UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

ADELAIDE RACHA — CASE NO. 02-66704

Debtor — Chapter 7

A. J. BOSMAN

Plaintiff

vs. — ADV. PRO. NO. 03-80023

ADELAIDE RACHA

Defendant

APPEARANCES:

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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 A.J. Bosman, Esq. ("Plaintiff") by the filing of a Complaint on February 3, 2003, pursuant to § 523(a)(5) of the U.S. Bankruptcy Code, 11 U.S.C. §§ 101-1330 ("Code"). Issue was joined by the filing of an Answer on April 9, 2003, on behalf of Adelaide Racha ("Debtor").

A trial was conducted on October 16, 2003, in Utica, New York. In lieu of closing arguments, the Court required that the parties submit memoranda of law by November 17, 2003. The matter was submitted as of that date.[1]

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) and (O).

FACTS

On June 30, 2001, Plaintiff, as law guardian of the Debtor's children in a pending divorce action between Debtor and her former spouse, was granted an award of attorney's fees in the amount of $7,829.53 by Order (June 2001 Order) signed by the Hon. Robert F. Julian, New York State Supreme Court Justice ("Judge Julian" or "State Court"). *See* Plaintiff's Exhibit 1B. The Order provided that the Debtor was responsible for the payment of $2,600 of the total fees awarded. *Id.*

Previously, on May 21, 2001, Judge Julian had signed an Order (May 21, 2001 Order) providing that "the physical and emotional health of the children and the best interests of the

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[1] On November 17, 2003, the date fixed by the Court for the submission of memoranda of law, Plaintiff faxed a letter to the Court requesting that she be given a week's extension to file her memorandum of law. The Court denied the request in light of the lateness of the request and the fact that Debtor's counsel had complied with the deadline and had objected to her request for an extension.

children requires relieving the Defendant Wife of her statutory support obligation." *See* Debtor's Exhibit C.[2] According to the Order, the State Court, after considering the statutory factors set forth in New York Domestic Relations Law § 204(f), approved a stipulation, dated April 18, 2001, whereby the parties had agreed that the Debtor would not pay any child support. *Id.*

Ultimately, Judge Julian entered a Final Decree of Divorce on November 15, 2001. *See* Defendant's Exhibit B. Under the terms of the Divorce Decree, Debtor is to receive $10,000 per year in spousal maintenance for a period of five years. The Divorce Decree also provides that she is "hereby relieved of the obligation to pay child support . . . ."

On November 4, 2002, the Debtor filed a voluntary petition pursuant to chapter 7 of the Code. On her petition she lists her address as 8603 Sand Road, Barneveld, New York 13304 ("Barneveld address"). However, at the trial she testified that she actually resides at 8603 Sand Road, Remsen, New York 13438 ("Remsen address"). Plaintiff was listed on Schedule F of the Petition as an unsecured creditor with a claim of $2,600.

Plaintiff filed her Complaint *pro se* on February 3, 2003. *See* Plaintiff's Exhibit 1. Plaintiff seeks a finding by this Court that the $2,600 awarded to her by the State Court as law guardian fees is nondischargeable pursuant to Code § 523(a)(5) as being in the nature of support.

A summons was issued on February 4, 2003, by the Clerk of the Bankruptcy Court. *See* Plaintiff's Exhibit 2. According to the testimony of Anthony J. Fernicola ("Fernicola"), an employee in Plaintiff's law office, the Summons and Complaint were mailed to the Debtor at the Barneveld address. It appears that they were mailed on or about February 14, 2003, and returned

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[2] At the trial Plaintiff objected to the relevancy of the May 21, 2001 Order. The Court reserved on its admission. The Court finds that it has relevance given the fact that it was entered prior to the award of law guardian fees on June 30, 2001.

to Plaintiff on or about February 18, 2003, as being undeliverable. *See* Plaintiff's Exhibit 6. On March 19, 2003, at Plaintiff's request, a summons was reissued ("Reissued Summons") by the Clerk of the Bankruptcy Court. *See* Plaintiff's Exhibit 3. Fernicola testified that he had placed the envelope containing the Reissued Summons and Complaint in the mailbox located outside of Plaintiff's law office at 258 Genesee Street, Utica, New York. According to the certificate of service, filed April 1, 2003, the Reissued Summons and Complaint were mailed to the Debtor on Friday, March 28, 2003, at the Remsen address.[3] Debtor testified that she found the envelope containing the Reissued Summons and Complaint in the mailbox at the Remsen address on Monday, March 31, 2003. The envelope was not postmarked. *See* Debtor's Exhibit A. According to the Debtor, she immediately contacted her attorney and met with him concerning the documents. An Answer was filed on her behalf on April 9, 2003. *See* Plaintiff's Exhibit 4.

In her Answer Debtor sets forth general admissions and denials and "as and for a first, separate and distinct affirmative defense" asserts that the action is barred by the statute of limitations given that the deadline for filing a complaint objecting to the dischargeability of the debt was February 3, 2003, and the "filing stamp on the adversary proceeding indicates that it was filed March 19, 2003 . . . ." *See id.* at ¶¶ 4 and 6. Debtor also states that "I was not personally served and it was not actually sent by mail and it appears that it was left in my mailbox with the postage not canceled." *Id.* at ¶ 5. Debtor goes on to state in her Answer that "the file stamp on the adversary proceeding indicates that it was filed March 19, 2003, the same date that she received her discharge. *Id.* at ¶ 6 and Exhibit "B" attached thereto.

The matter was originally scheduled for trial on September 17, 2003, but was adjourned

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[3] Fernicola testified that the Remsen address was found in the law guardian file in Plaintiff's office.

to October 16, 2003, at the request of Debtor's counsel. On September 15, 2003, the Debtor filed a motion to dismiss the Complaint, which was scheduled to be heard on September 30, 2003. However, due to the failure of Debtor's counsel to file a certificate of service, the motion was not added to the Court's calendar for that date.[4]

At the trial, the Debtor testified that she and her former spouse had been married for 17 years. She also testified that he is a dentist, earning approximately $100,000 per year at the time of the divorce. It was her testimony that she is currently collecting unemployment of $296 per week, which is scheduled to cease on January 14, 2004. She also testified that she had been injured in an automobile accident on September 18, 2003, and had suffered head, neck and back injury trauma for which she was under the care of a neurosurgeon. According to the Debtor, her injuries have interfered with her work as a sales representative.

DISCUSSION

Affirmative Defenses/Personal Jurisdiction

In her Answer, the Debtor raised the affirmative defense that the Complaint was not timely filed based on the date of the Reissued Summons of March 19, 2003. The bar date for filing a complaint objecting to the Debtor's discharge or to determine dischargeability of certain debts, as set out in the Notice of Chapter 7 Bankruptcy Case, Meeting of Creditors & Deadlines sent out to all creditors, was February 3, 2003. In this case, the Plaintiff filed her Complaint on

[4] The Notice of Trial originally issued by the Clerk of the Court on July 16, 2003, fixing the trial date as September 17, 2003, specifically provided that "any and all pre-trial motions must comply with Local Rule 9013-1 and must be filed and noticed so as to permit argument to be heard on the motion(s) at least two (2) weeks prior to the trial date."

February 3, 2003, and accordingly met the deadline set out in the Notice. Moreover, the Court would point out that even if it had not been filed until March 19, 2003, it would still have been timely. Rule 4007(b) of the Federal Rules of Bankruptcy Procedure ("Fed.R.Bankr.P.") states that "[a] complaint other than under § 523(c) may be filed at any time." Code § 523(a)(5), on which the Complaint is based, is not one of the sections listed in § 523(c) and may be filed at any time.

The next issue to be addressed is that of personal jurisdiction. Plaintiff, at the trial, argued that the Debtor had not raised personal jurisdiction as a defense in her Answer and, therefore, waived it. Admittedly, the Debtor's Answer refers to "a first, separate affirmative defense" based on an argument that the action was barred by the statute of limitations. Although not separately captioned as a second affirmative defense, Debtor's Answer does also raise the issue of whether the Reissued Summons and Complaint were properly served by mail on her due to the lack of postage cancellation on the envelope containing them.

Fernicola, nevertheless, testified under oath that he mailed the Reissued Summons and Complaint on Friday, March 28, 2003. The certificate of service, filed with the Court on Tuesday, April 1, 2003, was signed on March 28, 2003. The Debtor was explicit in her testimony that she found the envelope in her mailbox at the Remsen address on Monday, March 31, 2003. Despite the lack of postmark cancellation on the envelope, the Court recognizes the possibility that the U.S. Postal Service failed to cancel the postage. It is certainly reasonable that an envelope mailed on Friday would arrive at the Remsen address on Monday. Accordingly, the Court concludes that Fernicola properly served the Reissued Summons and Complaint on the Debtor.

In so finding in favor of the Plaintiff, the Court would also point out that the mailing of

the initial Summons and Complaint was mailed to the Barneveld address as listed on the Debtor's petition. Yet, that envelope came back as being undeliverable as addressed. The second mailing to the Remsen address was the result of the diligent efforts of Fernicola to effect proper service on the Debtor by using an alternate address found in Plaintiff's law guardian file. Despite Debtor's assertion in his opening remarks that she did not reside at the Remsen address. Debtor testified that she did. Fed.R.Bankr.P. 4002(5) requires a debtor to file a statement of any change in the debtor's address. Although the Debtor testified that she resided at the Remsen address, she never filed a statement indicating that the address listed in her petition was incorrect. Arguably, the original service would have been effective but for the fact that the address on her petition was not the correct mailing address. Fed.R.Bankr.P. 4002(5). *See In re Vincze*, 230 F.3d 297, 300 (7th Cir. 2000) (quoting *In re Coggin*, 30 F.3d 1443, 1450 n. 8 (11th Cir. 1994) for the premise that "service is effective on a debtor even if mailed to the wrong address, if the address to which it is mailed is the last listed by the debtor in a filed writing."); *see also In re Greaves*, 121 B.R 234, 237 (N.D.Ill. 1990) (citations omitted).

This conclusion does not end the Court's discussion of proper service, however, because Fed.R.Bankr.P. 7004(b)(9) requires that both the debtor and the debtor's attorney be served. *See Vincze,*230 F.3d at 299; *In re Shapiro*, 265 B.R. 373, 377 (Bankr. E.D.N.Y. 2001); *see also In re Bloomingdale*, 137 B.R. 351, 354 (Bankr. C.D. Calif. 1991) (concluding that there had not been proper service upon the debtor as a result of her counsel not having been served).

In this case, the fact that the Debtor's attorney was not served was not raised in the Debtor's Answer; instead, the Court was first confronted with the issue at trial.[5] Having failed

[5] The Court acknowledges that the Debtor did raise the issue in her motion to dismiss, filed on September 15, 2003, some five months after she had filed her Answer and two days

to raise the issue in her Answer or in a properly filed and served motion, the Court deems the Debtor to have waived her objection. *See In re Blutrich Herman & Miller*, 227 B.R. 53, 60 (Bankr. S.D.N.Y. 1998) (citations omitted).

Even if the Court were to find that the Debtor's objection had not been waived, the action could have been allowed to remain pending in an "inchoate state" in which the Plaintiff would have had the opportunity to file and serve yet another Summons and Complaint given that there are no time limits for asserting a cause of action pursuant to Code § 523(a)(5). *See generally In re Terzian*, 75 B.R. 923, 925 (Bankr. S.D.N.Y. 1987); *In re Legend Industries, Inc.*, 49 B.R. 935, 938 (Bankr. E.D.N.Y. 1985). Because the objection was not raised until the day of the trial, and the trial on the substantive issues has been concluded, the Court finds that further delay and expense to the parties, as well as judicial economy, warrants it going forward to a consideration of the merits of the Complaint.

Code § 523(a)(5)

In his opening statement, Debtor's counsel acknowledged that the debt owing to the Plaintiff is in the nature of support. However, Debtor's counsel, relying on a decision of the New York State Family Court, *Payton v. Kaplan*, 117 Misc.2d 137 (N.Y. Fam. Ct. 1982), contends that even though the debt is in the nature of support, it is still necessary for the Court to consider certain factors under state law to determine whether the obligation is nondischargeable. These include (1) the nature of the obligation; (2) the location of the obligation in the divorce decree or order of the court; (3) the length of the marriage, the presence

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prior to the initial trial date. However, because the motion was marked off the Court's calendar, it never had the opportunity to consider the argument.

of children requiring support and the relative earning power of the spouses and (4) the parties' understanding of the provisions. *See id.* at 140. However, the factors identified in *Payton* are those on which a determination is made concerning whether the debt is in the nature of support. *Id.* (stating that "[c]onsideration of the above factors strongly supports petitioner's claim that the respondent's assumption of these bills . . . are [sic] in the nature of child support . . . ."); *see also Maddigan*, 312 F.3d 589, 595 (2d Cir. 2002) (indicating that the bankruptcy court had considered the "income, limited assets and resources, financial obligations and inability to pay legal fees" of the child's mother before concluding that the obligation was in the nature of support.").

While Debtor's counsel has admitted that the debt is in the nature of support, the Court deems it prudent to analyze the facts herein. It is the Plaintiff's burden to convince the Court by a preponderance of the evidence that the particular debt in question should not be discharged. *See id.* (citing *Grogan v. Garner*, 498 U.S. 279, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991)). The determination of whether a particular obligation was intended to be in the nature of alimony, maintenance or support is a question of federal bankruptcy law. *See Brody v. Brody (In re Brody)*, 3 F.3d 35, 38 (2d Cir. 1993). The fact that a debt may not legally qualify as support under state law does not prevent an examination by the Bankruptcy Court concerning whether it was, by its nature, intended to provide support to the nondebtor. *See Gianakas v. Gianakas (In re Gianakas)*, 917 F.2d 759, 762 (3d Cir. 1990).

The Court's analysis must begin with an examination of the language found in the June 2001 Order. In addition, the Court must consider (1) the surrounding circumstances which existed at the time the document(s) was executed; (2) the financial circumstances of the parties at the time, and (3) the function served by the obligation at the time the parties entered into the agreement. *See id.* at 762-63.

In this regard, the Court notes that the Debtor only testified to her current financial situation. However, for purposes of determining whether the obligation is in the nature of support, the Court must consider the parties' circumstances at the time of the divorce decree or, in this case, the June 2001Order, awarding fees of $7,829.53 to Plaintiff, of which Debtor was responsible for $2,600. Judge Julian had already entered his May 2001 Order approving the parties' stipulation, which provided that the Debtor was relieved of having to meet her statutory child support obligation. Despite the prior order, Judge Julian was explicit in ordering that the Debtor be responsible for approximately one-third of the law guardian fees payable to Plaintiff, namely $2,600. While he did not specifically state that the award was in the nature of support, as noted by the court in *Maddigan*,

> it would be unrealistic and unreasonable to expect the [family] court to have framed its order of legal fees using the statutory terms of § 523(a)(5) - family court judges cannot reasonably be expected to anticipate future bankruptcy among the parties to a custody proceeding.

Maddigan, 312 F.3d at 595.

These fees were incurred by the Plaintiff in representing the Debtor's children in connection with custody and visitation. In *Maddigan* the plaintiff had represented the mother of a child born out of wedlock in a custody dispute. *Maddigan*, 312 F.3d at 592. The debtor had been ordered by the family court to pay $12,000 in attorneys' fees. *Id.* The debtor subsequently filed a chapter 7 petition and sought to discharge the debt. The court concluded that the debt was one due to the child, was incurred "in connection with an order of a court of record" and was in the nature of support. *Id.* at 596-97.

Plaintiff's representation as law guardian was on behalf of Debtor's children and like *Maddigan*, is a debt due to the children despite the fact that it is payable to a third party who

acted on their behalf. *See id.* at 593 (citations omitted). In addition, the Debtor's obligation to pay Plaintiff's fees was the result of an order of a court of record. It is apparent from the terms of the June 2001 Order that Judge Julian took into account the discrepancy in the parties' incomes by requiring the Debtor's former spouse to pay two thirds of the fees and the Debtor only one third. Furthermore, Judge Julian was certainly aware of the May 2001 Order approving the parties' stipulation regarding the Debtor's obligations insofar as child support was concerned; nevertheless, he specifically ordered her to pay $2,600 to the Plaintiff under these circumstances. The Court concludes that the debt to the Plaintiff in the amount of $2,600 for law guardian fees is nondischargeable as being in the nature of child support.

Based on the foregoing, it is hereby

ORDERED that the debt owing to Plaintiff by the Debtor of $2,600 pursuant to the terms of Judge Julian's Order of June 30, 2001,[6] is nondischargeable pursuant to Code § 523(a)(5).

Dated at Utica, New York

this 14th day of January 2004

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STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge

[6] In her Complaint Plaintiff requested a judgment against the Debtor; however, based on Judge Julian's Order that provides that it may be filed as a money judgment in the event that one of the parties fails to pay the Plaintiff, this Court finds that it would be superfluous to grant such relief.