

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF)	
)	
DANIEL JAMES SULLIVAN and)	CASE NO. 10-35782 HCD
CATHY NANCY SULLIVAN,)	CHAPTER 13
)	
DEBTORS.)	
)	
)	
JANET M. REIMER,)	
fka JANET M. SULLIVAN,)	
)	
PLAINTIFF,)	
vs.)	PROC. NO. 11-3023
)	
DANIEL JAMES SULLIVAN,)	
)	
DEFENDANT.)	

Appearances:

Eric C. Welch, Esq., counsel for plaintiff, Welch & Company, LLC, Post Office Box 428, Muncie, Indiana 47308-0428; and

Richard P. Busse, Esq., counsel for defendant, Post Office Box 528, Valparaiso, Indiana 46384.

MEMORANDUM OF DECISION

At South Bend, Indiana, on October 18, 2012.

Before the court are the Complaint for Determination of Dischargeability of the Debt, filed by plaintiff Janet M. Reimer, and the Answer of chapter 13 debtor Daniel James Sullivan. At the conclusion of the trial on the Complaint, held on October 2, 2012, the court issued a preliminary oral ruling that the debt was determined to be nondischargeable. The court now issues its formal written order holding that the debt owed by defendant Daniel James Sullivan to plaintiff Janet M. Reimer is excepted from his discharge.¹

¹ The court has jurisdiction to decide the matter before it pursuant to 28 U.S.C. § 1334 and § 157 and the Northern District of Indiana Local Rule 200.1. The court has determined that this matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I).

BACKGROUND

The marriage of the plaintiff and the defendant was legally terminated on July 30, 1997, when the Final Judgment Entry of Divorce was entered in the Court of Common Pleas, Lucas County, Ohio. Under the divorce decree, the plaintiff was awarded 25% of the defendant's accrued monthly benefit from his interest in his retirement plan with the Civil Service Retirement System ("CSRS"), a benefit that he was entitled to receive as of May 14, 1997. *See* R. 1, Ex. A, p. 1. She was also awarded the right to designate a beneficiary under the plan. *See id.* In later litigation to enforce the divorce decree, the plaintiff was granted summary judgment in the same Lucas County Common Pleas Court. That state court held that the plaintiff was entitled to a qualified domestic relations order ("QDRO"²) or a separate judgment entry, whichever was applicable, perfecting her rights in the defendant's retirement plan as awarded to her in the divorce decree. It also held that she was entitled to retroactive benefits from the date of the defendant's retirement. *See id.*

When the plaintiff tried to perfect a QDRO or separate judgment entry, however, she discovered that the defendant had removed his retirement plan from the CSRS, without notice to the plaintiff, and had transferred the plan to the District of Columbia Police Officers' and Firefighters' Retirement Plan ("DCRP"). Also without notice, the defendant retired on October 18, 2003, and began receiving the pension benefits without any allocation of those benefits being made to the plaintiff.

On December 11, 2008, the Common Pleas Court held a trial on the plaintiff's Motions for approval of a QDRO, retroactive benefits, and attorney fees. Both parties appeared and were represented by counsel. In its Judgment Entry of January 9, 2009 ("2009 Judgment Entry"), the court acknowledged its previous Judgment Entry of summary judgment, granting to the plaintiff entitlement to the QDRO and retroactive benefits. *See id.* After a trial, the court awarded judgment to the plaintiff in the following

² A QDRO is a domestic relations order that enforces a domestic support obligation. It "creates or recognizes an alternate payee's right to, or assigns to an alternate payee the right to, a portion of the benefits payable with respect to a participant under a plan." 29 U.S.C. § 1056(d)(3)(B)(I).

specified amounts: a monthly amount of \$1,325.07 as her interest in the defendant's current pension plan³; a lump sum of \$76,185.92 as the amount of retroactive benefits to which the plaintiff was entitled since the time of the defendant's retirement in October 2003⁴; and the plaintiff's attorney fees, court costs, and expenses in the amount \$24,684.00, plus statutory interest from the date of the Judgment. *See id.* at 2-4. The court concluded that it "deem[ed] the judgment awarded hereby to be in the nature of pension rights and sustenance to the Plaintiff and, therefore, not dischargeable in bankruptcy by the Defendant." *Id.* at 2.

The court also made specific findings with respect to the defendant's conduct before the court. It found that the defendant knew or had reason to know that his actions (both transferring the parties' CSRS accumulations to the DCRP and taking all of the retirement benefits) were in derogation of the plaintiff's rights in and to those funds. It also determined that "much of the Defendant's conduct in the instant litigation was dilatory in nature designed only for the purpose of delay." *Id.* at 3. It noted the defendant's appeal of various non-final orders and found that "the defendant's behavior in relationship to the matters before the Court cost the plaintiff needless legal fees and litigation expenses." *Id.*

³ The state court concluded:

Now, therefore, the Court awards to the Plaintiff such portion of the Defendant's rights in the pension under the [DCRP] so as to pay to the Plaintiff, beginning January 1, 2009, the monthly sum of \$1,325.07, together with any additional rights thereto including, but not necessarily limited to, the rights to designate beneficiaries for survivor benefits, to receive cost-of-living-adjustments and all other rights pursuant to said plan accorded to participants therein.

R. 1, Ex. A. at 2.

⁴ The court made this determination:

Now, therefore, judgment is hereby awarded to the Plaintiff against the Defendant in the amount of \$76,185.92, together with statutory interest thereon from the date hereof until paid in full. Further, the Plaintiff is awarded execution upon said judgment including, but not limited to, further attachment of the Defendant's rights in and to the [DCRP] pursuant to a qualified domestic relations order or separate judgment entry which may perfect the Plaintiff's rights in accordance with the orders herein and the terms of the pension plan.

R. 1, Ex. A at 2.

The Court further finds that not only were such fees needlessly incurred by the Plaintiff as a result of the Defendant's deliberate actions but also that the Plaintiff is otherwise unable to afford the same. To force her to pay such fees and expenses from the award hereinabove made would be unjust and inequitable to the Plaintiff and cause her greater harm from the intentional actions of the Defendant and a deprivation of her rights awarded pursuant to the parties' divorce decree.

Id. at 4. This 2009 Judgment Entry was appealed to the state appellate court and was upheld. The Supreme Court of Ohio denied certiorari.

On December 30, 2010, the defendant filed a voluntary petition under chapter 13 of the Bankruptcy Code. The plaintiff, now a creditor of the debtor defendant, commenced this adversary proceeding to determine the dischargeability of the debt owed to her by the defendant under that 2009 Judgment Entry of the Common Pleas Court of Lucas County, Ohio. She filed her Complaint under 11 U.S.C. § 1328(a)(2) and § 523(a)(2), (a)(5), and (a)(6).⁵ She alleged that the debt was a domestic support obligation which is nondischargeable. The defendant filed his answer, agreeing that the Lucas County Common Pleas Court had awarded the plaintiff 25% of the retirement benefit that he was entitled to receive as of May 14, 1997. However, he denied the other material allegations of the Complaint.

A trial on the matter was held on October 2, 2012. Both parties were represented by counsel. The parties agreed that the debt at issue arose from the parties' divorce and that, under the divorce decree, the plaintiff was awarded 25% of the defendant's accrued monthly benefit from his interest in his retirement fund. In fact, the defendant specifically agreed that the amount awarded pursuant to the divorce decree, as described in paragraph 1 of the Complaint as an award to the plaintiff of "twenty-five percent (25%) of the accrued monthly benefit that the Defendant (Sullivan) was entitled to receive as of May 14, 1997, from the Defendant's interest in his retirement plan with the Civil Service Retirement System," was the amount that

⁵ Section 1328(a)(2) excepts from a chapter 13 discharge any debt of the kind specified in § 523(a)(5). Section 523(a)(5) provides that a discharge under § 1328(b) does not discharge an individual debtor from any debt for a domestic support obligation. The plaintiff also alleged, in Count II of her Complaint, that the debt was excepted from the debtor's discharge under § 523(a)(2), for money obtained by false pretenses, a false representation, or actual fraud; and under § 523(a)(6), for willful and malicious injury by the debtor. At trial, however, the plaintiff waived those claims on the ground that, despite her use of subpoenas, she was unable to obtain the documents necessary to support the second count.

the defendant was obligated to pay. However, the defendant's position was that the state court, in the 2009 Judgment Entry, had erroneously assessed the valuation of what the plaintiff would be entitled to receive under his retirement benefit plan by including terms not bargained for under the divorce decree.

The plaintiff testified about the divorce and subsequent attempts to enforce the divorce decree in state court. The 2009 Judgment Entry was admitted in evidence without objection. She further testified that, after the defendant appealed that Judgment Entry to the state appellate and supreme courts without success, her attorney prepared a new QDRO. She would have received her first QDRO payment in 2011, she said; however, the defendant filed bankruptcy in December 2010. The plaintiff argued that the Ohio court, in that 2009 Judgment Entry, again affirmed her rights in the defendant's pension plan and deemed the judgment award of retroactive benefits to be in the nature of pension rights and sustenance to the plaintiff. She asked that the judgment amounts be held nondischargeable in the defendant's bankruptcy.

On cross examination, the defendant attempted to draw distinctions between the Final Judgment Entry of Divorce and the 2009 Judgment Entry. The court sustained the plaintiff's objection on the ground of collateral estoppel. It ruled that the divorce decree and subsequent judgments of the Ohio state court, affirmed on appeal, were final judgments that would not be relitigated in the bankruptcy court. It underscored that the issue before the bankruptcy court was the nondischargeability of the defendant's debt to the plaintiff.

The plaintiff then objected to the defendant's proffered Exhibit Number 6 on the ground that the defendant's exhibit and witness list had been filed untimely. The court sustained the objection and made clear that, under the court's Trial Order, any party's failure to submit his list timely would result in the court's disallowance of any and all of his exhibits and witnesses. It then called a recess to allow the defendant time for consideration of his trial position. After the break, counsel for the defendant had no further questions on cross examination.

Because plaintiff's counsel was unable to retrieve the documentation required to support the fraud claim of Count II of the Complaint, she rested her case under Count I after the testimony of the plaintiff. Counsel for the defendant then declined to call the defendant to the stand but argued that the defendant's assessment of his pension was quite different from the amount assessed in the 2009 Judgment Entry. Following the parties' closing statements, the court announced its preliminary ruling of the nondischargeability of the defendant's debt pursuant to § 1328(a)(2) and § 523(a)(5). It further held that the amounts specifically sought by the plaintiff, the state court judgment awards of \$76,185.92 in retirement pension rights and \$24,684.00 in fees and costs, were not dischargeable in the defendant's chapter 13 bankruptcy.

DISCUSSION

The issue before the court is whether the plaintiff's entitlement to a portion (25%) of the defendant's interest in his retirement plan is a debt that is excepted from the defendant's discharge pursuant to 11 U.S.C. § 1328(a)(2) and § 523(a)(5). Under the Bankruptcy Code, any debt "for a domestic support obligation" is not discharged in an individual debtor's bankruptcy under § 1328(b). A "domestic support obligation" is defined by § 101(14A) of the Bankruptcy Code. The statute provides:

(14A) The term 'domestic support obligation' means a debt that accrues before, on or after the date of the order for relief in a case under this title, . . . , that is –

(A) owed to or recoverable by –

- (i) a spouse, former spouse, or child of the debtor or such child's parent, legal guardian, or responsible relative; or
- (ii) a governmental unit;

(B) in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of such spouse, former spouse, or child of the debtor or such child's parent, without regard to whether such debt is expressly so designated;

(C) established or subject to establishment before, on, or after the date of the order for relief in a case under this title, by reason of applicable provisions of-

- (i) a separation agreement, divorce decree, or property settlement agreement;
- (ii) an order of a court of record; or
- (iii) a determination made in accordance with applicable nonbankruptcy law by a governmental unit; and

(D) not assigned to a nongovernmental entity, unless that obligation is assigned voluntarily by the spouse, former spouse, child of the debtor, or such child's parent, legal guardian, or responsible relative for the purpose of collecting the debt.

11 U.S.C. § 101(14A). When determining whether a particular debt constitutes a domestic support obligation, the court turns to federal bankruptcy law rather than state law. *See In re Reines*, 142 F.3d 970, 972 (7th Cir. 1998), *cert. denied*, 525 U.S. 1068 (1999). The party asking that a debt be considered a domestic support obligation has the burden of proof by a preponderance of the evidence. *See id.* at 973. In addition, the court construes exceptions to discharge strictly against a creditor and liberally in favor of the debtor. *See Goldberg Secs., Inc. v. Scarlata (In re Scarlata)*, 979 F.2d 521, 524 (7th Cir.1992); *Levin v. Greco*, 415 B.R. 663, 665 (N.D. Ill. 2009).

The plaintiff asserted that the state court determined that the defendant's obligation was "in the nature of pension rights and sustenance' and therefore maintenance, [and] should be res judicata for the purposes of the definition of a Domestic Support Obligation." R. 1, ¶ 12. In his Answer the defendant denied the validity of the state court decision. At trial the plaintiff produced the state court 2009 Judgment Entry documenting the court's reasoning and conclusion on the matter. She argued that the judgment had a collateral estoppel effect in this court. The defendant, on cross examination, then attempted to introduce an exhibit to challenge the plaintiff's earlier testimony, and plaintiff's counsel objected to the exhibit as one found on the defendant's untimely filed list of exhibits and witnesses. The court sustained the objection and held that the defendant's exhibits and witnesses were inadmissible at trial.

That ruling of inadmissibility was based upon the court's Trial Order of April 25, 2012, which set forth its instructions on trial preparation. It required that each party's exhibit and witness list was to be exchanged ten days prior to the trial date of August 14, 2012. The Order expressly stated:

A failure by any party timely to submit such a list shall be deemed by the court to be a waiver by that party of its right to call ANY witness or to offer ANY evidence at trial.

R. 19. The court later rescheduled the trial for October 2, 2012, but that Order again explicitly stated that the parties remained bound by the April 25, 2012 instructions. *See* R. 30.

The plaintiff timely filed her exhibit and witness list; however, the defendant's list was filed almost two months late. In fact, it was filed less than ten days before the continued trial date, as well, and no request for an extension of time within which to submit the list was made. Accordingly, the court determined that the defendant waived the opportunity to submit evidence or witnesses. *See* N.D. Ind. L.B.R. B-7016-1(d)⁶; *In re Alejandro*, 2007 WL 4893518 at *1 (Bankr. N.D. Ind. Dec. 6, 2007) (finding, after parties' failure to file timely submissions, that it was appropriate to dispose of the matter without a hearing). It has long been this court's practice to require the timely exchange of exhibit and witness lists before trial, and it enforces the rule strictly when requested to do so by a party. The defendant, fully apprised of the court's rule in the court order, waived his opportunity to submit evidence or witnesses.

The court's ruling that the 2009 Judgment Entry of the Ohio state court had collateral estoppel effect was also based on a long-standing, firm legal foundation. At trial the court refused to relitigate the findings made by the Ohio state courts and held that those determinations were entitled to collateral estoppel effect in this subsequent bankruptcy proceeding. That holding is well supported in this circuit. *See In re Davis*, 638 F.3d 549, 554 (7th Cir. 2011) (citing *In re Catt*, 368 F.3d 789, 792 (7th Cir. 2004)); *Garoutte v. Damax, Inc.*, 400 B.R. 208, 211-12 (S.D. Ind. 2009); *In re White*, 444 B.R. 887, 891-94 (Bankr. S.D. Ind. 2010). It was clear that the defendant had received full and fair hearings throughout the divorce and subsequent proceedings. Having reviewed the record, the court found (and the defendant did not argue otherwise) that there was a final judgment on the merits in a state court of competent jurisdiction; that there was identity of the issues; and that the parties before this court were the parties in the prior actions.

⁶ The Local Rule, amended to conform with the time computation changes in the Federal Rules of Bankruptcy Procedure, now requires that exhibits be exchanged "no later than fourteen (14) days prior to trial."

The doctrine of collateral estoppel applies in adversary proceedings. *See Grogan v. Garner*, 498 U.S. 279, 285 n. 11, 111 S. Ct. 654, 658 n. 11, 112 L.Ed.2d 755 (1991); *In re McCarthy*, 350 B.R. 820, 831 (Bankr. N.D. Ind. 2006). The court concluded in open court and now reiterates that the prior state court judgment before this court, the 2009 Judgment Entry, has preclusive effect in this bankruptcy court.

Returning now to the question whether the debt at issue is nondischargeable, the court considers whether the plaintiff has satisfied her burden of proving § 523(a)(5), the statutory exception to discharge, by showing that the debt was for a domestic support obligation as defined by § 101(14A). There was no dispute that the debt accrued before the date for the order for relief; that it was owed to a former spouse; that it was established by a divorce decree; and that it was not assigned to a nongovernmental entity. The parties disagreed only about whether the plaintiff's interest in the defendant's pension plan was "in the nature of alimony, maintenance, or support" and thus was nondischargeable pursuant to § 523(a)(5).

Whether a debtor's obligation is "in the nature of alimony, maintenance, or support" is demonstrated by the parties' intent at the time of the dissolution of the marriage. *See In re Reines*, 142 F.3d at 973. That intent may be discerned through the testimony of the parties, the allegations in the pleadings, and the language of the divorce decree. *See In re Bornemann*, 2008 WL 818314 at *2 (S.D. Ill. Mar. 21, 2008). However, the court is not bound by the labels attached to obligations in the dissolution judgment. *See id.* (citing *In re Reines*, 142 F.3d at 972). Moreover, the legislative history of § 101(14A) commented that the debt may not be expressly designated as support and thus that "an inquiry as to the intention of the parties or the state court judge is required." *In re Bowen*, 2010 WL 1855871 at *2 (Bankr. E.D.N.C. May 7, 2010); *see also In re Hayden*, 456 B.R. 378, 382 (Bankr. S.D. Ind. 2011) (reviewing the totality of the circumstances in determining whether a debt is nondischargeable as a domestic support obligation).

In the 2009 Judgment Entry, the Honorable Donald L. Ramsey, Judge of the Common Pleas Court of Lucas County, Ohio, deemed the defendant's monthly pension benefits awarded to the plaintiff to be "in the nature of pension rights and sustenance to the Plaintiff." R. 1, Ex. 1 at 2. This court specifically

considered those findings made in the state court proceedings, along with the plaintiff's testimony that the retirement benefits qualified as obligations in the nature of support. It also weighed the defendant's argument that the plaintiff was indeed entitled to the pension benefits under the divorce decree but was not entitled to the assessed valuations awarded in the 2009 Judgment Entry. The defendant did not present evidence of the intention of the parties at the time their marriage was dissolved. Nor did he argue that the pension benefits were in the nature of a property settlement, as defined in § 523(a)(15), which would not be excepted from a chapter 13 discharge under § 1328(a)(2). The sole direct evidence of intent was found in the 2009 Judgment Entry, which stated that the award of pension benefits was "in the nature of pension rights and sustenance to the Plaintiff." *Id.* Based upon the testimony and evidence in the record before it, the court concludes that the plaintiff's interest in the defendant's pension benefits constitute a nondischargeable debt in the nature of maintenance and/or support pursuant to § 523(a)(5).

The court finds that the plaintiff successfully carried the burden of demonstrating, through the language of the 2009 Judgment Entry, that the retirement pension benefit was in the nature of support and thus was a domestic support obligation that is excepted from the defendant's discharge under § 523(a)(5) and § 1328(a)(2). It further finds that, when the burden shifted back to the defendant, he utterly failed to persuade the court that the debt to the plaintiff, or any part of the debt awarded under the 2009 Judgment Entry, was dischargeable in the defendant's chapter 13 bankruptcy.

The court also determines that the plaintiff's attorney fees related to the pension benefit debt awarded to her are compensable as a nondischargeable divorce-related obligation, as well. *See In re Hying*, 477 B.R. 731, 736 (Bankr. E.D. Wis. 2012); *In re LyMBERPOULOS*, 453 B.R. 340, 344 (Bankr. N.D. Ill. 2011). The court concludes that the plaintiff proved by a preponderance of the evidence that the defendant's obligation to her – in the sums of \$76,185.92 in retirement pension benefits owed for the period between November 1, 2003, and December 1, 2008; and \$24,684.00 in fees and costs, plus postjudgment interest

thereon – constitutes a domestic support obligation that is nondischargeable in the defendant’s bankruptcy.

CONCLUSION

For the reasons stated above in this Memorandum of Decision, the court grants the relief requested in the Complaint for Determination of Dischargeability of the Debt filed by the plaintiff Janet M. Reimer against the defendant, chapter 13 debtor Daniel James Sullivan. The court holds that the pension benefit obligation owed to the plaintiff by the defendant constitutes a domestic support obligation that is not discharged in the defendant’s chapter 13 bankruptcy. It further holds that the domestic support obligation, in the specific amounts of \$76,185.92 in retirement pension benefits plus \$24,684.00 in attorney fees and costs and postjudgment interest thereon, is excepted from the defendant’s discharge pursuant to 11 U.S.C. § 523(a)(5) and § 1328(a)(2).

SO ORDERED.

/s/ HARRY C. DEES, JR.
Harry C. Dees, Jr., Judge
United States Bankruptcy Court