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ADV. NUMBER: 89-0044

JUDGE: M. A. Mahoney

PARTIES: Nikolas Alexander Janovski, T. L. Paramanandhan

CHAPTER: 7

ATTORNEYS:

DATE: 10/24/96

KEY WORDS:

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

In Re

NIKOLAS ALEXANDER JANOVSKI,

Case No. 88-12259-MAM-7

Debtor.

T. L. PARAMANANDHAN,

Plaintiff,

v.

Adv. No. 89-0044

NIKOLAS ALEXANDER JANOVSKI,

Defendant.

ORDER DENYING MOTION TO REOPEN CASE

This matter is before the Court for further hearing on the Motion of the Debtor, Nikolas A. Janovski (Janovski), to Reopen Case. The Court has already ruled in an order dated August 29, 1996, that the case need not be reopened to allow consideration of the issue raised by Janovski. The issue to be considered is whether a garnishment presently in effect against Janovski's Social Security benefits should be released. This Court has jurisdiction to hear this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the Order of Reference of the District Court. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). For the reasons stated below, the Court is denying the motion of Dr. Janovski in its entirety at this time.

The issue to be addressed is whether the order from Cook County Circuit Court dated January 10, 1990, precludes any further garnishment of Janovski's Social Security benefits by his former spouse, Dr. Paramanandhan (Paramanandhan), based upon the language of the order constituting a release or satisfaction of the debt. The debt for which Janovski was being garnished resulted from the parties' division of property at their divorce in 1978.

FACTS

The Court incorporates by reference the facts stated in its August 29, 1996 order which is attached. The Court heard further testimony at a hearing held on September 25, 1996. That testimony and evidence offered was not considered as evidence for purposes of this ruling as discussed below. The Court did consider certain facts ascertainable from a review of the court file.

Dr. Janovski and Dr. Paramanandhan, his former spouse, litigated several issues in regard to support of their two sons in this Bankruptcy Court and in the Circuit Court of Cook County, Illinois, over the years. One issue was present and future child support payments. The other was an issue about an account which the parties agreed to hold for their sons' college education.

At the time of his bankruptcy case, Dr. Janovski was paying monthly support for his minor sons. On June 2, 1989, Janovski filed a "Petition to Compromise Claim for Current and Future Accruing Child Support" in the Bankruptcy Court. The motion sought to allow him to pay a lump sum of \$10,524 in exchange for a total release of all child support now owed or hereafter accruing except as to the alleged support which is the subject of an adversary proceeding in Adversary Case Number 89-0044." (Underlining added for emphasis.) The matter was set for hearing. No objections to the compromise were raised. On August 3, 1989, the Bankruptcy Court entered an order which allowed Dr. Janovski and Dr. Paramanandhan to settle their child support issues as requested. The order also excepted from its scope "the alleged support which is the subject of the adversary proceeding in Adversary Case Number 89-0044 pending in this Court."

Adversary Case 89-0044 dealt with the dischargeability of a debt (the Promissory Note Debt) which arose from Article V of the Janovski/Paramanandhan Supplemental Judgment to

Judgment of Dissolution of Marriage entered August 2, 1978 by the Circuit Court of Cook County, Illinois. The supplemental judgment was entered December 20, 1978. It stated:

ARTICLE V. 1. Husband and Wife shall each contribute to the college and professional school education expenses of the children according to the reasonable needs of said children and the ability to pay and contribute of the respective parties.

ARTICLE V. 5. That the parties presently own in joint tenancy approximately \$35,000.00 on deposit at the Palatine National Bank in Palatine, Illinois. That by a separate agreement dated August 31, 1977, the parties have agreed to hold said monies as Trustee for the benefit of their two minor children for their education. The parties further agree that said monies shall be applied towards the children's college education.

With Paramanandhan's consent, Janovski borrowed \$16,000 from the account on October 7, 1980, to pay a tax debt. Janovski executed a promissory note stating he would repay the debt with interest in six months. According to the complaint, the debt was never repaid prior to the bankruptcy filing of Janovski and he owed approximately \$42,423.45 as of January 1, 1989 on the debt.

On September 5, 1989, the Bankruptcy Court declared the Promissory Note Debt to be nondischargeable in Dr. Janovski's bankruptcy case pursuant to 11 U.S.C. § 523(a)(5). The judgment is final. It is this judgment which has resulted in the garnishment which has been

placed upon Dr. Janovski's Social Security benefits. The decision was affirmed on appeal by the District Court on March 25, 1993, in an opinion which is attached.

After the Bankruptcy Court's order of August 3, 1989, allowing the parties to compromise the child support debt, an order was issued by the Circuit Court of Cook County, Illinois, on January 10, 1990, which stated:

1. That NIHOLAS (sic) A. JANOVSKI . . . shall cause to be paid to THANAM LAKSHMI PARAMANANDHAN JANOVSKI a certain cashier's check in the amount of \$10,000 . . . and that said sum has been paid in open court and, consequently, this obligation is fully satisfied.

2. By the payment of the \$10,000.00, . . . NICHOLAS (sic) A. JANOVSKI, is forever discharged and released from any and all further obligations to [Paramanandhan] as and for the care, support and maintenance of the parties' two minor children.

3. That [Paramanandhan] shall be forever barred from making any further claims for child support from [Janovski] and shall be further barred from making any claims for any medical, hospital or dental care against [Janovski] for the parties' two children.

4. That [Janovski] shall not have to make any further payments of any kind, nature or description, in behalf of the two children.

LAW

The dispute between the parties is over the effect of the January 10, 1990 Cook County Circuit Court order. Dr. Janovski claims it releases him from all debts related to his child support obligations to his two sons forever, including the Promissory Note Debt at issue in Adversary Case No. 89-0044. Dr. Paramanandhan claims it releases Dr. Janovski from all child support obligations too—except the one related to the Promissory Note Debt.

Dr. Janovski's position is incorrect for several reasons. First, the Bankruptcy Court order of August 3, 1989, was clear. It only allowed a compromise of the child support debts so long as the debt at issue in Adversary Case No. 89-0044 was excepted. Second, if Dr. Janovski truly believed that the January 10, 1990 Cook County order released him, in spite of the Bankruptcy Court order stating otherwise, he waived his right to assert the defense to Paramanandhan's garnishment by not asserting it for over six years in the Bankruptcy Court in response to various acts taken by Paramanandhan to collect the debt.

PROCEDURAL ISSUES

Prior to the hearing held by the Court on the effect of the Cook County order, several procedural and evidentiary motions were filed. Paramanandhan sought admissions from Janovski on a shortened schedule; sought to offer a transcript of a hearing in Cook County Circuit Court on May 18, 1989, as evidence; and sought to allow Paramanandhan's testimony by affidavit. Janovski opposed these motions and requests. For purposes of this ruling, the Court is denying all of the preliminary motions of Paramanandhan, and, to the extent they were granted, setting them aside, and granting Janovski's motion to exclude the transcript and Paramanandhan's testimony. Neither the transcript nor Paramanandhan's testimony are necessary to reach a decision in this matter.

BANKRUPTCY COURT AUTHORIZATION OF COMPROMISE

As the language of the August 3, 1989 bankruptcy order clearly stated, Dr. Janovski was not given authority to compromise his prepetition debt to his sons established by the Supplemental Judgment when he was authorized to settle all other child support claims. Therefore, the Bankruptcy Court retained jurisdiction over the Promissory Note latest issue.

Once a bankruptcy case is commenced, the district court, and through it the bankruptcy court, has original and exclusive jurisdiction over the case and all of the debtor's property. 28 U.S.C. §§ 1334(a) and (e). The bankruptcy court, through the district court, also has original but not exclusive jurisdiction over “all civil proceedings arising under title 11, or arising in or related to a case under title 11.” 28 U.S.C. § 1334(b). The jurisdiction conferred by title 28 is broad. *Matter of Lemco Gypsum, Inc.*, 910 F.2d 784 (11th Cir. 1990); *Wood v. Wood (In re Wood)*, 825 F.2d 90 (5th Cir. 1987). The validity and extent and dischargeability of prepetition claims are clearly issues within the jurisdiction and power of bankruptcy courts. 28 U.S.C. § 157(b)(2)(B). *See, Harrell v. Sharp (In re Harrell)*, 754 F.2d 902 (11th Cir. 1985) (bankruptcy court has authority to determine dischargeability); *Lawson v. Lackey (In re Lackey)*, 148 B.R. 626 (Bankr. N.D. Ala. 1992) (bankruptcy court may consider allottable treatment of claims in a plan); *Townsend v. Townsend (In re Townsend)*, 155 B.R. 235 (Bankr. S.D. Ala. 1992) (bankruptcy court may consider whether support obligations are claims at all as defined in 11 U.S.C. § 101(5)). However, if a party wishes to have a matter heard by another court, the party can ask to have the bankruptcy court abstain from hearing the matter or seek relief from the stay to have the matter heard in another court.

If Dr. Janovski wished to have the issue of his Promissory Note Debt heard and resolved by the Cook County Circuit Court, he could have sought abstention pursuant to 28 U.S.C. § 1334(b) or relief from the stay pursuant to 11 U.S.C. § 362. He did not. Therefore, the Bankruptcy Court never gave up its core jurisdiction over the matter. The order of the Cook County Circuit Court was ineffective as to the Promissory Note Debt. It only affected the child support debt of Janovski not covered by Adversary Case No. 89-0044.

Dr. Janovski argued that this Court should give full faith and credit to the state court's order. 28 U.S.C. § 1738; *Boyer v. Greenway (Matter of Greenway)*, 71 F.3d 1177 (5th Cir. 1996). This Court is doing so to the extent the order was within the state court's jurisdiction. *Fleet Consumer Discount Co. v. Graves (In re Graves)*, 33 F.3d 242, 247 (3d Cir. 1994). The state court could not take jurisdiction over a matter the bankruptcy court had not released from the stay or abstained from hearing. Actions taken in violation of the stay are void and without effect. *Borg-Warner Acceptance Corp. v. Hall*, 685 F.2d 1306 (11th Cir. 1982).

WAIVER AND RELEASE

Dr. Janovski's own actions in relation to Adversary Case No. 89-0044 support this position. For over six years after the Cook County order, he allowed the garnishment of his Social Security benefits without raising the applicability of the order to the garnishment. In fact, he even appealed a ruling of Judge Briskman about the properly garnishable amount without ever raising the January 10, 1990 order which supposedly discharged the debt. This lack of action implies that Dr. Janovski knew what the order was supposed to cover, even though its language, standing alone, appears broader.

Due to this failure to raise the issue in any timely fashion, even if the Court were wrong on the plain meaning of Judge Briskman's August 3, 1989 order and its effect on jurisdiction, the Court would rule that Dr. Janovski has waived his right to raise the order as a defense now. In a similar situation in Tennessee, a party who chose to perform under a written agreement for nearly two years was found to have ratified it and was estopped from claiming economic duress to avoid it. *Crocker v. Schneider*, 683 S.W.2d 335 (Tenn. App. 1984). Garnishments have occurred in this case since 1992. Janovski has filed motions to stay the garnishments, to

reconsider the garnishments, and to lower the garnished amount. None of the motions have raised release as a defense in four years. It is simply too late to do so now.

Payment and release are also affirmative defenses under Fed. R. Civ. P. 8 and Fed. R. Bankr. P. 7008. If affirmative defenses are not raised in answer to a complaint, they are waived. *George R. Hall, Inc. v. Superior Trucking Co., Inc.*, 532 F. Supp. 985 (D.C. Ga. 1982). *See also, GAF Corp. v. Poston*, 656 So.2d 1225 (Ala. Civ. App. 1995); *Lovelace v. Webster*, 656 So.2d 862 (Ala. Civ. App. 1995). In this case, Janovski answered the complaint in Adversary Case No. 89-0044 long before the January 10, 1990 order. However, he never raised the defense in any subsequent pleadings in this Court's file. That failure constitutes a waiver. *Cannon v. H. K. Porter Company, Inc.*, 705 F. Supp. 288 (E.D. Va. 1989) (failure to raise defense of release as soon as potential defense was known constitutes a waiver under Fed. R. Civ. P. 8).

~~CONCLUSION~~

Dr. Janovski's motion must fail. The Bankruptcy Court never gave up jurisdiction over the issues raised in Adversary Case No. 89-0044; therefore, the Cook County order did not affect the Promissory Note Debt. Even if the Cook County Circuit Court had jurisdiction and authority to enter an order affecting the Promissory Note Debt, Dr. Janovski waived his right to assert it as a defense in this adversary case by failing to raise it as a defense in a timely fashion.

THEREFORE IT IS ORDERED:

1. The motion of Paramanandhan to shorten time for response to request for admissions is DENIED and the prior granting of the motion is SET ASIDE.
2. The motion of Paramanandhan to submit testimony by affidavit is DENIED.

3. The motion of Janovski to set aside order granting motion to shorten time is GRANTED.

4. The motion of Janovski to reconsider motion to give testimony by affidavit is GRANTED.

5. The Motion of the Debtor to Reopen Case is DENIED.

Dated: October 24, 1996

MARGARET A. MAHONEY
CHIEF BANKRUPTCY JUDGE