UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re

KASRA ETEMADI — Case No. 93-12961 K

Debtor

MATILDA ETEMADI and
MARK G. HIRSCHORN, ESQ.

Plaintiffs

-vs- — AP 93-1299 K

KASRA ETEMADI

Defendant

DECISION AND ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF PLAINTIFFS

Before the Court is a Motion for Summary Judgment by this Chapter 7 Debtor's former wife and her attorney, who brought this adversary proceeding under 11 U.S.C. § 523(a)(5) seeking a declaration that the Debtor's remaining obligation to his former wife for "enhanced earning capacity" of the defendant (in the amount of $21,282, plus interest if appropriate) and $3500 in attorney's fees awarded her counsel, are non-dischargeable.

This Court is persuaded by the scholarly opinion of the late Judge Howard Schwartzberg, U.S.B.J., in the case of *In re Raff*, 93 B.R. 41 (Bankr. S.D.N.Y. 1988), that an award to one spouse, by a matrimonial court in the State of New York, of a percentage of the present value of a professional license or enhanced professional degree earned by the other spouse during the

course of the marriage is in the nature of alimony and support and is non-dischargeable pursuant to 11 U.S.C. § 523(a)(5). Judge Schwartzberg's analysis cannot be improved upon. Pursuant thereto I find that the $21,282 unpaid balance of the $34,532.00 obligation for "enhanced earning capacity" of Kasra Etemadi is not a dischargeable debt.

The remaining balance of the State Court Judgment ordering the Debtor, Kasra Etemadi, to make contribution to Matilda Etemadi's counsel fees is likewise non-dischargeable. This was well established by the Second Circuit Court of Appeals in the case of *In re Spong*, 661 F.2d 6 (2d Cir. 1981), which decision is binding upon this Court when, as here, it is clear that the counsel fees incurred were in fact "in the nature of alimony, maintenance or support."

Counsel for Matilda Etemadi also seeks an additional $1,000 in counsel fees. It is undisputed that at an earlier point in this adversary proceeding, when the Debtor was represented by capable counsel, counsel negotiated a settlement by which Matilda Etemadi would consent to the discharge of the $21,282.00 remaining balance of the "enhanced earning capacity" award, and the Debtor would agree that the $3,500 remaining balance for his former wife's attorneys fees would be non-dischargeable. Matilda Etemadi was not surrendering her right to go to State Court for matters involving future rights to maintenance or support.

The failure to achieve a settlement plays no role in

today's decision. The settlement discussions, as recited by the Debtor himself do, however, demonstrate an awareness that the positions now being asserted are frivolous. The Court was advised of this settlement in order that it might consider this matter closed. Neither attorney-client privilege nor Rule 408 Fed. R. Evid. was violated.

It is undisputed that Kasra Etemadi had agreed to that settlement. He now claims in open court that he refused to sign the stipulation of settlement because it expressly recognized that the wife would return to state court for modification of the maintenance and support provided for in the earlier State Court Judgment. Although it is clear that bankruptcy counsel for the Debtor correctly explained to the Debtor that this Court cannot permanently enjoin his former spouse from pursuing her rights, if any, under State Law with regard to future maintenance and support, the Debtor considered the stated intention to so proceed to constitute an affront to which he would not add his signature. His statements in open court made it clear that he intended to obstruct efforts to return to state court.

His attorney moved to withdraw as counsel and I granted that motion. Rather than attempt to bind the Debtor to his verbal agreement to settle, the plaintiffs moved for Summary Judgment on the merits of the Complaint. The Debtor has responded *pro se*.

Rather than arguing for extension or change of the existing law that had been explained to him, the Debtor presses his

own idea of what the law ought to be[1] and his own idea of the appropriateness or inappropriateness of the ways in which his former wife's attorneys have represented her.[2] In what this Court deems to be a "cross motion" the Debtor seeks a declaration that his obligations to his former wife and her counsel are dischargeable, that his wife's counsel "be prohibited from commencing proceedings in New York Supreme Court for the purpose of revising the aforementioned divorce decree," that he be granted an award "for his time and the emotional stress caused by lawyers," that a lawyer be assigned by the Court on his behalf and to investigate why he was "unnecessarily forced into bankruptcy," (this was a voluntary case, not an involuntary case) and such other and further relief as to the Court seems just and proper.

He asks this Court to recompute the distributive award, explaining that there is a typographical error in the State Court

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[1]"The distributive award ($21,282.00) is dischargeable [because] ... [it] was falsely calculated, [and]" because the matter of the schooling of his child "can only be resolved between Matilda and me," and because Matilda doesn't really need it, and because he can't afford it.

[2]"Mr. Hirschorn's fee ($3500) is dischargeable [because] ... Mr. Hirschorn has falsely accused me in court of being a terrorist, thief and cheater, thereby insulting me and subsequently generating higher lawyers fees [and] ... The attorney's fees to Mr. Hirschorn were awarded for the purpose of securing the maintenance and support of Mr. Hirschorn, not Matilda Etemadi and Sara Etemadi," and because Matilda "is fully capable of paying her own lawyer" and because Mr. Hirschorn knew about the error in the calculation of the enhanced earnings award.

Judge's computations which resulted in an erroneous computation. He laments the refusal of the State Court Judge to reconsider his decision in light of that asserted typographical error. He notes that although he had appealed the State Court decisions, he explains (in paragraph 18 of his Answer) that he had to leave the country to care for his father and he further stated "in addition, I have been so badly damaged financially by the divorce process, and have felt so disappointed in the way the case was handled by the lawyers, that I did not see any point in pursuing a costly appeal." (He had changed lawyers more than once in the course of the matrimonial proceeding in State Court.)

He believes that his former wife's attorneys have engaged in needless litigation and have consequently needlessly "driven up" their attorney's fees and have "confiscated" his earnings, and that they have "driven him into bankruptcy."

He seeks to argue before me the merits of the State Court matrimonial award, presenting claims about his former wife's earnings and expenses, and the proper method of educating his daughter (who resides with his former wife), seeming to ask this Court to decide the appropriate level of support for his estranged family and seeming to ask this Court to foreclose further litigation of these matters in State Court.

That there is simply no basis in law for the types of relief he requests is too well settled to require exposition. The Bankruptcy Code itself recognizes that matters of future alimony,

maintenance or support are left to State Court. (For example, see 11 U.S.C. § 362(b)(2).) This is not a matrimonial court.

Furthermore, this Court does not sit in review of state court judgments and determinations. *In re Andrijevic*, 825 F.2d 692 (2d Cir. 1987).

Not only does Kasra Etemadi not listen to the well-advised recommendations of his attorneys, but he has not listened to this Court. In response to his Answer wherein he requested Court-appointed counsel, I ordered, "that the Debtor's request for appointed counsel is denied as being beyond the Court's authority, this proceeding not being a criminal proceeding and not otherwise warranting or requiring appointed counsel." (Order of February 25, 1994.) I reiterated to the Debtor in open court that Congress appropriates funds for appointed counsel only in criminal cases; it does not appropriate funds to appoint lawyers for voluntary bankrupts in Bankruptcy Court. Nonetheless, in his recent appearances and his most recent submissions he again complains that he is "not familiar with any rules and regulations of the Court. I do not know how to determine what important issues and how to present those issues to the Court. ... After three years of a painful divorce process, I am in a poor emotional stage, the ineptitude of the present lawyers is such that I feel I need legal guidance. ... I did not know how I should bring forward the issues that I felt needed to be presented to the Court." As indicated above, he again "prays" to obtain a lawyer assigned by the Court.

(Since he in fact did have highly capable counsel at one point in these proceedings, it is clear to the Court that what the Debtor wants is that the Court give him an attorney who will do what he says instead of what sound legal judgment commands - one who will agree with him.)

Although Rule 11 of the Federal Rules of Civil Procedure, and Bankruptcy Rule 9011, provide ample authority for the award of additional attorney's fees requested by plaintiff's counsel, this Court typically hesitates to apply Rule 11 sanctions to a litigant acting pro se. Here, however, it is abundantly clear that whether or not there was ever any settlement proposal on the table, the Debtor has been well-counseled as to what the law requires, but has elected to ignore such counsel and elected to pursue frivolous arguments. In this court, it has been the Debtor (not, as he claims, his former wife's counsel) who has needlessly and baselessly increased the costs and burdens upon all parties.

The Debtor possesses a Ph.D. He is not unintelligent. When it was explained to him by competent bankruptcy counsel that the Bankruptcy Court cannot fail to acknowledge his former wife's rights to pursue matters of future maintenance and support in State Court, and when it was explained to him that binding authority in the Second Circuit requires that the attorney's fee award be declared non-dischargeable, and when it was explained to him that the weight of persuasive authority with regard to the dischargeability of a distributive award for enhanced earning

capacity was against him, he must have understood enough to realize that if he intended to press his defense, he must do so within the bounds of good faith argument. The Debtor here, however, engaged in a pro se effort, after competent counsel advised to the contrary, to make it as difficult as possible for his opponents to obtain what the law commands. To refuse to settle is his right. But to seek relief that is contrary to law is sanctionable under Rule 11, when done knowingly and with a purpose of obstruction. The request for $1,000 in additional attorney's fees is granted on authority of Bankruptcy Rule 9011.[3]

The Clerk shall enter final judgment declaring the prior matrimonial court judgments to be non-dischargeable and further awarding to the firm of Siegel, Kelleher & Kahn additional fees of $1,000.

SO ORDERED.

Dated: Buffalo, New York
May 20, 1994

U.S.B.J.

[3]The Debtor complains that all he has done here is to respond to proceedings initiated by the plaintiffs; it is they, not he who caused the added work, he complains. But he filed a voluntary bankruptcy proceeding, thus forcing the plaintiffs to seek a determination of dischargeability. By the Debtor's arguments it seems that he should not only be permitted to treat his voluntary bankruptcy as if it were an involuntary bankruptcy, but the plaintiffs should be foreclosed from asking for a determination of the effect of the bankruptcy upon them.