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ADV. NUMBER: None

JUDGE: M. A. Mahoney

PARTIES: Clyde Eli Lewis, State of Alabama Department of Human Resources

CHAPTER: 13

ATTORNEYS: J. A. Lockett, J. A. Wallace

DATE: 9/19/01

KEY WORDS:

PUBLISHED:

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

In Re

CLYDE ELI LEWIS,

Case No. 97-14379

Debtor.

ORDER DENYING THE MOTION OF DHR TO SET ASIDE

John A. Lockett, Jr., Selma, Alabama, Attorney for Debtor
Jack A. Wallace, Birmingham, Alabama, Assistant Attorney General

This matter is before the Court on the objection of the State of Alabama Department of Human Resources (“DHR”) to set aside the order of May 23, 2001. The Court has jurisdiction to hear this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the Order of Reference of the District Court. This is a core proceeding pursuant to 28 U.S.C. § 157(b) and the Court has the authority to enter a final order. For the reasons indicated below, the Court is denying the motion of DHR to set aside the order of May 23, 2001.

FACTS

Clyde Eli Lewis filed for relief pursuant to chapter 13 of the Bankruptcy Code on December 4, 1997. The debtor listed DHR as a creditor on his schedules. DHR’s debt was described as “delinquent child support.” In Lewis’ plan, he is paying 100% of the child support debt over the five-year life of the plan. The plan was confirmed on March 4, 1998. DHR did not file a claim and debtor filed a claim on behalf of DHR dated March 13, 2001. Lewis’ child reached the age of majority on February 11, 2001. In 2000 or 2001, DHR garnished Mr. Lewis’ wages and began collecting the child support arrearage debt through weekly deductions of \$76.47 from Mr. Lewis’ salary. Mr. Lewis, by letter dated February 22, 2001, requested that DHR release its garnishment. The garnishment was not released. Mr. Lewis then filed a motion

for contempt for violation of the automatic stay and this Court held a hearing on the matter on May 10, 2001. DHR did not appear at the hearing. By Order dated May 23, 2001, this Court granted Mr. Lewis' motion for contempt. The Court ordered DHR to terminate the garnishment, refund all money garnished subsequent to February 11, 2001, pay Mr. Lewis the sum of \$160 as lost wages for attending the contempt hearing and pay Lewis' attorney \$500 in attorney's fees. On August 16, 2001, DHR filed a motion to set aside the order of May 23, 2001.

LAW

DHR asserts that the action against DHR for violation of the automatic stay was barred by the Eleventh Amendment of the United States Constitution. The Eleventh Amendment 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 a Foreign State.

DHR claims that Eleventh Amendment immunity is a jurisdictional bar to a suit against an unconsenting state in federal bankruptcy court. There is a split of authority as to whether the states abrogated Eleventh Amendment immunity as to bankruptcy matters when they agreed to Article I, Section 8, in which Congress is given the power to establish uniform bankruptcy laws. Numerous courts have applied the sovereign immunity doctrine in the bankruptcy context. *See, e.g. Arecibo Community Health Care, Inc. v. Commonwealth of Puerto Rico*, 244 F.3d 241 (1st Cir. 2001); *NVR Homes, Inc. v. Clerks of Circuit Courts for Anne Arundel County, Md. (In re NVR., LP)*, 189 F.3d 442 (4th Cir. 1999); *Sacred Heart Hospital v. Commonwealth of Pennsylvania. (In re Sacred Heart Hospital)*, 133 F.3d 237 (3d Cir. 1998); *In re Service Merchandise Co., Inc.*, 2001 WL 951316 (M.D. Tenn. June 15, 2001); *Peterson v. State of Florida (In re Peterson)*, 254 B.R. 740 (Bankr. N.D. Ill. 2000); *Seay v. Tennessee Student*

Assistance Corp. (In re Seay), 244 B.R. 112 (Bankr. E.D. Tenn. 2000); *In re Womack*, 253 B.R. 241 (Bankr. E.D. Ark. 2000); *Scarborough v. Michigan Collection Div. (In re Scarborough)*, 229 B.R. 145 (Bankr. W.D. Mich. 1999); and *Pitts v. Ohio Dep't of Taxation (In re Pitts)*, 241 B.R. 862 (Bankr. N.D. Ohio 1999). Other courts have held that states may not assert the defense of sovereign immunity in bankruptcy cases. See, e.g. *Hood v. Tennessee Student Assistance Corp., (In re Hood)*, 262 B.R. 412 (B.A.P. 6th Cir. 2001); *H. J. Wilson Co., Inc. v. Comm'r of Revenue for the Commonwealth of Massachusetts (In re Service Merchandise Co., Inc.)*, 262 B.R. 738 (Bankr. M.D. Tenn. 2001) *rev'd and remanded*, -- BR -- 2000 WL 951316; *Arnold v. Sallie Mae Serv. Corp. (In re Arnold)*, 255 B.R. 845 (Bankr. W.D. Tenn. 2000); *In re Nelson*, 254 B.R. 436, (Bankr. W.D. Wis. 2000); *Lees v. Tennessee Student Assistance Corp. (In re Lees)*, 252 B.R. 441 (Bankr. W.D. Tenn. 2000); *Bliemeister v. Industrial Comm'n of Ariz. (In re Bliemeister)*, 251 B.R. 383 (Bankr. D. Ariz. 2000); *Willis v. Oklahoma (In re Willis)*, 230 B.R. 619 (Bankr. E.D. Okla. 1999); *Wyoming Dept. of Transp. v. Straight (In re Straight)*, 209 B.R. 540 (D. Wyo. 1997). The Eleventh Circuit discussed but, did not decide the issue in *In re Burke*, 146 F.3d 1313 (11th Cir. 1998). The *Burke* court stated that it “need not resolve this abrogation issue because . . . we conclude in this case the State waived its sovereign immunity.” *Id.* at 1317.

This Court finds the cases that hold that Eleventh Amendment immunity is abrogated to be more persuasive. This Court agrees with the reasoning of the recent Sixth Circuit Bankruptcy Appellate Panel decision of *In re Hood*, 262 B.R. 412 (B.A.P. 6th Cir. 2001); see also Leonard Gerson, *A Bankruptcy Exception to Eleventh Amendment Immunity; Limiting the Seminole Tribe Doctrine*, 74 AM. BANKR. L.J. 1, 11 (2000) (“[A]t the inception of the Constitution, it was recognized that bankruptcy law required a subordination of state sovereignty.”). The Bankruptcy Clause in Article I gives Congress the power to establish uniform laws on the subject of

bankruptcy throughout the United States. U.S. CONST. art. I, §8, cl.4. Uniformity and state sovereignty are incompatible. “Subordinating bankruptcy laws to the sovereignty of the States would permit the States to use their power and sovereignty to collect any debt . . .” *In re Hood*, at 419. “It would thus permit the States to ignore the bankruptcy process . . .” *Id.* This Court finds that the States ceded their sovereignty over bankruptcy matters and are not immune from suit in this court.

The only other basis DHR offered for setting aside the order of May 23, 2001 was that DHR’s failure to respond or appear was due to inadvertence. A judgment or order may be set aside under Federal Rule 60(b) if the movant can demonstrate "mistake, inadvertence, surprise, or excusable neglect." Fed. R. Civ. P. 60(b)(1) (1998). In order to establish a 60(b)(1) defense the defaulting party must show that: "(1) it had a meritorious defense that might have affected the outcome; (2) granting the motion would not result in prejudice to the non-defaulting party; and (3) a good reason existed for failing to reply to the complaint." *Florida Physician's Insurance Company, Inc. v. Ehlers*, 8 F.3d 780, 783 (11th Cir. 1993). DHR stated in it’s motion that it’s failure to respond or appear was due to inadvertence, but DHR offered no evidence or argument in its motion, at the hearing, or in its brief to establish a 60(b)(1) defense.

THEREFORE, IT IS ORDERED AND ADJUDGED that the motion of the State of Alabama Department of Human Resources to set aside the order of May 23, 2001 is DENIED.

Dated: September 19, 2001

MARGARET A. MAHONEY
CHIEF BANKRUPTCY JUDGE