SJC-07972

IN THE MATTER OF STANLEY ROBERT COHEN

Suffolk. May 11, 2001. - August 28, 2001.

Present: Marshall, C.J., Ireland, Spina, Cowin, Sosman, & Cordy, JJ.

Attorney at Law, Disciplinary proceeding, Suspension. Collateral Estoppel.

Information filed in the Supreme Judicial Court for the county of Suffolk on March 12, 1998.

The case was heard by Greaney, J.

Stanley R. Cohen, pro se.

Terence M. Troyer, Assistant Bar Counsel.

IRELAND, J. After having been held in contempt or sanctioned seven times by four different courts, the respondent, Stanley Robert Cohen, appeals from a judgment of a single justice of this court suspending him from the practice of law for one year and one day. This suspension is a result of multiple disciplinary violations, stemming from the respondent's representation of former employees of Cumberland Farms, Inc. (CFI). Specifically, the respondent prosecuted a series of lawsuits on behalf of these employees, despite a Federal court order enjoining him from doing so. He contends that the Federal court had neither personal nor subject matter jurisdiction over him or his clients, and all orders holding him in contempt, either issued from that court or based on that judgment, are therefore invalid. Accordingly, he maintains the resulting discipline is unwarranted. Because we find that (1) the Federal court had both personal and subject matter jurisdiction over the respondent; and (2) the doctrine of collateral estoppel precludes the respondent from raising this defense, we affirm the judgment of the single justice.

1. Background. We recite the factual findings of the hearing committee, which were adopted by the appeal panel and the Board of Bar Overseers (board). In 1986, attorneys brought a class action suit, Lance Curley vs. Cumberland Farms, Inc., Civil Action No. 86-5057, on behalf of former CFI employees in the United States District Court for the District of New Jersey (Curley court). The employees alleged that the defendant officers and employees of CFI had executed a scheme by which low-level employees were wrongfully accused of stealing from CFI. As part of that scheme, the defendants utilized threats, including that of being arrested, to coerce the employees into signing false confessions admitting guilt, even where the employees denied stealing. CFI allegedly fired the employees, used the coerced confessions to file criminal complaints against the former employees, and thereby obtained orders of "restitution" to which CFI was not entitled.

On January 23, 1991, after the initiation of the Curley class action, the respondent commenced his representation of Cheryl Adams after she had been convicted, when he filed Cheryl Adams vs. Cumberland Farms, Inc., Essex Superior Court, No. 91-231 While representing Adams, the respondent became aware of evidence that CFI had engaged in the aforementioned improper scheme against many of its other employees. Over the course of the next several years, the respondent was retained to represent forty-six former CFI employees, whose cases will be discussed in greater detail below.

On May 1, 1992, CFI filed a petition under Chapter 11 of the Bankruptcy Code, in the United States Bankruptcy Court for the District of Massachusetts. In June, 1992, the respondent filed a class proof of claim for injuries suffered by Adams and ten other former employees (eleven Adams claimants) as a result of CFI's loss prevention practices. Between January, 1991, and September, 1993, the respondent filed three additional lawsuits on behalf of former CFI employees: On January 11, 1993, Ronald Ring vs. Demetrios Haseotes, United States District Court for the District of Massachusetts, No. 93-CV-10051; on May 3, 1993, Richard Waugh vs. Demetrios Haseotes, Suffolk Superior Court, No. 93-2663; and on August 5, 1993, Lenora Spain vs. Demetrios Haseotes, United States District Court for the District of Massachusetts, No. 93-CV-11725. These complaints alleged similar claims as those alleged in the Adams case.

On July 28, 1993, the Curley court gave preliminary approval to a $5.5 million settlement in the Curley class action and conditionally certified a class consisting of all former CFI employees who had been questioned about stealing from CFI between October 15, 1970, and June 22, 1993. The preliminary settlement permitted the class members to opt out of the class action by August 31, 1993, "to the extent such person is not prohibited from requesting exclusion by Order of the Bankruptcy Court." The Curley notice of pendency of class action, dated August 2, 1993, was sent to class members, specifically stating that members could request exclusion from the class only if they either had not filed proofs of claim in the Bankruptcy Court or if the Bankruptcy Court ruled they were not required to participate. The notice further stated that, if members did not file notice of exclusion by the opt-out deadline, and were not excluded, they would be bound by the order. Specifically acknowledging that his clients were Curley class members, the respondent moved to intervene in that action. The Curley court denied the motion to intervene on August 11, 1993.

On August 5, 1993, CFI and the original Curley plaintiffs filed a joint motion with the Bankruptcy Court for approval of a "non-opt out settlement class," and for approval of a class settlement of loss prevention claims. The respondent filed an opposition on behalf of, among others, the eleven Adams claimants for whom he had filed the class proof of claim. On August 30, 1993, the Bankruptcy Court ordered all persons who filed proofs of claim in that court to participate in the final settlement of Curley, and further ordered that the claims of all such persons against CFI, its present or past owners, officers, directors, employees, agents, attorneys or insurers, were otherwise "forever barred and discharged."

In contravention of this order, the respondent filed opt-out notices in the Curley class action on behalf of the eleven Adams claimants, as well as an additional twenty other former CFI employees, just prior to the August 31, 1993, opt-out deadline. On September 8, 1993, the Curley court issued a final order and judgment, approving the settlement. It explicitly asserted its jurisdiction over all class members, dismissed pending claims of class members, "forever barred and enjoined" class members from pursuing any loss prevention action against CFI, and retained jurisdiction to enforce performance of the settlement.

As of September 8, 1993, the Adams and Waugh cases had been consolidated in the Superior Court and, like the Spain case, were pending. The Federal District Court had dismissed the Ring case in April, 1993. Almost immediately following the approval of the Curley settlement, the respondent continued to pursue these cases, and commenced new actions, thus violating the orders issued by both the Bankruptcy Court and the Curley court. He was held in contempt or otherwise sanctioned on (1) April 21, 1994, in the Bankruptcy Court ; (2) May 2, 1994, in the United States District Court for the District of New Jersey ; (3) July 12, 1995, in Suffolk Superior Court ; (4) July 19, 1995, in the United States District Court for the District of New Jersey ; (5) August 28, 1995, in the United States District Court for the District of Massachusetts ; and (6) March 5, 1996, in the United States District Court for the District of Massachusetts ; and (7) December 15, 1997, in the United States District Court for the District of Massachusetts.

In light of these events, on February 2, 1998, bar counsel filed a petition for discipline with the board, alleging multiple violations of (1) S.J.C. Rule 3:07, Canon 1, DR 1-102 (A) (5), as

appearing in 382 Mass. 769 (1981) (conduct prejudicial to the administration of justice); (2) S.J.C. Rule 3:07, Canon 1, DR 1-102 (A) (6), as appearing in 382 Mass. 769 (1981) (conduct that adversely reflects on fitness to practice law); and (3) S.J.C. Rule 3:07, Canon 7, DR 7-102 (A) (2), as appearing in 382 Mass. 785 (1981) (knowing advancement of a claim unwarranted under current law).

When the respondent failed to answer timely, bar counsel petitioned a single justice of this court for an administrative suspension pursuant to S.J.C. Rule 4:01, § 8 (3), as appearing in 425 Mass. 1309 (1997), and S.J.C. Rule 4:01, § 3 (2), as appearing in 425 Mass. 1303 (1997). The single justice entered an order of administrative suspension. The respondent then filed a motion for relief from the order, citing procedural issues. The single justice concluded that the administrative suspension suffered from procedural problems, but that the problems could be cured if bar counsel filed a petition for temporary suspension pursuant to S.J.C. Rule 4:01, § 12A, 425 Mass. 1315 (1997). The single justice then deferred any action on the respondent's motion until bar counsel had an opportunity to file such a petition.

Bar counsel then filed a petition for temporary suspension. The respondent answered the petition and filed a motion for dismissal. After a hearing, the single justice issued an order temporarily suspending the respondent pending further proceedings before the board and further order of the court. The respondent filed a notice of appeal. An information and record of proceedings were then filed with this court pursuant to S.J.C. Rule 4:01, § 8 (4), as appearing in 425 Mass. 1309 (1997).

After holding hearings on the petition for discipline, the hearing committee issued a report, finding that respondent had engaged in multiple violations of DR 1-102 (A) (5) and (6), and DR 7-102 (A) (2), and recommending that he be suspended from the practice of law for one year and one day.

The respondent appealed from the hearing committee's findings to an appeal panel of the board (appeal panel). In its report, the appeal panel adopted the hearing committee's findings and recommended a suspension of one year and one day. An information was filed in the county court. Following a hearing, on June 30, 2000, the single justice entered an order suspending the respondent from the practice of law for one year and one day. The respondent did not file a notice of appeal to the full court.

2. Discussion. Although the respondent did not file a notice of appeal after the entry of term suspension, he did file such notice after the entry of judgment of temporary suspension. Because the arguments of bar counsel and the respondent mirror those made before the single justice, appeal panel of the board, and hearing committee, we reach the merits of the appeal, despite the technical filing error. Swampscott Educ. Ass'n v. Swampscott, 391 Mass. 864, 865-866 (1984) ("a decision on the merits should not be avoided on the technicality that a premature notice of appeal was or may have been filed, where no other party has been prejudiced by that fact"). See Dimino v. Secretary of the Commonwealth, 427 Mass. 704, 708 (1998).

In a postargument letter, the respondent conceded that, "[i]f any of my clients were members of the Curley class then I deserved to have my license suspended." He maintains that his clients were not Curley class members, and thus, he was not in violation of the orders. We disagree.

The respondent argues that the Curley court lacked both personal and subject matter jurisdiction over him and his clients. Specifically, he claims that the court lacked jurisdiction over his clients because they allegedly were never parties to, or alternatively, opted out of, the Curley class action. The record does not support this contention. Moreover, the respondent is collaterally estopped from raising this challenge -- or any other -- to the contempt and sanction orders on which the term suspension is based.

Initially, as has been repeatedly found by various courts over the course of these lengthy proceedings, we conclude that the respondent and his clients were subject to the Curley court's jurisdiction. Curley was a class action. Thus, the Curley court had personal and subject matter jurisdiction over all members of the defined class who had not exercised their right to opt out. See Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811 (1985) ("a forum State may exercise jurisdiction over the claim of an absent class-action plaintiff even though that plaintiff may not possess the minimum contacts with the forum which would support personal jurisdiction over a defendant" if forum State provides notice and opportunity to opt out). See also Fed. R. Civ. P. 23 (setting forth circumstances in which class action may be maintained).

The majority of the respondent's clients were class members who did not validly opt out of the Curley class action. In particular, the core group of named plaintiffs in the actions filed by the respondent belong to the eleven Adams claimants group. Each of these plaintiffs filed a proof of claim with the Bankruptcy Court in the CFI bankruptcy proceeding. Consequently, each of these plaintiffs was also subject to the Bankruptcy Court's order approving a mandatory settlement class for those individuals that filed proofs of claim in the Curley action. Thus, these plaintiffs were required to participate in the Curley settlement and could not choose to opt out. Accordingly, as the respondent himself acknowledged in his motion to intervene, his clients were members of the Curley class, and were consequently subject to the jurisdiction of the Curley court.

Bar counsel argues that the doctrine of collateral estoppel bars the respondent from challenging any of the contempt or sanction orders against him. He maintains that the respondent has been "found in contempt or otherwise sanctioned seven times [by four different courts]." He further contends that these orders have become final and are not open to collateral attack by the respondent on jurisdictional or any other grounds. We agree.

We have said that "the offensive use of collateral estoppel is appropriate in bar disciplinary proceedings." Bar Counsel v. Bar Overseers, 420 Mass. 6, 10-11 (1995) (relitigation "would not comport with the judicial goals of finality, efficiency, consistency, and fairness"). The offensive use of collateral estoppel "occurs when a plaintiff seeks to prevent a defendant from litigating issues which the defendant has previously litigated unsuccessfully in an action against another party." Id. at 9. For the doctrine to apply, there must be "an identity of issues, a finding adverse to the party against whom it is being asserted, and a judgment by a court or tribunal of competent jurisdiction." Miles v. Aetna Cas. & Sur. Co., 412 Mass. 424, 427 (1992), citing Martin v. Ring, 401 Mass. 59, 61 (1987). A defendant must also have a "full and fair opportunity to litigate the issue in the first action." Restatement (Second) of Judgments § 29 (1982). See Fireside Motors, Inc. v. Nissan Motor Corp. in U.S.A., 395 Mass. 366, 373 (1985), quoting Fidler v. E.M. Parker Co., 394 Mass. 534, 541 (1985).

Here, bar counsel is seeking the imposition of a suspension against the respondent based on the same conduct that was at issue in each of the seven contempt and sanction orders, six of which resulted in final judgments. Thus, the same issue has been decided adversely to the respondent by three courts of competent jurisdiction. Moreover, before a variety of courts, the respondent has asserted repeatedly that the Curley court lacked jurisdiction over him and his clients. As stated above, the Curley court itself rejected this argument twice. The United States Court of Appeals for the Third Circuit agreed with the Curley court's findings. Thus, the respondent has had a full and fair opportunity to challenge the validity of the Curley contempt orders, both at the trial and appellate levels, to no avail.

The same is true of the other contempt and sanction orders issued against the respondent. As bar counsel points out, the respondent has been sanctioned seven times by four different courts. The record indicates that the respondent had an opportunity to challenge each of these decisions, both at the trial and appellate levels. The respondent does not contend that he was unable to participate in any of these actions; rather, he simply relies on the premise that these decisions were "erroneous" based on his argument that the Curley court lacked jurisdiction over him and his clients, and thus, he was warranted in repeatedly violating the

contempt orders. As discussed above, the respondent's assertion that the Curley court lacked jurisdiction over him is simply incorrect.

With these initial requirements met, we turn to "[f]airness," which is "the decisive consideration" in determining whether to apply offensive collateral estoppel. Aetna Cas. & Sur. Co. v. Niziolek, 395 Mass. 737, 745 (1985). See Parklane Hosiery Co. v. Shore, 439 U.S. 322, 331 (1979); Haran v. Board of Registration in Medicine, 398 Mass. 571, 579 (1986). In making this determination, "courts generally ask whether (1) the party in whose favor the estoppel would operate could have joined the original action, (2) the party against whom it would operate had an adequate incentive to defend the original action vigorously, (3) 'the judgment relied upon as a basis for the estoppel is itself inconsistent with one or more previous judgments in favor of the defendant,' and (4) 'the second action affords the defendant procedural opportunities unavailable in the first action that could readily cause a different result.' " Id. at 577-578, quoting Parklane Hosiery Co. v. Shore, supra at 329-331. Here, the circumstances lend themselves to a fair application of offensive collateral estoppel. First, because the board was not involved in the initial Curley litigation, it had neither a reason, nor an opportunity to join the contempt proceedings. Second, with his professional reputation at stake and confronting severely detrimental consequences from the contempt orders and sanctions, the respondent had every incentive to defend vigorously against the contempt orders and sanctions. Third, there is no possibility that the judgments upon which bar counsel relies are inconsistent with previous judgments in favor of the respondent, particularly since each and every one of these previous judgments have been unpropitious to the respondent. Furthermore, it has not been argued, nor do we conclude, that a different result could have been forthcoming in this case due to new procedural opportunities afforded the respondent. As such, the application of offensive collateral estoppel is fair, and it bars the respondent from challenging the contempt orders and sanctions on jurisdictional, or any other, grounds. Given the respondent's refusal to cease his pursuit of further claims in contravention of various court orders, as well as his acknowledgment that if his clients were members of the Curley class, the sanctions imposed on him were appropriate, the order of the single justice was proper.

Order affirmed.