

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

IN RE: CASE NO. 11-10609)
)
JOHN ARTHUR WITT)
)
Debtor)
)
)
JACK R. JAMES)
JAY PETROLEUM, INC.)
)
Plaintiffs)
)
vs.) PROC. NO. 11-1085
)
JOHN ARTHUR WITT)
)
Defendant)

DECISION

At Fort Wayne, Indiana, on August 27, 2012.

By this adversary proceeding the plaintiffs sought a determination that a debt owed to them by virtue of a state court judgment of contempt was non-dischargeable, as a willful and malicious injury, under § 523(a)(6) of the United States Bankruptcy Code, a proposition the defendant initially denied. See, Amended Complaint, filed June 30, 2011; Answer, filed August 4, 2011. The court issued a scheduling order which, after granting the parties' requested extensions of time, required them to jointly file a proposed pretrial order by May 15, 2012. Less than a week before the pretrial order was due, on May 9, the defendant filed a motion to abstain which stated that he now agreed the state court judgment was non-dischargeable and so the bankruptcy court should abstain from the matter. The court promptly denied the motion, see, Order of May 11, 2012, and because it appeared the request for abstention was not warranted by existing law or a non-frivolous argument for its

extension, and that a reasonable pre-filing inquiry would have revealed the lack of merit, the court scheduled a hearing to consider whether sanctions should be imposed upon counsel pursuant to Rule 9011(b)(2) of the Federal Rules of Bankruptcy Procedure. The matter is before the court following that hearing.

Rule 9011 is the bankruptcy equivalent of Rule 11 of the Federal Rules of Civil Procedure. Like Rule 11, it imposes an affirmative obligation upon counsel to conduct a reasonable investigation into both the law and the facts before presenting (“whether by signing, filing, submitting or advocating”) a particular position (“a petition, pleading, written motion, or other paper”) to the court. See, Fed. R. Bankr. P. Rule 9011(b). See also, Frantz v. United States Powerlifting Federation, 836 F.2d 1063, 1064 (7th Cir. 1987); Fred A. Smith Lumber Co. v. Edidin, 845 F.2d 750, 751 (7th Cir. 1988); McGhee v. Sanilac County, 934 F.2d 89, 93 (6th Cir. 1991); Slater v. Skyhawk Transp., Inc., 187 F.R.D. 211, 220 (D.N.J. 1999); Terminix Int’l Co. v. Kay, 150 F.R.D. 532, 538 (E.D. Pa. 1993). The results of that investigation must lead to the conclusion that the position being taken by counsel is warranted by existing law or by a non-frivolous argument. Whether or not the obligations imposed by Rule 11 have been fulfilled “is an objective determination of whether [counsel’s] conduct was reasonable under the circumstances.” Brown v. Federation of State Medical Boards of the U.S., 830 F.2d 1429, 1435 (7th Cir. 1987). See also, In re Ronco, 838 F.2d 212, 217 (7th Cir. 1988) (“litigation must be grounded in an objectively reasonable view of the facts and the law”). Consequently, the court must “undertake an objective inquiry into whether . . . counsel ‘should have known his position was groundless’” Dist. No. 8 International Assn v Clearing, 807 F.2d 618, 632 (7th Cir. 1986) (quoting Coleman v. CIR, 791 F.2d 68, 71 (7th Cir.1986)).

The questions before the court are whether a non-frivolous argument can be (or was) made that the bankruptcy court should abstain from deciding whether a debt is non-dischargeable as a willful and malicious injury, under § 523(a)(6), and whether counsel made a reasonable investigation into that issue before he asked the court to do so. The answer to both of these questions is no.

To abstain is to decline to act: to refuse to hear or decide a particular matter. It is governed by 28 U.S.C. § 1334(c). The court may abstain “in the interest of justice, or in the interest of comity with State courts or respect for State law,” 28 U.S.C. § 1334(c)(1), and it must do so where the proceeding before it is based upon a State law claim that is only related to a bankruptcy case and another proceeding has been commenced and can be timely adjudicated in State court. 28 U.S.C. § 1334(c)(2). The common theme in both of these provisions is allowing state courts to determine matters of state law.

Where the claim before the court is based upon federal law, such as the Bankruptcy Code, there is no reason to abstain in favor of state courts, and whether or not a particular debt is dischargeable is quintessentially an issue of federal law. Deciding that question does not present a need for comity with state courts, a matter of state law, or the possibility of inappropriate forum shopping as when a subsequent federal proceeding might derail an existing state proceeding. There is no basis for the bankruptcy court to abstain from deciding whether a particular debt is non-dischargeable under § 523(a)(6) as a willful and malicious injury. To the contrary, it cannot abstain from doing so because § 523(c)(1) requires that a decision to be made by the bankruptcy court; not someplace else. See, *Brown v. Felsen*, 442 U.S. 127, 99 S.Ct. 2205 (1979)(holding that the bankruptcy courts, as compared to state courts, have “exclusive jurisdiction” to determine issues of dischargeability under the Bankruptcy Code); *In re Everly*, 346 B.R. 791, 797 (8th Cir. BAP. 2006)

(“First, bankruptcy courts have exclusive jurisdiction to determine whether debts are non-dischargeable under § 523(a)(2), (4), or (6). A state court has jurisdiction, concurrent with the bankruptcy court, to determine the dischargeability of all other debts”); In re Waugh, 165 B.R. 450, 452 (Bankr. E.D. Ark. 1994) (“state court does not have jurisdiction to determine the section 523(a)(6) issue”). See also, 4–523 Collier on Bankruptcy ¶ 523.29[1] (“Section 523(c)(1) gives the bankruptcy court exclusive jurisdiction to determine the dischargeability of debts excepted from discharge under paragraph (2), (4) or (6) of section 523(a).”). Such a debt will be discharged unless the bankruptcy court decides that it is not. See, 11 U.S.C. § 523(c). See also, HR Rep No. 595, 95th Cong., 1st Sess 365 (1977); S Rep No. 989, 95th Cong., 2d Sess 80 (1978) (If a creditor does not initiate proceedings in the bankruptcy court for an exception to discharge under § 523(a)(6), “the debt is discharged.”).

It was objectively unreasonable to ask this court to abstain from deciding whether the debtor’s obligation to the plaintiffs was non-dischargeable and had counsel adequately researched the issue prior to filing the motion, he would have learned that. The brief he filed in connection with the motion does not reveal any meaningful pre-filing research into the issue of abstention generally, much less into the more particular issue of abstention in connection with dischargeability litigation. See e.g., Waugh, 165 B.R. at 445 (denying motion to abstain in dischargeability action); In re Pedersen, 2011 WL 1297708 *2 (Bankr. D. Neb. 2011) (court abstains from hearing issues other than dischargeability). Counsel cited the statute but only a single decision involving abstention – In re United States Aviex Co., 96 B.R. 874, 881 (N.D. Ind. 1989) a case in which abstention was denied – which he cited for the proposition that the court must abstain from a “related action” when “the state court can address the matter in a timely fashion.” He never paused to consider what a related

action might be or how the state court could address the issue of dischargeability. Similarly, his response to the motion does not reflect or refer to any pre-filing research that is not apparent from counsel's initial brief.

What counsel's response to the court's inquiry and his initial brief on abstention do reveal is some confusion and a failure to understand the difference between deciding whether a debt exists – the question of liability, if any, and damages – and whether an existing debt will survive the debtor's bankruptcy – the question of dischargeability. See, In re Sieger, 200 B.R. 636, 638-39 (Bankr. N.D. Ind. 1996). Many of counsel's arguments suggest that he sought abstention because he was concerned about enforcement proceedings. He believed that the state court was in the best position to determine how and when the judgment debt should be collected and somehow feared that this court would enter yet another money judgment and that proceedings would be undertaken here to enforce that judgment. Had he done a modicum of research into those issues, he would have learned that his fears were unfounded.

Where, as here, a state court has already entered judgment against the debtor, the only decision the bankruptcy court needs to make is whether the debt represented by that judgment is dischargeable. See, Matter of Clifton, 1996 WL 931683 * 4 (Bankr. N.D. Ind. 1996) ("Whatever rights plaintiff had against the debtor have been determined by the state court; they have merged in and are represented by the judgment issued in its favor. Plaintiff's only claim in this court is for a determination concerning the dischargeability of the judgment debt.), aff'd, Anthony Wayne Credit v Clifton, N.D. Ind. 1:96cv 382 (Dec. 13, 1996). It need not, and given the principles of res judicata, it may not, revisit the state court's decision concerning liability and damages. See e.g., In re Langeslag, 366 B.R. 51, 56-57 (Bankr. D. Minn. 2007); In re Tague, 137 B.R. 495, 503 (Bankr. D.

Colo. 1991). It can only determine whether that liability will survive the bankruptcy. This eliminated the possibility that there might somehow be a second money judgment entered against the debtor. Yet, even where the bankruptcy court does enter a money judgment in connection with finding a debt non-dischargeable – something that may be necessary where there is no previous judgment – counsel had no reason to be concerned about enforcement proceedings in this court. Several courts, including this one, have held that once the bankruptcy court has determined that a debt is non-dischargeable its jurisdiction ends and efforts to collect that debt must take place elsewhere. See e.g., In re Bass, 171 F.3d 1016, 1022-26 (5th Cir. 1999), In re Wernick, 242 B.R. 194 (Bankr. S.D. Fla. 1999); In re Sieger, 200 B.R. 636 (Bankr. N.D. Ind. 1996). See also, In re Import & Mini Car Parts Ltd., Inc., 200 B.R. 857 (Bankr. N.D. Ind. 1996) (bankruptcy court lacked jurisdiction to enforce money judgment no longer owned by the estate), aff'd, 203 B.R. 124 (N.D. Ind. 1996), aff'd, Matter of Mini Car Parts, Ltd., Inc., 97 F.3d 1454 (7th Cir. 1996) (table), 1996 WL 554450 (unpublished decision). Given the number of decisions which are readily available and would have alleviated counsel's concerns, his response does not indicate that he conducted a reasonable inquiry into the law concerning the motion for abstention before presenting it to the court.

Counsel also appears to have been confused procedurally. He simply did not know how to go about doing what he apparently wanted to accomplish. It seems he wanted to concede the issue of non-dischargeability and bring proceedings in this court to an end. He thought abstention would accomplish this. The rules of procedure do have a mechanism designed to address just that type of situation – where the defendant thinks a particular judgment should be entered in plaintiff's favor – but it is not abstention. It is an offer of judgment under Rule 68 of the Federal Rules of Civil Procedure. See, Fed. R. Bankr. P. Rule 7068. Under this rule, the party against whom a claim is

being asserted can serve “an offer to allow judgment on specific terms, with costs.” If, within fourteen days, the opposing party serves a written notice accepting the offer, the clerk is to enter judgment.¹ If for some reason the plaintiffs were not willing to agree to a judgment of non-dischargeability, all the defendant needed to do was make a formal offer of judgment in order to force the issue.² A motion to abstain is not the same thing and is not the proper way to accomplish counsel’s apparent goal.

Once the court has found a violation of Rule 11, whether or not it imposes sanctions, together with the nature of any such sanction, is a matter committed to the court’s discretion. Fed. R. Bankr. P. Rule 9011(c) (“the court may . . . impose an appropriate sanction”). In fashioning an appropriate sanction, the court’s primary goal should be deterrence; in other words, to avoid a repetition of the problem. Fed. R. Bankr. P. Rule 9011(c)(2). See also, White v. General Motors Corp. Inc., 908 F.2d 675, 685 (10th Cir. 1990), cert. denied, 498 U.S. 1069, 111 S.Ct. 788 (1991); In re Rimsat, Ltd., 229 B.R. 914, 921 (Bankr. N.D. Ind. 1998), aff’d, 230 B.R. 362 (D. N.D. Ind. 1999), aff’d, 212 F.3d 1039 (7th Cir. 2000). While monetary sanctions are often a quick and easy way to go about doing so, they are not always the best way. In this case, the motion was filed as a result of counsel’s confusion because of his failure to properly understand bankruptcy, bankruptcy litigation and its associated procedures. The best remedy for that problem is education. See e.g., Fed. R. Civ. P. Rule 11, advisory committee’s notes (1993) (sanctions may require “participation in seminars or other

¹The rule also addresses what may happen if the offer is not accepted.

²Of course, an offer of judgment is not necessary where the parties are able to agree upon a particular result, but that requires communication and there is no suggestion that defendant’s counsel actually tried to talk to opposing counsel before filing the motion to abstain. Subsequent events in the litigation confirm that such an attempt would have been a good thing.

educational programs”); In re Brent, 458 B.R. 444, 464-65 (Bankr. N.D. Ill. 2011); In re Thomas, 337 B.R. 879, 895 (Bankr. S.D. Tex. 2006); Bergeron v. Northwest Publications, Inc., 165 F.R.D. 518, 522 (D. Minn. 1996); Vandeventer v. Wabash Nat. Corp., 893 F. Supp. 827 (N.D. Ind. 1995). Completing six (6) hours of continuing legal education specifically focused upon bankruptcy law, only one of which may be completed through interactive Distance Education (web-based), should help counsel avoid future problems.

An appropriate order will be entered.

/s/ Robert E. Grant
Chief Judge, United States Bankruptcy Court