

In re Schenck, Case No. 394-35934-dds7

5/19/95 DDS unpublished

The Oregon State Bar initiated an adversary proceeding to determine whether § 523(a) (7) excepted the costs incurred in a disciplinary proceeding involving the debtor Ronald Schenck. The State Bar filed a motion for summary judgment and the debtor filed a cross motion.

The only issue on summary judgment was whether the assessed costs were in the nature of a fine or penalty or were compensation for actually pecuniary loss suffered by the State Bar under § 523(a) (7). Judge Sullivan held that the costs were as a matter of law in the nature of a fine and penalty based on the following five factors: (1) the cost assessment arose as part of the attorney disciplinary process; (2) Oregon practice reflects the policy of treating such a cost assessment as a penalty; (3) the cost assessment did not represent compensation for the State Bar; (4) public policy favors not excepting the cost assessment from discharge; and (5) courts unanimously agree with this conclusion.

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re:) Bankruptcy Case No.
) 394-35934-dds7
RONALD DEAN SCHENCK,)
)
Debtor,) Adversary Proceeding No.
) 95-3018-dds
)
OREGON STATE BAR,)
)
Plaintiff,)
)
v.)
)
RONALD DEAN SCHENCK,)
)
Defendant.)

The Oregon State Bar ("State Bar") initiated this adversary proceeding to determine whether § 523(a)(7) excepts costs incurred in a disciplinary proceeding involving Ronald D. Schenck ("Debtor") from discharge. The State Bar filed a motion for summary judgment and Debtor filed a cross motion for summary judgment. This is a core proceeding under 28 U.S.C. § 157(b)(2)(I). After a hearing on May 19, 1995, I grant State Bar's motion and deny Debtor's cross motion.

The debtor is a lawyer licensed to practice law in Oregon. The Oregon Supreme Court disciplined him for violations of the rules of professional conduct by publicly reprimanding him. In re Schenck, 320 Or. 94, 879 P.2d 863 (1994). In deciding on the disciplinary sanction, the Oregon Supreme Court declined to suspend Debtor, because the court had recently suspended him for 45 days and the court believed that a second suspension was "unfair." Id., at 106, 879 P.2d at 869. The Oregon Supreme Court awarded the State Bar \$1,724.65 for costs incurred in the disciplinary proceeding.

11 U.S.C. § 523(a)(7) excepts governmental fines and penalties from discharge to the extent it is not compensation for actual pecuniary loss. This provision creates a broad exception for all governmental, penal sanctions. Kelly v. Robinson, 479 U.S. 36, 51 (1986). Debtor concedes that the State Bar is a governmental unit under § 523(a)(7). (Def.'s Mem., at 2.) The only issue is whether the costs assessed in the disciplinary proceeding are in the nature of a fine or penalty or are compensation for actual pecuniary loss suffered by the State Bar. I find that there is no genuine issue as to any material fact and that as a matter of law the costs are in the nature of a fine and penalty.

I make this finding based on five factors. First, the costs arose as part of the State Bar's disciplinary process.

That process is penal in nature. See ORS 9.527. Compensation to the State Bar is not the primary objective for assessing costs. The primary objective is "to deter attorneys from engaging in improper conduct and to convey the message . . . that the practice of law is closely scrutinized" In re Haberman, 137 B.R. 292, 295 (Bankr. E.D. Wis. 1992).

Second, Oregon practice reflects the policy of treating cost assessments as penal. The Oregon Supreme Court typically awards costs to the State Bar whenever a member of the bar is disciplined. As shown by Debtor's case, the court does not apportion costs when the State Bar has not proved all its allegations or when the Court only reprimands the member. Schenck, 320 Or. at 101-04, 879 P.2d at 866-69; Or. Bar R. P. 10.7(b); see e.g., In re Boardman, 312 Or. 452, 822 P.2d 709 (1991).

Third, the State Bar does not depend on cost assessments for its vitality. Annual membership fee covers the operating expenses of the State Bar's disciplinary process. ORS 9.090 and 9.191; see also, In re Cilo, 165 B.R. 46, 49 (M.D. Fla. 1994); In re Lewis, 151 B.R. 200, 203 (Bankr. C.D. Ill. 1992).

Fourth, public policy favors this finding. A disciplined bar member should not escape the assessment of costs in state bar disciplinary proceeding by filing for

bankruptcy. Cilo, 165 B.R. at 47. If a member could discharge the costs arising out of a disciplinary proceeding, the State Bar could not carry out its function as effectively. Congress did not intend to interfere with state bar disciplinary process with the § 523(a)(7) exception. See, Kelly, 479 U.S. at 50-53.

Fifth, my review of case law indicates that courts unanimously agree with this conclusion. Betts v. Attorney Reg. and Disciplinary Com'n, 165 B.R. 870, 873 (N.D. Ill. 1994) (also finding unanimous agreement).

Debtor responds with four arguments. First, he argues that the claim is not in the nature of a penalty or fine, because it arose out of his statutory right to request review of disciplinary board's decision and did not arise out of any wrong doing. However, this argument ignores the fact that the Oregon Supreme Court reprimanded the Debtor for violating certain rules of professional conduct and his misconduct triggered the assessment, not his request for review. ORS 9.536(4); Or. Bar. R. P. 10.7.

Second, Debtor compares costs in a disciplinary proceeding to an award of costs on civil appeal. However, the comparison is misplaced--for as the Oregon Supreme Court explained a cost award arising from a disciplinary proceeding "is not limited to those items for which costs can be recovered in civil proceedings" In re Greene, 277 Or. 737, 562

P.2d 539 (1977) (reviewing proceeding statute with very similar language).

Third, the Debtor argues that the costs provided under ORS 9.536(4) represent compensation for actual pecuniary loss and that the plain language of § 523(a)(7) excludes such a debt from the exception from discharge. However, in determining the nature of a governmental assessment, a court should look to the nature of the proceedings and the involved state interest. Kelly, 479 U.S. at 50-53. In this case, the cost assessments arose from attorney disciplinary process. This is critical. The attorney disciplinary process serves a strong state interest and protects the public by investigating the conduct of an attorney and punishing an attorney for misconduct. ORS 9.527 to 9.536. Given the strong state interest and the penal nature of disciplinary proceedings, the cost assessment did not represent compensation for actual pecuniary loss.

Fourth, Debtor attempts to distinguish the unanimous case law. He points out that the debtors in these case were suspended, while he was only reprimanded. This distinction is without meaning. The Oregon Supreme Court only reprimanded the Debtor, because it had already suspended him and concluded that additional suspension would be unfair. Moreover, the severity of punishment does not change the penal nature of the proceedings and cost assessment. Debtor also points out that,

unlike Wisconsin bar rules examined in Haberman, Oregon law does not authorize monetary payment for attorney misconduct. Although Oregon law does not authorize monetary payment like Wisconsin, it authorizes the assessment of costs when an attorney has engaged in misconduct. ORS 9.527 and 9.537(4). Such authorization is in the nature of a fine or penalty.

For the foregoing reasons, I grant the State Bar's motion for summary judgment and deny Debtor's cross motion. Section 523(a)(7) excepts the \$1,724.65 costs incurred in the disciplinary proceeding from discharge. This memorandum constitutes the findings of fact and conclusions of law under Fed. R. Bankr. P. 7052 and Fed. R. Civ. P. 52. They shall not be stated separately.

DONAL D. SULLIVAN
Bankruptcy Judge

cc: Sylvia E. Stevens
Robert L. Carlton