REVISED VERSION

UNITED STATES BANKRUPTCY APPELLATE PANEL FOR THE FIRST CIRCUIT

BAP No. RI 98-071

IN RE: DONALD R. LEMBO,
Debtor.

DONALD R. LEMBO,
Appellant,

v.

CAROLYN LEMBO,
Appellee.

Appeal from the United States Bankruptcy Court
for the District of Rhode Island
[Hon. Arthur N. Votolato, U.S. Bankruptcy Judge]

Before

HILLMAN, BOROFF and CARLO, U.S. Bankruptcy Judges

George M. Prescott and George M. Prescott, Jr., Law Office of George M. Prescott, on brief for the Appellant.

Arthur M. Read, II, Gorham & Gorham, on brief for the Appellee.

September 10, 1999

Per Curiam

Introduction

The debtor/appellant (the "Appellant") appeals from an order granting Carolyn Lembo (the "Appellee") relief from the automatic stay to pursue a dischargeability action in state court. The Appellant contends that the order was in error because the bankruptcy court had exclusive jurisdiction over the dischargeability issues.

Facts

The parties commenced divorce proceedings in Rhode Island in 1992. On September 27, 1994, Judge Voccola of the Rhode Island Family Court entered an order imposing sanctions upon the Appellant in the amount of $68,800. On July 3, 1997, Judge Mutter of that Court entered an order imposing sanctions in the amount of $39,389.66 (collectively referred to as the "Sanctions"). Both judges entered judgments in favor of the Appellee in the amount of the Sanctions.

On March 3, 1998, the Appellant filed for relief under Chapter 7 of the United States Bankruptcy Code. On April 7, 1998, the Appellee filed a motion in state court requesting that the court make a determination as to the nature of the Sanctions (the "Motion").[1] Subsequently, the Appellant filed an adversary

[1] In the Motion, the Appellee represented that "[t]he dischargeability of debts in bankruptcy, to the extent that they are attributable to

proceeding against the Appellee and her counsel to determine the dischargeability of the Sanctions pursuant to 11 U.S.C. §523(a)(15) and to enjoin any further prosecution of the Motion in state court.[2]

On June 4, 1998, the Appellee filed a motion for relief from the automatic stay requesting that she be able "to resume legal proceedings presently pending [in state court] . . ." In the memorandum in support of the motion, the Appellee requests that the bankruptcy court "relieve the automatic stay and permit Carolyn to proceed in the Bankruptcy Court on her pending motion and any other motions in aid of enforcement of her judgments." Notwithstanding having issued an injunction *pendente lite* on June 25, 1998 with respect to the Motion, on August 20, 1998, Judge Votolato issued an order granting relief from stay. Also on that date, Judge Votolato entered judgment for the Appellee regarding the order for relief. In his order, he stated as follows:

> Heard on August 5, 1998, on Carolyn Lembo's (the Debtor's former wife) Motion for Relief from Stay to seek a Family Court determination as to whether certain obligations of Donald Lembo are in the nature of alimony, maintenance or support, and to enforce judgments entered by

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the marital relationship, is affected by the state court's determination as to the character or nature of the debts." The Appellee then requested "[t]hat the Family Court make an express determination as to the character of each of plaintiff's debts to defendant and defendant's counsel."

[2]In the "Statement of the Case" section of his brief, the Appellant represented that his complaint was brought pursuant to 11 U.S.C. §523(a)(15). In the "Argument" section of his brief, he references §523(a)(5).

> the Family Court. In light of the protracted litigation that has already taken place in the Family Court, its familiarity with this case, its experience in such matters, and the fact that the resolution of these issues involves intent vis-a-vis the various Family Court orders, relief from stay is GRANTED. *See In re Schweikart*, 154 B.R. 616 (Bankr. D. R.I. 1993). Once the family court determines the nature of these obligations, the parties shall report back to this Court for a determination of dischargeability of the challenged debts.

The Appellant filed the instant appeal arguing that Judge Votolato erred as a matter of law in granting the motion for relief from stay on the grounds that the Bankruptcy Court has exclusive jurisdiction to consider the dischargeability of the Sanctions.

Jurisdiction

An order granting a motion for relief from the automatic stay is a final appealable order. *Tringali v. Hathaway Mach. Co.*, 796 F.2d 553, 557 (1st Cir. 1986).

Positions of the Parties

Appellant argues that all circuits which have considered this issue have ruled that bankruptcy courts and not state courts must determine the dischargeabililty of a debt pursuant to 11 U.S.C. §523(a)(5) citing *Dennis v. Dennis (In re Dennis)*, 25 F.3d 274, 277-78 (5th Cir. 1994); *Brody v. Brody (In re Brody)*, 3 F.3d 35, 38 (2nd Cir. 1993); *Sampson v. Sampson (In re Sampson)*, 997 F.2d 717, 721 (10th Cir. 1993); *Gianakas v. Gianakas (In re Gianakas)*, 917 F.2d 759, 761 (3rd Cir. 1990); *Williams v. Williams (In re Williams)*, 703

F.2d 1055, 1056-57 (8th Cir. 1983). The Appellant further argues that the case of *In re Schweikart*, 154 B.R. 616 (Bankr. D. R.I. 1983) is inapplicable.

The Appellee contends that the Bankruptcy Judge was not asking that the state court make the final determination as to the dischargeability of the debt. Rather, she argues, because the state court was intimately familiar with the details of the divorce, it would be better able to inform the bankruptcy judge regarding the nature of the debt. She claims that it ultimately was the bankruptcy court that would decide the nature of the obligation but by sending it first to the state court, the bankruptcy court avoided what was certain to be unnecessary litigation. She also contends that *In re Schweikart, supra*, is exactly on point. In addition to asking that we affirm the bankruptcy court order, the Appellee asks that we direct that the injunction *pendente lite* be vacated because it conflicts with the Bankruptcy Court's order.[3]

Discussion

In *In re Schweikart*, Judge Votolato granted the non-debtor spouse relief from the automatic stay to pursue in state court the issues of what interest the debtor held in the marital home and what debts were dischargeable. 154 B.R. at 617. The focus of the analysis was the exclusive jurisdiction the bankruptcy court had to

[3]This Court notes that the only order appealed from was the order and judgment entered with respect to the motion for relief. Therefore, the injunction *pendente lite* is not before this Court.

determine property of the estate. *Id.* The court determined, however, that the state court was in a better position to decide the two issues. *Id.* Because the court did not explain why it was appropriate to have the state court determine the issue of the dischargeability of the debt, the case is not useful to this decision.

Pursuant to 11 U.S.C. §523(c)(1),[4] a bankruptcy court has exclusive jurisdiction over adversary proceedings brought pursuant to 11 U.S.C. §§523(a)(2), (4), (6), or (15). *See In re Crawford*, 183 B.R. 103 (Bankr. W.D. Va. 1995). Contrary to the understanding of both the Appellant and the Appellee, bankruptcy courts have concurrent jurisdiction with state courts to determine the dischargeability of debts under 11 U.S.C. §523(a)(5). *Id.; Siragusa v. Siragusa (In re Siragusa)*, 27 F.3d 406 (9th Cir. 1994); *Thaggard v. Pate (In re Thaggard)*, 180 B.R. 659, 662 (M.D. Ala. 1995); *Bereziak v. Bereziak (In re Bereziak)*, 160 B.R. 533, 535 (E.D. Penn. 1993); *Rosenbaum v. Cummings (In re Rosenbaum)*, 150 B.R. 994, 996 (E.D. Tenn. 1993)("Although there has been some confusion on this

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[4]That section provides, in part, as follows:

> [T]he debtor shall be discharged from a debt of a kind specified in paragraph (2), (4), (6), or (15) of subsection (a) of this section, unless, on request of the creditor to who such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge under paragraph (2), (4), (6), or (15), as the case may be, of subsection (a) of this section.

issue, it is now clear that bankruptcy courts and state courts have concurrent jurisdiction to determine whether a debt is excepted from discharge under §523(a)(5)"); *Chaney v. Chaney (In re Chaney)*, 229 B.R. 266, 269 (Bankr. D. N.H. 1999); *Rand v. Lombardo (In re Lombardo)*, 224 B.R. 774 (Bankr. S.D. Cal. 1998); *Pope v. Wagner (In re Pope)*, 209 B.R. 1015 (Bankr. N.D. Ga. 1997); *Pidgeon v. Pidgeon (In re Pidgeon)*, 155 B.R. 24 (Bankr. D. N.H. 1993); Fed. R. Bankr. P. 4007, Advisory Committee Notes (1983)("Jurisdiction over this issue on these debts is held concurrently by the bankruptcy court and any appropriate nonbankruptcy forum.").

The cases to which the Appellant cites do not address the issue of concurrent jurisdiction. Instead they discuss the standard which a bankruptcy court should apply when deciding whether an obligation is dischargeable under 11 U.S.C. §523(a)(5). With regard to whether a property settlement was in the nature of support the *Brody* court stated that "[w]hether a payment is alimony, maintenance or support within the meaning of section 523(a)(5) is a question of federal bankruptcy law, not of state law. . . . Although the status of a payment under state law is relevant to this determination, it is not dispositive." 3 F.3d at 39. In discussing whether the doctrine of collateral estoppel applied to an action under §523(a)(5), the *Dennis* court stated that "[s]ince 1970, the determination of whether a debt is nondischargeable under this provision has been a matter of federal bankruptcy law, not state law. . . . To be sure, '[t]he

ultimate finding of whether [a debt is nondischargeable as 'defined' by the bankruptcy law] is solely [in] the province of the bankruptcy court.'" 25 F.3d at 277.[5] In *Sampson v. Sampson (In re Sampson)*, 997 F.2d 717 (10th Cir. 1993), the court recognized that a §523(a)(5) action is governed by federal law and that "Congress, by directing federal courts to determine whether an obligation is 'actually in the nature of alimony, maintenance, or support,' sought to ensure that §523(a)(5)'s underlying policy is not undermined either by the treatment of the obligation under state law or by the label which the parties attach to the obligation." 997 F.2d at 722.

Although these cases may have made pronouncements regarding jurisdiction, none of them had before them the issue of jurisdiction. They simply were considering whether state or federal law applies to an action under 11 U.S.C. §523(a)(5), not which court has jurisdiction to decide that issue. To the extent that any language in those cases can be construed as deciding jurisdiction, the Court finds it unpersuasive because those courts were not considering jurisdiction.

Although a state court shares jurisdiction over an action

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[5]In support of the second sentence of this quote, the Fifth Circuit relied upon *Shuler v. Shuler (In re Shuler)*, 722 F.2d 1253, 1256 (5th Cir.), *cert. denied*, 469 U.S. 817 (1984). *In re Shuler* discussed the issue of collateral estoppel and bankruptcy in an action brought under 11 U.S.C. §523(a)(2)(A). It does not consider jurisdiction of cases brought pursuant to 11 U.S.C. §523(a)(5). Therefore, the cited sentence above cannot be considered persuasive with respect to the issue currently before this Court.

brought under 11 U.S.C. §523(a)(5), it is unclear if that is the only issue that the state court would have had before it in this case. From the record before us, we are unable to determine whether the dischargeability action was brought solely under 11 U.S.C. §523(a)(5) or if included in the complaint was a count under 11 U.S.C. §523(a)(15).[6] Because the bankruptcy court has exclusive jurisdiction over the latter, 11 U.S.C. §523(c)(1), sending that matter to the state court would be error. If the bankruptcy court intended only that the state court consider the action under 11 U.S.C. §523(a)(5), it is unclear why he would have the parties report back to him "for a determination of dischargeability of challenged debts." Moreover, it is unclear why the Appellee was given relief from the stay to pursue the matter in state court when the bankruptcy court had issued an injunction *pendente lite*.

Based upon the confusion in the record before us, we are unable to decide the matter on appeal. We remand this case for clarification on what matter or matters the Appellee was given relief to pursue. In light of the conclusions of law set forth above, the bankruptcy court may reconsider its order and judgment.

[6]We do not address the issue of whether the dischargeability of the debt was correctly raised in the state court.