UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

LEO I. MANNING CASE NO. 90-027l5

Debtor

JOY C. MANNING,

Plaintiff

vs. ADV. PRO. NO. 9l-600l8A

LEO I. MANNING,

Defendant

APPEARANCES:

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STEPHEN D. GERLING, U.S. Bankruptcy Judge

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

This adversary proceeding was commenced by the filing of a complaint by the Plaintiff, Joy C. Manning ("Plaintiff") against her former husband Leo I. Manning ("Debtor"), the Defendant herein. Plaintiff's complaint seeks a determination that the Debtor be denied a discharge with respect to the Plaintiff, presumably with regard to certain debts which arose out of a judgment of divorce granted to the Plaintiff and against the Debtor on June 28, l989 in the Supreme Court of the State of New York, Oneida County.

A trial was held on August l4, l99l, after which the Court reserved decision. Following the submission of memoranda by both parties, the proceeding was finally submitted for decision on September 4, l99l.

JURISDICTIONAL STATEMENT

The Court has jurisdiction over the parties and subject matter of this core proceeding by virtue of 28 U.S.C. §§1334(b) and l57(a), l57(b)(l) and (b)(2)(A,I,O).

FACTS

The facts as presented at trial are sketchy at best. It appears that the Plaintiff and Debtor became involved in a protracted and bitter divorce action some time in l987, which culminated in the aforementioned Judgment of Divorce on June 28, l989.

As a part of the Judgment of Divorce, Plaintiff was awarded certain items of and interests in property of the marriage.

The only exhibit received in evidence was a photocopy of a "Statement of Net Worth" of the Debtor executed May 6, l987, which appears to be only partially completed and which apparently had some relevance to the divorce action.

A review of the Plaintiff's complaint fails to disclose what statutory provision of the Bankruptcy Code (ll U.S.C. 1§101-1330) ("Code") she is proceeding under. Filed with the complaint is an adversary proceeding cover sheet (B104) which indicates that Plaintiff's "Cause of Action" is,

> Fraudulent misrepresentation by the debtor to the Plaintiff, to the New York State Supreme Court, constituting a non-dischargeable debt under Section 523(a)(2)(A) of the Bankruptcy code. Attached hereto and made a part hereof is the affidavit of the Plaintiff and her attorney, setting out the basis for the contention of fraud.

Additionally and in response to inquiry from the Court prior to the commencement of trial, Plaintiff's counsel referenced a cause of action under Code §523(a)(5).

Under the heading "Demand" on the Bl04, Plaintiff seeks $35,000" and under the heading "Other Relief Sought" reference is to "Items mentioned in Judgment of Divorce". A literal reading of the complaint leads to the conclusion that what Plaintiff is actually complaining about is the Debtor's secretion of assets in an effort to frustrate the transfers of property awarded to her by the state court in the Judgment of Divorce.

At trial, the Debtor acknowledged by stipulation that he had listed

the Plaintiff in his Petition and Schedules filed with this Court on November 5, l990 as an unsecured creditor in the amount of $25,000.00 dating back to l975.

Plaintiff contends that the Debtor failed to list the debt due and owing to her which arose from the Judgment of Divorce, that Debtor disposed of his assets before the divorce proceeding to deprive his creditors of the money due them, and that Debtor has failed to tell the truth under oath in denying that he ever had any assets.

Debtor argues that the provisions of the Judgment of Divorce must be construed as a property settlement not an award of alimony or maintenance and that Plaintiff has failed to prove any fraud citing a thorough review of those finances by the state court in the divorce action.

DISCUSSION

Viewing Plaintiff's complaint from the perspective of Code §523(a)(2)(A), she has failed to sustain her burden of proof by a preponderance of the evidence. See Grogan v. Garner, 111 S.Ct. 654, 112 L.Ed.2d 755 (l99l).

In order to utilize Code §523(a)(2)(A), Plaintiff must establish that 1) Debtor made a representation to Plaintiff; 2) that Debtor knew it was false; 3) that it was made with an intent to deceive; 4) that Plaintiff relied on the representation; and 5) that the Plaintiff suffered a loss as the result of the representation. See Van Horne v. Van Horne, 823 F.2d l285 (8th Cir. l987); Edelkind v. Alderman, l06 B.R. 3l5 (N.D.Ga. l989); In re Wheeler, l0l B.R. 39 (Bankr. N.D.Ind. l989).

The Court is unable to conclude from the evidence submitted by Plaintiff at trial that all of the necessary elements of Code §523(a)(2)(A) have been established by even a preponderance of the evidence. Plaintiff points to statements of the Debtor under oath that he disposed of all of his assets just prior to the divorce action as being contradicted by other testimony under oath that he had no stocks, bonds, bank accounts or investments since l98l.

The only testimony provided by Plaintiff was that of the Debtor who displayed continuous hostility toward Plaintiff's counsel and answered questions generally with half sentences and non-responsive statements.

Plaintiff succeeded in having one exhibit received in evidence which exhibit would tend to support Debtor's contention that prior to the commencement of the divorce action, apparently in l987, Debtor claimed to have very little in the way of tangible assets. (See Plaintiff's Exhibit E).

While it is true that a review of the Judgment of Divorce dated June 28, l989 portrays a much different picture of the Debtor's assets, such apparent inconsistencies do not rise to the level of proof necessary to establish nondischargeability under Code §523(a)(2)(A).

Statements made by the Debtor under oath or otherwise in connection with the existence or non-existence of presumed marital assets in the course of a difficult matrimonial proceeding without more are not the basis for finding nondischargeability.

Plaintiff has attempted to meet her burden of proof by attaching the Judgment of Divorce, affidavits, excerpts from a transcript of Debtor's testimony given at a prior time, photocopies of bank records and other miscellaneous documents to her complaint. With the exception of the Judgment of Divorce which neither party denies the existence of, the Court cannot consider the remainder of the "documentation" which was never received in evidence at trial.

It is apparent that since the parties have lived with the ongoing dispute between themselves for several years, Plaintiff incorrectly assumed that the facts involved in that dispute are such that this Court should somehow take judicial notice of them. See FEDERAL RULE OF EVIDENCE ("FRE") 20l.

Turning to the second cause of action, which Plaintiff asserted for the first time at trial, that found in Code §523(a)(5), the Court must determine whether the award made to Plaintiff by the state court in the divorce action constituted alimony, maintenance or support, or whether it was simply a property settlement between Plaintiff and Debtor.

Reading the Judgment of Divorce literally, it is apparent that what the state court intended was a property settlement. The next to last paragraph of the Judgment provides, "That the Court denies the plaintiff, Joy C. Manning, an award of maintenance in that the Court has made numerous lump sum awards in lieu of maintenance. The Court finds the division of property to be fair and reasonable and not unconscionable to either party;"

It is well-settled, however, that in determining which obligations constituted alimony, maintenance or support pursuant to Code §523(a)(5), Congress intended that bankruptcy law, rather than state law, be applied. See H.R.Rep. No. 95-595, 95th Cong., lst Sess. 364 (l977). Conversely, it is not the function of a bankruptcy court to modify or alter that which has been awarded to a former spouse by a state matrimonial court. See Forsdick v. Turgeon, 8l2 F.2d 80l (2d Cir. l987).

Thus, the bankruptcy court must focus its inquiry on the intention of the parties and the state court at the time the obligations are created. In re Gianakas, 9l7 F.2d 759, 762 (3d Cir. l990); Melichar v. Ost, 66l F.2d 300 (4th Cir. l98l); In re Calhoun, 7l5 F.2d ll03, ll09 (6th Cir. l983).

In the instant case there is little proof from which this Court can glean the intention of the Plaintiff and the Debtor in July l988, when their divorce proceeding went to trial culminating in the Judgment of Divorce dated June 28, l989.

There is no competent proof of the circumstances of the parties prior to the divorce other than that indicated in the Statement of Net Worth of the Debtor sworn to May 6, l987 (Plaintiff's Exhibit E).

That Statement indicates that both Plaintiff and Debtor, who had married in July l973, were retired. Debtor indicated his sole income was that received from "Railroad Retirement" presumably received monthly, in the sum of $l,l62.l2. Debtor listed numerous expenses, some incurred monthly, others apparently incurred annually, which appeared to exceed his monthly income.

Beyond that Statement and the Judgment of Divorce, the Court has no evidence from which it can ascertain either the pre-divorce circumstances of the parties or their intentions. Significantly, the Court has not been provided with any matrimonial agreement from which the intention of the parties might be determined. In fact, it appears that no such agreement was ever reached in light of the three day trial in the state court culminating in the Judgment of Divorce. Furthermore, there is no reference in the Judgment itself as to any such agreement. Thus, the Court is unable to analyze any factors from which the intention of the parties or for that matter, the state court may be determined. See In re Gianakas, supra 9l7 F.2d 762; In re Kaufman, ll5 B.R. 435, 440 (Bankr.

E.D.N.Y. l990; In re Campbell, 74 B.R. 805, 8l0 (Bankr. M.D.Fla. l987).

The Court is thus constrained by the language of the Judgment of Divorce and that clearly portrays the obligation of Debtor as one to make a property settlement with the Plaintiff, not one to pay alimony, maintenance or support. Accordingly, the Debtor's obligations under the Judgment of Divorce cannot be considered nondischargeable pursuant to Code §523(a)(5).

The Court will, however, view Plaintiff's complaint from the perspective of Code §727(a)(4) and (5), even though there is no reference to those Code sections found anywhere in the complaint.

Federal Rule of Bankruptcy Procedure ("FRBP") 70l5, which incorporates by reference Federal Rule of Civil Procedure ("Fed.R.Civ.P.") l5, permits the liberal amendment of pleadings to conform them to the proof actually elicited at trial, subject to certain procedural safeguards. Fed.R.Civ.P. l5(b) permits the amendment of pleadings at any time even after judgment, "but failure to so amend does not affect the result of the trial of these issues." Fed.R.Civ.P. l5(b).

The general rule of liberality was enunciated by the United States Court of Appeals for the First Circuit in D. Federico Co. v. New Bedford Redevelopment Auth., 723 F.2d l22, l26 (lst Cir. l983), wherein plaintiff sought to recover at trial on a theory of unjust enrichment which had not been pled. The court stated,

> Federal Rule of Civil Procedure l5(b) incorporated by reference in Rule 7l5 of the Rules of Bankruptcy Procedure, provides that when issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Rule l5(b) has rejected any concept that such amendments to conform with the evidence are barred if they result in a change of the Plaintiff's cause of action. The fact that it involves a change in the nature of the cause of action, or the legal theory of the action, is immaterial so long as the opposing party has not been prejudiced in presenting its case. See 3 Moore's Federal Practice §55.l3 (2d Ed. l976).

The First Circuit also noted that Fed.R.Civ.P. 54(c) and FRBP 7054 permit the trial court to grant relief to which the prevailing party is entitled even though not requested in the pleadings. Id. at pg. l26.

Faced with a similar factual scenario, the United States Bankruptcy Court for the Western District of Wisconsin in Matter of Nett, 70 B.R. 868 (Bankr. W.D.Wisc. l987), concluded that even though the plaintiffs had not alleged a cause of action under Code §727(a)(5) they were entitled to have the debtors' discharge denied pursuant thereto.

Bankruptcy Judge Robert Martin observed at page 87l that, "The fact that the amendment changes the legal theory of the action is immaterial so long as the opposing party has not been prejudiced in the presentation of its case."

Judge Martin went on to observe the Fed.R.Civ.P. l5(b) required a two part analysis, the first being "whether the contested issue was actually tried by the parties"; the second part being "whether the debtor had an opportunity to defend on the alternative theory." Id. at pg. 873. See also Hibernia Nat. Bank v. Perez, l24 B.R. 704, 707 (D.C. E.D.La. l99l); In re Gunn, lll B.R. 29l (9th Cir. BAP l990); In re Pollock, 90 B.R. 747 (Bankr. E.D.Pa. l988).

Plaintiff asserts in her post-trial memorandum that the Debtor has made conflicting statements regarding disposition of his assets, specifically on one occasion asserting that he had disposed of them prior to the divorce and on another occasion alleging that he had no assets from and after l98l. Such assertions, however, are not supported by the record before this Court so as to bring Debtor's actions within the scope of Code §727(a)(4).

While there does appear to be an obvious conflict between the financial picture as portrayed in Debtor's Statement of Net Worth sworn to May 6, l987, and the property settlement arrived at by the state court in the Judgment of Divorce dated June 28, l989, that, standing alone, does not bring Debtor's conduct within Code §727(a)(4).

Assuming, arguendo, that the Debtor made fraudulent misrepresentations regarding his assets in connection with the divorce action, it appears that as the result of three days of trial in state court, certain assets of the Debtor were ferreted out and appropriately allocated by the Judgment of Divorce.

Thus, such allegedly fraudulent statements regarding the existence of assets made prior to and in the course of the divorce action, were not made "in or in connection with the case" as required by Code §727(a)(4)(A). See

Matter of Ellison, 34 B.R. l20, l26 (Bankr. M.D.Ga. l983).

The Court does note, however, that there appears to be a significant discrepancy in the amount of property owned by the Debtor at the time of the divorce and that which Debtor listed in his Petition and Schedules filed pursuant to chapter 7 of the Code.

The Judgment of Divorce was entered June 28, l989 and Debtor filed his Chapter 7 Petition and Schedules on November 5, l990.

Thus, the Court may take judicial notice of the Debtor's Petition and Schedules even though not requested to do so by the Plaintiff or the Debtor. See FRE 20l(c); also In re Calder, 907 F.2d 953, 955 (l0th Cir. l990).

Debtor's petition indicates that as of the date of filing, he owned no real property, he had one account in Norstar Bank with a balance of $94.0l, household furnishings having a value of $350.00, wearing apparel worth $l00.00, a pistol worth $l5.00 and a l977 Cadillac valued at $l50.00.

Conversely, the Judgment of Divorce entered in the state court approximately seventeen months earlier granted Debtor a $6,000 credit against Plaintiff's share of the proceeds from the sale of "Elm Street property"; granted Debtor a further credit of $4,l97.5l for expenditures made in repairing "the property in Vernon, New York"; directed Debtor to transfer to Plaintiff $6,374.84 from the proceeds of the sale of the "Elm St. house"; to pay Plaintiff $7,804.43 "representing her share of the sale and disposal of certain stocks and bonds"; directed Debtor to pay Plaintiff one-half of the value of "American capital stock and Putnam stock as of the date Mr. Manning allegedly transferred those assets to his daughter"; pay to Plaintiff her one-half share in the value of an annuity policy; pay to Plaintiff one-half of a $l7,000 early retirement bonus Debtor received; pay to the Plaintiff one-half of withdrawals made by Debtor from several bank accounts and to finally pay Plaintiff for one-half the value of certain personal property.

Thus, from a reading of the Judgment of Divorce, one gets a much different picture of Debtor's assets in June l989 from those scheduled approximately a year and a half later upon Debtor's Chapter 7 filing.

Furthermore, while Plaintiff attempted to elicit testimony from the debtor which related to pre-divorce assets as opposed to pre-petition assets,

Debtor's responses and general demeanor as a witness prompts this court to seriously doubt the credibility of any of the Debtor's testimony.

Plaintiff's counsel sought to have the Debtor identify several exhibits relating to bank accounts, insurance policies and stock. Rather than identifying the exhibits or offering a plausible explanation for his inability to identify those exhibits, Debtor simply responded, "It don't mean nothing to me, its too far back"; or "Spent 'em fixing the house; or "I don't remember owning all that. If I owned all that I was well off and didn't know it."

Finally, on cross-examination by his own counsel, Debtor testified that all of his assets were utilized by him prior to his divorce to pay his existing bills incurred in the course of the marriage and that he had disposed of those assets two or three years prior to the filing of the bankruptcy case.

Such testimony and Plaintiff's Exhibit E are clearly contradicted by the Judgment of Divorce which divides up numerous assets as previously indicated between Plaintiff and Debtor and leads this Court to the conclusion that Debtor has failed to explain satisfactorily the loss of those assets though given every opportunity to do so at the trial. See In re Miller, 97 B.R. 760 (Bankr. W.D.N.Y. l989); In re Hendren, 5l B.R. 78l (Bankr. E.D. Tenn. l985).

While the Plaintiff had the initial burden of producing evidence in support of her complaint, once that burden is met, the Debtor has the burden of going forward with evidence to explain satisfactorily the loss of assets. See 4 COLLIER ON BANKRUPTCY ¶727.08 at 64 (l5th Ed.). Chalik v. Moorfield, 748 F.2d 6l6 (llth Cir. l984); Matter of Reed, 700 F.2d 986, 992-993 (5th Cir. l983).

Debtor here merely became argumentative with Plaintiff's counsel when questioned concerning these assets and then testified generally and somewhat confusingly in response to the inquiries of his own counsel that he used his assets prior to the divorce to pay existing marital expenses and that he had disposed of his assets two or three years prior to the filing of the bankruptcy case. "Testimony so cursory is insufficient and unpersuasive. More is required." In re Miller, supra. at 764.

Clearly, Debtor has failed to meet the burden of going forward with an explanation of how he can appear penniless both before and after the divorce action and yet, in the Judgment of the state court, after three days of trial,

be possessed of significant assets some seventeen months prior to filing his Chapter 7 case.

Having reached the conclusion that Plaintiff has established sufficient grounds by a preponderance of the evidence that Debtor has failed to satisfactorily explain before determination of denial of discharge, any loss of assets or deficiency of assets to meet his liabilities, to include that due and owing to Plaintiff. The Court must determine whether or not Debtor has been prejudiced by a change in the legal theory on which Plaintiff proceeded.

The thrust of Plaintiff's proof at trial, limited as it was, focused on various assets which Debtor repeatedly denied any knowledge of. Upon "Cross-examination" by his own counsel and presented with the opportunity to specifically articulate the status of such assets, Debtor chose instead to make vague self-serving responses to the effect that he had disposed of any such assets pre-divorce and pre-petition.

The Court, therefore, finds no prejudice to the Debtor and concludes that it may sua sponte permit the amendment of Plaintiff's complaint to assert a cause of action pursuant to Code §727(a)(5), a cause of action the Court has already concluded has been established by a preponderance of the evidence. See Grogan v. Garner, supra, 111 S.Ct. at 654.

The Court notes that while this adversary proceeding was pending a Discharge was granted to the Debtor on February 2l, l99l pursuant to FRBP 4004(c) and, therefore, that Discharge shall be revoked in accordance with this decision.

IT IS SO ORDERED.

Dated at Utica, New York
this day of January, l992

STEPHEN D. GERLING
U.S. Bankruptcy Judge