Barton Doctrine Applies to Special Discovery Mediators in Bankruptcy Courts

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In an unpublished opinion, *Bander v. Isaacson*, 2020 WL 1744539 (9th Cir. Apr. 8, 2020), the Court of Appeals for the Ninth Circuit addressed whether the Bankruptcy and District Courts had properly required potential litigants [hereafter collectively referred to as "Bander"] to seek approval of the Bankruptcy Court before suing a special discovery mediator, Isaacson, the court had appointed. The Bankruptcy Court denied leave to sue, the District Court affirmed, as did the Court of Appeals.

The *Barton* doctrine derives from the ruling in *Barton v. Barbour*, 104 U.S. 126 (1881), and requires a plaintiff to obtain authorization from the bankruptcy court before commencing proceedings in another forum against certain officers appointed by the bankruptcy court for actions the officers took in their official capacities. Courts in the Ninth Circuit use a five-factor test to decide whether to grant leave to sue in another forum under *Barton* or to require the action to go forward, if at all, in the bankruptcy court. These factors include: "(1) whether the acts complained of relate to the carrying on of the business connected with the property of the bankruptcy estate, (2) whether the claims concern the actions of the officer while administering the estate, (3) whether the officer is entitled to quasi-judicial or derived judicial immunity, (4) whether the plaintiff seeks a personal judgment against the officer and (5) whether the claims seek relief for breach of fiduciary duty, through either negligent or willful conduct." *Bander v. Isaacson, supra,* 2020 WL 1744539 at *2 (internal quotation marks and citations omitted).

The issue arose in a non-dischargeability adversary action alleging willful and malicious conduct under 11 U.S.C. § 523(a)(6). The Bankruptcy Court appointed the special discovery mediator. However, the discovery mediator failed to perform a conflicts' check prior to accepting the appointment. The mediator went on to assist the court with discovery disputes for nine months prior to learning from Bander that a partner in the mediator's law firm had represented someone in an unrelated adversary action against Bander ten years before. The mediator withdrew upon learning of the conflict.

Bander demanded the return of nearly $12,000 in fees paid to the mediator, who refused to pay back. Bander then asked the Bankruptcy Court for a declaration that leave was not required to sue the mediator in state court or, in the alternative, permission to file suit in state court, based on the mediator's alleged failure to perform a conflict check before agreeing to serve as the special discovery mediator in the adversary action. Bander also asserted that the mediator's position in the case would not affect the underlying bankruptcy case.

Applying the five-factor test to the circumstances at hand, the Court of Appeals agreed with the bankruptcy and district courts that the factors were met. Specifically addressing whether the mediator's conduct had any effect on the administration of the bankruptcy case, the appellate court found that it did. The example provided was that "if Isaacson [the mediator] did not allow discovery that demonstrates Allen's [the debtor's] actions in the defamation case were 'willful and malicious,' the judgment from the defamation action could be dischargeable," *id*, resulting in more money in the estate to distribute to other creditors. The court determined that the although the mediator's failure occurred before she accepted, any harm that resulted occurred after she became the discovery mediator. The Court decided that because there could be an impact on bankruptcy estate, and the effects of the mediator's breach disqualified her from acting as the special discovery mediator in the adversary action, the district court properly applied *Barton* to the action and required Bander to seek permission from the bankruptcy court before filing a lawsuit in state court. The Bankruptcy Court's refusal to permit the suit to be filed was upheld.

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Practice Pointer: In bankruptcy cases, *Barton* is typically applied to actions directed against trustees. *See, e.g., In re World Mktg. Chicago, LLC*, 584 B.R. 737, 742 (Bankr. N.D. Ill. 2018) ("Not surprisingly, though initially about state court receiverships, the courts that have considered Barton in the context of bankruptcy have held its reasoning applicable to bankruptcy trustees.") (citations omitted). The *Banter* opinion makes it clear that other appointments by bankruptcy judges will also be subject to the *Barton* doctrine. Take care to research how the doctrine has been applied in the jurisdiction in which you intend to sue. Consider filing the type of motion used in *Banter*, *i.e.*, an action to determine that leave to sue is not required.

For additional information contact Hon. Judith K. Fitzgerald (Ret.),

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