

11 USC §362(b)(4)
ORS 701.085 et seq
11 U.S.C. §362(h)
US Constitution, 11th Amendment
ORS 30.260-.300
Quasi-judicial immunity

In re Christensen

Case No. 393-33646-hlh13 USDC # CV 94-242-PA 4-29-94 (EOD 7-14-94)

Affirming and Reversing Bankruptcy Court (HLH)

Debtor filed a motion for sanctions against Oregon Contractors Board for alleged violation of the automatic stay. The Board had entered a final order against the debtor, a contractor, after the petition was filed. The order required payment of money by the debtor. The debtor argued the order was entered in knowing violation of the stay and was void. The debtor sought an order voiding the Board's order and sanctioning the Board under §362(h). The bankruptcy court denied the motion relying on In re Apache Construction, Inc., 34 BR 415 (Bankr. Or. 1983) and In re Fintel, 10 BR 50 (Bankr. Or. 1981) and held that the Board's acts were exempt from the stay under §362(b)(4).

The US District Court reversed the bankruptcy court's ruling that the Board was exempt from the stay. The US District Court held that the police power exception is not available where the government is primarily seeking to collect a debt. The fact that a surety may also be liable on the obligation does not alter the result. Thus, the District Court concluded the Board's order was void and that, although the Board's actions were intentional, damages were unavailable to the debtor because of the immunity conferred upon the state by the Eleventh Amendment to the US Constitution. The court also noted that attorney fees for prosecuting this action might be available except that the Board enjoyed quasi-judicial immunity as if it were a court.

In sum, the US District Court held that the Board violated the stay and its order was void but that no sanctions could be imposed.

(Note: Once again, the opinion was entered in April, 1994 but not received by the bankruptcy court until July, 1994.)

FILED

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CLERK, U.S. DISTRICT COURT
DISTRICT OF OREGON
PORTLAND, OREGON

BY *MJ*

Certified to be a true and correct
copy of original filed in my office.
Dated 7/14/94
By *Donald M. Cinnamon*, Clerk
Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

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In re)
))
JEFFREY CHRISTENSEN,) No. 393-33646-H13
) CV 94-242-PA
Debtor.) **OPINION**

U.S. BANKRUPTCY COURT
DISTRICT OF OREGON
FILED

APR 29 1994 *led 7/14/94*

PANNER, J.

TERENCE H. DUNN, CLERK
BY *TH* DEPUTY

Appellant Jeffrey Christensen appeals the November 1, 1993 order of the Bankruptcy Court denying his motion for sanctions against Respondent Oregon Construction Contractors Board¹ and denying his contention that Respondent's Final Order in claim No. 71836-103 is void. I have jurisdiction pursuant to 28 U.S.C. § 158(a) and Bankruptcy Rules 8002(a) and 9006(a). The decision of the Bankruptcy Court is affirmed in part and reversed in part. Respondent's order of

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¹ Appellant does not contest that portion of the Bankruptcy Court's order denying his motion for sanctions against Bend Decorating Studio.

1 - OPINION

94-8 (14)

(48) 43

1 August 17, 1993 violated the automatic stay and was void ab
2 initio. Appellant's motion for sanctions is denied. Each
3 party will pay its own costs.

4 BACKGROUND

5 Oregon law requires construction contractors to post a
6 surety bond. ORS 701.085. Aggrieved suppliers or customers
7 may file a claim against the contractor with the Oregon
8 Construction Contractors Board. ORS 701.140. The Board
9 determines the amount the contractor must pay. ORS 701.140-
10 .150. A final order of the Board that remains unpaid for 10
11 days constitutes a judgment in favor of the claimant against
12 the "person." ORS 701.150(2), 701.170(1). The term "person"
13 is not defined, but apparently refers to the contractor the
14 claim was brought against. If the contractor fails to pay the
15 order within ten days, the surety must pay the judgment. ORS
16 701.140, 701.150(1). The surety is not joined as a party, but
17 may intervene. ORS 701.145(6). The surety is bound by the
18 final order. Id.

19 Appellant posted the required bond. Bend Decorating
20 Studios ("Bend") filed a claim against Appellant with the
21 Contractors Board. Appellant subsequently filed for
22 bankruptcy. The Contractors Board then ordered Appellant to
23 pay Bend \$4,457.26. Appellant contends that order violated
24 the automatic stay imposed by 11 U.S.C. § 362(a)(1). He moved
25 to set aside the order and impose sanctions on the Contractors
26 Board. The Bankruptcy Court denied the motion. This appeal

1 followed. Respondent now concedes its order is void as to
2 Appellant, but argues it is still entitled to collect from the
3 surety.² Respondent also contends the Eleventh Amendment
4 confers immunity from sanctions.

5 DISCUSSION

6 The Bankruptcy Court relied on its earlier precedents
7 holding the Contractors Board is not subject to the automatic
8 stay. See In re Apache Construction, Inc., 34 B.R. 415
9 (Bankr. D. Or. 1983); In re Fintel, 10 B.R. 50 (Bankr. D. Or.
10 1981). The rationale for those decisions is that the
11 Contractors Board is exempt from the stay pursuant to 11
12 U.S.C. § 362(b)(4) or, alternatively, that the surety bond is
13 not property of the debtor's estate.

14 1. Exemption Under § 362(b)(4):

15 Section 362(b)(4) provides that the automatic stay does
16 not apply to any proceeding "by a governmental unit to enforce
17 such governmental unit's police or regulatory power."
18 Statutory exceptions to the automatic stay are interpreted
19 narrowly. In re Glaspoly Marine Industries, Inc., 971 F.2d
20 391, 394-95 (9th Cir. 1992). The exemption does not apply
21 where the governmental unit is primarily seeking to enforce
22 pre-petition obligations of the debtor towards either the
23 governmental unit or a third party. In re Massenzio, 121 B.R.
24

25 ² Appellant lacks standing to challenge the validity of
26 the order as to the surety. This appeal is not moot, though,
because Appellant also seeks sanctions for violation of the
automatic stay.

1 688, 691-92 (Bankr. N.D.N.Y. 1990) (automatic stay prevents
2 state from revoking insurance agent's license for failure to
3 pay pre-petition obligations owed to third party). Cf. In re
4 Fitch, 123 B.R. 61, 63 (Bankr. D. Idaho 1991) (state could
5 proceed with hearing to revoke insurance agent's license
6 because primary objective was to prevent fraud and punish
7 misconduct, not recover funds for benefit of state or third
8 party).³ This is called the "Pecuniary Purpose Test."

9 The § 362(b)(4) exemption to the automatic stay has also
10 been held inapplicable when the governmental unit is merely
11 adjudicating private rights. In re Dan Hixson Chevrolet Co.,
12 12 B.R. 917, 920 (Bankr. N.D. Tex. 1981) (proceedings before
13 Texas Motor Vehicle Commission in complaint filed by
14 franchisor seeking to terminate franchise agreement because
15 franchisee filed for bankruptcy are subject to automatic
16 stay); In re 1736 18th Street N.W. Ltd. Partnership, 97 B.R.

17
18 ³ The exemption to the automatic stay under § 362(b)(4)
19 has also been held inapplicable where the state threatened to
20 revoke a driver's license unless he paid overdue tickets, In
21 re Colon, 102 B.R. 421, 429 (Bankr. E.D. Pa. 1989) (subsequent
22 history omitted), attempted to recover welfare payments, In re
23 Ellis, 66 B.R. 821 (N.D. Ill. 1986), or suspended a driver's
24 license and automobile registration in order to coerce the
25 debtor into posting a bond to guarantee payment of the
26 debtor's pre-petition obligations to a third party resulting
from an automobile accident, In re Kuck, 116 B.R. 821, 824
(Bankr. S.D. Ala. 1990). See also In re Charter First
Mortgage, Inc., 42 B.R. 380, 382 (Bankr. D. Or. 1984) (in
determining whether a particular action falls within §
362(b)(4)'s "police or regulatory power" exception to the
automatic stay, the court must examine the specific acts the
government wishes to carry out and determine whether execution
would result in an economic advantage to the government or its
citizens over third parties in relation to the debtor's
estate.)

1 121, 123 (Bankr. D.D.C. 1989) (action by tenants before
2 District Rent Administrator to enforce private rights arising
3 under tenant/landlord laws subject to automatic stay).⁴ This
4 is called the "Public Policy Test."

5 The proceeding before the Contractors Board runs afoul of
6 both tests. Respondent was acting in the public interest
7 pursuant to its statutory mandate, but that is true of
8 virtually any action taken by a government agency or public
9 official. It is not enough that Respondent's general purpose
10 was to further consumer protection. Respondent was
11 adjudicating private rights (a dispute between a supplier and
12 contractor) and its immediate purpose was to assist a private
13 citizen recover a pre-petition obligation of the debtor. I
14 hold that § 362(b)(4) does not exempt proceedings before the
15 Contractors Board under ORS Chapter 701 from the automatic
16 stay of the Bankruptcy Act.⁵

17 ⁴ See also United States (EPA) v. Environmental Waste
18 Control, Inc., 131 B.R. 410, 422 (N.D. Ind. 1991), affirmed,
19 973 F.2d 1320 (7th Cir. 1992); In re Kuck, 116 B.R. at 824; In
20 re Charter First Mortgage, Inc., 42 B.R. at 383 (court must
21 distinguish between those proceedings which fulfill a public
22 policy and those which adjudicate private rights). Cf. NLRB
23 v. Edward Cooper Painting, Inc., 804 F.2d 934, 942-43 (6th
24 Cir. 1986) (automatic stay did not bar NLRB from proceeding
with hearing on unfair labor practices, even though the
decision could result in imposition of penalties and judgment
for backpay owed employees; NLRB was primarily seeking to
enforce labor laws and fix penalties for violations, not
adjudicate purely private claims).

25 ⁵ On appeal, Respondent argues that because the private
26 party filed its claim with the Contractors Board before the
debtor filed his bankruptcy petition, Respondent's August 13,
1993 order was part of a "continuation" of a proceeding and is
therefore specifically exempted from the stay by the language

1 2. Not the Debtor's Property:

2 The Contractors Board argues this proceeding was not
3 subject to the automatic stay because a surety bond is not the
4 debtor's property, citing In re Buna Painting & Drywall Co.,
5 Inc., 503 F.2d 618 (9th Cir. 1974) and Matter of Lockard, 884
6 F.2d 1171 (9th Cir. 1989). Both cases are distinguishable.

7 Buna stands for the proposition that a bankruptcy trustee
8 may not require a surety to pay into the bankruptcy estate the
9 penal sums on a contractors' licensing bond because the bond
10 is not property of the bankrupt but rather a third party
11 beneficiary contract to reimburse people harmed by the
12 bankrupt. Buna, 503 F.2d at 619. The issue in Lockard was
13 whether a creditor was barred from prosecuting an action
14 *directly against the surety*. The claimant had brought an
15 action against the debtor and the surety, but dismissed the
16 former after he filed for bankruptcy and thereafter proceeded
17 solely against the surety. Id. at 1173.

18 That option does not exist here. Chapter 701 does not
19 authorize Respondent to proceed against the surety unless it
20 has first found Appellant liable and fixed the amount of
21 damages, and Appellant has timely failed to pay that

22
23 of § 362(b)(4). Respondent's argument tortures the language
24 of the statute. Section 362(b)(4) provides that the automatic
25 stay does not apply to "the commencement or continuation of an
26 action or proceeding by a governmental unit *to enforce such
governmental unit's police or regulatory power.*" (emphasis
added). Respondent's construction of the statute conveniently
omits the limiting language at the end of the sentence which
modifies the phrase "continuation of a proceeding."

1 obligation. Bend's claim was not against the surety but
2 against the debtor personally. The surety is not named as a
3 defendant or mentioned anywhere in the Contractors Board's
4 Final Order. The Final Order contains a finding that
5 Appellant owes the claimant \$4,457.26, and orders him to pay
6 that sum to claimant. The Order also recites that "[u]npaid
7 final orders constitute judgments as provided by ORS 701.170."
8 This judgment is assessed against the debtor personally. The
9 surety is liable only if the debtor fails to timely pay that
10 judgment. ORS 701.140. The fact that the surety may
11 ultimately be liable does not alter the fact that this was
12 first and foremost an action against the debtor to recover
13 upon pre-petition obligations, and the Order constitutes a
14 judgment against Appellant personally.

15 The August 17, 1993 Final Order was a continuation of a
16 proceeding adjudicating pre-petition obligations of the
17 debtor. The automatic stay does more than just guard against
18 new claims. The automatic stay gives the debtor a temporary
19 breathing spell from creditors by stopping all collection
20 efforts, all harassments, and all foreclosure actions so the
21 debtor may attempt repayment or reorganization. In re
22 Computer Communications, Inc., 824 F.2d 725, 729 (9th Cir.
23 1987); Maritime Elec. Co., Inc. v. United Jersey Bank, 959
24 F.2d 1194 (3d Cir. 1991). The automatic stay also protects
25 creditors by preventing the estate from being eaten away by
26 lawsuits and seizures of property before the trustee has had a

1 chance to marshal the estate's assets and distribute them
2 equitably among creditors. Maritime Elec., 959 F.2d at 1194.
3 Requiring the debtor to defend himself in an action for
4 damages before the Contractors Board, and awarding damages
5 against him, is contrary to those objectives. See In re Joe
6 DeLisi Fruit Co., 11 B.R. 694, 696 (Bankr. D. Minn. 1981).

7 Respondent argues that an underlying purpose of the
8 surety bond is to protect the public from contractors who
9 become bankrupt. However laudatory the state's objectives, it
10 may not circumvent the provisions of the Bankruptcy Act. If
11 Respondent believes the proceeding before the Contractors
12 Board will have a negligible impact upon the debtor's estate
13 and is otherwise consistent with the purposes of the
14 Bankruptcy Act, procedures exist to obtain relief from the
15 automatic stay. I hold that proceedings before the
16 Contractors Board pursuant to Chapter 701 are subject to the
17 automatic stay. I decline to follow Apache Construction and
18 Fintel to the extent they hold otherwise.

19 3. Relief:

20 Actions taken in violation of the automatic stay are void
21 ab initio. In re Shamblin, 890 F.2d 123, 125 (9th Cir. 1989).
22 Respondent's order of August 17, 1993 is therefore a nullity.
23 Appellant also seeks sanctions against Respondent. 11 U.S.C.
24 § 362(h) provides that "[a]n individual injured by any willful
25 violation of a stay provided by this section shall recover
26 actual damages, including costs and attorneys' fees, and, in

1 appropriate circumstances, may recover punitive damages."
2 (emphasis added).

3 Respondent acted in good faith, relying upon prior
4 decisions by the Bankruptcy Court. That is not enough to
5 preclude a finding of a willful violation. In the Ninth
6 Circuit, a "willful violation" does not require a specific
7 intent to violate the automatic stay. In re Abrams, 127 B.R.
8 239, 243 (Bankr. 9th Cir. 1991); In re Bloom, 875 F.2d 224,
9 227 (9th Cir. 1989). It is enough that Respondent knew of the
10 automatic stay and its actions that violated the stay were
11 intentional. Id.

12 Respondent contends it first learned of the stay after
13 the proceeding was complete, so the violation was not knowing.
14 After learning of the stay, however, Respondent continued to
15 insist the proceeding was valid and refused to vacate its
16 order of August 17, 1993. Appellant contends that is an
17 independent violation of the automatic stay. There is some
18 authority for that contention. See, e.g., In re Gustafson,
19 111 B.R. 282, 287 (Bankr. 9th Cir. 1990), reversed on other
20 grounds, 934 F.2d 216 (9th Cir. 1991); In re Johnson, 18 B.R.
21 755, 757 (Bankr. S.D. Ohio 1982). I do not decide this
22 question because I conclude that even if Respondent violated
23 the automatic stay, it is not liable for damages, attorney's
24 fees, or other sanctions.

25 The Eleventh Amendment prohibits a federal court from
26 awarding compensatory or punitive damages against an arm of

1 the state. Edelman v. Jordan, 415 U.S. 651 (1974). The
2 Bankruptcy Act does not abrogate the state's Eleventh
3 Amendment immunity. Hoffman v. Connecticut Dept. of Income
4 Maintenance, 492 U.S. 96 (1989); In re Pearson, 917 F.2d 1215
5 (9th Cir. 1990), cert. denied, 112 SW.Ct. 1291 (1992).
6 Appellant argues that the Oregon Tort Claims Act, ORS 30.260 -
7 .300, waives the state's Eleventh Amendment rights. I
8 disagree. Oregon has waived its sovereign immunity, but not
9 its Eleventh Amendment rights. The former confers immunity
10 from suit in any court. The latter confers immunity from suit
11 in federal court. Oregon has consented to suit, but only in
12 its own courts.

13 Although the Eleventh Amendment precludes an award of
14 damages against the state, that does not end the matter. The
15 sanctions requested by Appellant include attorney's fees
16 incurred by Appellant in seeking a declaration that
17 Respondent's August 17, 1993 is void and unenforceable. An
18 award of attorney's fees ancillary to prospective relief is
19 not subject to the strictures of the Eleventh Amendment.
20 Missouri v. Jenkins, 491 U.S. 274, 284 (1989); Hutto v.
21 Finney, 437 U.S. 678 (1976). Such an award is not
22 compensating the plaintiff for the injury that first brought
23 him to court, but reimbursing him for expenses incurred in
24 seeking prospective injunctive relief. Hutto, 437 U.S. at 695
25 n.24 (analogizing to award of costs to prevailing party).

26 / / /

1 Although Hutto and its progeny would seem to authorize an
2 award to Appellant of attorney's fees incurred in prosecuting
3 this action, the Ninth Circuit recently held otherwise. In re
4 Gustafson, 934 F.2d 216 (9th Cir. 1991) (Eleventh Amendment
5 bars bankruptcy court from requiring state to compensate
6 debtor for attorney's fees incurred by debtor due to state's
7 violation of the automatic stay). Gustafson is perplexing
8 because it fails to even cite Hutto, let alone distinguish it.
9 The holding in Gustafson is also in conflict with the
10 conclusion reached by several other courts that have recently
11 addressed this issue. Cf. In re Colon, 114 B.R. 890 (Bankr.
12 E.D. Pa. 1990); In re James, 112 B.R. 687, 699 (Bankr. E.D.
13 Pa. 1990); In re Kuck, 116 B.R. at 825-26; In re Ellis, 66
14 B.R. at 822-23 n.4 (all holding Eleventh Amendment does not
15 bar award of attorney's fees and costs to compensate debtor
16 for such expenses incurred because of state's violation of the
17 automatic stay).

18 I need not resolve the tension between Gustafson and
19 Hutto because, even assuming the Eleventh Amendment permits an
20 award of attorney's fees and costs, there is an independent
21 basis for denying an award in the present case. Appellant
22 acknowledges Respondent was acting in a quasi-judicial
23 capacity when it adjudicated Bend's claim against Appellant.
24 Appellant's Reply Brief at 4. Judges are absolutely immune
25 from civil liability for damages for their judicial acts.
26 Mullis v. Bankruptcy Court (D. Nev.), 828 F.2d 1385, 1388 (9th

1 Cir. 1987), cert. denied, 486 U.S. 1040 (1988). Accordingly,
2 a state court whose actions are later determined to have
3 violated the automatic stay is not subject to sanctions under
4 the Bankruptcy Act.⁶

5 The Contractors Board is not a court. Nonetheless,
6 judicial immunity has gradually been extended to some
7 individuals or organizations acting in a quasi-judicial
8 capacity to adjudicate private claims, on the theory that the
9 same considerations that counsel in favor of immunity for
10 judges apply equally to persons acting in a similar capacity.
11 Thus arbitrators have been held entitled to absolute immunity,
12 even though they are private citizens. See, e.g., Corey v.
13 New York Stock Exchange, 691 F.2d 1205 (6th Cir. 1982); Cahn
14 v. International Ladies' Garment Union, 311 F.2d 113, 114-25
15 (3d Cir. 1962); Tamari v. Conrad, 552 F.2d 778, 781 (7th Cir.
16 1977); Raitport v. Provident Nat. Bank, 451 F. Supp. 522, 527
17 (E.D. Pa. 1978). To the extent the Contractors Board was
18 acting in a quasi-judicial capacity adjudicating a private
19 claim brought by a supplier against a contractor, the Board is
20 entitled to immunity.⁷

21 / / /

22 ⁶ I do not consider whether sanctions would be
23 permissible if the state court knowingly defies a direct order
24 from the federal court. See Hutto, 437 U.S. at 691
(discussing power of federal court to enforce its orders).

25 ⁷ I do not suggest that immunity attaches to all quasi-
26 judicial activities, or that all activities of the Contractors
Board are so protected. My holding is limited to the specific
facts of this case.

1 A judge is not denied immunity because the action he took
2 was in error, or was in excess of his authority, but only when
3 he has acted "in the clear absence of all jurisdiction."
4 Mullis, 828 F.2d at 1388. The Contractors Board relied upon
5 previous decisions of the Bankruptcy Court in this District.
6 Although I have determined those decisions were erroneous, the
7 Contractors Board did not act "in the clear absence of all
8 jurisdiction."

9 Although judicial immunity protects against an award of
10 damages, there are circumstances where a judge may be
11 mandamus or enjoined. See Mullis, 828 F.2d at 1391-93.
12 Notwithstanding that the Eleventh Amendment permits an award
13 of attorney's fees ancillary to a grant of prospective
14 injunctive relief, a party obtaining a writ of mandamus may
15 not recover attorney's fees or costs from the court whose
16 order has been reversed. The purposes of judicial immunity
17 would be thwarted if a judge were liable for a party's
18 attorney's fees should an appellate court later disagree with
19 a ruling the judge had made in the case. The same rule should
20 apply to individuals or organizations protected by quasi-
21 judicial immunity. See Tamari, 552 F.2d at 781 (individuals
22 cannot be expected to volunteer to arbitrate disputes if they
23 can be caught up in the struggle between the litigants and
24 saddled with the burdens of defending a lawsuit).

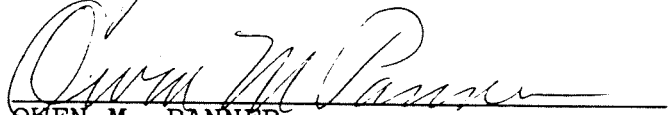
25 I hold that the Contractors Board was acting in a quasi-
26 judicial capacity adjudicating private claims, and is

1 therefore immune from liability for either damages or
2 attorney's fees for its actions in connection with this case.⁸

3 **CONCLUSION**

4 The Bankruptcy Court's order of November 1, 1993 is
5 affirmed in part, and reversed in part. Respondent's order of
6 August 17, 1993 violated the automatic stay and was void ab
7 initio. Appellant's motion for sanctions is denied. Each
8 party to pay its own costs and attorney's fees on appeal.

9 DATED this 29 day of April, 1994.

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12 OWEN M. PANNER
13 U.S. District Court Judge
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22 ⁸ It has been suggested that quasi-judicial actors
23 should be given only qualified immunity from suit instead of
24 absolute immunity. See Watts v. Burkhart, 978 F.2d 269, 278
25 (6th Cir. 1992) (Martin, J., dissenting). For purposes of this
26 case, it is not necessary for me to decide the extent of
immunity that attaches to the Contractors Board because
Appellant could not prevail under either standard. Respondent
acted in accordance with previous decisions of the Bankruptcy
Court in this District. Although those decisions have now
been found wanting, Respondent did not violate Appellant's
clearly established rights, constitutional or otherwise.