In the United States Bankruptcy Court

for the Northern District of Iowa

MARGARET PAULINE BRIDENSTINE Debtor.	Bankruptcy No. L-92-01219C Chapter 7
GERALD BRIDENSTINE Plaintiff vs. MARGARET PAULINE BRIDENSTINE Defendant.	Adversary No. 92-1215LC

ORDER

Trial in the above captioned matter was held on October 12, 1993. Plaintiff Gerald Bridenstine appeared with Attorney David McManus. Defendant/Debtor Margaret Bridenstine appeared with Attorney Michael Kennedy. Evidence was presented after which the Court took the matter under advisement.

STATEMENT OF THE CASE

The parties were married on August 30, 1975. They were granted a dissolution as the result of a stipulation and settlement agreement filed with the Iowa District Court on January 22, 1992. (Plaintiff's Exhibit 1). Debtor filed her bankruptcy petition on June 26, 1992. Plaintiff has filed an adversary proceeding seeking denial of discharge under 11 U.S.C. 727 and exception to discharge under 523.

FINDINGS OF FACT

Plaintiff first argues Debtor should be denied discharge because of failure to disclose assets in her bankruptcy schedules. This claim refers to Debtor's failure to list a Metropolitan Life retirement account which she held through the University of Iowa. Debtor began working at the University of Iowa in 1983. At that time, employees had the option of contributing to a Metropolitan Life retirement plan as well as TIAA-CREF. Debtor had both for some time. In the dissolution decree, Debtor received her entire TIAA-CREF plan because Plaintiff also had a retirement plan of approximately equivalent value. The parties retained these retirement plans without distribution.

However, Debtor had the additional retirement plan from Metropolitan Life. At the time of the dissolution, it was valued between $42,000 and $45,000. The dissolution decree provided for a Qualified Domestic Relations Order which transferred a one-half interest in the plan to Plaintiff. Distribution was not to be made until retirement. However, Metropolitan Life erroneously made an early distribution to Plaintiff of approximately $22,000 in September 1992. Debtor's half interest will not be distributed until retirement as provided by the plan. Debtor did withdraw 10 percent of this plan in January of 1992. This is permissible under retirement account rules as well as Metropolitan Life policy provisions.

Plaintiff asserts Debtor did not list all assets at the time of the filing. Primarily he asserts that she did not list the remainder interest she had in this Metropolitan Life retirement policy. Debtor admits that she did not declare either the TIAA-CREF or the Metropolitan Life retirement plans. She testified that she informed her attorney of their existence.

He asked if they were presently available for distribution and, when she said that they were not, he stated that she should not worry about them. As a result, they were not listed.

At this time, her attorney was closing his Iowa practice and leaving for Louisiana. Additionally, the parties had residential property which was being foreclosed. Because of the foreclosure, Debtor was desirous of getting the bankruptcy petition on file as soon as possible to gain the benefits of the automatic stay. Her attorney was under some time pressure to file; both to allow him to close his practice and to stay the foreclosure proceedings. The petition was presented to Debtor on the Friday before the Monday when the foreclosure was to take place. Because it was important to her to get the petition filed, she read the schedules hastily and there were omissions.

Debtor testified that it was her intent to fully disclose all assets and liabilities. She stated she did not knowingly or intentionally omit either of the pension plans or any creditors from the schedules. She testified that when she found out about the omissions she contacted Attorney Kennedy and the schedules were amended. The amendments were filed with the Court on October 6, 1992 listing the Metropolitan Life retirement account and the TIAA-CREF account as well as a court-ordered child support obligation which was also omitted from the original schedules.

Plaintiff also points out that two additional creditors are reflected in answers to interrogatories (Plaintiff's Exhibit 7). Interrogatory No. 1 lists a debt owed by Debtor to her mother. This was not listed on the schedule of creditors. Debtor explained that while she did owe her mother money pre-petition, her mother had forgiven this debt and it simply was not an obligation at the time of the filing of the bankruptcy. Additionally, there is a debt listed to a Bill Ruppert of $400. Debtor indicates that she is unsure what the debt is for or why it was not listed on her schedules.

Plaintiff's second issue relates to the dissolution stipulation (Plaintiff's Exhibit 1, page 17 at paragraph xvii) which states that Debtor will pay one-half of the 1989 income taxes plus any interest and penalty. The total income tax obligation was eventually determined to be approximately $13,000. This tax resulted from the parties' 1989 joint tax return and was listed as their joint obligation. This tax resulted from Plaintiff's employment with the Hy-Vee Corporation. When Plaintiff terminated his employment, he received a substantial retirement account disbursement. No tax was withheld and when the $13,000 in taxes came due, the parties did not have the money available.

When Debtor filed for bankruptcy, the obligation to the IRS was less than 3 years old and, under 11 U.S.C. 523(a)(1), it was nondischargeable. When Debtor filed her Petition, the IRS honored the automatic stay and did not pursue her for the tax debt. The IRS was then negotiating with Plaintiff. Plaintiff offered to settle for $4,000. However, when Plaintiff received the $22,000 lump sum distribution from Metropolitan Life, the IRS broke off settlement negotiations and demanded Plaintiff pay the total $13,000 tax liability.

Plaintiff additionally claims that he paid State taxes from the parties' 1990 return in the amount of $262. This constituted one-half of the State obligation. The State did not make him pay Debtor's one-half. Nevertheless, Plaintiff wants Debtor to pay him because the State may, in the future, seek payment from him if she doesn't pay.

It is Plaintiff's position that under the stipulation each party was to pay one-half of the tax obligation. Eventually, he was required to pay the entire $13,000 obligation. Plaintiff asserts that he is subrogated to the rights of the IRS to claim this as nondischargeable and should be allowed to seek repayment post-bankruptcy.

BURDEN OF PROOF

This is a core proceeding pursuant to 28 U.S.C. 157(b)(2) (I) and (J). The party claiming an exception to discharge under 11 U.S.C. 523 and 727 has the burden of proof by a preponderance of the evidence. Grogan v. Garner, 498 U.S. 279, 111 S. Ct. 654, 661, 112 L. Ed. 2d 755 (1991). The preponderance of the evidence standard reflects a fair balance between effectuating the "fresh start" policy of the Bankruptcy Code and limiting the opportunity for a completely unencumbered new beginning to the "honest but unfortunate debtor". Grogan, 111 S. Ct. at 659.

OBJECTION TO DISCHARGE (11 U.S.C. 727)

The first issue is Plaintiff's objection to discharge under 727(a)(2), (a)(4)(A) and (a)(4)(D). Sec. 727(a) states, in pertinent part, as follows:

> a. The Court shall grant the debtor a discharge, unless -- . . . .
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> 2. the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed --
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> A. property of the debtor, within one year before the date of the filing of the petition; or
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> B. property of the estate, after the date of the filing of the petition; . . . .
>
> 4. the debtor knowingly and fraudulently, in or in connection with the case --
>
> A. made a false oath or account;
>
> . . . .
>
> D. withheld from an officer of the estate entitled to possession under this title, any recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs.

For a discharge to be denied under this section, it must be shown that there has been an intentional untruth in a matter material to the bankruptcy case. In re Ellingson, 63 B.R. 271, 276 (Bankr. N.D. Iowa 1986). Where assets of substantial value are omitted from the schedules, the court may conclude that they were omitted purposefully and with fraudulent intent. In re Topping, 84 B.R. 840, 842 (Bankr. M.D. Fla. 1988). However, the court should not deny a debtor a discharge under this section where matters or property omitted are of a trivial nature or of a low value. In re Montgomery, 86 B.R. 948, 956 (Bankr. N.D. Ind. 1988); In re Simone, 68 B.R. 475, 478-79 (Bankr. W.D. Mo. 1983). Also, the court should not deny discharge if the untruth is a result of mistake or inadvertence of the debtor. In re Joslin, No. X88-01209S, Adv. No. X89-0012S, slip op. at 10 (Bankr. N.D. Iowa April 13, 1990); In re Cook, 40 B.R. 903 (Bankr. N.D. Iowa 1984).

Plaintiff has failed to establish a knowing and intentional untruth or omission with fraudulent intent. Debtor points out that the retirement accounts would be exempt. In fact, when Debtor amended her schedules to include the retirement accounts she claimed them as exempt and no objection was raised to the exemptions. While exemptions are to be determined by the Court, their exempt status provides some evidence that Debtor had no intent to defraud. There was nothing to gain by hiding the retirement accounts because, in all probability, the Court would have determined them to be exempt.

The evidence fails to establish that the alleged debts to Debtor's mother and Bill Ruppert are binding obligations. They are inconsequential in nature and probably have been forgiven. Debtor's failure to schedule these debts is not a knowing and willful violation. It constitutes, at most, mere oversight of inconsequential impact.

The Court concludes that while there may have been omissions and errors in the filing of the schedules, they are adequately explained because of the time pressures on Debtor's former attorney and the foreclosure proceeding. Debtor did disclose the assets and debts to her original attorney and he simply omitted them from the schedules, possibly based on a misunderstanding. The fact that Debtor corrected the schedules as soon as the omission was discovered indicates a lack of fraudulent intent.

EXCEPTION TO DISCHARGE (11 U.S.C. 523(A)(1)

Plaintiff argues that he is entitled to subrogation of the IRS's right to claim the tax debt nondischargeable. Codebtors are given subrogation rights under 509(a) which provides that "an entity that is liable with the debtor on, or that has secured, a claim of a creditor against the debtor, and that pays such claim, is subrogated to the rights of such creditor to the extent of such payment."

Sec. 509 is essentially a statutory enactment of the common law doctrine of equitable subrogation. It has been consistently interpreted by applying equitable principles to compel "the ultimate discharge of an obligation by him who in good conscience ought to pay it". 17 Am. Jur. 2d Subrogation 1 (1990). Sec. 509 has been given broad application and has been interpreted to allow a debtor's former spouse to be subrogated to claims which the IRS could have brought against the Debtor. In re Cooper, 83 B.R. 544 (Bankr. C.D. Ill. 1988). In Cooper, the Court held that where a divorce decree provided that Debtor was responsible for the parties' entire tax liability, the former spouse was entitled to full indemnity. It is now almost unanimously accepted that this code section envisions the type of equitable subrogation which is presented in this factual context.

To derive some benefit from being subrogated, it is necessary that the underlying claim be nondischargeable. In this case, it is undisputed that the IRS would have had a nondischargeable claim against the Debtor under 523(a) if the Plaintiff had not paid the joint tax obligation.

The next issue presented is whether a codebtor, who is subrogated to the IRS claim, is also subrogated to the IRS's right to have the tax debt declared nondischargeable. The tax in this case would be indisputably excepted from discharge if not paid by the Plaintiff. A majority of the Courts considering the issue have concluded that one who pays tax claims for another can be subrogated to the right of the taxing authority to seek an exception to discharge. In re Caffrey, 77 B.R. 219, 221 (Bankr. W.D. Mo. 1987) (finding debt to former spouse for payment of taxes nondischargeable); In re Fields, 926 F.2d 501, 504 (5th Cir.), cert. denied, 112 S. Ct. 371 (1991) (applying rule to payment of state taxes by surety). The majority of Courts conclude that where the Debtor owes a former spouse for a tax obligation imposed under their divorce decree, the debt is characterized as an obligation for a tax and is, therefore, nondischargeable under 523(a)(1). Cooper, 83 B.R. at 548; see also In re Alloway, 37 B.R. 420, 423 (Bankr. E.D. Pa. 1984).

Based on the foregoing, it is the conclusion of this Court that having paid the tax, the Plaintiff is subrogated to the claim of the IRS under 509(a). While the Plaintiff is not entitled to a tax claim priority under 507(d), Plaintiff is subrogated to the right of the taxing authority to seek exception to discharge under 523(a).

A determination that the Plaintiff is subrogated to this tax obligation, however, does not complete the analysis. The Plaintiff seeks to have the entire debt declared nondischargeable. The parties' dissolution decree provides that Debtor is responsible for one-half of the $13,000 tax obligation. The final issue for the Court's determination is the extent that Plaintiff should be subrogated to this tax obligation. Sec. 509 is, in many respects, a codification of the common law doctrine of subrogation. Subrogation is, by its nature, purely equitable. Alloway, 37 B.R. at 423. The objective of subrogation is to do justice between the parties. Id. at 424. In addition to pure equitable principles, 509 incorporates concepts of contribution between joint debtors. The general rule between joint obligors is that if a joint debtor pays more than his or her pro rata share, that person is entitled to contribution against the other. Brown v. Brown, 269 N.W.2d 819, 822 (Iowa 1978). In the present application, the doctrines of equitable subrogation and contribution are not in conflict. The parties, in their decree of dissolution, stipulated that each would be responsible for one-half of the Federal tax obligation. Ultimately, this obligation was determined to be $13,000. While it is true that a large portion of the tax appears to have been generated from the Plaintiff's own income rather than from Debtor's, it also appears that these funds were received sufficiently in advance of the dissolution that the funds became commingled and used for family purchases and obligations. There is no evidence in this record to indicate that justice would not be served, as in Alloway, by enforcing the original dissolution decree mandating that each party would be responsible for one-half of the

$13,000 tax obligation. Enforcing this Stipulation would serve the purposes of subrogation under 509, principles of equitable subrogation, as well as principles of contribution.

It is the ultimate conclusion of this Court that the Plaintiff is subrogated to the IRS claim for taxes under 509. The underlying claim is a debt for tax and is nondischargeable under 523(a)(1). While subrogated to the status of the IRS, the Plaintiff is not entitled to a priority tax claim under 507(d). However, being subrogated to the claim of the IRS, the Plaintiff is authorized to seek an exception to discharge based on that claim. The amount and the extent of the subrogation is controlled by the language of 509, purely equitable principles of subrogation, and concepts of contribution. Applying all of these doctrines, it is the conclusion of this Court that the subrogated claim should be applied in the same manner and to the same extent as the parties' original agreement incorporated into their dissolution decree. This envisions that each party would pay one-half of the Federal tax obligation. The amount paid to the Internal Revenue Service by Plaintiff, by the Court's calculation, is $12,989.02. It is the determination of this Court that Debtor's tax obligation will be declared nondischargeable to the extent of one-half of that amount.

Finally, Plaintiff asserts that because of the payment and recomputation of Federal taxes, some State taxes for the 1990 Iowa tax return were also recomputed. Plaintiff asserts that he was required to make an additional payment of $262 to the State of Iowa. He testified that this constituted one-half of the obligation owing to Iowa as a result of the recomputed 1990 Iowa tax return. He testified that the State of Iowa did not require him to pay the additional one-half which is apparently owing to the State. Plaintiff seeks payment for the $262 because the State might later make claim against him for the remaining amount. However, 509, by its own language, allows subrogation to a codebtor only after the codebtor pays a claim. There is nothing in the language of 509 or case law which this Court has found which allows subrogation in anticipation of a potential claim. The Plaintiff is not subrogated to the rights of the taxing authority of the State of Iowa as he has not met the requirements of 509 mandating payment prior to being subrogated. The Plaintiff's claim for subrogation for State taxes is denied.

WHEREFORE, Plaintiff's claim that Debtor should be denied discharge under 727(a) is DENIED for the reasons set forth in this opinion.

FURTHER, Plaintiff's claim that Debtor's tax obligation should be declared nondischargeable is GRANTED to the extent that Plaintiff will be subrogated to the Internal Revenue Service tax claim in the amount of one-half of the sums paid for the reasons set forth in this opinion. The amount declared nondischargeable is $6,494.51 as computed in this opinion.

FURTHER, Plaintiff's claim that Debtor's tax obligation should be declared nondischargeable for Iowa taxes is DENIED for the reasons set forth in this opinion.

SO ORDERED this 3rd day of November, 1993.

PAUL J. KILBURG, Judge
U.S. Bankruptcy Court