UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

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In re

FRANCIS A. LESINSKI — Case No. 92-12531 K

Debtor

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THOMAS J. GAFFNEY

Plaintiff

-vs- — AP 92-1308 K

FRANCIS A. LESINSKI

Defendant

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JOHN E. SPADAFORA
BERNADETTE LESINSKI

Plaintiffs

-vs- — AP 92-1309 K

FRANCIS A. LESINSKI

Defendant

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Attorney for the Debtor

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Attorney for Plaintiffs

The Court is today asked to determine whether a State Court award of $3,000 in attorneys fees to the Debtor's former wife and her matrimonial counsel, and an award of $140 to the Law Guardian for two infant children of the Debtor and his former

spouse in connection with those matrimonial proceedings, are debts "to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child," and thus non-dischargeable debts under 11 U.S.C. § 523(a)(5).

The former wife, her counsel, and the Law Guardian, have raised this question by means of Motions for Summary Judgment in the two Adversary Proceedings before the Court. (Those proceedings are hereby consolidated for purposes of decision.)

The Debtor has opposed the motions both in substance and on the grounds that genuine disputes exist as to material facts, thus precluding an award of summary judgment, he argues, under Rule 56 F.R.Civ.P. and Bankruptcy Rule 7056.

The parties have briefed the issues presented. It is agreed that the Second Circuit decision in the case of *In re Spong*, 661 F.2d 6 (2d Cir. 1981) commands that the decisive inquiry is whether these awards are actually in the nature of maintenance or support. The Debtor argues that they are not; that they are in the nature of a dischargeable settlement or distribution of "property." The creditors, of course, argue the contrary.

Where, as here, the awards were made by a State Court Judge (though based almost in toto upon the stipulation of the parties) it has been said that the Bankruptcy Court must determine whether the award of attorneys fees was intended to address a financial necessity of the non-debtor spouse to enable that person to sue or defend such an action, and that it must determine the

need of the recipient spouse at the time of the award to properly determine whether the award was directly related to that spouse's ability and means to otherwise provide for himself or herself, or his or her family, while contesting the domestic action.[1]

"Often Bankruptcy Court must glean the [State] Court's intent from a dissolution decree that is either ambiguous, or ... did not contemplate a subsequent bankruptcy by one of the spouses which would necessitate the application of the federal standards of Section 523(a)(5) to the Decree."[2]

In the case at bar, most of the provisions incorporated into the matrimonial decree were the result of a stipulation between the parties. Pursuant to the stipulation, the matter of an award of attorneys fees was submitted to the discretion of the State Court. Any questions as to whether the award regarding the former wife's attorneys fees were "in the nature of" support is resolved by resort to the language of the State Court Order. State Supreme Court Justice Whelan, in his order dated March 9, 1992, noted that the former wife had incurred a total of $8,246.37 in legal fees and disbursements, and that she had paid only $2,600 leaving a balance due of $5,646.37. He specifically noted that it

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[1]*In re Hart,* 130 B.R. 817 (Bankr. N.D. IND. 1991) quoting from *In re Schiltz*, 97 B.R. 671 (Bankr. N.D. Ga. 1986). *Hart* at page 829-830.

[2]*Hart,* at p. 837, quoting from another case.

was the husband - the debtor here - who "earned the majority of the family income of $30-36,000." And most tellingly, Judge Whelan wrote "During the course of this litigation the [wife] was required to make various motions for family support and to secure money judgments for non-payment." (*Lesinski v. Lesinski*, No. 90-2385, slip op. at 2 (N.Y.Sup.Ct. March 9, 1992).

He then stated "Therefore, the plaintiff [the debtor here] is to make as and for his contribution to the [wife's] legal fees the amount of $3,000 ...." Id.

That Judge's discussion of the relative income of the two spouses, the fact that the former wife had been required to make motions for family support to secure money judgments for non-payment of support, and the fact that he fixed an amount of $3,000 out of a larger claim, make it clear to the present court that the allowance of attorneys fees bore the appropriate nexus to each spouse's ability and means, as well as to the matter of fixing and enforcing support awards, as to inescapably lead to the conclusion that the attorney fee award was in the nature of support. The Debtor's argument that trial is necessary to determine the intent of the parties in stipulating to the submission of the matter of attorneys fees to the State Court Judge, is misplaced, for whatever the intention of the parties, the intention of the Judge was clear and unambiguous. The Debtor is free to petition the matrimonial court to reopen the matter and amend its decision, but this court finds that the attorney fee award granted by Judge Whelan on March

9, 1992 is non-dischargeable under 11 U.S.C. § 523(a)(5), subject to the right of Judge Whelan to reconsider his Order upon the Debtor's request.

As to the question of the dischargeability of the award to the Law Guardian, the Court is thoroughly persuaded by the analysis of this issue presented by Bankruptcy Judge Schwartzberg in the case of *In re Peters*, 124 B.R. 433 (Bankr. S.D.N.Y. 1991), cited by the Law Guardian in his Motion for Summary Judgment. Legal Representation of the children regarding visitation is clearly an essential element in the resolution of such matters. If the children are not possessed of the wherewithal to obtain such representation, then it must be provided by the parents as an element of support. To the extent that *In re Shaw*, 67 B.R. 911 (Bankr. M.D. Fla. 1986) and *In re Lanza*, 100 B.R. 100 (Bankr. M.D. Fla. 1989) are to the contrary, I respectfully disagree therewith.

That the award of $140 was made against the Debtor is sufficient to establish his responsibility for the obligation, and this Court finds it to be an obligation "in the nature of support" for the minor children, non-dischargeable under 11 U.S.C. § 523(a)(5).

The Motion of John E. Spadafora and Bernadette Lesinski seeking summary judgment determining $3,000 to be a non-dischargeable debt and permitting them to re-enter money judgment against the Debtor in that amount, is granted. The motion of Thomas J. Gaffney in AP 92-1308K seeking summary judgment with

regard to the award to him as Law Guardian is similarly granted.

The Clerk will enter judgment in each of these two adversary proceedings accordingly.

SO ORDERED.

Dated: Buffalo, New York
~~March~~ April 1, 1993

U.S.B.J.