United States Bankruptcy Court
Western District of Wisconsin

Cite as: [Unpublished]

Robert P. and Kathleen S. Fisher, Plaintiffs, v.
Dianne Niemi-Hart, Defendant
(In re Robert P. Fisher, Kathleen S. Fisher, Debtors)
Bankruptcy Case No. 96-15255-7; Adv. Case No. A98-1023-7

United States Bankruptcy Court
W.D. Wisconsin, Eau Claire Division

August 10, 1999

Chris A. Gramstrup, Superior, WI, for plaintiffs.
Martha M. Markusen, Fryberger, Buchanan, Smith & Frederick, Pl.A., Duluth, MN, for defendant.

Thomas S. Utschig, United States Bankruptcy Judge.

MEMORANDUM OPINION, FINDINGS OF FACT, AND CONCLUSIONS OF LAW

If this case proves one thing, it is that divorce is never final. Robert Fisher and Dianne Niemi-Hart were divorced in Douglas County, Wisconsin, on July 8, 1966, more than thirty years ago. Ms. Niemi-Hart received custody of the parties' two children, and Mr. Fisher was ordered to pay $165.00 per month in child support through the clerk of court's office. The clerk's records indicate that Mr. Fisher's last payment was made on December 13, 1968. The children did not reach the age of majority until 1975 and 1977, respectively, and the court clerk's office therefore reflected an arrearage of approximately $18,000.00 on the child support obligation.

Despite this apparent delinquency, Ms. Niemi-Hart took no legal action against the debtor for years. Then in 1992, she obtained the assistance of the Douglas County Child Support Enforcement Unit and moved for judgment on the obligation. She contended that she had delayed in pursuing the claim not only because she lacked the funds with which to hire an attorney, but also because she was unaware of any state agency which would have assisted her in compelling Mr. Fisher to pay the child support. She also claimed that except for a small payment in 1970, Mr. Fisher paid her nothing in the way of support after 1968. In contrast, Mr. Fisher testified in state court that he made regular direct payments to Ms. Niemi-Hart, even paying more than was required to catch up the arrearage.

After a hearing, the state court judge denied Ms. Niemi-Hart's motion for judgment.[(1)] On appeal, the Wisconsin Court of Appeals reversed and held that even though sixteen years had passed since the youngest child reached the age of majority, neither laches, estoppel, waiver, nor any other equitable consideration constituted a bar to Ms. Niemi-Hart's claim. However, the appellate court also concluded that the trial court did have the discretion to credit Mr. Fisher for any direct payments made by him to Ms. Niemi-Hart, and therefore remanded for further

proceedings. See Douglas County Child Support Enforcement Unit v. Fisher, 185 Wis. 2d 662, 517 N.W.2d 700 (Wis. App. 1994). During those subsequent proceedings, the trial court set the amount of arrearage at $3,000.00 and denied Ms. Niemi-Hart's request for statutory interest.[(2)] Another appeal followed.

In the second appeal, the Wisconsin Court of Appeals concluded that as a result of certain amendments by the Wisconsin Legislature, the trial court in fact lacked the discretion to credit Mr. Fisher for any direct payments.[(3)] Further, the appellate court concluded that the trial judge erred in denying Ms. Niemi-Hart's motion for statutory interest on the arrearage under Wis. Stat. § 767.25(6). The court reversed and remanded for entry of judgment for the total amount of arrearage plus interest. Judgment was thereafter entered in the total amount of $94,903.13.

Mr. Fisher then filed bankruptcy and brought this adversary proceeding seeking to discharge the judgment, with the possible exception of the $3,000.00 he admits might actually be owed to Ms. Niemi-Hart. Motions for summary judgment were filed by both parties. Shortly after the briefs were submitted, Mr. Fisher notified the Court that he wished to stay the proceedings to permit him to fully litigate a motion he had filed in state court to alter the underlying judgment amount. This motion was based on yet another change in Wisconsin law, this one apparently allowing some credit for direct payments.[(4)] The Court agreed to stay the proceedings and entered an appropriate order on September 28, 1998. At a subsequent status conference, the parties indicated that the state court entered an order amending the judgment amount to $71,790.20.[(5)]

The question before the Court is whether this debt is nondischargeable. When Congress enacted the bankruptcy code in 1978, the primary purpose was to create a vehicle for the rehabilitation of bankrupt debtors. While there is no constitutional or "fundamental" right to a discharge in bankruptcy, the intent of the code is to provide debtors with a "fresh start." Grogan v. Garner, 498 U.S. 279, 111 S. Ct. 654, 112 L. Ed. 2d 755, 764 (1991). As the Grogan court stated:

> [A] central purpose of the [bankruptcy] Code is to provide a procedure by which certain insolvent debtors can reorder their affairs, make peace with their creditors, and enjoy "a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt." [citation omitted]

112 L. Ed. 2d at 764. However, the code also reflects that Congress did not believe *all* debts should be so easily forgiven, and the obligations which are thus excepted from discharge are found in 11 U.S.C.§ 523(a).

Among those debts excepted from discharge are various marital obligations. Under 11 U.S.C. § 523(a)(5), a debtor may not discharge a debt "to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child." The critical element of this exception to discharge is found in § 523(a)(5)(B), in that regardless of its designation in the divorce decree, the debt must be "actually in the nature of alimony, maintenance, or support." The labels used by the parties are not controlling when determining the nature of a marital obligation for dischargeability purposes. In re Messnick, 104 B.R. 89, 92 (Bankr. E.D. Wis. 1989); see also In re Snipes, 190 B.R. 450 (Bankr. M.D. Fla. 1995). Whether a debt falls within the exception to discharge for support, alimony, or maintenance is a question of federal law. In re Hoivik, 79 B.R. 401 (Bankr. W.D. Wis. 1987); see also In re Sampson, 997 F.2d 717 (10th Cir. 1993). Generally, the bankruptcy court's

burden is to look beyond the language of the award and determine the substance of the obligation. Hoivik, 79 B.R. at 402. The debtor in this case contends that the debt to Ms. Niemi-Hart is dischargeable because it is not "in the nature" of child support. He bases this contention on the notion that regardless of its original purpose, the debt now represents nothing more than a beneficial windfall to Ms. Niemi-Hart and an onerous, oppressive penalty on him.

As a preliminary matter, the Court notes that the debtor's briefs contain a significant amount of argument premised upon the fact that the state court at one time "found" that the amount of arrearage was only $3,000.00. The debtor believes that this Court can therefore discharge the balance as some form of penalty due to the state court's inability to credit the alleged double payments. However, as indicated previously, the debtor requested that the Court suspend these proceedings so that he could pursue a motion in state court which he alleged would resolve the issue of the double payments. The state court entered an order revising the original judgment amount downward approximately $25,000.00, apparently crediting the debtor for some direct payments.

The state court judgment is entitled to preclusive effect in these proceedings. Collateral estoppel or "issue preclusion" refers to the effect a prior judgment has in foreclosing litigation of an issue of law or fact that was actually decided or litigated. Meyer v. Rigdon, 36 F.3d 1375, 1378 n.1 (7th Cir. 1994). Under appropriate circumstances, collateral estoppel may preclude a party in a bankruptcy adversary proceeding from relitigating issues which were previously decided in another forum. Certain conditions must be met before the prior judgment may be given such preclusive effect:

1. The issue sought to be precluded must be the same as that involved in the prior action.

2. The issue must have been actually litigated.

3. The determination of the issue must have been essential to the final judgment.

4. The party against whom estoppel is invoked must be fully represented in the prior action.

Klingman v. Levinson, 831 F.2d 1292, 1295 (7th Cir. 1987).

There can be no doubt whatsoever that the issue of "direct payment" has been previously litigated. One might even submit that it has been over-litigated. The debtor even had the additional opportunity to present such evidence to the state court while these proceedings were suspended. Clearly after this most recent round of hearings, the state court judgment reflects a final determination on the issue of direct payment by the debtor, and that issue was actually and necessarily resolved in settling on the amount awarded by the amended judgment. Therefore, the debtor is precluded from relitigating whether the state court failed to properly credit him with any additional payments to Ms. Niemi-Hart.[(6)]

The dischargeability of this obligation hinges solely upon the appropriate interpretation of § 523(a)(5)(B). Is this debt "in the nature" of support? The debtor cites authority for the proposition that in the course of this determination, the Court should examine (i) the intent of the parties, (ii) whether the obligation actually has the effect of providing the support necessary to satisfy the needs of the children, and (iii) whether the amount of support represented by the obligation is so excessive that it is

manifestly unreasonable under traditional notions of support. See In re Perlin, 30 F.3d 39 (6th Cir. 1994). As this Court has itself stated, the evidence which is typically considered by courts in determining the nature of the award is (i) the form of the award and (ii) whether the need for support exists. Hoivik, 79 B.R. at 402.[(7)]

The debtor concedes the payments were originally intended as child support. Further, he does not really dispute that at the time the award was made, the payments were reasonable. And he does not argue that the payments were unnecessary for the support of his children at the time they were due. Rather, he focuses on the present. He submits that today the payments will provide no support "necessary to satisfy the needs of the children" because, after all, the "children" are nearing middle age and likely have children of their own. In addition, the debtor points out that the accumulated interest charges have caused the debt to swell from a relatively modest sum to an amount which threatens his future financial security. He believes that these considerations should render the debt dischargeable.

As indicated in the debtor's brief, these are equitable considerations, and this is a court of equity as well as law. But law must also be served. The focus of the Court's inquiry under § 523(a)(5) is the parties' situation at the time of the divorce, not the time of the bankruptcy, and the "current needs of the recipient spouse are irrelevant." Messnick, 104 B.R. at 92. For purposes of this section, the Court must consider whether there was a need for support at the time of the divorce or separation. Id.; see also In re Anthony, 190 B.R. 433 (Bankr. N.D. Ala. 1995). The congressional purpose behind the exception must also be considered. The purpose of the exception is to protect the spouse who may lack job skills and minor children who may be neglected if the custodial spouse were forced to enter the job market. Hoivik, 79 B.R. at 402; see also In re Sargis, 197 B.R. 681 (Bankr. D. Colo. 1996). In essence, the provision reflects Congress's effort to balance the conflict between the "fresh start" policy of the code and the family law policy of ensuring necessary support for the disadvantaged spouse and children after termination of the marriage. In re Sateren, 183 B.R. 576 (Bankr. D. N.D. 1995). The term "support" in § 523(a)(5) is therefore entitled to broad application, In re Clegg, 189 B.R. 818 (Bankr. N.D. Okla. 1995), even though the exception should generally be construed narrowly in favor of the debtor. Messnick, 104 B.R. at 92.

At the time of the divorce, the decree required the debtor to make monthly payments of $165.00. These payments were for child support. The debtor did not make the payments when due, or in the prescribed manner, and a judgment for the child support arrearage was entered. While the Court agrees with the debtor that Ms. Niemi-Hart's delay in prosecuting the matter may have resulted in a sizeable award of prejudgment interest, ultimately the debtor's failure to pay the child support is the reason for the arrearage. Had he paid the child support when it was due, there would be no present obligation. See In re Smith, 139 B.R. 864, 867 (Bankr. N.D. Ohio 1992) (retroactive child support award was nondischargeable; had debtor satisfied financial obligation to provide for child when the obligation arose, the remaining debt would be only a minimal amount). When considering the facts at the time of the parties' divorce, it is clear that (i) the debt was intended as support, (ii) the payments were necessary for support of the children, and (iii) the award was not manifestly unreasonable. Time does not alter the essential character of this debt, and the Court can do nothing but conclude that it is "in the nature" of child support.

Further, while the debtor's argument suggests that this Court could fashion a remedy and discharge the accrued interest charges as some sort of "unreasonable penalty," the law is clear in that regard as well. The Seventh Circuit has held that

"ancillary obligations" such as attorney's fees and interest may attach to the primary debt; consequently, "their status depends on that of the primary debt." See Klingman, 831 F.2d at 1296. The Supreme Court's recent decision in Cohen v. De La Cruz, 523 U.S. 213, 118 S. Ct. 1212, 140 L. Ed. 2d 341 (1998), reflects this same policy. In that case, the Supreme Court considered whether treble damages were nondischargeable under § 523(a)(2)'s exception for debts resulting from "actual fraud." The Court first held that each use of the phrase "debt for" in § 523(a) "served the identical function of introducing a category of nondischargeable debt." 140 L. Ed. 2d at 347. The Court then held that the section was "best read" to prohibit the discharge of *any* liability resulting from the proscribed conduct or obligation. Id. In this case, the underlying support obligation is nondischargeable, and all ancillary debts, including interest, are nondischargeable as well.

Accordingly, the plaintiff's motion for summary judgment is denied. The defendant's motion for summary judgment is granted, and the debt in the revised amount of $71,790.20 is hereby found nondischargeable under 11 U.S.C. § 523(a)(5) as it is a debt "in the nature of" child support.

This decision shall constitute findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052 and Rule 52 of the Federal Rules of Civil Procedure.

END NOTES:

1. The state court judge found that Ms. Niemi-Hart's inaction, together with the detriment to Mr. Fisher and the lack of public assistance to the children compelled a finding of waiver and equitable estoppel. See June 3, 1993, memorandum decision of the Honorable Joseph A. McDonald in the matter of Douglas County Child Support Enforcement Unit for Dianne M. Niemi v. Robert P. Fisher, Case No. 786, Douglas County Circuit Court at p. 4. The judge was particularly perturbed by the involvement of the child support agency, as he found it a more appropriate use of limited resources for the agency to assist those children presently in need of financial assistance, rather than help create a "windfall." Id.

2. The second time around, the state court judge admitted that there appeared to be "some" arrearage, but also found that Mr. Fisher had made some direct payments as well. The court stated that the "exact amount I'm unable to - to compute because the - Mr. Fisher did not pay through the Clerk of Courts." Nonetheless, the judge determined the amount of arrearage to be $3,000.00 and denied Ms. Niemi-Hart's request for interest on the basis that the proceeding was an equitable one, and he found it inequitable for her to "sit on [her] rights and let interest accumulate." See excerpt of the transcript of proceedings held before Judge McDonald in Douglas County Circuit Court, attached as Exhibit "C" to the plaintiff's motion for summary judgment.

3. Apparently, prior to the enactment of 1993 Wis. Act 481, a trial court had the discretion to grant equitable credit for direct expenditures made for support in a manner other than that prescribed in the order or judgment, if the order or judgment was entered prior to August 1, 1987. See Schulz v. Ystad, 155 Wis. 2d 574, 603-04, 456 N.W.2d 312, 323 (1990). In the 1993 amendments, the legislature amended Wis. Stat. § 767.32(1m), and created § 767.32(1r), which the Court of Appeals concluded "unambiguously provide that a trial court cannot grant credit for direct payments for support made in a manner other than that prescribed in the order or judgment providing for support." See Douglas County Child Support Enforcement Unit v. Fisher, 200 Wis. 2d 807, 813, 547 N.W.2d 801 (Wis. App. 1996).

4. According to the affidavit of the debtor's attorney filed in support of the motion to suspend payments, the Wisconsin Legislature in 1998 passed Wis. Act 273, which apparently amends Wis. Stat. § 767.32 and "restores" power to the circuit court to consider credits for direct payment. See August 17, 1998, affidavit of Chris A. Gramstrup at paragraph 6. The debtor filed a motion in state court for rehearing based upon this second change in the law, and sought reinstatement of the initial judgment of $3,000.00. Id. at paragraphs 8-9.

5. A copy of this judgment was received by the Court on May 20, 1999. The Court requested that each party provide the Court with a letter brief outlining the impact this order had upon the briefs which had been previously submitted. On June 14, 1999, Ms. Niemi-Hart's counsel wrote and stated that her client's position remained unchanged, in that the state court had again set forth the amount of child support which was due and owing and that this amount was nondischargeable.

By letter on the same date, the debtor's counsel submitted that the revised order "does not disturb the State Court's original Findings," and had "no effect" on the issue before this Court. The debtor's position is somewhat disturbing, given the statements made in support of the motion to suspend these proceedings. The debtor stated emphatically that the state court proceedings would settle the matter of the amount of the arrearage, and that if the original determination of $3,000.00 were restored, the relief the debtors sought in this Court would be "unnecessary." While this Court does not have the benefit of the transcript in these most recent state court hearings, it is clear that the entire point of the proceedings was to settle the debtor's contention that he had made uncredited "direct" payments to Ms. Niemi-Hart. The Court can only conclude that the order amending the judgment reflects any credits the state court found appropriate.

6. Further, the debtor's assertion that the trial court's determination that $3,000.00 was the amount of arrearage overlooks not only the rather "equitable" nature of the award but also the fact that the decision was reversed. While the appellate court did not specifically overturn the factual finding, it also expressly noted that it did not reach the issue. Niemi, 547 N.W. 2d at 802 n.1.

7. In many cases it is difficult to determine whether an award was for support or property division. Courts have developed elaborate sets of factors to assist in making the determination. See Messnick, 104 B.R. at 92-93 (listing eleven factors). In this case, the parties both agree the award was originally intended as support; the question is whether the passage of time has altered its character.