcy court considered whether appellees' actions violated provisions of the New York Social Services Law and New York Civil Practice Law and Rules.

Discussion

When reviewing bankruptcy appeals, the district court must review conclusions of law *de novo* and apply the "clearly erroneous" standard to the bankruptcy court's findings of fact. *See In re Nemko, Inc.*, 202 B.R. 673 (E.D.N.Y. Aug 13, 1996).

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[1]Appellant appears to be attempting to refer to the due process clause of the Fifth Amendment, and not the Fourth Amendment right against unreasonable searches and seizures.

Procedurally, the Court may not apply a rule inconsistent with Bankruptcy Rules 8001-8017. *See* Bankruptcy Rule 8018. Bankruptcy rule 8013 addresses the standard of review regarding findings of fact and reads, in pertinent part,

> On appeal the district court . . . may affirm, modify, or reverse a bankruptcy court's judgment, order, or decree or remand with instructions for further proceedings. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses.

Bankruptcy Rule 8013. Section 362(h) reads,

> An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

11 U.S. Code § 362(h).

The Court will address appellant's arguments in the order in which they are presented in his brief appeal.

Withdrawal of Sovereign Immunity Motion

Appellant's first point of consists of a one sentence argument: "[t]he Court erred when it to allow[ed] the New York State Department of Taxation and Finance to withdraw their motion for Sovereign Immunity, that contained evidence (proof of claim signed by the New York State Department [of] Taxation and Finance, dated October 26, 1998)." Appellant's brief at 1. This issue is not before the Court on this appeal because there is no proof in the record on appeal that the motion was withdrawn, or that appellant preserved the issue below by protesting the bankruptcy court decision

allowing withdrawal. In any event, the motion, presumably with all its attachments, was included in the record on appeal. *See* Walter Johnson letter to Honorable John C. Ninfo, II (Dec. 20, 1999). Moreover, as stated above, Judge Ninfo found that on October 30, 1998, the Department of Taxation filed a proof of claim for unpaid 1994 income taxes. Slip opinion at 15. Therefore, if any error was made in allowing the state to withdraw its motion, it appears to have had no detrimental effect on appellant's rights.

Constructive Notice to the State and County Agencies

In his second point, a appellant appears to question the bankruptcy court's findings regarding whether the state and county agencies had constructive notice of the bankruptcy proceeding as early as July 30, 1998. In his statement of facts in the brief, however, appellant appears to complain that New York State Hearing Examiner Margaret M. Boldt's September 15, 1998, judgment and order of support failed to mention appellant had filed for bankruptcy. Hearing Examiner Boldt's order is not on appeal before this Court and appellant has not directed the Court's attention to anything in the record which would show Judge Ninfo's findings of fact are "clearly erroneous," or how the facts in this case reveal a willful violation by the State. Although, Judge Ninfo did find a willful violation by the county, without proof of actual damages, he correctly concluded that neither actual nor punitive damages were due to appellant.

Due Process Violation

In his affidavit filed on April 11, 2000, appellant charges that the, "Justice System is an Institutional form of Racism at the highest level that protects this evil beast racism." Johnson aff. at 2. Appellant further impugns the integrity of State Supreme Court Justice Galloway for apparently having exercised his authority to determine custody and visitation of appellant's child between appellant and his estranged wife (and creditor in the bankruptcy), Joyce Johnson. *Id.* at 2-3. Appellant's affidavit then attacks State Judge Purple of Steuben County, alleging that his racist attitude would not permit appellant's attorney to mount a defense in that court regarding appellant's child support and other issues that arose during the equitable distribution of property between appellant and Joyce Johnson. *Id.* at 4-5. Nowhere in his affidavit, or his motion for contempt below, does appellant raise the argument now address on appeal. Although it was mentioned during the hearing on September 29, 1999, before Judge Ninfo, it was not pressed and Judge Ninfo's decision did not rely on this argument or decide it. Since the issue has not been preserved by appellant below, this Court will not address it now.

Social Services Law and Civil Practice Law and Rules

Finally, appellant asks whether the bankruptcy court considered violations of New York Social Services Law § 111-b and 117-i and New York Civil Procedure Law and Rules § 5232(a). Once again, the Court finds no support in the record on appeal designated by appellant showing this issue was raised by him below. Although this

issue was mentioned during the September 29, 1999, hearing before Judge Ninfo, it was not pressed below, nor did Judge Ninfo's decision rely on this issue, or even address it. Since this issue has not been preserved for appellate review, the Court will not address it here.

County's Request for Summary Judgment

The County asks in it's brief on appeal for summary judgment in its favor. It does not appear from the record, however, that the county ever appealed from the bankruptcy court decision and order of December 3, 1999. Since the only appellant in this case is the debtor, Walter Johnson, and the Court is affirming the bankruptcy court decision, it will decline appellee's request for summary judgment in its favor.

Conclusion

For the reasons stated above, Judge Ninfo's decision and order of December 3, 1999, is affirmed.

IT IS SO ORDERED.

Dated: Rochester, New York
October 12, 2000

ENTER:

Charles J. Siragusa
United States District Judge

ATTEST: A TRUE COPY
U.S. DISTRICT COURT, WDNY
RODNEY C. EARLY, CLERK

By _____
Deputy Clerk

Original Filed 10-13-00

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Johnson

Plaintiff(s)

v. 6:00-cv-06019

County of Monroe C

Defendant(s)

PLEASE take notice of the entry of an ORDER filed on 10/13/00, of which the within is a copy, and entered 10/13/00 upon the official docket in this case. (Document No. 13 .)

Dated: Rochester, New York
October 13, 2000

RODNEY C. EARLY, Clerk
U.S. District Court
Western District of New York
2120 U.S. Courthouse
100 State Street
Rochester, New York 14614

Enclosure
TO:

Walter J. Johnson .
Marie C. D'Amico, Esq.
Marie C. D'Amico, Esq.
Elaine Cole, Esq.
George M. Reiber

1AO 450 (Rev. 5/85) Judgment in a Civil Case

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

WALTER J. JOHNSON,

JUDGMENT IN A CIVIL CASE

Plaintiff(s),

vs.

COUNTY OF MONROE CHILD SUPPORT ENFORCEMENT UNIT AND NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE,

Defendant(s)

FILED
U.S. DISTRICT COURT
W.D.N.Y. ROCHESTER
00 OCT 13 PM 3:13
CELEBRATING 100 YEARS OF SERVICE TO WESTERN NEW YORK 1900-2000

CASE NUMBER:
00-CV-6019

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X **Decision by Court.** This action came to ~~trial or~~ hearing before the Court. The issues have been ~~tried or~~ heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED THAT United States Bankruptcy Judge John C. Ninfo's decision and order dated 12/3/99 is affirmed and the action is dismissed.

October 13, 2000
Date

RODNEY C. EARLY
Clerk

(By) [signature]
Bryan J. Blough, CLA
Deputy Clerk

ATTEST: A TRUE COPY
U.S. DISTRICT COURT, WDNY
RODNEY C. EARLY, CLERK
By [signature]
Deputy Clerk

Original Filed 10-13-00

#14

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Johnson

Plaintiff(s)

v. 6:00-cv-06019

County of Monroe C

Defendant(s)

PLEASE take notice of the entry of a JUDGMENT filed on 10/13/00, of which the within is a copy, and entered 10/13/00 upon the official docket in this case. (Document No. 14 .)

Dated: Rochester, New York
October 13, 2000

RODNEY C. EARLY, Clerk
U.S. District Court
Western District of New York
2120 U.S. Courthouse
100 State Street
Rochester, New York 14614

Enclosure
TO:

Walter J. Johnson .
Marie C. D'Amico, Esq.
Marie C. D'Amico, Esq.
Elaine Cole, Esq.
George M. Reiber