UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WISCONSIN

Cite as: [Unpublished]

Ruth E. Garland, Debtor
Bankruptcy Case No. 99-33728-7

United States Bankruptcy Court
W.D. Wisconsin, Madison Division

February 22, 2001

J. David Krekeler, Krekeler Strother, S.C., Madison, WI for Debtor

Robert D. Martin, United States Bankruptcy Judge

MEMORANDUM DECISION

This story began on March 5, 1998 when the debtor and Martin Lueck were divorced and a judgment of divorce incorporating their stipulation was entered. The stipulation assigned certain marital debts to each party and included a waiver of maintenance by the debtor in exchange for "Section 71 payments" from Lueck.[1] The parties stipulated that the Section 71 payments could not be modified unless one party died or the debtor received an award for child support.

When the debtor failed to pay her debts under the divorce judgment, Lueck filed contempt proceedings against her in state court. On May 12, 1999, he was awarded a $4,937.06 judgment comprised of: (1) the unpaid balance on the debtor's debts under the divorce judgment; (2) his half interest in a previously undisclosed pension account of the debtor; (3) a dental bill which he incurred after being removed from the debtor's insurance; and (4) his attorney's fees.

On August 11, 1999, the debtor filed for chapter 7 relief. Lueck received notice of the bankruptcy and of the deadline for filing nondischargeability proceedings, but took no action in the bankruptcy case. On November 16, 1999, the debtor received her discharge.

On September 12, 2000, Lueck petitioned the state court to revise the divorce

[1]Payments made under 26 U.S.C. § 71 are recognized by the IRS to permit nonmodifiable limited-term periodic spousal support.

judgment. He urged the court to reduce the Section 71 payments "to reflect [the debtor's] non-payment of the bills..., which...were imposed entirely on [him] as a result of [her] ... bankruptcy."

On October 31, 2000, the debtor filed a motion to re-open her case for the purpose of bringing this contempt motion and leave was granted. In her contempt motion, the debtor advances a two-step argument. First, that Lueck is estopped from modifying the Section 71 payments by the stipulation, except for the two reasons stated therein. Secondly, that Lueck's petition to reduce the Section 71 payments in the amount of her pre-petition, marital debt is tantamount to the enforcement of a discharged debt and violates § 524.

Turning first to the debtor's estoppel argument, the stipulation as incorporated in the parties' divorce judgment provides:

> A. Maintenance to both parties shall be waived and denied. In lieu of maintenance and child support, [the debtor] shall receive Section 71 payments from [Lueck] as set forth hereinbelow. If child support is awarded to [the debtor] for any reason hereinafter such Section 71 payments shall be reduced by the amount of such child support. If [Lueck] is awarded child support for any reason, such child support shall not take into account the Section 71 payments in applying any guideline amount.
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> B. [Lueck] shall pay [the debtor] Section 71 payments in the amount of $900 per month for 60 months following date of final trial herein, $700 per month for 24 months following such time, and $500 per month for the final 24 months of such nine year period.... Such payments shall terminate when [the debtor] or [Lueck] die. The court shall not have authority to raise or lower such payments or to terminate such payments or to extend such payments. Thus, these payments shall not be subject to revision under Sec. 767.32, Stats., except as specifically provided herein.

The stipulation identifies only two circumstances in which the agreed Section 71 payments can be modified: (1) the death of the debtor or Lueck or (2) the awarding of child support to the debtor. This contrasts sharply with the general rule of Wis. Stat. § 767.32(1) that maintenance awards are always subject to modification if there is a substantial change in circumstances:

> After a judgment or order providing for child support under this chapter or s. 48.355 (2)(b) 4., 48.357 (5m), 48.363 (2), 938.183 (4), 938.355 (2)(b) 4., 938.357 (5m), 938.363 (2) or 948.22 (7), maintenance payments under s. 767.26 or family support payments under this chapter, or for the appointment of trustees under s. 767.31, the court may, from time to time, on the petition, motion or order to show cause of either of the parties, or upon the petition,

> motion... revise and alter such judgment or order respecting the amount of such maintenance or child support and the payment thereof ... A revision, under this section, of a judgment or order with respect to an amount of child or family support may be made only upon a finding of a substantial change in circumstances.

Wis. Stat. § 767.32.(1). The Wisconsin Supreme Court recognized an exception to the general rule in Rintelman v. Rintelman, 118 Wis.2d 587, 348 N.W.2d 498 (1984). That case holds that a party may be estopped from seeking to modify maintenance by entering into a stipulation which clearly denies the right to modify. In Rintelman, the ex-wife was awarded nonmodifiable maintenance over her lifetime by a stipulation incorporated in a divorce judgment. Later, she remarried and her ex-husband moved to terminate the maintenance. He argued that, notwithstanding the stipulation, Wis. Stat. § 767.32(3) required a court to vacate a maintenance order whenever the recipient remarried. The trial court denied the application and the Wisconsin Supreme Court affirmed the denial.

The Wisconsin Supreme Court first noted the special status conferred on the stipulation by its incorporation into the divorce judgment:

> This court has analyzed the rights that arise upon the incorporation of a stipulation into a divorce judgment on a number of occasions. The leading case on the subject is Miner v. Miner, 10 Wis.2d 438, 103 N.W.2d 4 (1960). In that case, this court distinguished between the situation in which the trial court merely refers to and approves the parties' contractual settlement of their financial obligations and the situation in which the trial court adopts the parties' agreement and recommendation and makes it a part of its judgment. In the former situation, where the court simply approves the parties' formal out-of-court agreement, "[t]he arrangement is contractual, not a judicial determination, and therefore no more subject to change by the court than the terms of any other private agreement...." In the latter situation, where the court adopts the parties' stipulation and incorporates it into its judgment, "[t]he award [is] ... by adjudication and subject to modification...."

Rintelman, 348 N.W.2d at 501 (citations omitted). Accordingly, the Court found that the [ex-wife] did not have "a contractual right to the receipt of [the] maintenance [payments]." Id. But this did not mean that "she [was] without legal grounds to insist upon enforcement of the terms of the stipulation." Id.. Rather the stipulation worked an estoppel on the ex-husband and, more generally, on the party seeking modification:

> We conclude that, at least in cases involving stipulations incident to a divorce decree where the parties stipulated to a comprehensive package for the settlement of their financial obligations, ... all that need be shown to constitute an estoppel is that both parties entered into the stipulation freely and knowingly,

> that the overall settlement is fair and equitable and not illegal or against public policy, and that one party subsequently seeks to be released from the terms of the court order on the grounds that the court could not have entered the order it did without the parties' agreement.

Id. at 502-503. Unlike the traditional doctrine of equitable estoppel, which looks to benefit and detriment, Rintelman's doctrine of equitable estoppel describes "the act of holding a party to his or her voluntary and knowing agreement to settle the financial aspects of a divorce action in cases where that agreement is incorporated into a judgment of the court." Ross v. Ross, 149 Wis.2d 713, 717, 439 N.W.2d 639, 641 (Ct. App.1989). *See also* Nichols v. Nichols, 162 Wis.2d 96, 110, 469 N.W.2d 619, 625 (1991)("a quid pro quo... need not be shown in order for a stipulation to fulfill the requirements of Rintelman").

Rintelman makes it clear that the consent of the parties to nonmodifiable maintenance makes such a provision in a divorce judgment enforceable, notwithstanding the general rule of Wis. Stat. § 767.32. The rationale of Rintelman is that "it is good policy to encourage settlement agreements," Driscoll v. Driscoll, 1997 SD 113, 568 N.W.2d 774, and thereby avoid "time-consuming and costly litigation," Whitford v. Whitford, 232 Wis.2d 41, 606 N.W.2d 563 (Ct.App.1999). Further, holding the parties to the terms of their stipulation does not make a nullity of Wis. Stat. § 767.32, because "[i]f the legislature intended to prevent parties from entering into nonmodifiable maintenance agreements, it would have expressly prohibited such agreements." Nichols, 162 Wis.2d at 105, 469 N.W.2d at 623.

Rintelman also applies to stipulations that make Section 71 payments nonmodifiable. For example, in Ross v. Ross, 149 Wis.2d 713, 439 N.W.2d 639 (Ct. App.1989), the court held that Section 71 payments were a form of spousal support to be analyzed like nonmodifiable maintenance under Rintelman. In Ross, the ex-wife was awarded nonmodifiable Section 71 payments under a settlement agreement. Subsequently, the ex-husband suffered a decline in income and sought the suspension of his Section 71 payments. The circuit court denied his request and the Court of Appeals affirmed the denial, finding that each element of Rintelman's equitable estoppel doctrine was satisfied: (1) "the settlement agreement was ... a 'comprehensive' settlement of [the parties'] financial affairs" (2) the ex-husband "'freely and knowingly' assented to the agreement" (3) "enforcement of the agreement [did] not contravene the law or public policy of Wisconsin..." and (4) "the court, on its own or over the parties' objections, would lack the power to order such payments." Id. at 642-43. *See also* Patrickus v. Patrickus, 2000 WL 1341840 (Wis. App.) (stipulation allowing only the ex-wife to move for modification of Section 71 payments was void as against public policy and therefore was not enforceable under the doctrine of equitable estoppel) *and* Nichols, 469 N.W.2d at 626 ("[t]he doctrine of estoppel set forth in Rintelman is equitable only if it applies to both payors and payees of maintenance").

In our case, Lueck is estopped from seeking to modify his Section 71 payments. First, the parties entered into the stipulation "freely" and "knowingly." Both parties were represented by counsel and there is no allegation that Lueck was misled or misunderstood the meaning of the anti-modification provision. Second, the state court made a specific finding that the stipulation was equitable and fair at the time it incorporated the stipulation into the divorce judgment. *See* Nichols at 625 ("[w]e determine whether a stipulation is fair, equitable, and not against public policy by taking into account the circumstances which existed at the time the stipulation was incorporated into the divorce judgment"). Third, the anti-modification provision is not illegal or against public policy. *See* Ross, 439 N.W.2d at 643 {"[w]e see no difference in law, policy or principle between an agreement waiving statutory maintenance and providing instead for limited-term periodic spousal support payments [i.e. payments under § 71]..."). Finally, the state court could not have forced the inclusion of this provision in the judgment without the parties' consent. Id. at 643 ("we have little doubt that the court, on its own or over the parties' objections, would lack the power to order [§ 71] payments").

Having determined that Lueck was estopped from moving to modify the Section 71 payments, the next question is whether by seeking modification he violated the debtor's bankruptcy discharge. Resolving this issue requires an examination of which debts were discharged under § 727(b) and which post-discharge acts are prohibited under § 524(a).

§ 727(b) provides that:

> Except as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter, and any liability on a claim that is determined under section 502 of this title as if such claim had arisen before the commencement of the case, whether or not a proof of claim based on any such debt or liability is filed under section 501 of this title, and whether or not a claim based on any such debt or liability is allowed under section 502 of this title.

11 U.S.C. § 727.

§ 524(a) provides that:

> (a) A discharge in a case under this title– (1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section 727 ... of this title, whether or not discharge of such debt is waived; (2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived; and (3) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect or

> recover from, or offset against, property of the debtor of the kind specified in section 541(a)(2) of this title that is acquired after the commencement of the case...

11 U.S.C. § 524(a). Under § 727, the discharge effects a release of debtor's liability for all debts that arose pre-petition except for certain debts which are excepted from discharge under § 523. § 524 permanently enjoins in personam enforcement of debts discharged under § 727.

The debtor argues that Lueck was enforcing a discharged debt when he moved to modify the Section 71 payments by the amount of her pre-petition marital debt. Lueck counters that Eckert v. Eckert, 424 N.W.2d 759 (Wis.App. 1988) and subsequent cases permit a divorce judgment to be revised and a maintenance award to be modified based on a bankruptcy discharge. In Eckert, Judge Sundby held that the discharge of a debtor's debt to his spouse justified the divorce court's decision to upwardly modify the spouse's maintenance award:

> [The debtor] contends that because the maintenance modification order "re-creates" discharged debts, it frustrates the "fresh start" objective of the bankruptcy code and violates the supremacy clause of the United States Constitution.... State family law is not preempted by a federal statute unless it "conflicts with the express terms of federal law" and "sufficiently injure[s] the objectives of the federal program to require nonrecognition...." The United States Supreme Court has repeatedly recognized that the subject of domestic relations belongs to the laws of the states and not the federal government.... Before state action governing domestic relations will be overridden it "must do 'major damage' to 'clear and substantial' federal interests...." Bankruptcy relief attempts to provide the debtor a "new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt."
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> [But] [t]he exercise of judicial power modifying spousal support post-bankruptcy is not antagonistic to the federal "fresh start" policy of bankruptcy relief. When modifying maintenance and its duration, the family court must consider the factors under sec. 767.26, Stats. The family court's determination of maintenance should be made according to the ability of the payor spouse to pay ... In modifying support a court can consider everything having a legitimate bearing on the present and prospective matters relating to the lives of divorcing parties.... Consideration of these factors should prevent the frustration of the bankrupt's "fresh start." "The federal courts and the state courts are engaged in a cooperative enterprise, not a competitive one...." [Thus], [w]e conclude that

> a state family court may modify a payor spouse's support obligation under sec. 767.32(1), Stats., following the payor's discharge in bankruptcy without doing "major damage" to the "clear and substantial" federal interests... served by the bankruptcy code.

Eckert v. Eckert, 424 N.W.2d at 775-776 (citations omitted). *See also* Kruse v. Kruse, 464 N.E.2d 934 (Ind. App. 3 Dist. 1984) (bankruptcy discharge warranted increase in child support); Clements v. Clements, 134 Cal. App.3d 737, 184 Cal. Rptr. 756 (Ct. App.1982) (discharge of debts on which debtor's ex-husband was jointly liable justified reduction in debtor's support); Haslbeck v. Haslbeck, 204 Wis.2d 109, 552 N.W.2d 897 (Wis. App. 1996) (discharge was change in circumstance under Wis. Stat. § 767.32(1) that justified the modification of child support) (unpublished disposition); Oyen v. Oyen, 152 Wis.2d 404, 449 N.W.2d 336 (Wis. App. 1989) (same) (unpublished disposition). *But see* Spankowski v. Spankowski, 172 Wis.2d 285, 290, 493 N.W.2d 737, 740 (Ct. App.1992) (modifying property settlement debt that was discharged in bankruptcy violates supremacy clause).

Although Eckert correctly states the general rule, it is unavailing to Lueck. The holding in Eckert assumes that the parties have not opted out of Wis. Stat. § 767.32(1) by stipulating to nonmodifiable maintenance. Where the parties have so stipulated, Rintelman holds that neither party can modify maintenance except as permitted by the stipulation. In our case, the parties have stipulated to nonmodifiable maintenance except in two circumstances and neither includes a bankruptcy discharge. Thus, Lueck was not entitled to modify his Section 71 payments based on the debtor's discharge, notwithstanding the general rule of Eckert.

Stripped of a defense under Eckert, Lueck may nevertheless be innocent of a § 524 violation if the debt he seeks to collect was not discharged in the debtor's bankruptcy. Although the debtor assumes that her debt to Lueck was discharged, this is not the inevitable conclusion because not all marital debts are discharged in bankruptcy. For dischargeability purposes, § 523(a) classifies marital debt into two categories. The first category is described in § 523(a)(5), which provides:

> (a) A discharge under section 727 ... of this title does not discharge an individual debtor from any debt--
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> (5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record...

11 U.S.C. § 523(a)(5). The second category is described in § 523(a)(15), which provides:

> (a) A discharge under section 727 ... of this title does not discharge an

individual debtor from any debt--

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(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, ... 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.

11 U.S.C. § 523(a)(15). Claims under § 523(a)(15) can only be excepted from discharge by the bankruptcy court[2] and only upon a complaint "that is filed no later than 60 days after the first date set for the meeting of creditors under § 341(a)." Fed. R. Bankr.P. 4007(c); In re Kirsch, 65 B.R. 297 (Bankr. N.D. Ill. 1986). By contrast, claims under § 523(a)(5) are within the concurrent jurisdiction of the bankruptcy court and the state court, and may be raised at any time.[3] *See* Fed. R. Bankr.P. 4007(b).

It is apparent from the record that Lueck has not obtained a determination in either this Court or the state court with respect to the dischargeability of the debt he seeks to collect from the debtor. Nor has he argued in response to this motion that the debt owed him was excepted from discharge. In the absence of any evidence to the contrary, and none was produced at the hearing, Lueck's petition to modify must be construed as an attempt to enforce a discharged debt.

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[2]§ 523(c) vests the bankruptcy court with exclusive jurisdiction to determine the dischargeability of certain debts, including those falling under § 523(a)(15): (1) Except as provided in subsection (a)(3)(B) of this section, the debtor shall be discharged from a debt of a kind specified in paragraph (2), (4), (6), or (15) of [§ 523(a)]... unless, on request of the creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge under paragraph (2), (4), (6), or (15), as the case may be, of subsection (a) of this section.

[3]§ 523(a)(5) claims often arise in the post-bankruptcy context. A typical scenario is of a debtor who receives a discharge without having litigated the dischargeability of a pre-petition martial obligation. Thereafter, the ex-spouse brings proceedings in state court to enforce the obligation and the debtor raises the discharge as a bar to enforcement. The state court may then determine whether the debt was discharged under § 523(a)(5) and thus whether it is enforceable against the debtor.

What if any sanction should be imposed on Lueck? Unlike violations of the automatic stay, which may be remedied by sanctions under § 362(h), § 524 lacks a provision for violations of its injunction.[4] This omission has created a split of authority over whether bankruptcy courts may sanction § 524 violations. *See* In re Elias, 98 B.R. 332 (N.D.Ill. 1989) *and* In re Torres, 117 B.R. 379 (Bankr. N.D. Ill. 1990)(discussing split of authority and collecting cases).

In this circuit, the cases have favored the bankruptcy court's authority to sanction violations of § 524's discharge injunction. As explained by Judge Ginsberg in Behrens v. Woodhaven Ass'n, 87 B.R. 971 (Bankr. N.D. Ill. 1988), *aff'd*, 1989 WL 47409 (N.D. Ill. 1989):

> The problem is, of course, that there is no equivalent sanction provision to 11 U.S.C. § 362(h) in 11 U.S.C. § 524(a) when the automatic stay becomes the permanent discharge injunction by operation of law on the grant of discharge.... Nevertheless, 11 U.S.C. § 524(a) is an injunction and it has long been the law in bankruptcy cases that willful violations of injunctions such as the automatic stay will give rise to contempt and sanctions.... The same approach should apply under 11 U.S.C. § 524(a) even in the absence of a specific statutory sanctions provision.... Creditors cannot be allowed to interfere with a debtor's fresh start by suing in nonbankruptcy courts on discharged debts in the hopes the debtor will not defend or will not raise the bankruptcy discharge as a defense.... In addition, just as acts done in violation of the automatic stay are voidable, ... acts done in violation of the discharge injunction are voidable. Accordingly, since [creditor] with full knowledge of the Debtors' Chapter 7 case and discharge chose to sue them after the discharge on a prepetition contract, [creditor] is found to have willfully violated the discharge injunction and is in contempt of this Court. The appropriate sanction on the facts and circumstances of this bankruptcy case is actual damages and attorney's fees.

Behrens v. Woodhaven Ass'n, 87 B.R. at 976. Behrens requires the creditor to act "willfully," i.e. with knowledge of the bankruptcy, for purposes of awarding contempt sanctions under § 524. As that term has been defined in the § 362(h) context, it requires only that violative actions are undertaken with knowledge of the bankruptcy, regardless of the specific intent, or lack thereof, on the part of the actor. *See* In re Halas, 249 B.R. 182, 191 (Bankr. N.D. Ill. 2000) *and* In re Price, 42 F.3d 1068, 1071 (7th Cir. 1994).

Behrens' interpretation of the bankruptcy court's sanctioning powers under § 524 has been widely adopted by courts in this circuit. *See* In re Johnson, 148 B.R. 532 (Bankr. N.D.

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[4] § 362(h) provides that "[a]n individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages."

Ill. 1992) (finding that violations of the discharge injunction are sanctionable, but declining to hold creditor in civil contempt because violation was not "willful"); In re Gallagher, 47 B.R. 92, 98 (Bankr. W.D. Wis. 1985)(violations of the discharge injunction "are punishable by civil contempt sanctions").

Although not explicit in Behrens, sanctions for violations of § 524 are compensatory in nature, rather than punitive. Thus, only sanctions for actual damages will normally lie. This Court has so held on at least one occasion. *See* In re Gallagher, 47 B.R. at 98 ("[c]ivil contempt is not punitive, but restorative, and any ordered payment thereunder is limited to actual expenses incurred by [debtor] in this action to enforce his bankruptcy discharge").

In the instant case, Lueck, having been found guilty of violating § 524's discharge injunction, is subject to sanctions because his violation was willful. Lueck had actual notice of the bankruptcy filing and the discharge injunction which he purposefully set out to avoid. Upon that action and given the compensatory nature of sanctions under § 524, the debtor is entitled to recover the actual costs incurred in enforcing the discharge injunction of her bankruptcy.

Upon the debtor filing and serving on Lueck an itemization of actual costs including inter alia attorney fees incurred in bringing this contempt motion, an order will issue awarding the debtor and requiring Lueck to pay the reasonable costs of this motion as a sanction.