

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT - SAN FRANCISCO

In the Matter of)	Case No. 13-AE-10281-LMA
)	
GERALD WILLIAM FILICE,)	ORDER GRANTING MOTION FOR
)	INVOLUNTARY INACTIVE
Member No. 99657,)	ENROLLMENT [Bus. & Prof. Code,
)	§ 6203, subd. (d); Rules Proc. of State Bar,
A Member of the State Bar.)	rule 5.360, et seq.]

INTRODUCTION

This matter is before the court on a motion filed by Kenneth E. Bacon, Presiding Arbitrator of the Mandatory Fee Arbitration Program of the State Bar of California (State Bar), seeking the involuntary inactive enrollment of Award Debtor **Gerald William Filice** (Award Debtor), pursuant to Business and Professions Code section 6203, subdivision (d), and rule 5.360, et seq., of the Rules of Procedure of the State Bar of California (Rules of Procedure) due to his failure to pay an arbitration award. Based on the State Bar's motion and supporting documents, the court finds that Award Debtor has failed to comply with the arbitration award and has not produced a payment plan acceptable to the client or the State Bar.

SIGNIFICANT PROCEDURAL HISTORY

On January 18, 2013, the State Bar filed a motion seeking the involuntary inactive enrollment of Award Debtor. (Bus. & Prof. Code, section 6203, subd. (d), Rules of Procedure, rule 5.360, et seq.) That same day, a copy of the motion was properly served at Award Debtor's official membership records address, by certified mail, return receipt requested, and by regular mail. On February 4, 2013, Award Debtor filed a response to the motion and a request for a hearing. On February 5, 2013, the court filed a notice, setting a hearing date of March 5, 2013.

On March 5, 2013, the State Bar filed a reply to Award Debtor's response. On that same day, a hearing was held and this matter was submitted for decision. Presiding Arbitrator Kenneth E. Bacon appeared for the State Bar. Award Debtor represented himself in this matter.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Award Debtor was admitted to the practice of law in California on December 1, 1981, and has been a member of the State Bar at all times since.

Facts

On May 6, 2010, Gene Webber (Webber) requested mandatory fee arbitration with the Sacramento County Bar Association to resolve a fee dispute with Award Debtor. On November 18, 2010, the Sacramento County Bar Association served a non-binding arbitration award on the parties. It awarded Webber a refund in the amount of \$1,665 in attorneys' fees and costs. This award subsequently became final and binding because neither party filed a timely request for trial after arbitration. (See Bus. & Prof. Code, section 6204.)

On March 5, 2012, Webber's attorney, Mark Gallagher (Gallagher), called Award Debtor requesting payment of the award. That next day, Award Debtor sent Gallagher an email stating that he had "rejected" the Sacramento County Bar Association's arbitration award.¹ The following day, Gallagher sent an email to Award Debtor advising that the arbitration award had become binding and, again, requesting payment of the award. Award Debtor did not subsequently pay the award or contact Webber about the award.

On March 16, 2012, Webber filed a request for enforcement of the arbitration award (request for enforcement) with the State Bar pursuant to section 6203, subdivision (d).

On or about March 27, 2012, the State Bar served the request for enforcement on Award Debtor by regular and certified mail.² Included in this mailing was a cover letter from the State Bar advising Award Debtor of the potential consequences for: (1) failing to comply with the

¹ On or about December 13, 2010, Award Debtor sent Gallagher and Webber a letter indicating that he was rejecting the award of the arbitrator. This "rejection," however, was not in accordance with Bus. & Prof. Code, section 6204, subdivisions (a) and (c).

² All letters from the State Bar to Award Debtor were sent to his official State Bar membership records address.

arbitration award; and (2) failing to respond to the Client's Enforcement Request by April 26, 2012.

After not receiving a reply from Award Debtor, the State Bar sent a letter to him on May 10, 2012, advising him of the ramifications of his continued non-compliance with a final and binding fee arbitration award. The letter advised that the State Bar may seek the imposition of administrative penalties.

On May 16, 2012, the State Bar received a telephone call from Award Debtor. Award Debtor told the State Bar that they were prevented from continuing the arbitration award enforcement proceedings because his wife had filed bankruptcy. Award Debtor also asserted that the State Bar did not have jurisdiction to enforce the award as the Federal Arbitration Act was the controlling law. Award Debtor confirmed that he would send his formal reply in writing.

After not receiving Award Debtor's response, the State Bar sent him another warning letter on May 31, 2012. In this letter, the State Bar advised Award Debtor that it intended to seek administrative penalties because his reply had not been received.

On June 14, 2012, Award Debtor faxed a letter to the State Bar. In this letter, Award Debtor reiterated his argument that the State Bar did not have authority to enforce the award.

On June 18, 2012, the State Bar sent a letter to Award Debtor reasserting its authority to enforce the arbitration award and giving Award Debtor until July 3, 2012, to provide a responsive reply to Webber's request for enforcement by either producing proof of full payment of the award, offering a payment plan to achieve that end, or providing reasons that he is not responsible for or financially unable to pay the award.

On July 5, 2012, Award Debtor faxed another letter to the State Bar. In this letter, he again argued that the State Bar could not enforce the arbitration award and warned that he would likely file suit in the U.S. District Court if the State Bar did not dismiss its arbitration enforcement matter entirely.

Thereafter, the Presiding Arbitrator issued an Order re Administrative Penalties against Award Debtor on July 13, 2012. In this order, the State Bar ordered administrative penalties against Award Debtor in the amount of \$750. This order was served on Award Debtor by regular and certified mail at his official membership records address, and stayed for 14 days to give Award Debtor an opportunity to fully comply with the award.

Award Debtor did not subsequently pay the arbitration award and the penalty was added to his 2013 State Bar membership dues.

Award Debtor's Contentions

Award Debtor contends that he is not responsible for making or insuring payment of the arbitration award. Award Debtor argues that the Sacramento County Bar Association's fee arbitration award is unenforceable because his retainer agreement with Webber states that any fee disputes will be "decided by neutral and binding arbitration, under the rules of the American Arbitration Association." Yet, despite his current contention, the record reflects that both Award Debtor and Webber participated and testified in the Sacramento County Bar Association's fee arbitration hearing.³ Consequently, Award Debtor and Webber waived the retainer agreement clause requiring arbitration under the American Arbitration Association.

What is more, the court does not have any evidence that Webber actually signed the purported retainer agreement. Award Debtor attached a copy of the alleged retainer agreement to his declaration. The attached agreement, however, is in the form of a letter and is not signed by any of the parties. Award Debtor stated that he could not locate the signed copy. Therefore, it is not clear to the court if the attached retainer agreement ever was actually signed by Webber.

Even if the parties signed the retainer agreement and the arbitration clause was not waived, Award Debtor has not demonstrated by clear and convincing evidence that he is not personally responsible for payment of the Sacramento County Bar Association's arbitration award. Award Debtor failed to cite any compelling authority in support of his contention that

³ The Fee Arbitrator's decision gives no indication that Award Debtor raised the arbitration clause issue during the arbitration process.

where an attorney-client fee contract provides for binding arbitration of disputes before the American Arbitration Association, that clause controls over State law.

Finally, Award Debtor also contends that he is unable to pay the arbitration award. Award Debtor, however, did not present any tangible or credible evidence demonstrating the totality of his financial circumstances. In addition, there is no evidence that Award Debtor ever proposed any type of a payment plan. Consequently, Award Debtor did not demonstrate, by clear and convincing evidence, an inability to pay the arbitration award.

Conclusions of Law

The court finds that the State Bar has met the burden of demonstrating by clear and convincing evidence that Award Debtor has failed to comply with the arbitration award and has not proposed a payment plan acceptable to the client or the State Bar. (Bus. & Prof. Code, § 6203, subd. (d)(2); Rules of Procedure, rule 5.360, et seq.)

In addition, the court finds that Award Debtor has not met his burden of demonstrating by clear and convincing evidence that he is not personally responsible for making or ensuring payment of the award; that he is unable to pay it; or that he has proposed and agrees to comply with a payment plan which the State Bar has unreasonably rejected as unsatisfactory. (Bus. & Prof. Code, § 6203, subd. (d)(2); Rules of Procedure, rule 5.365(B).)

ORDER

IT IS ORDERED that Award Debtor **Gerald William Filice**, be enrolled as an inactive member of the State Bar of California pursuant to Business and Professions Code section 6203, subdivision (d)(1), effective five days after the date of service of this order. (Rules of Procedure, rule 5.368(B)(1).)

IT IS FURTHER ORDERED that Award Debtor **Gerald William Filice** must remain involuntarily enrolled as an inactive member of the State Bar until: (1) he has paid the arbitration award to Gene Webber in the amount of \$1,665, plus interest at the rate of ten percent per annum from November 18, 2010, the date the award was served; (2) he has paid reasonable

costs, if any; and (3) the court grants a motion to terminate the inactive enrollment pursuant to rule 5.370(A) of the Rules of Procedure of the State Bar of California.

Reasonable costs are awarded to the State Bar upon the Presiding Arbitrator's submission of a bill of costs. (Bus. & Prof. Code, § 6203, subd. (d)(3); Rules Proc. of State Bar, rule 5.368(B)(2).)

Dated: March ___, 2013

LUCY ARMENDARIZ
Judge of the State Bar Court