UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re

KEVIN J. ELLEDGE, fdba Mr. Fixits Construction Company — Case No. 96-11340K

Debtor

DUANA ELLEDGE

Plaintiff

-vs- — AP 96-1171 K

KEVIN J. ELLEDGE, fdba Mr. Fixits Construction Company

Defendant

Claude A. Joerg, Esq.
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Lockport New York 14094

Attorney for Plaintiff

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Niagara Falls, New York 14304-4595

Attorney for Defendant/Debtor

ORDER AND MEMORANDUM OF DECISION

A. *RENTS*

This is not a question of whether the obligation to pay rents is in the nature of support/maintenance or is in the nature of a property settlement. Therefore, *Kubera v. Kubera,* 200 B.R. 13 (W.D.N.Y. 1996) and similar cases are inapposite

In re Spong, 661 F.2d (2d. Cir. 1981), clearly extends the statutory phrase "debt owed to a spouse" to include those to whom the spouse is obligated. This case presents the question of whether this Debtor must, despite his bankruptcy, pay his former wife (or his former in-laws) for rents that his former wife never had to pay. Clearly if the Debtor's former wife rented from a landlord, she would be obligated to pay rent, and the matrimonial court's order to the Debtor to pay his former wife's rent would be "support" and nondischargeable. (See this Court's unpublished decision in *In re Hawley*, Case No. 95-11315, A.P. Nos. 95-1220, 95-1221, attached).

But she lived with her parents instead, with no agreement for rents.

It is truly commendable that daughter and parents have pulled together in this matter. There is no compelling argument either way as to whether an ex-spouse who is ordered to pay the other ex-spouse's rent should enjoy a windfall from the bittersweet fact that rental payments are rendered unnecessary because of "family."

(The public policy arguments can spiral inward or outward paradoxically. Do we wish to encourage moving in with parents, but not to the ex-spouse's financial benefit? Do we wish to encourage taking an apartment lease, even if most nights are spent at the parent's home

instead of the apartment? Etc.).

But so far as a Bankruptcy Court is concerned, the issue is not one of policy, but one of existing law. The statute speaks of debts "to a spouse" and *Spong* extended it to debts owed by the spouse. In the absence of a legal obligation running from the spouse to her parents, there is no exception from discharge either under the plain language of the statute or its judicial gloss.

Quite simply, neither Congress nor the matrimonial court has spoken as to why the Debtor's ex-wife's parents should be paid by the Debtor, despite his bankruptcy, for the parents' having provided shelter to her that she could have obtained elsewhere. Were I deciding policy, I would speak in the parents favor. But bound by law, I rule in favor of the Debtor, without prejudice, however, to a ruling by the matrimonial court (the Hearing Examiner's report notwithstanding) that this "pseudo-rent" obligation should be further imposed on the Debtor despite the absence of a legal obligation for rents, as "support."

B. *ATTORNEYS FEES*

The Debtor cites two cases to support its position that attorney's fees may not be awarded to the Plaintiff in this nondischargeability proceeding. *Collins v. Florez (In re Florez)*, 191 B.R. 112 (Bankr. N.D. Ill. 1995) and *Colbert v. Colbert (In re Colbert)*, 185 B.R. 247 (Bankr. M.D. Tenn. 1995). This Court is of the view that where attorney's fees have been awarded in the state court matrimonial action, attorney's fees incurred by a plaintiff pursuing a nondischargeability

complaint against a voluntary Debtor who does not concede the nondischargeability of an obligation that is ultimately found nondischargeable under 11 U.S.C. § 523(a)(5)should be granted as an extension of the state court award of fees; separate authority under the Bankruptcy Code is not necessary. In declining to award attorney fees to a plaintiff pursuing a § 523(a)(5) and (15) nondischargeability complaint, the court in *Colbert* does not clarify whether attorney's fees were previously awarded in the underlying matrimonial action, but insisted on Bankruptcy Code authority for granting attorney's fees and could not find it. Therefore, this Court has no quarrel with the reasoning in *Colbert* and with the conclusion that attorney's fees should not be granted in the bankruptcy proceeding where there has been no prior award of attorney's fees in the state court proceeding.

For the above reason, I respectfully disagree with the court in *Florez*. *Florez* adopts the result and the reasoning of *Colbert*, but in that case a matrimonial settlement agreement (later incorporated into a Judgment of Dissolution) clearly awarded attorney's fees to the prevailing party "in the event of any court proceedings arising out of a default under the terms of [the] agreement or failure of either party to make payments as outlined."

The present Court has consistently held that attorney's fees incurred in enforcing a nondischargeable support obligation are themselves also nondischargeable. *See, e.g. In re Hawley*, Case No. 95-11315, A.P. Nos. 95-1220, 95-1221, Order dated September 26, 1996. Although the Court has here held that the rental award is discharged (subject to further order of the matrimonial court), other elements of the Plaintiff's claim were eventually conceded by the Debtor. To the extent that legal action was necessary to enforce the nondischargeable claims, the

fees are nondischargeable. If, on the other hand, the Debtor would have conceded those elements without resort to litigation the fees should not be awarded.

If the parties cannot agree to a fee for Plaintiff's counsel, he may seek an award by Motion, no later than 30 days after entry of his Order.

In summary, by her Amended Complaint, the Plaintiff seeks a declaration of non-dischargeability of:

> (1) $6,800.00 in spousal maintenance and/or child support (found to be due and owing to Plaintiff by Hearing Examiner Lerch on December 22, 1995).
> (2) $4,319.66 in medical insurance premiums (found to be due and owing to Plaintiff by Hearing Examiner Lerch on December 22, 1995).
> (3) $445.56 in telephone, gas and electric bills (found to be due and owing to Plaintiff by Hearing Examiner Lerch on December 22, 1995).
> (4) $500 in attorney's fees (order to be paid to Plaintiff by the Debtor if a law firm did not reimburse Plaintiff for fees that it improperly withheld from a distribution it made to the Plaintiff; Order of Niagara County Family Court dated March 14, 1996).
> (5) $1,290 in additional child support arrearages (order to be paid to Plaintiff by Order of Niagara County Family Court dated March 14, 1996).
> (6) $8,000 in rent (disallowed by Order of Hearing Examiner Lerch dated December 22, 1995).
> (7) $760.00 in water bills (disallowed by Order of Hearing Examiner Lerch dated December 22, 1995).
> (8) $2,894.88 in additional support.

In his Answer, the Debtor conceded the non-dischargeability of child support arrears (items (1) and (5) above). By letter of his attorney, Robert J. O'Toole, dated October 16, 1996, the Debtor also conceded, to the extent that such amounts were allowed in the Family Court proceeding, the non-dischargeability of attorney's fees (item (4) above); medical expenses (item (2) above); utility bills (item (3) above).

To the extent that they were disallowed by Order of Hearing Examiner Lerch, the

Debtor opposes a finding of non-dischargeability of items 6, 7 and 8. As reasoned in the body of this Decision, item 6 ($8,000 in rent disallowed by Hearing Examiner Lerch) is hereby held to be dischargeable. Because item 7 ($760.00 is water bills) was also disallowed by Hearing Examiner Lerch, that obligation is also discharged, without prejudice to the Plaintiff seeking a different determination here if her appeal of Hearing Examiner Lerch's determination is decided in her favor.

The parties seem to agree that item 8 ($2,894.88 in additional support) was also disallowed by Hearing Examiner Lerch. Because it was disallowed in the Family Court proceeding, it is dischargeable here, also without prejudice to Plaintiff seeking a different determination here if her appeal of Hearing Examiner Lerch's determination is decided in her favor.

CONCLUSION

For tracking purposes, this matter is set for a calendar call on March 19, 1997 at 11:30 a.m.

SO ORDERED.

Dated: Buffalo, New York
February 7, 1997

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Michael J. Kaplan, U.S.B.J.