UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO

In re:	)	
	)	
DWIGHT E. PATRICK,	)	**Case No. 02-21021 DEC**
SSN: 521-39-7130	)	
	)	**Chapter 7**
Debtor.	)	
	)	
JANET R. CORLEY,	)	
	)	
Plaintiff,	)	
	)	**Adversary No. 02-1511 HRT**
v.	)	
	)	
DWIGHT E. PATRICK	)	
	)	
Defendant.	)	

ORDER FINDING DEBT TO BE NONDISCHARGEABLE
PURSUANT TO 11 U.S.C. § 523(a)(5)

This matter comes on for the Court's consideration on Plaintiff's Complaint to Determine Dischargeability of Debt. A trial was held on May 1, 2003. The Court has considered the evidence produced at trial and the arguments of counsel and is now ready to rule.

The Court has jurisdiction of this matter pursuant to 28 U.S.C. § 157(b)(2)(I).

The case arises under 11 U.S.C. § 523(a)(5). Plaintiff is an attorney, licensed in the state of Colorado. She served as counsel to Debtor's former spouse in a domestic case which resulted in the termination of the Debtor's marriage. Plaintiff seeks a determination from this Court that attorney fees payable to her from the Debtor/Defendant, pursuant to an agreement of the parties in the domestic case, are nondischargeable as support under § 523(a)(5). The Court does find the portion of the debt related to custody and support issues to be nondischargeable.

I. FACTS

Plaintiff represented Debtor's former spouse, Erina Patrick, in the case of *Dwight Elliot Patrick v. Erina Elyse Patrick*, Case No. 01DR1203, District Court, Boulder County, Colorado [the "Domestic Case"]. Debtor's chapter 7 bankruptcy case was filed on July 19, 2002. The Domestic Case was commenced by the Debtor against Erina Patrick sometime prior to the filing of Debtor's bankruptcy petition. On July 30, 2002, subsequent to the bankruptcy petition date, Debtor appeared with counsel in the District Court of Boulder County and entered into a settlement of the Domestic Case. A Separation Agreement was submitted to that court and terms agreed to in addition to those appearing in the Separation Agreement were read into the record. Those added terms included generally: 1) a provision for Mrs. Patrick, or someone on her behalf, to come to Colorado for the purpose of retrieving personal property which remains in Mr. Patrick's possession and control; 2) a provision that "Mr. Patrick will pay $11,000.00 of attorney's fees to Ms. Corley, consisting of $6,920.00 of fees related to contempt actions, and $4,080.00 of additional attorney's fees related to the divorce case;" 3) a provision for Mr. Patrick to pay child support owed for the months of January and February, 2002, in the amount of $3,700.00; and 4) a provision that ". . . the issue of any child support obligation of Mr. Patrick or Mrs. Patrick for the period of March 3rd, 2002, until either or both of the children are returned to either of the parties, will be deferred to the State of Nevada for determination;" and 5) a provision setting the child support for one of the children (Ilyia) at $648.43 per month from the date the child returns to Mrs. Patrick's custody.[1] The state court judge stated on the record that

[1] It appears that, at the time of that agreement, both children were wards of the state of Nevada.

he was signing the divorce decree and was adopting the Separation Agreement of the parties. Relief from the automatic stay was neither requested nor granted in Debtor's bankruptcy case in connection with that post-petition hearing. On July 30, 2002, prior to the hearing held on that date, during a meeting of counsel in the chambers of the state court judge, the fact of Defendant's bankruptcy filing was brought up and all parties decided to go forward with the hearing. From billing statements submitted by Plaintiff, it appears that all attorney fees related to contempt proceedings were incurred pre-petition – in the September, 2001, to December, 2001, time-frame. It also appears, from billing statements submitted by Plaintiff, that the attorney fees in question were incurred between August 28, 2001, and July 28, 2002; that her billing rate for the Domestic Case was $200.00 per hour; and that $1,640.00 (8.2 hours) of attorney fees were incurred post-petition.

II DISCUSSION

Plaintiff claims that attorney fees, which Defendant agreed to pay to her in connection with a settlement of the divorce action between Defendant and his former spouse, are nondischargeable pursuant to 11 U.S.C. § 523(a)(5). That section applies to support obligations incurred in the course of a domestic proceeding and provides as follows:

> 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--
> . . .
> (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, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that--
>
> > (A) such debt is assigned to another entity, voluntarily, by operation of law, or otherwise (other than debts assigned pursuant to section 408(a)(3)

> of the Social Security Act, or any such debt which has been assigned to the Federal Government or to a State or any political subdivision of such State); or
>
> (B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support;

In arguing for discharge of the attorney fees, Defendant does not contend that § 523(a)(5)(A) is applicable due to an assignment of the debt to another entity or that § 523(a)(5)(B) is applicable due to the fees being designated as support in the Separation Agreement but not actually being in the nature of support. Thus, the Court needs to find the following elements present in order to find in Plaintiff's favor:

1. that the debt is "to a spouse, former spouse, or child of the debtor;"
2. that the debt is "for alimony to, maintenance for, or support of such spouse or child;" and
3. that the debt is " in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement."

As to element number one, the debt in question is payable directly to the Plaintiff, the former spouse's attorney, and not to Debtor's former spouse or child. However, the case law is clear that an award of attorney fees payable directly to a former spouse's attorney satisfies the requirement that the debt be payable to the former spouse or child. *See, e.g., Holliday v. Kline (In re Kline)*, 65 F.3d 749, 751 (8th Cir. 1995). Thus, the first element is satisfied.

Regarding element number two, the Court finds that 90% of the fees which Defendant agreed to pay are in the nature of alimony or support. In the Tenth Circuit, the terms "alimony or support" are broadly interpreted. *In re Jones*, 9 F.3d 878, 881-82 (10th Cir. 1993). Attorney fees

are in the nature of alimony or support when they are incurred in the process of litigating alimony or support issues. *In re Jones*, 9 F.3d at 881 ([A]ttorney fees incurred and awarded in child custody litigation should . . . be considered as obligations for 'support,'. . .."); ***Wedgle & Shpall, P.C. v. Ray (In re Ray)***, 143 B.R. 937, 940 (D. Colo. 1992) ("most courts hold that fees 'inextricably intertwined with proceedings affecting the welfare of the child' such as custody and visitation, should be deemed support") (quoting ***Peters v. Hennenhoeffer (In re Peters)***, 133 B.R. 291, 295 (S.D. N.Y. 1991)). Plaintiff's uncontroverted trial testimony was that 90% of her time in the Domestic Case was related to litigation of child support and custody issues, because there was little property of the parties to divide. That view is borne out by the scant treatment given to property issues in the Separation Agreement. Therefore, from the evidence presented, the Court finds that 90% of the fees incurred in the Domestic Case were "inextricably intertwined" with proceedings whose primary focus was the welfare and best interests of the children of the marriage. Therefore, those fees are in the nature of support.

Lastly, the Court finds that the fees which Defendant agreed to pay are in connection with an order of the domestic court presiding over the divorce case which Defendant filed against his former spouse. Defendant's actual agreement to pay attorney fees was never reduced to writing. On July 30, 2002, when Defendant appeared in state court to finalize his divorce, a written Separation Agreement of the parties was presented to that court. At the same time, counsel for the parties read additional terms of their agreement into the record. The judge stated clearly on the record that he was adopting the agreement of the parties. According to Plaintiff's testimony, at a later date, Defendant's attorney made a motion to the domestic court to make the July 30, 2003, transcript the order of the court. The motion was granted by that court. Under these

circumstances, the Court finds that Defendant's agreement to pay Plaintiff's fees was properly made an order of the state domestic court and this Court is not troubled by the absence of a signed order reciting the terms of the addendum to the parties' Separation Agreement which was read into the record.

Defendant raises an issue with respect to the timing of the domestic court order. He cites *In re Smolenski*, 210 B.R. 780 (N.D. Ill. 1997), for the proposition that, in order for a debt to be nondischargeable under § 523(a)(5), it must be a debt that is memorialized in a court order which was entered prior to the petition date of Debtor's bankruptcy case. This Court disagrees with *Smolenski* to the extent that the case can be fairly read to stand for that proposition.

In that case, the debtor's former spouse incurred attorney fees in extensive post-divorce child custody and support litigation. The former spouse had requested an order with respect to the attorney fees from the domestic court pre-petition, but no order was entered prior to the filing of the bankruptcy case. The court relied on its reading of the "plain language" of the statute and did indeed find the attorney fees dischargeable. The court suggested that the debtor prevailed because she won the race to the bankruptcy court. *Smolenski*, 210 B.R. at 783.

This Court does not wish to sanction such a "race to the courthouse." That is exactly what the bankruptcy process is intended to prevent. *Holland v. Star Bank, N.A., (In re Holland)*, 151 F.3d 547, 550 (6th Cir. 1998) ("One of the purposes of bankruptcy is to allow for the fair treatment of similarly situated creditors, thus preventing creditors' rights from being determined by a race to the courthouse."); *Rine & Rine Auctioneers, Inc. v. Douglas County Bank & Trust Co. (In re Rine & Rine Auctioneers, Inc.)*, 74 F.3d 854, 860 (8th Cir. 1996) ("[A] race to the courthouse, . . . directly contradicts the goal of the bankruptcy laws to impose a fair and orderly

distribution of property among equal creditors."); *see also Weisberg v. Abrams (In re Weisberg)*, 218 B.R. 740, 757 (Bankr. E.D. Pa. 1998) ("We also must observe that we are unimpressed with the reasoning emphasized in *Smolenski* . . .. These results appear calculated to unjustly reward a debtor who races through the bankruptcy courthouse door before the state domestic relations court can enter an order regarding attorneys' fees.").

Furthermore, this Court cannot agree that the "plain language" of the statute mandates such a result. The statute states that the debt must be incurred "*in connection with* a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement." 11 U.S.C. § 523(a)(5) (emphasis added). To say that the debt must be incurred "in connection with" a divorce decree or other order of the court does not suggest to this Court any requirement that a fee order must be entered prior to the filing of a bankruptcy case in order for § 523(a)(5) to be applicable.

To embrace the Defendant's view would be to create the anomalous situation where a debt could be listed on a debtor's bankruptcy schedules but would be immune to being excepted from discharge under § 523(a)(5). With the knowledge that an attorney fee order would soon be entered, a debtor could simply file a bankruptcy petition before the entry of that order and place a non-debtor spouse in the position of never being able to address the dischargeability of the fee order. That is not what § 523(a)(5) says and this Court is unwilling to believe that is what § 523(a)(5) means. Defendant cannot have it both ways. If Plaintiff's fees are amenable to discharge in Defendant's bankruptcy case, then the dischargeability of those fees must be equally amenable to challenge under § 523(a)(5).

The Court also presumes that Defendant is not arguing that the debt did not exist prior to its reduction to a written order of the domestic court. If that were the case, and the debt did not arise until the domestic court entered its order, then the debt did not exist pre-petition and could not be discharged in Debtor's bankruptcy.

To the contrary, the Bankruptcy Code defines a claim to include any right to payment, whether or not that right has been reduced to judgment. 11 U.S.C. § 101(5)(A). "Congress intended by this language to adopt the broadest available definition of 'claim.'" *Johnson v. Home State Bank*, 501 U.S. 78, 83, 111 S. Ct. 2150, 2153 (1991); *see also, Pennsylvania Dept. of Public Welfare v. Davenport*, 495 U.S. 552, 558, 110 S. Ct. 2126, 2130-31 (1990); *Ohio v. Kovacs*, 469 U.S. 274, 279, 105 S. Ct. 705, 707 (1985). The Tenth Circuit recognizes that a claim arises when the *conduct* giving rise to the claim has occurred. *In re Parker*, 313 F.3d 1267, 1269 (2002). Thus, as soon as Plaintiff rendered services to her client in the Domestic Case, her claim arose against the Defendant for bankruptcy purposes. Colorado law provides for such an order to be entered with a proper showing to the domestic court. Colo. Rev. Stat. § 14-10-119.

The domestic court may not have entered its order approving the parties' agreement with respect to attorney fees until after the filing of the bankruptcy case. But that does not mean that no claim existed on the petition date upon which this Court can make a determination of dischargeability under § 523(a)(5).

Accordingly, the Court finds that all of the elements required under § 523(a)(5) have been satisfied to support a finding of nondischargeability with respect to attorney fees which Defendant agreed to pay to Plaintiff.

However, the court appearance at which that agreement was consummated took place after the petition date in Defendant's bankruptcy case. The parties did not seek leave from this Court to go forward with the Domestic Case by filing a motion to lift the automatic stay. Consequently, says Defendant, the proceeding took place in violation of the automatic stay, making his agreement to pay fees void ab initio. Not so.

The bankruptcy court is, at bottom, at court of equity. *Local Loan Co. v. Hunt*, 292 U.S. 234, 240, 54 S. Ct. 695, 697 (1934); *Young v. U.S.*, 535 U.S. 43, ___, 122 S. Ct. 1036, 1041 (2002); *Central States Corp. v. Luther*, 215 F.2d 38, 46 (10th Cir. 1954). It was the unchallenged testimony of Plaintiff that the she met in chambers with Defendant's counsel and the state court judge prior to the hearing on July 30, 2002. During that meeting, the fact of Defendant's bankruptcy filing was raised and all present, including Defendant and his counsel, decided to go forward with the hearing. Defendant will not now be heard by this Court to say that an agreement which he entered into is void in a circumstance where: 1) he was represented by counsel; 2) all of the parties present, including Defendant and his counsel, were informed of the pending bankruptcy proceeding; and 3) all agreed to go forward with the proceeding, under the apparent belief that no stay violation was taking place.

This Court will not reach the issue of whether or not a stay violation took place. It is far from clear that any such violation occurred. It was, after all, a proceeding initiated by the Defendant. He was the petitioner in the Domestic Case. Additionally, the debt which the Court finds to be nondischargeable here is in the nature of support. Section 362(b)(2) allows proceedings to establish, modify, or collect support obligations to go forward as an exception to the automatic stay.

But even if the July 30, 2002, hearing took place in violation of the provisions of § 362, the Tenth Circuit recognizes an equitable exception to § 362. In this circuit, equitable principles will be applied where finding a violation of the automatic stay under a strict reading of § 362 would allow the Debtor to advance an inequitable position before the court. As the court said in *Calder v. Job (In re Calder)*, 907 F.2d 953, 956 (10th Cir. 1990), "equitable principles may, in some circumstances, be applicable to claimed violations of the stay." This is one of those circumstances.

The automatic stay is in place as a shield to protect debtors from actions initiated by their creditors and to give them a breathing spell after a bankruptcy case has been filed. *Fortier v. Dona Anna Plaza Partners*, 747 F.2d 1324, 1330 (10th Cir. 1984) (The purpose behind the automatic stay "is to permit the debtor to organize his or her affairs without creditor harassment and to allow orderly resolution of all claims."). It would be inequitable and inappropriate to allow this Debtor to use § 362 as a sword to avoid only the provision relating to the payment of Plaintiff's bill in the post-petition agreement which he freely entered into in settlement of the Domestic Case which he himself had filed.

The Debtor also seeks to avoid his agreement by clothing it under the mantle of a post-petition reaffirmation of a pre-petition debt which fails to comply with § 524(c). That subsection provides in relevant part:

> An agreement between a holder of a claim and the debtor, *the consideration for which, in whole or in part, is based on a debt that is dischargeable in a case under this title* is enforceable only to any extent enforceable under applicable nonbankruptcy law, whether or not discharge of such debt is waived . . ..

11 U.S.C. 524(c) (emphasis added). The subsection goes on to describe all of the elements which must be present for such a reaffirmation agreement to be enforceable. Those elements have no application where, as in this matter, the subject of the agreement is a nondischargeable debt. To the extent that Debtor's agreement to pay Plaintiff's attorney fees can be characterized as an agreement for the payment of a pre-petition obligation, the subject of the agreement is a nondischargeable support obligation. Thus § 524(c) is simply inapplicable on its face.

III Conclusion

The total agreement of the parties is reflected in the Separation Agreement presented to the domestic court at the July 30, 2002, hearing plus the addendum to that agreement. The addendum was read into the record and was adopted by and made an order of that court. The Separation Agreement reflects the parties' agreement that Defendant shall pay $2,680.00 to Plaintiff in attorney fees which were incurred litigating contempt issues. The parties' addendum to that agreement provides that Defendant shall pay $11,000.00 to Plaintiff for attorney fees. The addendum read into the record breaks that figure down as $6,920.00 of fees related to contempt actions and $4,080.00 of additional attorney fees related to the divorce action.

The parties did not squarely address whether or not the $2,680.00 referenced in the Separation Agreement is subsumed within the $6,920.00 figure read into the record or was intended to be an amount agreed to in addition to the figure in the Separation Agreement. The Court notes, however, that Plaintiff's complaint prays for judgment in the amount of $11,000.00 and does not reference the additional $2,680.00 figure. Since the amount in the Separation Agreement is specifically denominated as related to the contempt litigation and the $6,920.00 is also denominated as related to contempt litigation, the Court interprets the $2,680.00 figure in

the Separation Agreement to be a part of the $11,000.00 figure which was read into the record on July 30, 2002. Therefore, the Court finds that the agreement of the parties is that Defendant shall pay Plaintiff $11,000.00.

It was Plaintiff's testimony that 90% of her time was spent on matters related to child support and custody. Therefore, the Court finds that $9,900.00 of the attorney fees which Defendant agreed to pay to Plaintiff are nondischargeable.

The Court took under advisement Defendant's objection to Plaintiff's testimony with respect to categorization of work which appears on her billing statements and which was not provided to Defendant prior to trial. Prior to trial, Defendant had requested, and Plaintiff had provided, a breakdown of work reflected in Plaintiff's billing statements. Plaintiff provided a breakdown of fees related to support issues. On the morning of trial, Plaintiff again went through her billing statements and broke out additional time entries related to custody matters. The Court finds that was information which should have been provided to Defense counsel prior to trial and that admission of the testimony would constitute unfair surprise to Defendant. Defendant's objection will be sustained. Such testimony was not considered by the Court in reaching its decision in this matter.

The Defendant also made a motion to dismiss at the close of Plaintiff's evidence at trial. The Court took that motion under advisement, but as the Court noted at the time, the arguments presented in support of the motion to dismiss were similar to those advanced in support of the earlier motion for summary judgment which was denied by the Court. After reading the cases suggested by Defendant in support if his motion, the Court finds that Plaintiff did produce

sufficient evidence during her case to carry her burden of going forward and that Defendant's motion to dismiss should be denied. Therefore, it is

ORDERED, that Defendant's objection to Plaintiff's trial testimony concerning her time entries which she categorized on the morning of trial as being related to custody issues and which were not provided to Defendant prior to trial is SUSTAINED and that such testimony should be stricken from the record. It is further

ORDERED, that Defendant's motion to dismiss the case at the conclusion of Plaintiff's evidence at trial is hereby DENIED. It is further

ORDERED, that Plaintiff shall have judgment against Defendant in the amount of $9,900.00 and that said amount is determined to be NONDISCHARGEABLE pursuant to 11 U.S.C. § 523(a)(5).

Dated this 2nd day of June, 2003.

BY THE COURT:

_____
Howard R. Tallman, Judge
United States Bankruptcy Court