UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

MARK STEVEN ROWAN — CASE NO. 98-65301

Debtor — Chapter 7

CHRISTINA L. ROWAN

Plaintiff

vs. — ADV. PRO. NO. 98-70998A

MARK STEVEN ROWAN

Defendant

APPEARANCES:

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DANIEL COHEN, ESQ.
Of Counsel

Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Presently before the Court is an adversary proceeding commenced by Christine L. Rowan ("Plaintiff") against her former spouse, Mark Steven Rowan ("Debtor"). Plaintiff seeks a determination that an award of attorney's fees in the amount of $3,995.03 to her pursuant to an

order of the Hon. John L. Murad, Justice, New York State Supreme Court, Oneida County ("State Court") is non-dischargeable pursuant to § 523(a)(5) of the U.S. Bankruptcy Code, 11 U.S.C. §§ 101-1330 ("Code").[1][2]

Plaintiff commenced the adversary proceeding by filing a complaint on November 25, 1998. On March 24, 1999, the Court signed an Order granting default judgment against the Debtor. A Judgment of default was signed by the Court on April 9, 1999, in the amount of $6,756.25,[3] plus continued monthly child support of $787.66 per month from January 29, 1999. An Amended Judgment of default was signed by the Court on May 21, 1999, deleting the language in the original Judgment which denied the Debtor's discharge pursuant to Code § 727(a) and (c) because said relief had not been sought in the complaint. The adversary proceeding file was administratively closed on June 21, 1999, and the Debtor's[4] case was closed on June 23, 1999. On September 9, 1999, the Debtor filed a motion to reopen the case in order to seek vacatur of the default Judgment. The Court granted Debtor's motion on September 9, 1999. A hearing on the Debtor's motion to vacate the default Judgment was originally scheduled for January 25, 2000, and adjourned several times on the consent of the parties. A hearing was

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[1] Debtor lists in Amended Schedule F, filed on September 24, 1998, $10,654.27 as owing to Plaintiff's counsel as an unsecured debt.

[2] Plaintiff's complaint also requested a determination of nondischargeability of child support arrears and past due medical expenses. At the trial of the adversary proceeding, the Debtor stipulated that amounts owed for child support or for medical expenses for the child incurred after the divorce was commenced are nondischargeable. Debtor reserved the right to contest the amounts owed, however.

[3] This amount reflected not only attorney's fees but also child support and medical expenses.

[4] The chapter 7 case was filed by the Debtor, as well as his current wife, Allison Joy Rowan.

ultimately held on August 1, 2000, at which time the Court concluded that the Plaintiff had failed to comply with Rule 7004(e) of the Federal Rules of Bankruptcy Procedure, which requires that service of the complaint be made within ten days after the summons is issued. In this case, the summons was originally issued on November 25, 1998, but it was not served on the Debtor until December 10, 1998, thereby making service ineffective as to the Debtor. On August 4, 2000, the Court signed an Order vacating the default Judgment.

On October 12, 2000, the Plaintiff filed an Amended Complaint. Issue was joined by the filing of an Answer by the Debtor on November 9, 2000. The trial was conducted on January 29, 2001, in Utica, New York. Following the close of proof by the Plaintiff, the Debtor moved for dismissal of the complaint. In lieu of closing arguments, both parties were provided with an opportunity to file memoranda of law. The matter was submitted for written decision on February 26, 2001.

JURISDICTIONAL STATEMENT

The Court has core jurisdiction over the parties and subject matter of this adversary proceeding pursuant to 28 U.S.C. §§ 1334, 157(a), (b)(1), and (b)(2)(I).

FACTS

On March 15, 1995, Plaintiff commenced an action in State Court seeking dissolution of her marriage to the Debtor by filing a summons and verified complaint. *See* Plaintiff's Exhibit

1. The Debtor failed to answer the summons and complaint and on November 29, 1995 a Judgment of Divorce was granted on consent. *See id.* Pursuant to the Judgment of Divorce, the Debtor was obligated to pay child support in the amount of $335.75 per month and his *pro rata* share of child care in the amount of $135.60, commencing November 1, 1995.[5]

On or about November 7, 1997, the Debtor filed a motion for paternity testing in State Court, and on or about November 19, 1997, Plaintiff filed a Notice of Cross-Motion seeking an order *inter alia* increasing Debtor's payments for day care and requiring the Debtor to pay outstanding child support obligations, medical expenses and attorney's fees in connection with the Debtor's motion and Plaintiff's cross-motion. Plaintiff also sought sanctions for what was alleged to be frivolous conduct on the part of the Debtor and an adjudication of contempt. Of particular relevance to the matter presently before the Court is the requirement in Judge Murad's Order of March 28, 1998, that the Debtor pay Plaintiff's attorney's fees of $3,995.03 "in connection with the aforesaid application and the application in opposition to [the] motion to compel blood grouping tests which motion was previously denied . . . ." *See* Plaintiff's Exhibit 2.

At the trial, Plaintiff acknowledged that she had requested her counsel to submit an affidavit to Judge Murad with respect to services performed in connection with her cross-motion and in response to her husband's motion for paternity testing. Plaintiff testified that at the time of the award by Judge Murad, she was without the financial resources to pay for those services. She explained that she was working, earning approximately $18,000 per year at the time. She

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[5] The couple had one son, Nicholas, born November 26, 1994. Plaintiff testified that he had special needs requiring physical, occupational and speech therapy, as well as special education.

was living on Catherine Street in Utica, New York, and was paying the mortgage on the property for which she, as well as her former father-in-law, was obligated. At some point, she found that she was unable to afford the payments and informed her former father-in-law of that fact. She then moved in with her parents. It was her testimony that her net income amounted to approximately $250 per week and she had had to borrow monies from her parents in order to supplement her income and meet expenses. At the same time, the Plaintiff acknowledged that in January 1998 she had received $471 from her husband in child support. She also received a check from her former father-in-law in January 1998 in the amount of $942, which she endorsed over to her attorney to reduce the amount of arrears owing for attorney's fees. *See* Debtor's Exhibit A. She testified that she had incurred approximately $12,000 in attorney's fees over the course of the divorce proceedings. She also acknowledged the receipt of $471 from her former father-in-law in March of 1998. *See id.* Again, the check was endorsed over to her attorney. No child support was received in February 1998. On cross-examination she admitted that she had not submitted an affidavit to Judge Murad setting forth her income and expenses for purposes of establishing her inability to pay the attorney's fees.

On August 19, 1998, the Debtor, along with his current wife, filed a voluntary petition pursuant to chapter 7 of the Code. Debtor lists in his Amended Schedule E an unsecured priority claim for alimony, maintenance or support. However, in his Amended Schedule F he lists Plaintiff as holding an unsecured nonpriority claim in the disputed amount of $6,061.68.

DISCUSSION

Code § 523(a)(5) excepts from discharge "any debt 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 . . ." provided such debt is actually in the nature of alimony, maintenance or support. 11 U.S.C. § 523(a)(5). It is well established in this Circuit that the payment of attorneys' fees to a former spouse in connection with proceedings arising out of a matrimonial action may be in the nature of alimony and support and, therefore, nondischargeable. *See Pauley v. Spong (In re Spong)*, 661 F.2d 6, 8 (2d Cir. 1981). As one court has noted,

> In any matrimonial action, whether it concerns the divorce, maintenance, support, custody, or post-decree proceedings implicating any of the foregoing, it is essential that each party be able to adequately represent its interest; accordingly, attorneys' fees owed to spouses are deemed to be in the nature of support.

In re Peters, 133 B.R. 291, 295 (S.D.N.Y 1991) (citations omitted), *aff'd* 964 F.2d 166 (2d Cir. 1992) (*per curiam*).

Whether an obligation is deemed to be in the nature of support is a question of federal bankruptcy law. *See Brody v. Brody (In re Brody)*, 3 F.3d 35, 39 (2d Cir. 1993) (citations omitted). Debtor's counsel points out that Plaintiff failed to furnish Judge Murad with an affidavit setting forth her income and expenses. However, the fact that Judge Murad made the award of attorney's fees implies a finding of financial need. *See In re Jarrell*, 251 B.R. 448, 452 (Bankr. S.D.N.Y. 2000). Judge Murad was familiar with the financial status of both parties, having presided over the matrimonial proceedings beginning in 1995. In his Order, Judge Murad denied Debtor's request for paternity testing and granted Plaintiff's cross-motion for the payment of arrears by the Debtor. He also found it appropriate to increase the amount the Debtor was to

pay in child care expenses. It is also clear that he had concerns about the Plaintiff receiving the monies awarded to her and her child such that he made sure she not only receive her share of rental income from real property owned by the two parties but that she also receive Debtor's share, thereby reducing any amounts he might owe to her. Judge Murad also required that the monies the Debtor owed her be secured by any award of equitable distribution. These provisions in Judge Murad's Order also weigh in favor of a finding that the award of attorney's fees was in the nature of support

At the trial, the Plaintiff testified that at the time of Judge Murad's Order, she was having difficulty meeting her expenses and had found it necessary to move in with her parents. It was her testimony that she had also borrowed money to meet her expenses. At the time, she was earning approximately $18,000 per year or net weekly income of approximately $250. The Debtor offered no evidence to dispute this testimony.

Based on the above findings, the Court concludes that the Plaintiff has met her burden by a preponderance of the evidence and has established that the award of attorney's fees was in the nature of support.

It is hereby

ORDERED that the Debtor's obligation to pay attorney's fees awarded to the Plaintiff by virtue of Judge Murad's Order of March 28, 1998, is determined to be nondischargeable pursuant to Code § 523(a)(5); and it is further

ORDERED that the Debtor's obligation to pay child support and medical expenses for the child to the Plaintiff by virtue of Judge Murad's Order of March 28, 1998, as stipulated to by the Defendant at the trial, is determined to be nondischargeable pursuant to Code § 523(a)(5),

without any finding by this Court as to the amount; said amount being a matter for determination by the State Court.

Dated at Utica, New York

this 27th day of June 2001

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge