



SIGNED this 27 day of July, 2005.

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FRANK R. MONROE
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

IN RE:)
)
CHARLES WALTER RATHGEBER) CASE NO. 03-12685-FM
DEBTOR) (Chapter 13)
)

GERALD D'ANGELO)
PLAINTIFF)
VS.) ADVERSARY NO. 03-1181-FM
)
CHARLES WALTER RATHGEBER II)
DEFENDANT)

MEMORANDUM OPINION

On June 9, 2004 this Court rendered Judgment in favor of Plaintiff against the Defendant in the amount of \$141,698.11 and further held such Judgment to be nondischargeable pursuant to 11 U.S.C. §523(a)(2)(A). On February 17, 2005, Plaintiff filed his Application for the Order Directing Payment Out of the Real Estate Recovery Trust Account ("Application") and gave notice of the Application to the Texas Real Estate Commission and the Defendant. No timely response was received. This Court entered its Order Directing Payment on Verified Claim on March 8, 2005 which found

that the Real Estate Recovery Fund pursuant to Section 8(a) of the Real Estate License Act should pay the Plaintiff \$50,000.00 since the actions of the Defendant that resulted in the Judgment in favor of the Plaintiff constituted a violation of the Texas Real Estate License Act Sections 15(a) (3) and 15(a) (6), which are now a part of the Texas Occupation Code as Sections 1101.652(a) (3), (b) (2) and (b) (5).

On March 14, 2005, the Texas Real Estate Commission filed its Motion to Vacate the Order Directing Payment on Verified Claim pursuant to Rules 59, 12(b) (1) and/or (b) (2) of the Federal Rules of Civil Procedure primarily raising the defense of lack of jurisdiction over the State of Texas under the Eleventh Amendment of the United States Constitution.

ISSUE

Does the following language of the Real Estate Recovery Trust Account statute of the State of Texas waive the State's Eleventh Amendment immunity from suit in Federal Court:

"Section 1101.606. Claim For Payment From Trust Account.

(A) An aggrieved person who obtains a court judgment against a licensed or certificate holder for an act described by Section 1101.602 may, after judgment is entered, execution returned nulla bona, and a judgment lien perfected, file a verified claim in the court that entered the judgment.

(B) After the twentieth day after the date aggrieved person gives written notice of the claim to the commission and judgment debtor, the person may apply to the court that entered the judgment

for an order for payment from the trust account of the amount unpaid on the judgment. The court shall proceed promptly on the application." (Emphasis added).

Tex.Occ.Code, Section 1101.606(a), Vernon's Texas Codes Annotated.

CONCLUSIONS

The process for obtaining payment from the Real Estate Recovery Trust Fund Account is not perfunctory. It is incumbent upon the aggrieved person to prove that the judgment is based on facts allowing a recovery under the appropriate subchapter. Tex.Occ.Code, Section 1101.607. Further, the Texas Real Estate Commission and the Texas Attorney General are specifically authorized to protect the trust fund account from spurious or unjust claims and the Commission is entitled to litigate the sufficiency of the claim. Tex.Occ.Code, Section 1101.608.

Therefore, the assertion of a claim by Plaintiff against the Texas Real Estate Recovery Fund is in all respects a suit in law against the State of Texas.

The Eleventh Amendment of the United States Constitution provides: "The 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." This Amendment has been uniformly construed to deny federal courts the authority to adjudicate lawsuits brought by private parties against estates without its consent. *Hans v. Louisiana*, 134 U.S. 1, 10 (1890); *Ford Motor Co. v. Indiana*, 343 U.S. 459, 464 (1945). The

United States Supreme Court has consistently construed the Eleventh Amendment very narrowly. For example, 11 U.S.C. §106(c) does not authorize a monetary recovery against the state without its consent because such section does not to "unequivocally express" a waiver of a government's immunity from actions for monetary relief as is necessary for the waiver to be effective. See *Hoffman v. Connecticut Dept. Of Income Maintenance*, 492 U.S. 96 (1989), *Irwin v. Department of Veteran's Affairs*, 498 U.S. 89 (1990), *United States v. Nordic Village*, 503 U.S. 30 (1992).

Therefore, the standard this Court must apply is whether the state statute in question has "unequivocally expressed" a waiver of the State of Texas' sovereign immunity with regard to actions against the Texas Real Estate Recovery Fund. The statute is explicit that the actions against the Real Estate Recovery Fund be had in the court which entered the judgment. In the normal, non-constitutional case, such language would probably be uniformly held as unambiguous and easy to enforce. However, when dealing with the Eleventh Amendment, the waiver must be unequivocally expressed. *College Savings Bank v. Florida Prepaid Post Secondary Education Expense Bd.*, 527 U.S. 666, 680 (1999). In that case the court said, "The whole point of requiring a 'clear declaration' by the state of its waiver is to be certain that the state in fact consents to suit." *Id.* For example, a state statute which authorized a suit in "any court of competent jurisdiction" does not constitute an express waiver of Eleventh Amendment immunity. *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573 (578-80)

(1946).

The language of the statute at hand, which authorizes the action against the Texas Real Estate Recovery Fund by bringing a claim against the Texas Real Estate Commission in the court which granted the judgment, is very similar to the phrase in *Kennecott Copper*, i.e. "any court of competent jurisdiction". This Court concludes that to be an unequivocal expression of an Eleventh Amendment waiver the language in the statute would have to expressly state that the claim could be brought in federal court if that was the court which entered the judgment. One example of an express waiver might be to add the following qualifying language to the statute: "whether it be a court of the United States or a Texas state court." That not being presently in the statute, we are simply not entitled to presume that was the intention of the state legislature. The United States Supreme Court has held that a state must make its intent to waive by "the most express language or by such overwhelming implication from the text that no other 'reasonable construction' is possible." *Eddelman v. Jordan*, 415 U.S. 651, 673 (1974) (quoting *Murray v. Wilson Distilling Co.* 213 U.S. 151, 171 (1909)). There are many other cases that could be cited; but to do so would simply be piling on.

The Texas Real Estate Commission's Motion to Vacate the Order Directing Payment should be granted. An Order of even date herewith will be entered.

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