

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION**

IN RE:

Clara J. Pinkney

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Case No.: 00-52385-C13W

**ORDER DENYING MOTION TO STAY
THE NORTH CAROLINA STATE BOARD OF
CPA EXAMINERS CONSENT ORDER**

This matter came on for hearing before the United States Bankruptcy Judge in Winston-Salem, North Carolina on February 27, 2002 upon the Motion of Clara J. Pinkney to Stay the North Carolina State Board of CPA Examiners Consent Order and to allow the Chapter 13 Plan to be completed. Appearing before the court were William E. West, Attorney for the Debtor, Jack Nichols of the law firm of Allen and Pinnix, on behalf of the North Carolina State Board of CPA Examiners, and Kathryn L. Bringle, Trustee.

The Court, after hearing the arguments of counsel as well as the briefs submitted, makes the following:

FINDINGS OF FACT

1. On or about October 5, 1999, Willie L. Pinkney and Clara J. Pinkney filed a voluntary petition for relief under Chapter 13 of the United States Code in the Middle District of North Carolina. That case was known as case number 99-51757.
2. On January 12, 2000, the Debtors filed an application to convert the case to Chapter 7 and an order was entered directing that the case be converted on January 19, 2000. Bruce Magers was the duly appointed Chapter 7 Trustee. The Debtors received an Order of Discharge discharging all dischargeable debts on April 24, 2000.
3. Prior to the entry of the discharge, Ace Ventures, Inc. doing business as Office Furniture Warehouse had instituted an adversary proceeding against Mr. and Mrs. Pinkney contending that their debt was nondischargeable. The adversary proceeding concerned matters in controversy existing between the parties regarding a worthless check written to Ace Ventures, Inc., doing business as Office Furniture Warehouse, on the account of Clara J. Pinkney, CPA, PLLC, by Clara J. Pinkney. In January of 1999, prior to filing the first petition, the Debtors

had signed a confession of judgment and promissory note in an action arising in the Superior Court of North Carolina, Forsyth County, and known as 99CVS2904.

4. Pursuant to a consent order entered by the Bankruptcy Court to resolve the claim against the Debtors, the Debtors agreed to make four payments to the plaintiff over the next year each in the amount of \$5,000 with the first payment to be due and payable on June 30, 2000, the second payment to be due and payable on September 30, 2000, the third payment to be due and payable on December 30, 2000 and a final payment to be due and payable on March 30, 2001. The parties stipulated and agreed that, should the Debtor fail to make any of the payments provided, the outstanding debt plus applicable interest in fees would be adjudged nondischargeable in this and any subsequent bankruptcy proceeding commenced under any chapter of the United States Bankruptcy Court.
5. On November 24, 2000, Mrs. Clara Pinkney filed a second Chapter 13 proceeding. The terms of her Chapter 13 Plan provide that she is to pay Ace Ventures, Inc., doing business as Office Furniture Warehouse, pursuant to the terms of the confession of judgment. This confession of judgment constitutes a lien against the residential real property jointly owned by the Debtor and her non-filing spouse. In order for the Debtor to pay all creditors in full under her Chapter 13 plan, plan payments must be paid at the rate of \$4,500 per month.
6. On November 19, 2001, The North Carolina State Board of Certified Public Accountants Examiners approved a consent order in a case pending before it known as case number 9904-043 in the matter of Clara Jean Pinkney No. 17752. That consent order was executed by Mrs. Pinkney. That consent order provides that Mrs. Pinkney's actions were in violation of N.C.G.S. 93-12 (9)(e), which provides that the Board has the power to revoke either permanently or for a specific period any certificate to a certified public accountant for violation of any rule of professional ethics and professional conduct adopted by the Board. The Board specifically found that Mrs. Pinkney has violated 21 N.C.A.C. 8N .0201, .0202(a), .0203(a), and .0203(b) which provide:

.0201 INTEGRITY

The reliance of the public and the business community on sound financial reporting and advice on business affairs imposes on the accounting profession an obligation to maintain high standards of technical competence, morality, and integrity. To this end, a CPA shall at all times maintain independence of thought and action, hold the affairs of clients in strict confidence, strive continuously to improve professional skills, observe generally accepted accounting principles and standards, promote sound and informative financial reporting, uphold the dignity and honor of the accounting profession, and maintain high standards of personal conduct.

.0202 DECEPTIVE CONDUCT PROHIBITED

(a) Deception Defined. A CPA shall not engage in deceptive conduct. Deception includes fraud or misrepresentation and representations or omissions which a CPA either knows or should know have a capacity or tendency to deceive. Deceptive conduct is prohibited whether or not anyone has been actually deceived. Deception includes not only deceptive statements but also includes the knowing failure to disclose material facts.

.0203 DISCREDITABLE CONDUCT PROHIBITED

(a) Discreditable Conduct. A CPA shall not engage in conduct discreditable to the accounting profession.

(b) Prohibited Discreditable Conduct. Discreditable conduct includes but is not limited to:

- (1) acts that reflect adversely on the CPA's honesty, integrity, trustworthiness, good moral character, or fitness as a CPA in other respects;
- (2) stating or implying an ability to improperly influence a governmental agency or official; or
- (3) failing to comply with any order issued by the Board.

Based upon the foregoing and in lieu of further proceedings, the Board and Mrs. Pinkney agreed to the following:

1. The respondent's license shall be suspended for one year beginning February 1, 2002.
2. If the respondent failed to comply with the terms of this order or any bankruptcy plan or order, the respondent's license shall be permanently revoked.
7. By motion dated January 31, 2002, the Debtor requested that the suspension of her license be stayed until such time as she can complete her Chapter 13 plan. The Debtors Chapter 13 plan provides for the payment of all creditors in full within a term of 60 months.¹

DISCUSSION

The Debtor accepts the fact that she consented to the suspension of her CPA license. The Debtor contends that the consent order of the Board was to serve the pecuniary interest of Office Furniture Warehouse and that the automatic stay of 11 U.S.C. § 362 should apply or,

¹It should be noted that there are only secured and priority creditors under the Debtors Chapter 13 Plan, as all unsecured debt was discharged through her Chapter 7 proceeding. The secured debt consist primarily of real estate mortgages, real estate taxes, vehicle taxes and vehicle debt as well as a nondischargeable student loan and the nondischargeable obligation to Office Furniture Warehouse.

alternatively, that under 11 U.S.C. § 105 the Court has the ability to enjoin under its equitable powers the suspension of the Debtor's license during the time period that her Chapter 13 plan is open. The Debtor contends that absent the ability to work as a CPA the Debtor cannot fund the plan which has already been confirmed and that many creditors will suffer loss.²

Counsel for the State Board of Certified Public Accountant Examiners contends that its actions as a governmental board are not stayed and the Court does not have the authority under § 105 to enjoin its action and that the consent order should stand. For the reasons set forth the Court agrees that the actions of the Board are not stayed.

When a Debtor files for bankruptcy one of the most important benefits is the automatic stay under § 362. The stay allows the debtor some breathing room from creditors so that the debtor can fashion a plan to repay creditors or an orderly liquidation of assets. The automatic stay has several exceptions including 11 U.S.C. § 362(b)(4), which provides:

the commencement or the continuation of an action or a proceeding by a governmental unit . . . to enforce such governmental units or organization police or regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such judgment's unit or organizations police or regulatory power is not stayed by the automatic stay.

The State Board of Certified Public Accountant Examiners was created as an agency of the state of North Carolina pursuant to N.C.G.S. § 93-12. The purpose of N.C.G.S. § 93-12 is to formulate rules for the government of the Board, the examination of applicants and admitting such applicants to practice as certified public accountants. This Board also has the power to issue disciplinary actions. The Board has the power to revoke, either permanently or for a specified period any certificate issued under the provisions of this chapter to a certified public accountant. It is not the purpose of the Board to adjudicate private rights between two parties.³

In this instance, the Debtor's contends that the Board's action is monetary and the Board's suspension of her license should be stayed. It is clear that the State Board of Certified Public Accountant Examiners is a governmental unit as defined in 11 U.S.C. § 101(27). See N.C.G.S. § 93-12.

The Debtor argues that the Board's actions are not engendered out of concern for the public safety and welfare, and therefore are not within the scope of its police and regulatory power. Rather, the Debtor contends that in as much as the consent order of the Board serves the

²All parties concede that the Debtor continue to work in the financial field and can perform many of the same services as before. She cannot however certify any financial records and, therefore, could not charge as much for her services.

³The Debtor contends that the consent order arose out of the check given to Office Furniture Warehouse. The Board contends the consent order was based on matters other than just Office Furniture Warehouse.

pecuniary interest of Office Furniture Warehouse and the repayment of its claim, the exception to the automatic stay should not apply.

The Debtor's argument under 11 U.S.C. § 362 fails. The Board does not hold the status of a creditor in this proceeding. The Board is not attempting to protect any pecuniary interest. In the Fourth Circuit case of Safety Kleen, Inc. v. Wyche, the court noted that courts do have to "distinguish between situations in which the state acts pursuant to its police and regulatory powers" and situations in which the state acts merely to protect its status as a creditor. Safety Kleen, Inc. v. Wyche, 274 F.3d 846, 864 (4th Cir. 2001). The court stated that "[t]he inquiry is objective: we must determine the primary purpose of the law that the state is attempting to enforce." Id. at 865. See, also, Yellow Cab Corp. v. Metro Taxi, Inc. (In re Yellow Cab Corp.), 132 F.3d 591, 597 (10th Cir. 1997); Javens v. City of Hazel Par. (In re Javens), 107 F.3d 359, 367-68 (6th Cir. 1997).

In the matter before the Court the Board of Examiners is acting on the interest of public health and safety. It is their duty to take disciplinary action if they believe there has been a violation of any rule of professional conduct adopted by the Board. The primary purpose of the actions taken by the Board is to deal with Mrs. Pinkney's violation of rules of professional ethics and conduct regarding integrity, deceptive conduct and discreditable conduct. The Board has the authority and the duty to punish such misconduct and to insure that future acts in violation of the Code of Conduct do not occur. This is a valid police and regulatory interest

The actions of the Board are proceedings to enforce police or regulatory powers under the provisions of Chapter 93 of The North Carolina General Statute and Title 21, Chapter 8 of The North Carolina Administrative Code. These acts are not stayed by the filing of the bankruptcy proceeding and are expressly accepted from the provisions of the automatic stay. Actions by the state board for accountants and attorneys are accepted from the scope of the automatic stay under § 362(b)(4). "The [state] bar is a governmental unit for bankruptcy law purposes, and its conduct on enforcement of the Idaho Rules of Professional Practice are classic police or regulatory functions." In re Williams, 158 B.R. 488, 490 (Bankr. D.Id. 1993). See, also, In re Wade, 948 F.2d 1122 (9th Cir. 1991) (disciplinary actions by Arizona State Bar are outside the scope of the automatic stay); In re Friedman & Shapiro, P.C., 185 B.R. 143 (S.D.N.Y. 1995) (disciplinary actions to regulate the professional conduct of attorneys falls squarely into the exception to the automatic stay); In re McAtee, 162 B.R. 574 (N.D. Fla. 1993)(Florida State Bar can exercise its authority to assess fitness of a debtor to resume practice of law); In re Fitch, 123 B.R. 61 (Bankr. D. Idaho 1991)(state's post-petition institution of proceeding to revoke a Chapter 7 debtor's insurance license came within the exception to the automatic stay for government enforcement of police or regulatory powers).

The Debtor contends that even if the Board's actions fall within the exception to the automatic stay, under 11 U.S.C. § 105(a) the Court has the equitable power to stay the actions of the Board. 11 U.S.C. § 105(a) provides that the "court may issue any order, process or judgment that is necessary or appropriate to *carry out the provisions* of this title." 11 U.S.C. § 105(a)(emphasis added). Section 105 cannot alter the provisions of the Code and permit the debtor to enjoin acts that are expressly permitted under 11 U.S.C. § 362. Section 105(a) authorizes the court to issue orders necessary to carry out the provisions of the Bankruptcy Code.

In re Harold S. Williams Dev. Co., 163 B.R. 77, 80-81 (Bankr. E.D. Va. 1994). The court's "authority does not act in a vacuum, however, but generally must be grounded upon other provisions of law." Id. at 80. See, also, IRS v. Levy (In re Landbank Equity Corp.), 973 F.2d 265, 271 (4th Cir. 1992)(court's equitable powers do not constitute unlimited authority to ignore plan statutory requirements or alter substantive rights).

The State of North Carolina has established a self-governing board to adopt the rules of professional ethics and conduct for certified public accountants in this state. The Board is charged with the responsibility to revoke either permanently or for a specific period any certificate issued. The Board, with the consent of the Debtor, suspended the Debtor's license for a period of one (1) year beginning February 1, 2002. The filing of the bankruptcy proceeding did not stay this action because the acts of a governing board are expressly excluded from the automatic stay under § 362 (b)(4). Section 364(b)(4) allows a quasi judicial board, sanctioned by the State of North Carolina, to determine who is fit to be licensed as a certified public accountant in this state. The purpose of the board is to determine that only those who meet the moral and ethical criteria are allowed to be certified public accountants in this state and that the public can rely on the licensing procedures.

This court will not authorize the continued practice of a Certified Public Accountant who has been found to have violated rules of ethical and professional conduct in such a way that the Board of CPA Examiners feels it is appropriate to suspend her license. The filing of a bankruptcy case does not stay the Board's authority which is designed to protect the public interest and § 105 cannot be utilized to delay the ruling by the Boards, as to allow such would be inconsistent with the statutory language and undermine the purpose of 11 U.S.C. § 364(b)(4).

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the Debtor's Motion to Stay the North Carolina State Board of CPA Examiners Consent Order is denied.

This the 8 day of March 2002.

CATHARINE R. CARRUTHERS

Catharine R. Carruthers
United States Bankruptcy Judge