2002 BNH 022 Note: This is an unreported opinion. Refer to AO 1050-1 regarding citation.

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE

In re:

Kathleen R. Roberts,
Debtor

Bk. No. 01-12259-MWV
Chapter 7

Kathleen R. Roberts,
Plaintiff

v.

Florida Department of Education,
Defendant

Adv. No. 01-1172-MWV

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MEMORANDUM OPINION

The Court has before it the Florida Department of Education's ("FDOE's "/"Defendant's") motion to dismiss Kathleen R. Robert's ("Debtor's") complaint for a hardship discharge of her student loan debts with the FDOE pursuant to section 523(a)(8) of Title 11 of the United States Code.[1] Based upon the record before it and for the reasons set out below, the Court grants the Defendant's motion.

This Court has jurisdiction of the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the "Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire," dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

[1] Unless otherwise noted, all section references hereinafter are to Title 11 of the United States Code.

FACTS

The Debtor filed under Chapter 7 of the Bankruptcy Code on July 10, 2001. In her schedules, the Debtor listed the FDOE as holding an unsecured priority claim in the amount of $13,290.78 for loans guaranteed by the FDOE and placed in collection with OSI Education Services. On September 24, 2001, the Debtor commenced the above captioned adversary proceeding to determine whether the debt owed to the FDOE is dischargeable pursuant to the undue hardship exception of § 523(a)(8).

The FDOE moves to dismiss the Debtor's complaint for lack of jurisdiction. The FDOE did not file a claim or participate in any other way in the Debtor's bankruptcy, other than to respond to the adversary complaint in which it was named as a defendant.

DISCUSSION

The Federal Rules of Civil Procedure authorize a court, upon suitable showing, to dismiss any action or any claim within an action for lack of subject matter jurisdiction or, in the alternative, lack of jurisdiction over the person.[2] See Fed. R. Civ. P. 12(b)(1), (2).

The Eleventh Amendment provides that:

> [t]he 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.

U.S. Const., amend. XI.[3] Thus, the Court must first determine whether the FDOE is an entity entitled to immunity under the Eleventh Amendment by analyzing its status under state law. In the present case, the FDOE appears to be a state agency entitled to such protections because it was created by the Florida legislature and is empowered through various state statutes. See FLA. STAT. §§ 20.15, 240.465(1) and (3)

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[2] Courts diverge on the issue of whether jurisdiction over a state under the Eleventh Amendment is more properly characterized as a lack of subject matter jurisdiction, a lack of jurisdiction over the person, or some other jurisdictional bar. See Union Pacific Railroad Co. v. Burton, 949 F. Supp. 1546, 1550-51 (D. Wyo. 1996). This Court will analyze the motion to dismiss under Fed. R. Civ. P. 12(b)(1).

[3] The Eleventh Amendment also extends to bar suits instituted in federal courts against a state by its own citizens. See Hans v. Louisiana, 134 U.S. 1, 15 (1890).

(2001); see also Drivas v. Intuition, Inc. (In re Drivas), 266 B.R. 515, 518 (Bankr. M.D.Fla. 2001) (holding that the Florida Department of Education is a state agency because the Florida legislature created it by statue and placed it under the control of the State Board of Education).

Generally, a state cannot be sued in Federal Court without its consent. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 55 (1996).[4] However, there are certain exceptions to this immunity: the *Ex Parte Young* Doctrine, consent and abrogation. The *Ex Parte Young* Doctrine, which strips illegal actions taken by state officers of their state character so that suits against such officials are not barred by states' Eleventh Amendment immunity, does not apply to the present case. Seminole, 517 U.S. at 73.

Additionally, the FDOE did not waive its immunity through consent because it did not file a proof of claim or otherwise participate in the Debtor's bankruptcy case. See In re Rose, 187 F.3d 926, 930 (8th Cir. 1999); In re Drivas, 266 B.R. at 522 (denying Florida Department of Education's motion to dismiss because it had waived its immunity from proceedings to determine the dischargeability of student loan debt by filing a proof of claim in the bankruptcy case).

The exception which is most relevant to the present inquiry is abrogation. The Court in Seminole utilized a two-prong test to determine the validity of congressional abrogation of states' sovereign immunity: "first, whether Congress has 'unequivocally expresse[d] its intent to abrogate the immunity,' and second, whether Congress has acted 'pursuant to a valid exercise of power.'" 517 U.S. at 55 (quoting Green v. Mansour, 474 U.S. 64, 68 (1985)). "Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction." Id. at 73. However, Congress may abrogate Eleventh Amendment immunity pursuant to provisions of the Fourteenth Amendment. See College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 670 (1999).

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[4] The Supreme Court's subsequent sovereign immunity jurisprudence continues to support the Seminole decision. See Federal Maritime Comm'n v. South Carolina State Ports Authority, 122 S.Ct. 1864 (2002); Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356 (2001); Kimel v. Florida Board of Regents, 528 U.S. 62 (2000); College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999); Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627 (1999); Alden v. Maine, 527 U.S. 706 (1999).

Congress unequivocally expressed its intent to abrogate the states' Eleventh Amendment immunity in § 106(a). Section 106(a) provides:

> (a) Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to the following:
>
> (1) Sections ... 106, ... 523 ... of this title.

11 U.S.C. § 106(a). The issue is whether § 106(a) is legislation that is a valid exercise of Congress' abrogation power. The FDOE argues that § 106(a) does not abrogate its Eleventh Amendment immunity because it is unconstitutional. A majority of Courts have agreed with the FDOE's position, determining that Congress enacted § 106(a) pursuant to Article I, § 8 of the Constitution, thus rendering the provision unconstitutional.[5] See e.g. Mitchell v. Cal. Franchise Tax Bd. (In re Mitchell), 209 F.3d 1111 (9th Cir. 2000) (determining that Congress manifested intent to abrogate, but lacked the authority under the bankruptcy clause to do so); Sacred Heart Hosp. v. Pa. Dep't of Pub. Welfare (In re Sacred Heart Hosp.), 133 F.3d 237, 243 (3rd Cir. 1998); Seay v. Tennessee Student Assistance Corp. (In re Seay), 244 B.R. 112, 115 (Bankr. E.D. Tenn. 2000); In re Janc, 251 B.R. 525 (Bankr. W.D.Mo. 2000); In re Snyder, 228 B.R. 712 (Bankr. D.Neb. 1998). But see In re Hood, 262 B.R. 412, 414 (B.A.P. 6th Cir. 2001) (holding that § 106(a) is constitutional because Congress may validly abrogate a state's Eleventh Amendment immunity by legislating pursuant to the power to establish uniform bankruptcy laws under U.S. Const. art. I, § 8, cl. 4). Thus, since Congress intended to abrogate states' Eleventh Amendment immunity, the

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[5] There are also Courts which have found that Congress enacted § 106(a) pursuant to the Fourteenth Amendment's "Privileges and Immunities" clause. See Wilson v. South Carolina State Education Assistance Authority (In re Wilson), 258 B.R. 303; In re Burke, 203 B.R. 493, 497 (Bankr. S.D.Ga. 1996); In re Headrick, 200 B.R. 963 (Bankr. S.D. Ga. 1996). However, the Courts in both Burke and Headrick also discussed the waiver exception as an alternative basis for determining that immunity did not apply to the state because the states had filed proofs of claims in the bankruptcy cases. The Eleventh Circuit, in affirming Burke on other grounds in 146 F.3d 1313, 1317 (11th Cir. 1998), stated "[h]owever, we need not resolve this abrogation issue because assuming arguendo that the State of Georgia has Eleventh Amendment immunity and it has not been validly abrogated by § 106(a), we conclude that in this case the State waived its sovereign immunity by filing a proof of claim in the debtor's bankruptcy proceedings." If the Fourteenth Amendment does provide a Congress with a valid basis to exercise their power to abrogate states' immunity, the Court notes that Congress is best suited to reenact § 106 so that it corresponds with the holding in Seminole.

Court is required to find that exercise of authority unconstitutional pursuant to the holding in Seminole. Consequently, the present case constitutes a suit against an agency of a state without its consent.

Finally, although the Debtor is also precluded from bringing an action in state court on the student loan dischargeability issue without FDOE's consent, the Court notes that the Debtor "may assert undue hardship as an affirmative defense to any attempt by the state to collect its debt post-bankruptcy, for the courts have uniformly held that state courts have concurrent jurisdiction with federal courts over dischargeability determinations involving student loans." Seay, 244 B.R. at 120 (citations omitted).

CONCLUSION

For the reasons outlined above, the Court lacks jurisdiction over the FDOE. Accordingly, the FDOE's motion to dismiss is granted. This opinion constitutes the Court's findings and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. The Court will issue a separate judgment consistent with this opinion.

DATED this 10th day of June, 2002, at Manchester, New Hampshire.

/s/ Mark W. Vaughn
Mark W. Vaughn
Chief Judge