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Bertsch v. Eighth Jud. Dist. Ct., 133 Nev. Adv. Op. 33, (June 22, 2017)

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CONSTITUTIONAL LAW: QUASI-JUDICIAL IMMUNITY

Summary

To sue a court-appointed master who has quasi-judicial immunity, an individual must seek leave of the appointing court. This includes court-appointed forensic accountants who were acting within the scope of their duties.

Background

Real party in interest Jay Bloom sued Larry L. Bertsch and Larry L. Bertsch CPA & Associates (collectively, Bertsch) for Bertsch's actions as court-appointed special master in a previous lawsuit in which Bloom was the defendant. Bertsch provided forensic accounting services for the district court and the court provided him qualified immunity.

Before Bertsch filed his final report, plaintiff's counsel disclosed that it previously represented Bertsch in another matter. In Bertsch's final report, he stated that "certain companies associated with Bloom had the 'earmarks of a Ponzi scheme'." Bloom filed a motion to disqualify plaintiff's counsel, alleging a conflict of interest with Bertsch. When Bloom initiated discovery, Bertsch moved for a protective order, which the district court granted in part, while ordering that Bertsch and plaintiff's counsel produce communications. Bloom argued that Bertsch's report was biased, and requested that the court strike the report and issue sanctions. Bertsch opposed the motion and argued that his communications with plaintiff's counsel were proper and routine. The district court found that Bertsch should have disclosed his prior attorney-client relationship with plaintiff's counsel, but that it did not merit disqualification because the conflict no longer existed at the time Bloom objected, and Bloom failed to take any earlier action to prevent Bertsch from issuing his report.

The court accepted the report, but declined to adopt the findings as conclusions of law or analyze the findings. Additionally, the district court found that Bertsch, as a special master under NRC 53, had the same immunities from discovery as a judge, and that only non-privileged communications regarding the report were discoverable. The case settled and Bertsch was never deposed. Bloom then filed a complaint against Bertsch for gross negligence, fraudulent concealment, willful misconduct, and defamation. Bertsch filed a motion to dismiss, arguing in part absolute quasi-judicial immunity from suit. The district court denied the motion to dismiss finding that Bertsch was only entitled to qualified immunity. Bertsch petitioned the Nevada Supreme Court for a writ of mandamus, arguing that he had quasi-judicial immunity because of language in the order that appointed him special master. Bertsch also argued that Bloom's complaint is jurisdictionally improper, because Bloom did not seek leave of the court that appointed Bertsch before initiating the action.

Discussion

Standard for writ relief

¹ By Sydney Campau.

The Nevada Supreme Court has original jurisdiction to grant extraordinary writ relief.² The Court rarely grants writ relief because there is generally another remedy available, and writ relief is costly and disruptive for the district court.³ However, the Court has discretion to grant writ relief to clarify an important issue of law, and when it is in the interest of judicial economy.⁴ The Court exercised its discretion because Bertsch's claims raised important legal issues requiring the Court's clarification.

Bloom was required to seek leave of the appointing court prior to filing a separate complaint against Bertsch

The Court found that Bertsch should have raised his jurisdictional challenge in his opening brief. Nonetheless, the Court chose to consider the issue, which it inferred from Bertsch's oral argument, because it was in the interest of justice. Bertsch's argument implicates the *Barton* doctrine, which is a federal common law rule that requires a party to obtain leave from a bankruptcy court before suing a trustee for their official actions. In *Int'l Game Tech., Inc. v. Sec. Jud. Dist. Ct.*, the Court considered whether the *Barton* doctrine should apply to all court-appointed officers.⁵ The *Barton* doctrine's purpose is to prevent frivolous lawsuits and to protect officials performing their court-appointed duties, because exposure to liability could influence a court-appointed professional's decision to accept their appointment, or could affect their recommendations. The Court held that Bertsch played an integral role in the judicial process, and was required to use discretionary judgment to evaluate records and assist in making determinations of law and fact. Thus, the Court extended the *Barton* doctrine to court-appointed accountants in the capacity of special master, and held that an individual must seek leave of the appointing court to sue a court-appointed special master.

The appointing court determined that Bertsch did not act outside the scope of his court-derived duties

Bertsch should have disclosed his prior attorney-client relationship under NCJC 2.11(C). However, the district court did not find this to be grounds for disqualification, finding that Bertsch is an unbiased and skilled forensic accountant who complied with the order of appointment.

Conclusion

Bertsch did not act beyond the scope of his court-derived duties, and Bloom was required to file a motion with the appointing court in order to sue Bertsch. Thus, the Court granted Bertsch's petition and issued a writ of mandamus directing the district court to dismiss the underlying complaint against Bertsch.

² *Mountain View Hosp., Inc. v. Eight Jud. Dist. Ct.*, 128 Nev. 180, 184, 273 P.3d 861, 864 (2012).

³ 124 Nev. 193, 197, 179 P.3d 556, 558–59 (2008).

⁴ *Id.* at 197–98, 179 P.3d at 559.

⁵ *Blixseth v. Brown*, 470 B.R. 562, 567 (Bankr. D. Mont. 2012).