United States Bankruptcy Court
District of New Mexico

Document Verification

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:
JAMES ALAN WYLIE,
Debtor. No. 7-98-10995 SA

JAMES ALAN WYLIE,
Plaintiff,
v. Adv. No. 98-1072 S

DONNA WYLIE,
Defendant.

MEMORANDUM OPINION

This matter came before the Court for trial on the merits of plaintiff's complaint seeking a declaration that a debt owed to defendant is discharged under 11 U.S.C. § 523(a)(5), and the counterclaim by defendant seeking a declaration that the debt is not dischargeable under § 523(a)(5), §523(a)(15), and objecting to discharge under § 727(a)[1]. This is a core proceeding under 28 U.S.C. § 157(b)(2)(I) and (J). Plaintiff ("Husband") appeared through his attorney Gary Ottinger. Defendant ("Wife") appeared through her attorney George Moore. Having considered the testimony presented and the documents introduced in evidence, and having consulted the relevant case law, the Court finds that

[1]In an earlier Memorandum Opinion, the Court granted a motion for summary judgment in part for plaintiff, to the extent that the 727 complaint was based on the omission from the original statements and schedules of a series of deeds between plaintiff and his current spouse, which deeds were recorded to reflect the community ownership of the plaintiff's current residence. The omission was promptly cured in an amended filing following the § 341 meeting.

Judgment should be entered for Wife, declaring that the obligation should not be discharged.

FACTS

1. The parties were married in January 1972.
2. The parties separated about June 1989.
3. On August 12, 1991, the Second Judicial District Court, Bernalillo County, New Mexico ("State Court") entered a Partial Final Decree of Dissolution of Marriage. Both parties were represented by counsel. The decree states that there was one minor child of the marriage, who would attain majority on September 24, 1991 and that neither party would pay child support to the other. It also states that oral agreements and stipulations were put on the record in open court, and that counsel would prepare and submit a written Marital Settlement Agreement and Final Decree.
4. On January 30, 1992, the State Court entered the Marital Settlement Agreement ("MSA"). This document was prepared by counsel and signed by the parties.
5. MSA Article 1, entitled "Support and Maintenance" states: Husband shall pay or otherwise provide alimony to wife as set forth below and the sums paid or benefits provided shall be taxable to wife as income and excluded from the income of Husband:

    A. Husband shall pay to wife as non-modifiable lump

sum alimony the total sum of Four Hundred Eighty Thousand Dollars ($480,000) payable in installments [sic] of Four Thousand Dollars ($4,000) per month for a period of one hundred twenty (120) months. Payment shall be made in two equal monthly installments of Two Thousand Dollars ($2000), ...

i. Husband's obligation for payment shall terminate on wife's death;
ii. Husband's obligation shall not terminate upon Wife's remarriage.
iii. Husband's estate shall have no liability for any payment due after Husband's death if the insurance provisions of this settlement agreement set forth in paragraph 1.B. are in full force and effect;
iv. If a delinquency accrues in the support hereunder in an amount equal to at least one (1) month's support, Husband's income shall be subject to withholding in an amount sufficient to satisfy the support herein and an additional amount to reduce and retire any delinquency, all as provided under §40-4A-1, et seq. N.M.S.A. 1978.

B. Husband shall obtain and keep in place until the obligation in paragraph 1.A. is satisfied or until the death of Wife or Husband, declining term life insurance on Husband's life with Wife as the sole owner and beneficiary ... In the event of the death of either Husband or Wife, any further obligation of Husband or the estate of Husband under this paragraph ... shall thereupon cease. ...

C. Husband shall pay premiums for Wife's Health Insurance benefit ... for a period not to exceed three (3) years from the date of the parties' divorce ...

5. MSA Article 2 lists the parties' separate property: Wife had none, Husband had "an interest in the Wylie Corporation based upon separate property contributions of Husband," the

“Wylie Children’s land” and a real estate contract.

6. MSA Article 3 lists a “compromise distribution” of the community property. Wife received, among other things, the community residence subject to a mortgage, a promissory note from Husband for the balance remaining on the community mortgage, a 401(K) profit-sharing plan valued at $62,383, and “a cash payment of $100,800". Husband received, among other things, all benefits arising from his employment with Wylie Corporation, the community interest in the Wylie Corporation and subsidiary, all interests in Rio Grande Aggregates Inc. and Integrated Financial Services Corporation, two pieces of real estate, and his residence.

7. On February 4, 1992, the State Court entered its Final Decree, which states that the MSA fairly relates the agreements and stipulations of the parties as placed on the record and approved by the Court, and were made an integral and nonseparable part of the Final Decree.

8. The 1986 income tax return, Exhibit 5, shows total income of $161,275. No W-2's were provided with the exhibit, nor was an explanation of the $111,159 “Other Income - See Attached.”

9. The 1987 income tax return, Exhibit 6, shows total income of $337,590. $258,300 came from W-2's, which were not provided with the exhibit. The return also shows net rental income

(from construction equipment and a construction building) of $76,828.

10. The 1988 income tax return, Exhibit 7, shows total income of $570,187. Total wages were paid to Husband in the amount of $57,200. The return shows approximately $52,500 of interest and dividends (of which about $48,000 was from "S Corporations"), $31,500 of net rental income, and $433,000 income from S Corporations.

11. The 1989 income tax return, Exhibit 8, shows a net operating loss of $405,000. Husband had a W-2 for $103,100. There was $60,600 of interest from S Corporations, a net rental loss of $10,600 and a $563,000 loss from S Corporations.

12. The 1990 income tax return, Exhibit 9, shows a net operating loss of $24,106. There was W-2 income of $2,000. Supporting Schedules B, D, and E were not attached as part of the exhibit.

13. Wife worked before the marriage, but quit in 1973 when the parties' first child was born. She did not work outside the home again during the marriage.

14. Exhibit 10 is a budget prepared by Wife in August 1989 that reflected her current monthly expenses of $2,957.

15. Wife presented no evidence that Husband transferred property with intent to hinder, delay or defraud a creditor.

16. Wife presented no evidence that Husband made false oaths in

his bankruptcy.

CONCLUSIONS OF LAW

1. Section 523(a)(5) excepts from discharge any debt to a former spouse for alimony, maintenance, or support in connection with a divorce decree, but not to the extent that the debt includes a liability designated as alimony, maintenance, or support, unless the liability is actually in the nature of alimony, maintenance, or support.

2. The parties stipulated that although Husband is plaintiff in this adversary proceeding and is going forward with the evidence, Wife has the ultimate burden of persuasion. Sampson v. Sampson (In re Sampson), 997 F.2d 717, 725 (10th Cir. 1993) ("Sampson"); 4 King et al., Collier on Bankruptcy (15th Ed. Rev. 1999) ¶ 523.04, at page 523-19 ("Collier"). She must prove her case by a preponderance of the evidence. Grogan v. Garner, 498 U.S. 279, 290, 111 S.Ct. 654, 661 (1991). Wife has met this burden.

3. The terms "alimony" and "support" are to be given a broad construction to support the Congressional policy that favors enforcement of spousal and child support, thereby overriding the general bankruptcy policy which construes the exceptions to discharge narrowly. Collier ¶ 523.11[2], at page 523.78, citing Jones v. Jones (In re Jones), 9 F.3d 878, 881 (10th Cir. 1993)(the term "support" as used in § 523(a)(5) is

entitled to a broad construction); Dewey v. Dewey (In re Dewey), 223 B.R. 559, 564 (10th Cir. BAP 1998), aff'd 1999 WL 1136744 (10th Cir. 1999) ("Dewey") (the term "support" is to be read broadly and in a realistic manner).[2]

4. Whether an obligation to a former spouse is in the nature of support is resolved according to federal bankruptcy law, not state domestic relations law. Young v. Young (In re Young), 35 F.3d 499, 500 (10th Cir. 1994) ("Young"); Sylvester v. Sylvester, 865 F.2d 1164, 1166 (10th Cir. 1989)(per curium) ("Sylvester")(citing Goin v. Rives (In re Goin), 808 F.2d. 1391, 1392 (10th Cir. 1987)) ("Goin").[3] That determination is made as of the time of the divorce, not later, Sampson, 997 F.2d at 725-26, regardless of the ex-spouses' current needs or circumstances. Young, 35 F.3d at 500; Sylvester, 865 F.2d at 1166. On the other hand, nothing about the

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[2] Even construing this exception to discharge narrowly does not change the result.

[3] In closing argument, both parties argued that referring to state law would be proper to find out what the constraints were that the parties were negotiating under, as a way of divining their intentions; e.g., what is "nonmodifiable 'lump sum' alimony" under New Mexico law and what are its effects. Collier, ¶ 523.11[1], at page 523-78; see, e.g., Sampson, 997 F.2d at 724, n. 5. The testimony of the parties, including not only the parties themselves but particularly the three attorneys who had represented the parties at various stages of this litigation, has permitted the Court to employ this methodology, the result of which is consistent with the conclusions reached in this opinion.

federal basis for making the dischargeability decision precludes either party from returning to State Court to pursue a change in the substance of the support obligation as may be permitted under state law. Federal courts should not put themselves in the position of modifying state matrimonial decrees. Sylvester, 865 F.2d at 1166.

5. In Young the Tenth Circuit Court of Appeals gave clear guidance to the Bankruptcy Courts in making 523(a)(5) determinations through analyzing its earlier Sampson case:

> In re Sampson ... held that a bankruptcy court must conduct a two-part inquiry when resolving the issue of whether payments from one spouse to another incident to divorce settlement are in the nature of support. In re Sampson, 997 F.2d at 722-23. First, the court must divine the spouses' shared intent as to the nature of the payment. Id. at 723. This inquiry is not limited to the words of the settlement agreement, even if ambiguous. Id. at 722. Indeed, the bankruptcy court is required to look behind the words and labels of the agreement in resolving this issue. Id. Second, if the court decides that the payment was intended as support, it must then determine that the substance of the payment was in the nature of support at the time of the divorce – i.e., whether the surrounding facts and circumstances, especially financial, lend support to such a finding. Id. at 725-26.

In re Young, 35 F.3d at 500.

FIRST ELEMENT - PARTIES' INTENT

6. The Sampson Court held that the "critical inquiry" with respect to the first element is the "shared intent of the

parties at the time the obligation arose." Sampson, 997 F.2d at 723. (Citation omitted.) "A written agreement between the parties is persuasive evidence of intent." Id. (Citation omitted.) In that case the Court examined a marital settlement agreement that contained an Article I denoted as Maintenance and Spousal Support, and an Article III that addressed the property settlement. The Court found that this structure in the agreement provided "compelling evidence" that the parties intended the obligation as maintenance.[4]

7. Exhibit 2, the MSA, contains an identical structure; it sets up a section for Support and Maintenance, and sections for separate and community property. Therefore, the Court finds that the parties' intention, as manifested in the MSA, was that the obligation be alimony. See also In re Sylvester, 865 F.2d at 1166 (separation of property settlement provisions from support provisions a factor indicating that support was intended).

8. Husband recalls no discussions related to support when the MSA was being drafted. Tom Griego, Husband's attorney in an action now or recently pending in State Court to reduce the

[4] The structure of the agreement in the Sampson case is remarkably similar to the structure of the MSA in the instant case. Sampson, 997 F.2d at 720, n.1.

"alimony" testified that he now believed the liability was a property settlement and not alimony; had he gotten more information from Husband, he would not have filed the motion to modify. Zenon Myszkowski, Wife's attorney during the divorce, testified that there were alimony discussions at the time of the MSA, and that the $4,000 per month was calculated from her budget of approximately $3,000 per month, Exhibit 10, plus the amounts of tax that would be payable to net the $3,000 figure. Letters related to these discussions are in evidence as Exhibits 15 (offer by Husband of $3,500 per month alimony for 10 years), Exhibit 16 (counteroffer by Wife of $4,250 per month alimony for 10 years which "takes into consideration federal and state income tax which ... will leave Donna sufficient monthly income to live on of approximately $3,000.) Therefore, there is disputed testimony regarding the parties' shared intent as of the time of the MSA. The Court concludes that the testimony, standing alone, is insufficient to overcome the "substantial obstacle" posed by the MSA's clear expression of the parties' shared intent. See Sampson, 997 F.2d at 723.

9. The fact that the alimony was payable for ten years, a substantial time, is a factor indicating that the parties' intention was support. Sylvester, 865 F.2d at 1166 (citing

Goin, 808 F.2d at 1393). Sampson, 997 F.2d 724 n.5 (Eight years of alimony indicative of either property settlement or temporary award of support).

10. Husband testified that the MSA classified his liability as alimony because that was the only way he could afford to pay that amount, presumably because of the tax deductible status. This fact situation also arose in Sampson, 997 F.2d at 724-25. The Tenth Circuit Court of Appeals found that a payer's "reaping of the tax benefit" strengthens the position that the parties intended the obligation as maintenance. "We ... have a strong aversion to sanctioning a sham transaction which we would effectively be doing if we accepted Defendant's argument [that property division was characterized as alimony solely for tax purposes]." Id. at 724 n.6. Similarly, this Court finds that Husband, having taken advantage of the tax laws for many years, cannot now claim that the MSA payments were not intended to be alimony.

11. There is ample other evidence in the record to reflect that the parties intended the obligation to be in the nature of support. Wife had no income and $3,000 per month in expenses. All of the income producing assets were determined to be Husband's separate property. A review of the tax returns and Wife's testimony shows that all wage income came from Husband. Substantially all of the

considerable dividends and interest were generated by Subchapter S Corporations which were declared to be Husband's (or at least awarded to Husband in the divorce). As in Sampson, 997 F.2d at 725, Wife's obvious need for support at the time of the divorce is enough to presume that the obligation was intended as support. The fact that Husband had to secure the obligation with insurance is not relevant to a determination of intent. Id. at 724 n.5. And Husband's obligation terminates upon Wife's death. Goin, 808 F.2d at 1393.[5]

SECOND ELEMENT - SUBSTANCE OF THE OBLIGATION

12. The Sampson Court held that the "critical inquiry" with respect to the second element is the "function served by the obligation at the time of the divorce." Sampson, 997 F.2d at 723. (Citation omitted.) "This may be determined by considering the relative financial circumstances of the parties at the time of the divorce." Id. As discussed in Conclusion of Law 11, at the time of the divorce Wife was in

[5] At the same time, Husband's obligation does not terminate upon Wife's remarriage, a traditional state law factor suggesting that the payments are a property division rather than support. Sampson, 997 F.2d at 723-24. While the assumption that an ex-spouse's future spouse is obliged to and will support the ex-spouse apparently continues in force (perhaps as a vestigial attempt to control the post-divorce life of an ex-wife), this factor does not in any event outweigh the remaining facts in this case which lean so heavily in favor of a conclusion that the payments are support rather than a property distribution.

a dire financial situation; she had no separate property, no history of income from wages, and all of the income producing assets were or about to be Husband's separate property. Also, the amount of alimony appears tied directly to her budget plus anticipated taxes, and suggests the funds were to be used for her support.

THE 727 COUNTERCLAIM

13. Wife has failed to meet her burden of proof under 727 and her counterclaim under that section should fail.

CONCLUSION

The Court concludes that the obligation owed Defendant is not dischargeable in Plaintiff's Chapter 7 proceeding. Therefore the Court will enter a judgment denying relief on Plaintiff's complaint, awarding relief on Defendant's counterclaim under 11 U.S.C. § 523(a)(5), denying relief on Defendant's counterclaim under 11 U.S.C. § 523(a)(15) as moot, and denying relief on Defendant's counterclaim under 11 U.S.C. § 727.

Honorable 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 the listed counsel and parties.

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