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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

COLLIN MBANUGO,

Plaintiff and Appellant,

v.

CALIFORNIA REGIONAL WATER
QUALITY CONTROL BOARD, SAN
FRANCISCO BAY REGION,

Defendant and Respondent.

A131410

(Alameda County
Super. Ct. No. RG10532631)

INTRODUCTION

Collin Mbanugo appeals from an order of the Alameda County Superior Court denying his petition for a writ of administrative mandate against respondent California Regional Water Quality Control Board, San Francisco Bay Region (Regional Board). The court sustained the Regional Board's demurrer to the petition without leave to amend on the ground that the petition was untimely filed. Mbanugo contends the court erred in finding the petition untimely on the ground his Chapter 11 bankruptcy stayed all actions outside the bankruptcy court proceedings, including the filing of the underlying writ petition seeking review of the Regional Board's imposition of a \$200,000 fine against him. He contends the exception to the automatic stay for proceedings by a governmental

unit to enforce the unit's police or regulatory power (11 U.S.C. § 362(b)(4)) does not apply here, as the fine was a money judgment.¹ We shall affirm.

FACTS AND PROCEDURAL BACKGROUND

Mbanugo is the owner of a 135-acre property in the Oakland Hills that includes the Leona Heights Sulfur Mine, a two-acre abandoned mining site that continues to discharge sulfuric acid and metals into the waters of the state. The Regional Board is the agency charged with administering provisions of the Porter-Cologne Water Quality Control Act (Wat. Code, § 13000 et seq.) within its region. (Wat. Code, § 13267.) In January 1998, the Regional Board adopted cleanup and abatement order No. 98-004 issued to numerous entities for the investigation and cleanup of the mine. Mbanugo purchased the property sometime after the Regional Board issued a cleanup and abatement order requiring remedial measures to address pollution associated with the mining site. The Regional Board amended the cleanup and abatement order in 2003 to include him. The Regional Board issued an order under Water Code section 13267, requiring Mbanugo and others to submit monthly progress reports documenting cleanup under the order. After May 2007, Mbanugo ceased filing the monthly reports. Consequently, the Regional Board issued a draft administrative civil liability complaint seeking a penalty of \$200,000 against Mbanugo only. In September 2008, a hearing was held before the Regional Board and the Regional Board imposed the penalty.

Mbanugo then appealed to the State Water Resources Control Board (State Board) to overturn the penalty and the petition was dismissed by the State Board on November 24, 2008. Mbanugo then had 30 days following the State Board's decision to file a petition in the superior court for a writ of mandate challenging the imposition of the administrative civil liability. (Wat. Code, § 13330, subd. (b).) He did not do so. Instead, on December 15, 2008, he filed a Chapter 11 bankruptcy petition as an individual. (§ 101 et seq.) Mbanugo listed the Regional Board as a creditor in the bankruptcy petition and other papers he filed and indicated the fine was disputed. The Regional

¹ All statutory references are to title 11 of the United States Code, unless otherwise indicated.

Board filed a proof of claim against him in the bankruptcy.² Mbanugo's reorganization plan was confirmed by the bankruptcy court on June 24, 2010.

On August 23, 2010, Mbanugo filed a petition for administrative mandate (Code Civ. Proc., § 1094.5) in the superior court, challenging the Regional Board's administrative civil liability order. The Regional Board demurred to the petition on November 8, 2010, arguing that the 30-day statute of limitations for filing the petition had run. (Wat. Code, § 13330.) Mbanugo opposed the demurrer, arguing that the administrative civil liability fine imposed by the Regional Board was subject to the automatic stay provision of the Bankruptcy Code (§ 362(a), (c)) and therefore, the statute of limitations on filing his writ petition had not run.

The court sustained the Regional Board's demurrer without leave to amend on December 15, 2010. The trial court based its ruling on alternative bases: First, it held that Mbanugo's filing for bankruptcy did not stay the environmental regulatory action by the Regional Board, because the action came within the police and regulatory power exception to the automatic stay found in section 362(b)(4). Second, the court held that because Mbanugo was making an affirmative challenge to a decision of the Regional Board, the action lay outside the bankruptcy stay provisions. The court reasoned: "Petitioner alone, in these Chapter 11 proceedings, had the right to take affirmative action to challenge that decision. Affirmative action by Petitioner is not apparently barred by the stay provisions."³

² The Regional Board maintained that its filing of the claim was "irrelevant" to the issues on demurrer and that the "claim filed was filed out of an abundance of caution and clearly indicated that no waiver of jurisdiction occurred by the filing of the claim, and that the debt was non-dischargeable. The debt was not part of the plan, although mentioned in the plan, because [Mbanugo] acknowledged his obligation to pay the debt and the debt is a non-dischargeable debt in any event."

³ The trial court also concluded that even assuming the bankruptcy stay tolled Mbanugo's time to challenge the decision, his writ petition was untimely as the bankruptcy stay was terminated on June 24, 2010, and the instant petition was not filed until August 23, 2010, more than 30 days from the date on which the board denied review. (See Wat. Code, § 13330.) However, the Regional Board has conceded that this

The court therefore sustained the demurrer without leave to amend and denied the writ petition. This appeal followed.⁴

DISCUSSION

The parties argue over whether the trial court properly construed the exception to the automatic bankruptcy stay set forth in section 362(b)(4) and whether the Regional Board's filing of a proof of claim in the bankruptcy made a difference. The Regional Board also contends that the court properly found that Mbanugo's writ petition was an affirmative challenge to the Regional Board decision that would not be covered by the automatic stay.

A. *Statute of limitations (Wat. Code, § 13330).*

Water Code section 13330, subdivision (b), requires that a party aggrieved by an order of the Regional Board that is subject to review must seek a writ of mandate from the superior court "not later than 30 days from the date on which the state board denies review."⁵ The failure to seek timely review precludes review of the decision or order by any court. (Wat. Code, § 13330, subd. (d).)

third reason is not supported, as "it was not until the Bankruptcy court issued its final decree and the case was closed on June 3, 2011, that any potential stay actually would have been lifted. (See 11 U.S.C. § 362(c)(2)(A).)"

⁴ On April 21, 2011, this court issued an opinion dismissing the appeal as untimely filed. However, on May 20, 2011, we granted rehearing and vacated that opinion and found the appeal was timely filed. We explained that the December 15, 2010 order was not file-stamped and neither a document entitled " 'Notice of Entry' of judgment" nor a "file-stamped copy of the judgment" was mailed to Mbanugo by the superior court clerk (Cal. Rules of Court, rule 8.104(a)(1)) or served by a party (Cal. Rules of Court, rule 8.104(a)(2)). Therefore, the time for filing a notice of appeal was governed by rule 8.104(a)(3) and the appeal was timely filed under that rule.

⁵ "(b) A party aggrieved by a final decision or order of a regional board subject to review under Section 13320 may obtain review of the decision or order of the regional board in the superior court by filing in the court a petition for writ of mandate not later than 30 days from the date on which the state board denies review.

"[¶] . . . [¶]"

"(d) If no aggrieved party petitions for writ of mandate within the time provided by this section, a decision or order of the state board or a regional board shall not be subject to review by any court." (Wat. Code, § 13330, subds. (b), (d).)

B. *Exception from the automatic stay under section 362 (b)(4).*⁶

“The applicability of the automatic stay, and the extent of the ‘police or regulatory power’ exception under [section] 362(b)(4), are questions of law that we consider de novo. [Citation.]” (*Lockyer v. Mirant Corp.* (9th Cir. 2005) 398 F.3d 1098, 1107.)

This exception to the automatic stay was described by the Ninth Circuit in *Lockyer v. Mirant Corp.*, *supra*, 398 F.3d 1098, 1107-1108:

“Section 362(b)(4) provides that the filing of a bankruptcy petition does not operate as an automatic stay ‘of the commencement or continuation of an action or proceeding by a governmental unit . . . to enforce such governmental unit’s . . . police or regulatory power.’ 11 U.S.C. § 362(b)(4). A government unit need not affirmatively seek relief from the automatic stay to initiate or continue an action subject to the

⁶ Title 11 United States Code section 362 provides in relevant part:

“(a) Except as provided in subsection(b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of—

“(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

“[¶] . . . [¶]

“(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, *does not operate as a stay*—

“[¶] . . . [¶]

“(4) under paragraph (1), (2), (3), or (6) of subsection (a) of this section, of the commencement or continuation of an action or proceeding by a governmental unit or any organization . . ., *to enforce such governmental unit’s or organization’s police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit’s or organization’s police or regulatory power; . . .*” (Italics added.)

exemption. [Citation.] The theory of the exception is that bankruptcy should not be ‘ ‘a haven for wrongdoers.’ ’ [Citation.]

“The ‘police or regulatory power’ exception allows the enforcement of laws affecting health, welfare, morals, and safety despite the pendency of the bankruptcy proceeding. The exception applies, for example, to suits to determine a federal income tax exemption, [citation]; to enforce federal labor laws, [citation]; to enforce state bar disciplinary rules [citation]; to enforce federal employment discrimination laws [citation]; and to enforce state consumer protection laws [citation].”

The exception “is designed to prevent a debtor from frustrating necessary governmental functions by seeking refuge in the bankruptcy court” (Ahern and Marsh, *Environmental Obligations in Bankruptcy* (Thomson Reuters 2012) § 4:8 (Ahern and Marsh).) To that end, the courts have devised two interrelated, fact-dominated inquiries for determining whether a particular governmental proceeding comes within the “police or regulatory powers” exception of section 362(b)(4): the “pecuniary purpose” and “public purpose” tests. (*Lockyer v. Mirant Corp.*, *supra*, 398 F.3d at p. 1108; Ahern and Marsh, at § 4:8.) “The two tests are the related, and somewhat overlapping, ‘pecuniary purpose’ and ‘public purpose’ tests. A suit comes within the exception of [section] 362(b)(4) if it satisfies *either* test. [Citation.]” (*Lockyer v. Mirant Corp.*, at p. 1108, italics added, citing *Universal Life Church, Inc. v. United States* (9th Cir. 1997) 128 F.3d 1294, 1297 [“The question in this case is whether [the government action] meets either test.”].)

“ Under the ‘pecuniary purpose’ test, ‘the court determines whether the [government] action relates primarily to the protection of the government’s pecuniary interest in the debtors’ property or to matters of public safety and health.’ [Citations.] If the suit seeks to protect the government’s pecuniary interest, the [section] 362(b)(4) exception does not apply. On the other hand, if the suit seeks to protect public safety and welfare, the exception does apply. The purpose of the ‘pecuniary purpose’ test is to prevent suits that would allow a governmental unit to obtain an advantage over creditors

or potential creditors in the bankruptcy proceeding.” (*Lockyer v. Mirant Corp.*, *supra*, 398 F.3d at pp. 1108-1109.)

“Under the ‘public purpose’ test, the court determines whether the government seeks to ‘effectuate public policy’ or to adjudicate ‘private rights.’ [Citation.] If the government seeks the former, the exception applies; if the government seeks the latter, it does not. [Citations.] A suit does not satisfy the ‘public purpose’ test if it is brought primarily to advantage discrete and identifiable individuals or entities rather than some broader segment of the public. [Citation.]” (*Lockyer v. Mirant Corp.*, *supra*, 398 F.3d at p. 1109.)

“In the environmental context few courts have held that a governmental action was not within the police and regulatory action and was therefore stayed.” (Ahern & Marsh, *supra*, § 4:8, fn. omitted.) Here, the civil penalty assessed by the board for Mbanugo’s failure to file monthly progress reports documenting cleanup under the cleanup and abatement order issued by the Regional Board serves a dual purpose. In addition to protecting the state’s pecuniary interests, it also promotes the public welfare by promoting compliance with Regional Board cleanup and abatement orders. (See *Safety-Kleen, Inc. (Pinewood) v. Wyche* (4th Cir. 2001) 274 F.3d 846, 865-866 (*Safety-Kleen*) [issuance and enforcement of bond order by state’s Department of Health and Environmental Control against hazardous waste landfill operator satisfied exception where it served primary purpose of state’s financial assurance regulations of deterring environmental misconduct and encouraging safe design and operation of hazardous waste facilities].)

As explained by the Fourth Circuit in *Safety-Kleen, supra*, 274 F.3d 846, 865-866: “The inquiry is objective: we examine the purpose of the law that the state seeks to enforce rather than the state’s intent in enforcing the law in a particular case. [Citations.] Of course, many laws have a dual purpose of promoting the public welfare as well as protecting the state’s pecuniary interest. The fact that one purpose of the law is to protect the state’s pecuniary interest does not necessarily mean that the exception is inapplicable.

Rather, we must determine the *primary* purpose of the law that the state is attempting to enforce. [Citations.] Likewise, the fact that the state action requires the debtor to make an expenditure does not necessarily mean that the regulatory exception is inapplicable. [Citation.]

“In considering whether the regulatory exception applies to environmental laws, courts often focus on whether deterrence is the primary purpose of the law. For example, in *United States v. Nicolet, Inc.*, 857 F.2d 202 (3d Cir.1988), the court considered whether the bankruptcy stay applied to the EPA’s efforts to pursue a CERCLA^[7] suit to recover clean-up costs against the debtor. The EPA conceded that the plain language of the regulatory exception did not allow the agency to enforce a monetary judgment. See 11 U.S.C. § 362(b)(4) (limiting state under its police and regulatory power to enforcing ‘judgment[s] other than . . . money judgment[s]’). Nevertheless, the EPA wanted to obtain a judgment against the debtor for a specific monetary amount. The Third Circuit agreed with the EPA. The court determined that CERCLA actions ‘interject[] a valuable deterrence element into the CERCLA scheme, ensuring that responsible parties will be held accountable for their environmental misdeeds.’ *Nicolet*, 857 F.2d at 210. See also *City of New York v. Exxon Corp.*, 932 F.2d 1020, 1024 (2d Cir. 1991) (holding that CERCLA suits fall within regulatory exception because such suits ‘provide an effective deterrent to violators, who will be forced to pay for the government’s costs in responding to their violations’). Because the primary purpose of CERCLA suits is to deter environmental misconduct, the court held that the regulatory exception applied ‘up to and including entry of a monetary judgment.’ *Nicolet*, 857 F.2d at 210.”

Here, it appears the primary purpose of the penalty assessed was to provide an effective deterrent to violators. (Cf. *State of California v. City and County of San*

⁷ Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. § 9604.)

Francisco (1979) 94 Cal.App.3d 522, 531 [“Penalties are designed to deter as well as compensate.”].)

Moreover, the second “public purpose” test is also met here. The assessment of the civil penalty against Mbanugo appears designed to “effectuate public policy,” rather than to adjudicate “private rights.” (See *Lockyer v. Mirant Corp.*, *supra*, 398 F.3d at p. 1109.) Mbanugo has not asserted, and it does not appear, that assessment of the penalty against him advantaged individuals or entities previously associated with the mine. The assessment of the penalty against Mbanugo was not “brought primarily to advantage discrete and identifiable individuals or entities” rather than the public. (*Ibid.*) It was directed toward the public purpose of achieving clean-up of the site and discouraging flouting of future cleanup and abatement orders.

Mbanugo argues that the penalty assessment is outside the exception to the stay by the plain terms of section 362(b)(4), as it is a “money judgment.” The exception provides that the automatic stay does not apply to the governmental unit’s enforcement of its police and regulatory power, “including the enforcement of a judgment *other than a money judgment . . .*” (Italics added.) It is true that “[w]hile governmental agencies proceeding pursuant to the police and regulatory powers exception may prosecute their actions up to and including a judgment, they cannot enforce or collect money judgments without bringing a claim for that amount into the bankruptcy proceeding. See 11 U.S.C. § 362(b)(5). Thus, in this Circuit the tension between the two policies contained within the Bankruptcy Code is reconciled by allowing prosecution up to and including judgment, but not permitting collection without first obtaining relief in the Bankruptcy Court. [Citation.]” (*In re Thomas* (Bankr. N.D.Cal. 2006) 355 B.R. 166, 172.) That is what the Regional Board apparently attempted to do here. However, the Regional Board has not attempted to collect or enforce the penalty outside the bankruptcy process. The collection or enforcement of a money judgment is not at issue in this appeal.

Nor do we agree with Mbanugo that this case is similar to *In re Landstrom Distributors, Inc.* (Bankr. C.D.Cal. 1985) 55 B.R. 390 (*Landstrom*). There, the court held the automatic stay would not be lifted to allow *collection* of a criminal fine for price fixing from assets of the debtor's estate. (*Id.* at pp. 392-393.) The court held that the stay applied to *all* collection proceedings, including collection of criminal fines imposed on the debtor by a federal district court. Unlike *Landstrom*, the question here is not whether the stay applies to an action by the governmental entity to collect the fine. *Landstrom* has no application here, where the question is whether the stay applied to the debtor's filing of a writ petition under Code of Civil Procedure section 1094.5 to challenge the administrative imposition of the fine.

C. *Regional Board's filing of proof of claim in the bankruptcy is irrelevant.*

Mbanugo also argues that by filing a proof of claim in the bankruptcy proceeding, the Regional Board attempted a collection action in the bankruptcy proceeding, and submitted to the jurisdiction of the bankruptcy court. He argues that his ability to bring a writ petition against the Regional Board was stayed as a consequence. Mbanugo does not explain the connection he posits between the Regional Board's filing of a proof of claim in the bankruptcy or even its being bound by a reorganization plan, if such were the case, and application of the section 362(b)(4) exception from the automatic stay.

The stay provision of sections 362(a)(1) and 362(b)(4) do not mention and do not depend upon whether a particular person or entity has filed a proof of claim, whether the claim is within the subject matter of the bankruptcy court, or whether the claimant is bound by a reorganization plan. The inquiry under the stay provision is whether the stay applies to the type of action in question and, if so, whether an exception applies. We have determined above that the exception of section 362(b)(4) applies in this case.

Furthermore, section 523(a)(7) specifically excludes governmental fines from discharge in bankruptcy "to the extent such debt is for a fine, penalty or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, . . ." The penalty assessed by the Regional Board was not compensation for any actual pecuniary loss. (See, e.g., *In re Jones* (Bankr. M.D.Ga. 2004) 311 B.R.

647, 656 [civil penalty assessed against debtor under the Clean Water Act was not in “compensation for actual pecuniary loss” sustained by government, and was thus excepted from discharge and penalty for discharge of oil into navigable water was likewise not in “compensation for actual pecuniary loss”].)

We conclude that the Regional Board’s filing of a proof of claim in the bankruptcy proceeding was irrelevant to the determination that the exception to the automatic stay applied. Consequently, the automatic stay did not prevent Mbanugo from pursuing his writ action in the superior court. Having failed to timely pursue his writ remedy under Water Code section 13330, subdivision (b), he was precluded from seeking review of the fine in any court. (Wat. Code, § 13330, subs. (b) & (d).)

Having determined that the section 362, subdivision (b) exception to the automatic stay applied here, we need not address the alternative basis relied upon by the trial court, that Mbanugo’s writ action lay outside the bankruptcy stay provisions, as he was making an *affirmative challenge* to a decision of the Regional Board.

DISPOSITION

The judgment is affirmed. Respondent is awarded its costs on appeal.

Kline, P.J.

We concur:

Lambden, J.

Richman, J.