United States Bankruptcy Court
District of New Mexico

Document Verification

Case Title: **Emily E. Wipfler v. Eric L. Lamb**
Case Number: **98-01217**
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Description:	Memorandum Opinion re: [7-1] Motion For Summary Judgment by Emily E. Wipfler . Plaintiff's Motion for Summary Judgment as to Defendant's first and second affirmative defenses is granted. The first and second affirmative defenses are dismissed. Plaintiff's Motion for Summary Judgment as to Defendant's third defense is denied.				
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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:

Eric L. Lamb,

Debtor. No. 7-98-13614 SR

Emily E. Wipfler,

Plaintiff,

vs. Adv No. 98-1217 S

Eric L. Lamb,

Defendant.

MEMORANDUM OPINION AND ORDER
ON PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT DISMISSING DEFENDANT'S AFFIRMATIVE DEFENSES

This matter is before the Court on Plaintiff's Motion for Summary Judgment Dismissing Defendant's Affirmative Defenses, filed March 22, 1999. Plaintiff is represented by Zentmyer & Fogarty, LLP (Bruce E. Fogarty). Defendant is represented by Velarde & Sessions (Gerald R. Velarde).

This adversary proceeding was commenced by the filing of a complaint on September 21, 1998. The summons was issued on September 28, 1998 and served on September 30, 1998, per the certification of service filed with the Court on October 5, 1998. Defendant answered on November 18, 1998 and set forth three affirmative defenses: 1) The complaint fails to state a claim upon which relief can be granted, 2) the claims are barred by the applicable statute of limitations or the time provisions set

forth in the Bankruptcy Rules, and 3) the action should be stayed under the provisions of the Soldier's and Sailor's Civil Relief Act, 50 U.S.C. §521, since defendant is in the military and stationed in Korea.

On March 22, 1999 Plaintiff filed her Motion for Summary Judgment, asking the Court to dismiss the affirmative defenses. Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Bankruptcy Rule 7056(c). Once the moving party has properly demonstrated that there is no genuine issue of material fact, the burden shifts to the nonmoving party to show that there is a genuine issue of material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 257 (1986). In this case movant filed her motion for summary judgment and attached as supporting documents: 1) a *Final Judgment, Decree and Order* issued by the Ninth Judicial District Court, Curry County, New Mexico, 2) a copy of the *Notice of Commencement of Case Under Chapter 7* issued in this bankruptcy case, and 3) a file stamped copy of the complaint in this adversary proceeding. Defendant did not file a response to the motion for summary judgment. Therefore, if movant has satisfactorily established that there is no issue of material fact summary judgment should be entered if proper as a matter of law. Bankruptcy Rule 7056(e).

FIRST AFFIRMATIVE DEFENSE

The first affirmative defense is a Rule 12(b)(6) motion, made applicable to this case by Bankruptcy Rule 7012. The complaint has two counts, one denoted under 523(a)(5), and one under 523(a)(15). The first count alleges that the parties were married, then divorced by decree entered on November 21, 1997, and that sums owing under the terms of the decree are in the nature of alimony, maintenance, or support. The *Final Judgment, Decree and Order*'s ¶4 arguably supports the allegations[1] of count one. Plaintiff seeks these sums be held nondischargeable. The Court finds that plaintiff has stated a valid cause of action under ¶523(a)(5).

The second count incorporates the first count and pleads alternatively that if the debt is not found to be in the nature of alimony, maintenance or support, then the court should declare it nondischargeable under 523(a)(15) because defendant has the ability to pay and the detriment to plaintiff in allowing discharge outweighs the benefit of the discharge to the debtor. The Court finds that this states a valid cause of action. Therefore, the first affirmative defense will be dismissed.

SECOND AFFIRMATIVE DEFENSE

In his second affirmative defense, defendant claims that this adversary complaint is untimely. The *Notice of*

[1]NM LBR 7056-1 states "All material facts set forth in the statement of the movant [of a summary judgment motion] shall be deemed admitted unless specifically controverted."

Commencement of Case Under Chapter 7 states that July 22, 1998 was the date for the first meeting of creditors and that September 21, 1998 was the deadline to file complaints objecting to discharge of the debtor or to determine dischargeability of debts. This adversary proceeding was filed on September 21, 1998.

Section 523(c) provides that debts of the kind specified in 523(a)(15) will be discharged unless the creditor seeks a determination and the Court determines that the debt is nondischargeable. Bankruptcy Rule 4007(c) requires that a complaint to determine the dischargeability of a debt pursuant to §523(c) be filed not later than 60 days following the first date set for the first meeting of creditors. Plaintiff complied with this time restriction.

With regard to the count seeking determination of dischargeability pursuant to §523(a)(5), there is no time deadline fixed by the Bankruptcy Code or Rules. Therefore, that count is also timely.

Therefore, the second affirmative defense will be dismissed.[2]

THIRD AFFIRMATIVE DEFENSE

Defendant states as his third affirmative defense "This action should be stayed under the provisions of the Soldiers' and

[2] At some point it may be useful for defendant's counsel to explain why these first two affirmative defenses were pled. In particular the second affirmative defense appears to have no basis in fact or law.

Sailors' Relief Act, 50 U.S.C. §521, since Lamb is in the military and currently stationed in Korea". Plaintiff seeks summary judgment on this defense, agreeing that defendant is in the military and in Korea, but arguing that 1) because he voluntarily filed the bankruptcy and attended the first meeting of creditors, there is no reason that he should now be unable to defend in an adversary proceeding, 2) allowing relief under 50 U.S.C. 521 would create "manifest injustice", and 3) that he has plead no facts or evidence to support his defense. While all of these allegations may be true, Movant provided the Court with no evidence on these issues. The Court can, and does, take notice from the record of the facts that defendant voluntarily filed this chapter 7 case, and that he appeared at the Section 341 meeting, as appears from the Trustee's report of that meeting. However, there is no affidavit that supports the rest of Movant's allegations. Also, neither the Motion's exhibits, nor answers to the complaint establish facts related to defendant's ability to defend this adversary proceeding.[3] The Court is not prepared to rule, as a matter of law, that the mere facts of the voluntary filing of a chapter 7 case and appearing at the first meeting of creditors mean that the defendant's ability to conduct his defense is not materially affected by his military service. To

[3] NM LBR 7056-1 does not require the opposite conclusions. That rule deems admitted "material facts" set forth in the statement. Plaintiff presented only legal argument on this point.

begin with, the statute, by its own terms, does not limit its coverage to defendants or parties who are otherwise involuntary litigants[4] (although in this adversary proceeding the debtor is a defendant); therefore the fact that debtor filed this bankruptcy case and therefore plays a role in a sense vaguely similar to a plaintiff does not preclude defendant from relying on the statute. And as a practical matter, filing a bankruptcy petition and appearing at the first meeting of creditors, even taking into account the consultation with counsel and preparation required on the part of the debtor, will ordinarily require a much smaller commitment of the debtor's time and money than defending an adversary proceeding. Defending an adversary proceeding may also be hampered by the distance (resulting from his military service) between defendant and both his counsel and the situs of the litigation. Therefore, summary judgment would be appropriate on this issue only if the defense were invalid as a matter of law.

[4] "At any stage . . . in which a person in military service is involved, either as a plaintiff or defendant, . . ." 50 U.S.C. Appendix §521.

The Soldiers' and Sailors' Relief Act provides:

> At any stage thereof in any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided in this Act (sections 501 to 593 of this Appendix) unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service

50 U.S.C. Appendix §521 (emphasis added). The statute contemplates that the Court will examine the facts and circumstances in order to form an opinion. See Boone v. Lightner, 319 U.S. 561, 569 (1943):

> The Act makes no express provision as to who must carry the burden of showing that a party will or will not be prejudiced... We, too, refrain from declaring any rigid doctrine of burden of proof in this matter, believing that the courts called upon to use discretion will usually have enough sound sense to know from what direction their information should be expected to come.

See also In re Burrell, 340 B.R. 309, 313 (Bankr. E.D. Tx. 1999)("It becomes incumbent upon someone to present evidence to the Court upon which the Court can conclude that its discretionary application of the Act is needed to accomplish substantial justice as between the parties.")

The Court in this case has no facts before it upon which to base an opinion, and plaintiff cannot shift the burden of coming forward with evidence on a motion for summary judgment merely by alleging that defendant has pleaded no facts or evidence to

support the defense. And in any event, it is not disputed that defendant is in the military and is stationed in Korea. Therefore the case presumptively is stayed until such facts are presented that enable the Court to rule on defendant's ability to defend. The Court cannot decide this issue as a matter of law. There are material issues of fact not yet developed in the record such that summary judgment is not appropriate.

In so ruling, the Court is sensitive to the type of claims alleged in this case: obligations arising out of a divorce decree, including the payment of an adjudicated sum in lieu of spousal support (specifically $8,500.00 to pay for half of the remaining balance owed on the Ford Escort station wagon that plaintiff is or was using as her transportation). The Court's ruling only states that with what has been presented to it, the Court cannot strike the third affirmative defense as a matter of law. Nothing in this ruling precludes plaintiff from attempting to present sufficient facts to this Court in support of a motion to strike the third affirmative defense and allow the action to go forward.

IT IS ORDERED that Plaintiff's Motion for Summary Judgment as to Defendant's first and second affirmative defenses is granted,

IT IS ORDERED that the first and second affirmative defenses are dismissed.

IT IS ORDERED that Plaintiff's Motion for Summary Judgment as to Defendant's third defense is denied.

Hon. James S. Starzynski
United States Bankruptcy Judge

I hereby certify that, on the date file stamped above, a true and correct copy of the foregoing was either electronically transmitted, faxed, mailed, or delivered to Bruce E. Fogarty and Gerald R. Velarde.