

MAY 26 2005

NOT FOR PUBLICATION

**HAROLD S. MARENUS, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT**

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT**

6	In re:)	BAP No.	CC-04-1446-BMoD
7	HARRY H. MITCHELL,)	Bk. No.	RS 95-25776-MJ
8	Debtor.)	Adv. No.	RS 03-01561-MJ
9	_____)		
10	HARRY H. MITCHELL,)		
11	Appellant,)		
12	v.)	MEMORANDUM¹	
13	GERALD GOLDBERG,)		
14	Appellee.)		
	_____)		

Argued and Submitted on May 12, 2005
at Pasadena, California

Filed - May 26, 2005

Appeal from the United States Bankruptcy Court
for the Central District of California

Honorable Meredith A. Jury, Bankruptcy Judge, Presiding

Before: BRANDT, MONTALI, and DUNN,² Bankruptcy Judges.

¹ This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except when relevant under the doctrines of law of the case, res judicata or collateral estoppel. See 9th Cir. BAP Rule 8013-1.

² Hon. Randall L. Dunn, United States Bankruptcy Judge for the District of Oregon, sitting by designation.

1 Debtor/appellant Harry Mitchell sought declaratory relief that
2 certain state taxes were discharged in his chapter 7³ case, and
3 injunctive relief requiring the release of the California Franchise Tax
4 Board's (FTB) lien on Mitchell's home. Mitchell's prior adversary
5 against FTB seeking similar relief was dismissed on sovereign immunity
6 grounds, so Mitchell brought his adversary proceeding against Gerald
7 Goldberg, Executive Director of FTB. Mitchell appeals the bankruptcy
8 court's dismissal of his adversary proceeding against Goldberg. We
9 AFFIRM.

11 I. FACTS

12 Appellant Harry Mitchell and his wife June ("Mitchells") filed for
13 chapter 7 relief in November 1995. At the time, Mitchells were indebted
14 to FTB for taxes owing for 1973, 1974, 1976, 1977, and 1980. FTB had
15 issued Notices of Proposed Assessment for those taxes on 13 October
16 1992. Mitchells filed protests of the assessments; FTB affirmed the
17 assessments on 17 May 1995. Mitchells then appealed to the State Board
18 of Equalization ("SBE"). While the appeal was pending, Mitchells filed
19 the instant chapter 7 case; they received a discharge in February 1996.

20 Mitchells subsequently filed an adversary proceeding against FTB
21 and SBE for various claims, including a determination of the
22 dischargeability of the subject taxes. The bankruptcy court ultimately
23 dismissed the complaint on sovereign immunity grounds; we upheld
24 dismissal, In re Mitchell, 222 B.R. 877 (9th Cir. BAP 1998) aff'd, 209
25 F.3d 1111 (9th Cir. 2000).

28 ³ Absent contrary indication, all section and chapter
references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330.

1 Mitchells were unsuccessful in their appeal to the SBE, which
2 issued Notices of Determination on Appeal on 2 December 1998. In
3 September 2003 Harry Mitchell (individually) filed an adversary
4 proceeding against Goldberg, FTB and SBE. The bankruptcy court granted
5 defendants' motion to dismiss FTB and SBE from the lawsuit, and allowed
6 Mitchell to amend his complaint twice. Mitchell alleged that FTB had
7 illegally placed a lien on his residence in 1999 in violation of the
8 discharge granted in his chapter 7 case. He sought a declaration that
9 the taxes had been discharged and an order requiring Goldberg to release
10 the lien.

11 On 16 July 2004 Goldberg moved for summary judgment dismissing
12 Mitchell's complaint because (1) the taxes at issue were not discharged
13 in Mitchells' bankruptcy, and (2) Mitchell was estopped from
14 relitigating that issue based on the prior dismissal of Mitchells' claim
15 against FTB on sovereign immunity grounds. The bankruptcy court agreed,
16 and dismissed the complaint by judgment entered 27 August 2004.
17 Mitchell timely appealed.

18 19 **II. JURISDICTION**

20 The bankruptcy court had jurisdiction via 28 U.S.C. § 1334 and
21 § 157(b) (1) and (b) (2) (I) and (O), and we do under 28 U.S.C. § 158(c).
22

23 **III. ISSUE**

24 Whether the bankruptcy court erred in granting summary judgment
25 dismissing Mitchell's complaint.
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IV. STANDARD OF REVIEW

We review the granting of summary judgment de novo. In re Baldwin, 245 B.R. 131, 134 (9th Cir. BAP 2000), aff'd, 249 F.3d 312 (9th Cir. 2001). We must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the trial court correctly applied relevant substantive law. In re Bishop, Baldwin, Rewald, Dillingham & Wong, Inc., 819 F.2d 214, 215 (9th Cir. 1987).

V. DISCUSSION

A. Dischargeability of Taxes

Whether Mitchell is entitled to an injunction against further enforcement action turns on whether his debt to FTB was discharged in his chapter 7 case. He contends the debt was discharged and that, despite FTB's sovereign immunity, he may obtain prospective injunctive relief against Goldberg individually via the Ex Parte Young doctrine. Under that doctrine, "a suit seeking prospective equitable relief against a state official who has engaged in a continuing violation of federal law is not deemed to be a suit against the State for purposes of state sovereign immunity." In re Ellett, 254 F.3d 1135, 1138 (9th Cir. 2001) (citing Ex Parte Young, 209 U.S. 123, 159-60 (1908), and Will v. Mich. Dep't of State Police, 491 U.S. 58, 71 n.10 (1989)).

In Ellett, the Ninth Circuit held that a discharge order may be enforced against a state tax official for prospective injunctive and declaratory relief pursuant to Ex Parte Young. What distinguishes Ellett from the instant case is that in Ellett, the taxes at issue were presumed to be discharged. That is not the case here.

1 Section 523(a) (1) (A) excepts from discharge debts for taxes "of the
2 kind and for the periods specified in . . . 507(a) (8) of this title . .
3 . ." Section 507(a) (8) includes income taxes "not assessed before, but
4 assessable, under applicable law or by agreement, after the commencement
5 of the case[.]"

6 "A tax deficiency is 'assessed' for purposes of rendering the
7 assessment nondischargeable not when the notice of the assessment is
8 filed, but when the assessment becomes 'final.'" In re Bracey, 77 F.3d
9 294, 295 (9th Cir. 1996) (citing In re King, 961 F.2d 1423, 1427 (9th
10 Cir. 1992)). Under California law, the filing of a protest or an appeal
11 prevents an assessment from becoming final. See Cal. Rev. & Tax Code
12 § 19042 (if no protest is filed, assessment becomes final after 60
13 days); § 19045 (FTB's action upon protest is final after 30 days unless
14 taxpayer appeals to SBE); and § 19048 (SBE's determination becomes final
15 after 30 days unless taxpayer or FTB files petition for rehearing, in
16 which case the determination becomes final 30 days after SBE issues its
17 opinion).

18 Mitchells filed their chapter 7 petition while their appeal to SBE
19 was pending. Accordingly, the assessments were not final on the
20 petition date and were thus excepted from discharge under
21 § 523(a) (1) (A). As the taxes were not discharged, they are still owed
22 to the state, and there are no grounds to enjoin Goldberg from further
23 collection efforts. The bankruptcy court did not err in dismissing
24 Mitchell's complaint.

25
26 **B. Issue Preclusion**

27 The bankruptcy court concluded that Mitchell is precluded from
28 relitigating the issue of dischargeability due to the prior dismissal of

1 his suit against FTB, citing In re Associated Vintage Group, Inc., 283
2 B.R. 549, 556 (9th Cir. BAP 2002), and In re Elder, 262 B.R. 799, 806
3 (C.D. Cal. 2001) aff'd, 40 Fed. Appx. 576 (9th Cir. 2002) (table).
4 Statement of Uncontroverted Facts and Conclusions of Law, conclusion 3.

5 It is not clear that the doctrine of issue preclusion applies in
6 this instance. See Park Lake Resources LLC v. U.S. Dep't of
7 Agriculture, 378 F.3d 1132, 1138 (10th Cir. 2004) (when identity of
8 defendant is central to jurisdictional dismissal, such as when party is
9 protected by sovereign immunity, issue preclusion does not bar suit
10 against a third party). But because the taxes were not discharged, this
11 issue is not dispositive, and any error in this respect is harmless.
12 28 U.S.C. § 2111; FRCP 61, incorporated by Rule 9005; Dittman v.
13 California, 191 F.3d 1020, 1027 n.3 (9th Cir. 1999); In re Maximus
14 Computers, Inc., 278 B.R. 189, 194 (9th Cir. BAP 2002).

15
16 **C. Claim Preclusion**

17 Mitchell argued to the bankruptcy court that the tax assessments
18 were invalid, and he appears to incorporate that argument into his
19 appellate brief. But Federal courts must give preclusive effect to
20 factual determinations of a state agency acting in a judicial capacity.
21 Univ. of Tenn. v. Elliott, 478 U.S. 788, 799 (1986). See also Rooker v.
22 Fidelity Trust Co., 263 U.S. 413 (1923) (holding that the exclusively
23 original jurisdiction of federal district courts precludes the same from
24 entertaining appeals from state courts, even of federal constitutional
25 questions); District of Columbia Court of Appeals v. Feldman, 460 U.S.
26 462 (1983) (developing the same); Exxon Mobil Corp. v. Saudi Basic Indus.
27 Corp., 125 S. Ct. 1517, 1521-22 (2005) ("Rooker-Feldman does not
28 override or supplant preclusion doctrine or augment the circumscribed

1 doctrines that allow federal courts to stay or dismiss proceedings in
2 deference to state-court actions"). The validity of the assessments had
3 been finally determined by SBE; accordingly, Mitchell is precluded from
4 raising this claim.

5
6 **D. Mitchell is Not Entitled to Other Relief**

7 For the foregoing reasons, Mitchell is neither entitled to a
8 contempt order against Goldberg nor to \$5000 for his expenses, which he
9 requested in his opening brief. Even if he were, he set forth neither
10 statutory authority for any monetary award, nor itemization of the
11 amounts requested, nor has he complied with the procedure for seeking
12 sanctions.

13 Finally, Mitchell complains that the bankruptcy judge appeared to
14 have "joined the opposition" because she was the only person who talked
15 to him during the hearing. This is not a basis for finding bias on the
16 part of the judge, and he points to nothing else in the record that
17 would so indicate.

18
19 **VI. CONCLUSION**

20 Mitchell has not shown that the bankruptcy court erred in granting
21 defendant's motion for summary judgment; accordingly, we AFFIRM.⁴

22
23
24
25
26
27
28

⁴ On May 13, 2005, Mitchell filed a document, which appears in
part to request supplemental briefing. All relief requested by
Mitchell in his May 13, 2005 document is hereby ordered denied.