UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In Re:

EDWARD MALDONADO Case No. 94-10560 K

Debtor

This matter came on for trial on January 18, 1995. It is an action by Sandra Proulx, the former wife of this Chapter 7 Debtor, under 11 U.S.C. § 523(a)(5) and (a)(6) seeking to declare non-dischargeable certain sums of money owed by the Debtor to his former wife pursuant to a divorce settlement.

This is a core proceeding under 28 U.S.C. § 157, although one procedural aberration must be briefly addressed. Ordinarily, dischargeability proceedings are required, by Bankruptcy Rule 7001, to be commenced by Summons and Complaint and are governed by the Adversary Proceeding Rules contained in Part 7 of the Rules of Bankruptcy Procedure. Here, the Plaintiff raised the issue of dischargeability by means of a Motion, and it was agreed on behalf of the Debtor, and approved by the Court, that the matter proceed in that fashion in the interest of economy. It is for descriptive ease that the Court will refer herein to the Movant as Plaintiff, and to the Respondent as Defendant.

The following constitutes the Court's findings of fact, conclusions of law, and decision.

First, it must be noted that at hearing, the Debtor agreed that the sum of $4,000 would be non-dischargeable under 11 U.S.C. § 523(a)(5). Judgment must enter on that stipulation. The balance of this decision addresses sums of money other than that $4,000.

1. Plaintiff and Defendant had dated "off and on" for approximately six years prior to November of 1990, sometimes living together, but they had not been living together for several months immediately preceding November of 1990.

2. Plaintiff was, during 1990, a nurse in the Armed Forces of the United States.

3. In November of 1990, Plaintiff was summoned to active duty for "Operation Desert Storm."

4. As of November, 1990, Plaintiff had two children by a previous marriage. Their approximate ages were 10 and 11.

5. Plaintiff was permitted to return home on December 24, 25 and 26 of 1990, immediately preceding her being transported overseas.

6. On December 26, 1990, Plaintiff and Defendant joined in matrimony.

7. At some time in November or December, but prior to December 26, 1990, Plaintiff executed a Standard Short Form Power of Attorney, under New York Law, in favor of Defendant,

empowering him, among other things, to write checks against her personal checking account.

8. As of the date of the marriage, Plaintiff's children were living with Defendant. They were living in one unit of a two unit dwelling owned solely by Plaintiff. The other unit provided rental income to Plaintiff.

9. As of November and December of 1990, Plaintiff's usual bills were current and there were no apparent discrepancies in her checking account. She did have occasion to make reference to her checking account during the three days that she was home in December, and apparently noted no discrepancies in Defendant's handling of her finances during the previous days or weeks since the grant of the Power of Attorney.

10. Plaintiff's anticipated monthly income at the time in question consisted of three elements: military pay of $1800 per month deposited directly into her account; rental income of $375 per month from the tenant of the other unit at the marital residence collected, usually in cash, personally by the Debtor; and child support payments from her previous husband in the amount of $421 per month. The latter two income sources were not always regular.

11. By Plaintiff's calculations, some $15,000 of income should have gone into her account during the period that she was away, and some $5,000 should have been paid toward maintaining the residence and supporting her children, leaving

some $10,000 remaining in the account. She bases this upon her assertion that although she left no written instructions for the Debtor, she told him clearly that he could use money from her account only to maintain the residence and support the children, but not for his own expenses or pleasure.

12. The Debtor directly contradicts Plaintiff's assertions, stating that it was clearly understood between the two of them that he would use her money to pay bills "as he saw fit," and that "he would do what he thought was right." It is his testimony that she never told him that he could not use any money for himself.

13. It is undisputed that he did use some money for himself, particularly from cash rents collected from the tenant and from checks written for cash. He kept no record of his expenditures of her cash.

14. An account history compiled by Plaintiff for her own use in connection with the parties' 1992 divorce proceedings shows that at least some rental income and some child support payments were deposited into her checking account by Defendant, and that all of her military pay was deposited directly into her account by the government.

15. There was some communication between the parties during the period that she was away, and Defendant was given some guidance by Plaintiff as to some bills that she did not want paid because those bills had not been adjusted to accord relief to her

in accordance with federal statutes governing, inter alia, interest rates that could be applied upon obligations of persons serving on active military duty.

16. By Plaintiff's calculations (as noted at Finding 11, above), when she returned from Desert Storm in April of 1991, her bills should have been current and there should have been $10,000 in her checking account. Instead, it is her testimony that the account was depleted, her mortgage was two months in arrears and her utilities and credit card accounts were substantially in arrears. She testified that she was forced to borrow $10,000 against her residence to pay all the bills that Defendant should have and could have paid from her income.

17. Also, during her absence Defendant, by Plaintiff's testimony, had been cited for drunk driving and her children had not been fully provided for, necessitating Plaintiff's sister to care for the children.

18. At some point subsequent to Plaintiff's return, the parties decided to divorce, though there is no evidence of whether that decision was specifically the result of any of the matters cited above.

19. In a settlement stipulation entered in the divorce proceeding in November 1992, the Debtor agreed to pay Plaintiff $12,500 (of which $2500 was for legal fees), in consideration of the fact that, "[t]he husband during the course of this marriage expended funds that were of the wife's earnings, but, she was in

the military service in Desert Storm, and in addition failed to pay some bills of the wife which were to be paid with the money from Desert Storm." Plaintiff's Exhibit 1 at 3.

20. There is evidence that during the periods of time prior to their marriage when the parties were on good terms, Plaintiff did expend some of her own money, from the checking account in question or otherwise, for Defendant's benefit.

21. There is no evidence of any particular significant expenditures made by the Debtor for his own benefit; there is only Plaintiff's computations of how much money should have been received, and which expenses should have been paid and how much should have been left over. There is no evidence of any luxury purchases, vacations, or other substantial expenditures, although such expenditures could have been made using cash.

CONCLUSIONS OF LAW AND DISCUSSION

The Court finds that both Plaintiff and Defendant are of questionable credibility. Both of them gave evasive and non-responsive answers to the questions asked. The Court is satisfied that neither Plaintiff nor Defendant told the truth and nothing but the truth at trial.

The $12,500 obligation that the Debtor owes to Plaintiff is not a debt for "alimony to, maintenance for, or support of" Plaintiff or any child, in connection with her

divorce from this Defendant. *See* 11 U.S.C. § 523(a)(5). Consequently, § 523(a)(5) is inapplicable to the case at bar. There is no suggestion that this obligation was anything but an agreement by the Debtor to repay her for money she claimed to be owed. This obligation is a property settlement, and not a support provision. The fact that some of what Defendant is accused of spending wrongfully was child support payments made by the previous husband, or was other income which "supported" Plaintiff, does not bring the promise to pay $12,500 within the ambit of § 523(a)(5).

As to the claim that the $12,500 constituted a debt "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny," as set forth in 11 U.S.C. § 523(a)(4), the Plaintiff must prove her case by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279 (1991).

Although Defendant's acceptance of the role of attorney-in-fact for Plaintiff undeniably created a fiduciary relationship between Plaintiff and Defendant, that did not, of itself, establish the restrictions upon Defendant's use of the account that Plaintiff claims existed. Standing alone, a power of attorney creates an agency relationship. "Power of Attorney" is defined as "[an]instrument in writing whereby one person, as principal, appoints another as his agent and confers authority to perform certain specified acts or kinds of acts on behalf of [the] principal." Black's Law Dictionary, (6th ed. 1990).

While it is true that "[a]n agent is a fiduciary with respect to the matters within the scope of his agency," (3 Am. Jur.2d *Agency* § 210 (1986)(footnote omitted)) and that "[t]he very relationship implies that the principal has proposed some trust or confidence in the agent, and the agent or employee is bound to the exercise of the utmost good faith, loyalty, and honesty towards his principal or employer," *Id.* (footnote omitted), such relationship does not, without more, conclusively establish that anything that the Debtor here might have done for his own benefit was outside the scope of his authority and was the type of self dealing that he would bear the burden of vindicating. In other words, while it is a well-understood principal of agency that a presumption of invalidity accompanies acts of the agent that constitute self-dealing with the property of the principal, that presumption does not arise until the principal has made a prima facie case.

Plaintiff here has not made a prima facie case. These parties were married, and Plaintiff's testimony that she clearly instructed Defendant that he could not use any of her income for his own benefit is not credible. Plaintiff attempted to evade questions about whether she had ever made expenditures of her own income for the benefit of Defendant even before they were married, but eventually she admitted that she had. By the time of the transactions in question, and after these parties were married, she had decided to let her husband exercise his own judgment in place of hers, while she was away. Even if he

exercised his judgment more generously in his own favor than she would have exercised hers had she been present, the result is not a "fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny," 11 U.S.C. § 523(a)(4), in the absence of some extrinsic proof of dishonesty or convincing proof that the parties intended and agreed to place limitations on the husband's exercise of his judgment.

Defendant here found it to be in his best interest, in the context of the matrimonial proceeding, to agree that he owed Plaintiff $12,500 arising out of the transactions in question. Plaintiff now claims that that obligation is non-dischargeable but offers no proof beyond the power of attorney itself, her own computations of how far her income should have reached, and her own uncorroborated testimony that she enunciated clear limitations on the scope of his discretion. To shift to the Defendant the burden of proving that each dollar that he spent during that period was either validly spent or was an honest mistake - for which a monetary obligation might arise but not one that would be non-dischargeable in bankruptcy - turns the burden of proof of dischargeability of debts on its head.

Plaintiff has failed to carry her burden of proof as to the $12,500 obligation.

The Clerk is directed to enter judgment in favor of the Plaintiff in the amount of $4,000, but declaring the balance of the Plaintiff's Complaint to be dismissed on the merits. The

sides shall bear their own costs.

SO ORDERED.

Dated: Buffalo, New York
January 26, 1995

/s/Michael J. Kaplan
U.S.B.J.

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