

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

IN RE:)
)
JEROME VASILE,) CASE NO. 05-64628 JPK
) Chapter 7
)
Debtor.)

SPANGLER, JENNINGS &)
DOUGHERTY, P.C.,)
)
Plaintiff,)
)
v.) ADVERSARY NO. 05-6257
)
JEROME VASILE,)
)
Defendant.)

MEMORANDUM AND DECISION

This adversary proceeding, initiated by a complaint filed by the plaintiff Spangler, Jennings & Dougherty, P.C. ["Spangler"] on November 23, 2005 against the defendant Jerome Vasile ["Vasile"], seeks a determination pursuant to 11 U.S.C. § 523(a)(15) that an indebtedness owed by Vasile to Spangler is excepted from the discharge granted to Vasile in case number 05-64628 April 18, 2006. The record establishes that service of process of the complaint and summons was properly made upon Vasile pursuant to Fed.R.Bankr.P. 7004(b)(9), and that no appearance was filed by or on behalf of the defendant and no answer or other response to the complaint was filed of record. A clerk's entry of default pursuant to Fed.R.Bankr.P. 7055/Fed.R.Civ.P. 55(a) was entered on May 4, 2006. Pursuant to the Court's orders entered on May 4, 2006 and on June 29, 2006, Spangler filed a Motion for Default Judgment and supporting materials on June 29, 2006, and an Affidavit Concerning Military Service on June 30, 2006.

This adversary proceeding is now before the Court for review with respect to the default

judgment sought by Spangler. The Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. § 1334(b), 28 U.S.C. § 157(a) and N.D.Ind.L.R. 200.1(a)(2). This adversary proceeding constitutes a "core" proceeding as defined by 28 U.S.C. § 157(b)(2)(I).

As will be explained below, the plaintiff cannot sustain a cause of action against the defendant pursuant to 11 U.S.C. § 523(a)(15).

I. Standards for Review of Motions for Default Judgment

The basic procedural provision with respect to judgment by default is provided by F.R.C.P. 55(b)(2), made applicable to adversary proceedings by B.R. 7055. That provision in pertinent part states:

(b) Judgment. Judgment by default may be entered as follows:

(2) By the Court. In all other cases the party entitled to a judgment by default shall apply to the court therefor: . . . If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper . . .

The fact that a plaintiff is entitled to an entry of default does not entitle the plaintiff to the entry of judgment by default. As explained in *In Re Sanchez*, 277 B.R. 904, 907 (Bankr. N.D.III. 2002):

Rule 7055(b)(2) Fed.R.Bankr.P. governs default judgments entered by a bankruptcy court. A movant is not entitled to default judgment as a matter of right even though the debtor is in default under Rule 55(a) [Fed.R.Bankr.P. 7055(a)]. *Lewis v. Lynn*, 236 F.3d 766, 767 (5th Cir.2001). Panels in this Circuit have eschewed traditional notions disfavoring default judgments. *Stafford v. Mesnik*, 63 F.3d 1445, 1450 (7th Cir.1995); *Profile Gear Corp. v. Foundry Allied Industries, Inc.*, 937 F.2d 351, 354 (7th Cir.1991); *Matter of State Exchange Finance Co.*, 896 F.2d 1104, 1106 (7th Cir.1990). However, in the bankruptcy context, where a debtor has a presumptive right to a discharge, default judgment motions should not be granted unless the movant shows that its debt is nondischargeable as a matter of law. *Valley Oak Credit Union v. Villegas*, 132 B.R. 742, 746 (9th Cir. BAP

1991) (court must determine whether plaintiff is entitled to judgment); *In re McArthur*, 258 B.R. 741, 746 (Bankr.W.D.Ark.2001) (noting that bankruptcy courts have taken a conservative approach and sometimes refrain from granting default judgment motions which deprive debtor of discharge).

Thus, the issue here is whether Plaintiff has shown at least *prima facie* facts meeting the legal requirements to except a debt from discharge under § 523(a)(2)(A).

As explained by the Bankruptcy Appellate Panel of the Ninth Circuit in *Valley Oak Credit Union v. Villegas*, 132 B.R. 742, 746 (9th Cir. BAP 1991):

The court has wide discretion in determining whether to enter a default judgment under Rule 55. See generally 10 C. Wright, A. Miller and M. Kane, *Federal Practice and Procedure Civil 2d* § 2685 (1983). Similarly, a trial court has broad discretion as to the nature of the hearing that it will hold pursuant to Rule 55(b)(2) in determining whether to enter a default judgment. This language of the rule itself confirms the discretion of the trial court to hold such hearings "as it deems necessary and proper." Fed.R.Civ.P. 55(b). This provides the trial court with discretion to require, at a hearing under Rule 55(b)(2), some proof of the facts that are necessary to a valid cause of action or to determine liability. See *Peerless Industries, Inc. v. Herrin Illinois Café, Inc.*, 593 F.Supp. 1339, 1341 (E.D.Mo.1984), *aff'd without opinion* 774 F.2d 1172 (8th Cir.1985); Wright, Miller and Kane, at § 2688.

Because of the impact of a nondischargeability action on the "fresh start" arising from the entry of an order of discharge pursuant to 11 U.S.C. § 727(a), bankruptcy courts are particularly reluctant to "rubber stamp" motions for default judgments in adversary proceedings filed to determine dischargeability of indebtedness, particularly in circumstances where averments of the complaint are largely conclusory; *In Re Sziel*, 206 B.R. 490, 492-493 (Bankr. N.D.Ill. 1997).

In establishing the basic facts of record upon which the Court is to review a motion for default judgment, the United States Court of Appeals for the Seventh Circuit follows the rule that "upon default, the well-pleaded allegations of a complaint relating to liability are taken as true, [but] allegations in a complaint relating to the amount of damages suffered ordinarily are not," *US v. Di Mucci*, 879 F.2d 1488, 1497 (7th Cir. 1989); *Dundee Cement Company v. Howard*

Pipe & Concrete Products, Inc., 722 F.2d 1319, 1323 (7th Cir. 1983); *Merrill Lynch Mortgage Corp. v. Narayan*, 908 F.2d 246, 253 (7th Cir. 1990).

II. Facts Established by the Record

The facts pertinent to this adversary proceeding are simple, and may be concisely stated.

Attorney Ketaki Sircar, of the law firm of Spangler, Jennings & Dougherty, P.C., represented the defendant's now-former spouse Roberta Vasile in an action for dissolution of marriage filed in the Porter County, Indiana Superior Court under cause number 64D01-0304-DR-3128. On April 7, 2005, an order was entered in that action, paragraph 18 of which establishes the obligation which is the subject of this adversary proceeding. That paragraph states:

18. Also due to the disparity in earnings and earning capacities, Jerome should contribute to Roberta's attorney fees. This is also due to Jerome's contempt provisionally. For Roberta to have to pay all of her attorney's fees would inhibit her ability to support the children. Accordingly, Jerome is ordered to pay directly to Ketaki Sircar, Esquire, the sum of \$4,500.00, which amount shall be entered as a judgment against Jerome. No execution on the judgment may commence so long as Jerome pays at least \$300.00 each month commencing in May, 2005.

The complaint further alleges that the defendant had failed to make any payments on this judgment as of the date of the filing of his Chapter 7 bankruptcy case.

It bears mention that the debt created by paragraph 18 of the dissolution judgment is on its face a debt owed by Vasile "directly to Ketaki Sircar, Esquire", and not a debt specifically owed to Spangler, which is presumably the employer of Attorney Sircar. Thus, in one context Spangler, as the plaintiff, has failed to establish based upon this record that there is any debt owed by Vasile to Spangler, and the action sought to be asserted by the complaint fails on that basis alone. However, if one were to deem Attorney Ketaki Sircar to be the proper plaintiff, Fed.R.Bankr.P. 7017/Fed.R.Civ.P. 17(a) provides a simple mechanism for substitution of the

real party-in-interest, and the determination made by this decision is not premised upon the record's failure to establish an indebtedness owed by Vasile to the plaintiff by whom the action was filed.

Thus, the pertinent facts are that in an action for dissolution of marriage, a court having jurisdiction over the defendant entered a judgment of \$4,500.00 against him in favor of the attorney who represented his spouse in an action for dissolution of marriage. The premise for this judgment was in part "the disparity in earnings and earning capacities" between Jerome Vasile and Roberta Vasile, and also in part "due to Jerome's contempt provisionally". The judgment also contains the finding that "(f)or Roberta to have to pay all of her attorney's fees would inhibit her ability to support the children", and thus it might be inferred that the judgment was intended to be somewhat in the nature of child support on the theory that by relieving Roberta of the obligation to pay her attorney's fees, more of her income resources would be available for her to pay for the expenses of raising the couple's children.

III. Legal Analysis

Issues concerning the interplay between 11 U.S.C. § 523(a)(5) and 11 U.S.C. § 523(a)(15) have plagued and bedeviled state courts which determine the rights of parties in marital actions, and federal bankruptcy courts which must determine whether or not rights and obligations so determined are subject to exceptions from discharge under those two statutes. The complaint proceeds solely under 11 U.S.C. § 523(a)(15), which states:

(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 governmental 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.¹

11 U.S.C. § 523(a)(5), as applicable to this proceeding, stated:

(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 –

(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.

As one will note from reviewing the foregoing provisions, § 523(a)(15) convolutedly describes debts subject to its provisions by exclusion of debts subject to the provisions of § 523(a)(5). It should first be noted that the "debt" which is the subject of this proceeding is not within the provisions of § 523(a)(5). To be within that section, the "debt" must meet the following criteria:

¹ Vasile's Chapter 7 case was initiated by a petition filed on August 22, 2005, and thus § 523(a)(15) as in effect prior to the implementation of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, which amended § 523(a)(15) as effective to cases filed on or after October 17, 2005, is applicable. It is the date of filing of the debtor's underlying Title 11 case, rather than the date of the filing of an adversary proceeding, which controls the applicability of the new law.

1. It must be payable "to a spouse, former spouse, or child of the debtor";
2. It must be "for alimony to, maintenance for, or support of such spouse or child";
3. The debt must have arisen "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 a property settlement agreement";
4. It must not have been assigned to another entity in any manner [subject to certain exceptions]; and
5. The liability must actually be in the nature of alimony, maintenance or support, and not merely labeled as such.

The debt here is an obligation imposed upon Vasile to Attorney Ketaki Sircar, who is not "a spouse, former spouse, or child of the debtor". Thus, under the absolutely clear language of 11 U.S.C. § 523(a)(5), this indebtedness does not fall within the provisions of that section.²

We next come to 11 U.S.C. § 523(a)(15). Some courts have struggled somewhat with the fact that any number of debts which are not within § 523(a)(5) may be "incurred by the debtor in the course of a divorce or separation . . .", and therefore may appear to literally fall within the provisions of § 523(a)(15). However, the better reasoned decisions – and the ones with which the Court agrees – incorporate the underlying predicate obligee of § 523(a)(5) into

² There are no cases decided by the United States Court of Appeals for the Seventh Circuit on the issue of whether or not a debt for attorney's fees awarded to counsel for a debtor's former spouse might be within the parameters of 11 U.S.C. § 523(a)(5). In *In re Seibert*, 914 F.2d 102 (7th Cir. 1990), the Court held that pregnancy and confinement expenses and court costs awarded against a punitive father in a paternity action in favor of a county which pursued those expenses by assignment of rights from the mother, both on her own behalf and on behalf of the parties' child, were nondischargeable pursuant to § 523(a)(5). However, while the Court in *dicta* stated that the identity of the person to whom payments are to be made may not be critical in order to sustain an action under § 523(a)(5), the facts in *Seibert* are that the expenses were in fact incurred directly with respect to a child, and that the rights of both the mother and child were assigned to the county. Therefore the issue of whether a totally independent third party in whose favor a judgment was entered in its own right could proceed under § 523(a)(5) is not factually in that case.

§ 523(a)(15), and thus hold that only a spouse, former spouse or child of the debtor has standing to assert an action for exception from discharge under 11 U.S.C. § 523(a)(15); *In re Wenneman*, 210 B.R. 115 (Bankr. N.D.Ohio 1997); *In re Sanders*, 236 B.R. 107 (Bankr. S.D.Ga. 1999); *In re Bryant*, 260 B.R. 839 (Bankr. W.D.Ken. 2001); *In re Beach*, 203 B.R. 676 (Bankr. N.D.Ill. 1997); *In re Euell*, 271 B.R. 388 (Bankr. D.Colo. 2002). In the instant action, the "debt" sought to be enforced is a debt owed either to an attorney or to a law firm, neither of whom is the "spouse, former spouse, or child of the debtor". Because the party to whom the debt which is the subject of this adversary proceeding is owed has no standing to pursue an action under § 523(a)(15), the complaint fails to state a *prima facie* case for exception to discharge under that provision.

The Court thus finds that the plaintiff has failed to establish, and indeed cannot as a matter of law establish, a claim entitling it to the relief requested in this adversary proceeding. As a result, the Court determines that judgment must be entered against the plaintiff on its complaint.

IV. Decision

IT IS ORDERED, ADJUDGED AND DECREED that the motion for default judgment filed by the plaintiff in this action is denied.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the debt of \$4,500.00 owed to Attorney Ketaki Sircar of the law firm of Spangler, Jennings & Dougherty, P.C. is not excepted from the discharge granted to Jerome Vasile in case number 05-64628.

Dated at Hammond, Indiana on February 21, 2007.

/s/ J. Philip Klingeberger
J. Philip Klingeberger, Judge
United States Bankruptcy Court

Distribution:
Attorney for Plaintiff
Defendant