United States Bankruptcy Court
Western District of Wisconsin

Cite as: [Unpublished]

Janice M. Zdimal, Plaintiff, v.
Dennis E. Lundquist, Defendant
(In re Dennis E. Lundquist, Debtor)
Bankruptcy Case No. 95-30238-7; Adv. Case No. 95-3059-7

United States Bankruptcy Court
W.D. Wisconsin

August 29, 1995

James A. Jaeger, Sara Buscher, Hill, Glowacki & Jaeger, Madison, WI, for plaintiff.
Michael E. Kepler, Timothy J. Peyton, Kepler & Peyton, Madison, WI, for defendant.
Peter M. Gennrich, Jenswold, Studt, Hanson & Gennrich, Madison, WI, Trustee.

Robert D. Martin, United States Bankruptcy Judge.

MEMORANDUM DECISION

On June 27, 1995, the Court took under advisement a motion to dismiss a complaint under 11 USC § 523(a)(15) for failure to state a claim upon which relief could be granted. Also taken under advisement was a further motion by the plaintiff for leave to amend her complaint and/or to join parties in the event that she did not prevail on the motion to dismiss.

The following summary of facts is derived from the parties' Joint Pretrial Statement, filed June 26, 1995:

On December 26, 1991, Dennis E. Lundquist (Lundquist) and Jean Sue Lundquist were divorced. Janice M. Zdimal (Zdimal) is the attorney who represented Jean Sue Lundquist throughout the divorce. On June 23, 1994, a Supplemental Stipulated Judgment was entered "nunc pro tunc" as of November 26, 1991, which purported to divide property and debts, and to order support. Among other provisions, the Supplemental Stipulated Judgment ordered Lundquist to pay $15,000 in legal fees to Zdimal on behalf of Jean Sue Lundquist.

After Lundquist filed this Chapter 7 bankruptcy, Zdimal filed a timely complaint to avoid discharge of the unpaid remainder of the $15,000 pursuant to either 11 USC § 523(a)(5) or 11 USC § 523(a)(15). Lundquist moved under FRBP 7012(b)(6) to dismiss the § 523(a)(15) cause of action for failure to state a claim upon which relief could be granted. He argued that § 523(a)(15) is only available to a spouse, former spouse, or child of the debtor, and that Zdimal was none of those. On June 21, 1995, Zdimal filed a response to the motion to dismiss, and moved in the alternative for leave to amend her complaint to add a cause of action under 11 USC § 523(a)(4) and/or to join Jean Sue Lundquist as a party.

Section 523(a)(15) is new[(1)] and the right to proceed under it has not been considered in a published opinion. It provides:

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt--

(15) not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, a determination made in accordance with State or territorial law by a government unit, unless--

(A) the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor and, if the debtor is engaged in a business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business; or

(B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor.

The plain language of § 523(a)(15) contains no limitation on who can bring an action. Indeed, any debt arising out of an "order of a court of record" should qualify, subject to the factual limitations of sub-paragraphs (A) and (B). The section makes non-dischargeable the sort of property-settlement and other non-support divorce-related debts that § 523(a)(5) did not reach.[(2)] Judge Margaret Dee McGarity, "Family Law Provisions in the Bankruptcy Reform Act of 1994," *Bankruptcy Court Decisions*, May 16, 1995. It may be, therefore, that the best guidance for construing § 523(a)(15) lies in the interpretations already afforded the older § 523(a)(5).

A majority of circuits have found that orders to pay a former spouse's legal fees can qualify as "support" pursuant to § 523(a)(5). The payment of such fees may be necessary to enable a moneyless spouse to assert rights to the more traditional types of support, and would therefore itself be in the nature of support. In the common case where payment is ordered to be made directly to the former spouse's attorney, the question is whether this can qualify as a debt "to a spouse, former spouse, or child of the debtor" pursuant to § 523(a)(5)'s main clause. All courts have resolved this legal question in favor of the attorney. *Norton Bankruptcy Law and Practice* § 47:37 (1995). See also In re Seibert, 914 F2d 102 (7th Cir 1990); In re Spong, 661 F2d 6 (2d Cir 1981) (spouse a third-party beneficiary of order to pay attorney, and thus able to enforce).

Some courts have held that orders to pay legal fees arising out of a divorce proceeding are always support. In re Sigworth, 60 BR 137 (Bankr ND Ohio 1986); *Norton* § 47:37 n71. Although it has been suggested that Sigworth states what is now the majority view, that view has not been adopted in either this district or circuit. Courts within this circuit, including this one, suggest otherwise. See, e.g. In re Hart, 130 BR 817, 825 (Bankr ND Ind 1991); In re Wisniewski, 109 BR 926, 930 (Bankr ED Wis 1990), citing, In re Kijewski, 91 BR 48, 50-51 (Bankr ND Ill 1988), and In re Vande Zande, 22 BR 328, 330 (Bankr WD Wis 1982). These courts hold inter alia that an award of legal fees meant to balance a property division does not qualify under § 523(a)(5). Whether payment of the legal fees qualifies as support in a particular case remains a factual determination. This is important for our purpose, since if the fees were support as a matter of law under § 523(a)(5), no claim could be raised under § 523(a)(15), which only applies to debts "not of the kind described in paragraph (5)" and our analysis would reach an end.

Under any reasonable reading of § 523(a)(5)(A), a lawyer who by court order becomes the assignee of a debt to a spouse, former spouse, or child may not seek to have the assigned debt declared non-dischargeable, if the debt was originally for support. (3) However, courts have tended to ignore the technical reading, relying instead on the fact that the payment still accrues to the benefit of the spouse and is in the nature of support. In re Dvorak, 986 F2d 940 (5th Cir 1993); In re Peters, 964 F2d 166 (2d Cir 1992). The Seventh Circuit has taken the expansive position that § 523(a)(5)(A) need not be taken literally: "The fact that the debt was assigned . . . does not affect its dischargeability." In re Seibert, 914 F2d 102, 105 n5 (7th Cir 1990). Judge Flaum continues:

"A strict reading of § 523(a)(5) as 'to whom' payments are made defeats both state statutes and the intent of the Code because 'obligations arising out of the family relationship and the stability generated thereby outweighs [sic] the general bankruptcy goal of a fresh start."

Id. (Quoting In re Huber, 80 BR 531, 533 (Bankr D Colo 1987); quoting In re Morris, 14 BR 217, 220 (Bankr D Colo 1981).)

Section 523(a)(15) lacks any explicit language limiting discharge exceptions to spouses, former spouses or children. If the Seventh Circuit (and others) refuses to acknowledge explicit limitations on assigned debts where they exist in the plain language of the statute, it is unlikely to invent them where they do not.

However, there is an implicit limitation on who can assert the claim. Section 523(a)(15)(B) creates a balancing test which sets the benefit to the debtor in getting the discharge against the detriment to the spouse, former spouse, or child of the debtor. Lundquist has argued that this implies that the only cases envisioned for § 523(a)(15) are those brought by a spouse, former spouse, or child. But this is not the only possible conclusion. Just as debts payable directly to the attorney can qualify as support under § 523(a)(5), if they are actually in the nature of support to the spouse, former spouse, or child of the debtor, so too may debts to third parties (including attorneys) qualify under § 523(a)(15) if discharging them would produce a detriment to the spouse, former spouse, or child that exceeds the benefit to the debtor in receiving the discharge. Indeed, the fact that Congress added § 523(a)(15)(B) suggests that the real question is how much benefit the spouse will get from payment of the debt, not to whom it is directly payable. From the text of § 523(a)(15)(B), it seems likely that Congress would have intended a debt to a third party to qualify for a discharge exception if it truly accrued to the benefit of the spouse. While this calls for a factual inquiry to determine whether the plaintiff's claim and its possible discharge would have any effect on the defendant and, more importantly, upon his former spouse and his children, if any, it does not support dismissal of the proceeding as a matter of law.

Although the attorney for the former spouse of the debtor can apparently bring the § 523(a)(15) action herself, there are serious concerns about adjudicating either that action or the § 523(a)(5) action in the absence of the former spouse. This issue was partially raised by the plaintiff when she moved in the alternative to join the former spouse if she did not prevail on the dismissal motion. Although she prevails, it deserves at least brief discussion.

Under FRCP 19(a)(2)(i) (1987), a party who is subject to service of process and whose joinder won't deprive the court of subject matter jurisdiction must be joined if she claims an interest related to the subject of the action and is so situated that her ability to protect that interest will be impaired as a practical matter by the disposition of the action. Nationwide service of process is provided by FRBP 7004(d). Subject matter jurisdiction was originally present under 28 USC § 1334(b) (1994) and 28 USC § 157(b)(1) (1994), since this was a core proceeding arising under a cause of action

contained in Title 11. The federal question remains despite the joinder of additional parties, so the jurisdictional requirement is also satisfied.

It may well be that the interest that Jean Sue Lundquist claims is the subject of the action itself. Quite simply, she may well have an interest in seeing that the debtor continues to pay her legal fees. According to Zdimal, if the debtor is discharged of this obligation, she has the right to collect the remainder of the $15,000 from Jean Sue Lundquist directly. (Joint Pretrial Statement at 9). Without addressing the merits of that claim, it seems clear that Jean Sue Lundquist's ability to protect her interest will be materially affected by the outcome of the instant action. Currently (or at least pre-stay), she benefits from any payment of the fees by the debtor, and the reduction of any claim against her by Zdimal. If she is not a party to this proceeding, she may have much less influence on the outcome.

Decided cases seems to support joinder. Kamhi v Cohen, 512 F2d 1051 (2d Cir 1975) (former wife a necessary party to action by former husband against receiver and sequester regarding obligations of divorce decree). The reasoning of Spong that the former spouse is a third-party beneficiary to the debt to the attorney is also supportive.

Since the conditions of FRCP 19(a)(2)(i) have been satisfied, Jean Sue Lundquist is probably a necessary party to the current action and, if sought by any party, her joinder should be ordered by the Court. As we don't yet know her inclinations or whereabouts, any determination of indispensability under FRCP 19(b) would be premature. But to the extent plaintiff seeks leave to join her by further pleading, that motion will be granted.

While Jean Lundquist may be joined, plaintiff also seeks leave to amend her complaint by adding a cause of action under § 523(a)(4). Pursuant to FRCP 15(a) made applicable in bankruptcy by FRBP 7015, leave of court "shall be freely given when justice so requires." It should be granted unless the party opposing amendment can show actual prejudice. *Moore's Federal Practice and Procedure* § 9.09[1]; Foman v Davis, 371 US 178 (1962). In the present case, no prejudice has been alleged or suggested.

However, amendments to add additional causes of action shouldn't be allowed if they substantially change the nature of the case or the amount of discovery required. Medigen of Kentucky, Inc. v Public Service Comm'n of W. Va., 985 F2d 164 (4th Cir 1993); McCann v Hall & Co., 109 FRD 363 (ED Ill 1986). Although the § 523(a)(4) action is also one to determine dischargeability, it is based on a breach of fiduciary duty, and would require proof of facts substantially different from the divorce-related claims. A court may deny leave to amend without explicit presentation of proof from the opposing party if it feels that the proposed amendment could not survive a subsequent motion to dismiss. Martin v Associated Truck Lines, 801 F2d 246 (6th Cir 1986). No facts have been alleged or suggested which would support a determination that the defendant served in any fiduciary capacity with respect to the plaintiff; certainly, none that would support relief under § 523.[4] Rather than allowing this proceeding to be delayed and encumbered by legal claims which are unlikely to have any merit, I will deny the motion to amend.

END NOTES:

1. Section 523(a)(15) is part of the Bankruptcy Reform Act of 1994 which is applicable in cases filed after October 22, 1994.

2. See note 3 supra.

3. The relevant portion of § 523(a)(5) provides an exception for a debt "assigned to another entity, voluntarily, by operation of law, or otherwise (other than debts assigned

pursuant to section 402(a)(26) of the Social Security Act, or any such debt which has been assigned to the Federal Government or to a State or any political of such State)" or "such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support." 11 USC § 523(a)(5)(A) & (B).

4. See Davis v Aetna Acceptance Co., 293 US 328, 55 SCt 151, 79 LEd 393 (1934), and progeny (e.g., In re Reuscher, 169 BR 398, 399-402 (SD Ill 1994)).