United States Bankruptcy Court
Northern District of Illinois
Eastern Division

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Bankruptcy Caption: In re Alexander Miceli

Bankruptcy No. 99 B 24641

Adversary Caption: William R. Axley v. Alexander Miceli

Adversary No. 99 A 01497

Date of Issuance: September 11, 2000

Judge: John H. Squires

Appearance of Counsel:

Attorney for Plaintiff: Thomas A. Else, Esq., 600 Enterprise Drive, Suite 111B, Oak Brook, IL 60523

Attorney for Defendant: Pro Se Defendant/Debtor, Alexander Miceli, 626 Greenview, Itasca, IL 60143

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	)	
ALEXANDER MICELI,	)	Bankruptcy No. 99 B 24641
Debtor.	)	Chapter 7
	)	Judge John H. Squires
	)	
WILLIAM R. AXLEY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Adversary No. 99 A 01497
	)	
ALEXANDER MICELI,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

This matter comes before the Court on the motion for summary judgment filed by William R. Axley (the "Creditor") against Alexander Miceli (the "Debtor") pursuant to Federal Rule of Bankruptcy Procedure 7056 to determine that the debt owed by the Debtor to the Creditor is non-dischargeable under 11 U.S.C. § 523(a)(5). For the reasons set forth herein, the Court denies the motion as both procedurally and substantively deficient.

I. JURISDICTION AND PROCEDURE

The Court has jurisdiction to entertain this matter pursuant to 28 U.S.C. § 1334 and Internal Operating Procedure 15(a) of the United States District Court for the Northern District of Illinois. This matter constitutes a core proceeding under 28 U.S.C. § 157(b)(2)(I).

II. FACTS AND BACKGROUND

Most of the relevant facts are undisputed and are drawn from the pleadings and papers furnished by the parties. The Creditor was retained by the Debtor as his attorney in a domestic relations case pending in DuPage County Circuit Court, Illinois, to represent the Debtor in obtaining sole custody of a minor child who had been the subject of a joint custody order. The state court ultimately awarded a judgment of $41,146.82 to the Creditor for the services rendered by the Creditor to the Debtor. Although it is clear that the Creditor was the attorney of record for the Debtor and not the minor child, the Creditor contends that his services were in the nature of support of and for the exclusive benefit of the child and are thus non-dischargeable under § 523(a)(5). In addition, the Creditor points out that the Debtor has failed to properly respond to certain requests to admit which should be deemed admitted under Federal Rule of Bankruptcy Procedure 7036 and Federal Rule of Civil Procedure 36.

The Debtor, who is pro se, does not deny that the Creditor was his attorney in that state court matter, or that he was successful in obtaining the change of custody. The thrust of the Debtor's defense seems to be that the attorneys' fees are excessive; that he was never given an opportunity to contest the inflated amount awarded; and that he never desired to alter the joint custody, but only followed the Creditor's advice. The Debtor argues that he was taken advantage of by the Creditor who, he asserts, was more than compensated for his time and legal advice. The Debtor, however, has not responded to the instant motion.

III. APPLICABLE STANDARDS

A. Summary Judgment

In order to prevail on a motion for summary judgment, the movant must meet the statutory criteria set forth in Rule 56 of the Federal Rules of Civil Procedure, made applicable to adversary proceedings by Federal Rule of Bankruptcy Procedure 7056. Rule 56(c) reads in part:

> [T]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56(c). See also Dugan v. Smerwick Sewerage Co., 142 F.3d 398, 402 (7th Cir. 1998). The primary purpose for granting a summary judgment motion is to avoid unnecessary trials when there is no genuine issue of material fact in dispute. Trautvetter v. Quick, 916 F.2d 1140, 1147 (7th Cir. 1990); Farries v. Stanadyne/Chicago Div., 832 F.2d 374, 378 (7th Cir. 1987) (quoting Wainwright Bank & Trust Co. v. Railroadmen's Federal Sav. & Loan Ass'n of Indianapolis, 806 F.2d 146, 149 (7th Cir. 1986)). Where the material facts are not in dispute, the sole issue is whether the moving party is entitled to a judgment as a matter of law. ANR Advance Transp. Co. v. International Bhd. of Teamsters, Local 710, 153 F.3d 774, 777 (7th Cir. 1998).

In 1986, the United States Supreme Court decided a trilogy of cases which encourage the use of summary judgment as a means to dispose of factually unsupported claims. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Matsushita Electric Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986); Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

The burden is on the moving party to show that no genuine issue of material fact is in dispute. Anderson, 477 U.S. at 248; Matsushita, 475 U.S. at 585-86; Celotex, 477 U.S. at 322.

All reasonable inferences drawn from the underlying facts must be viewed in a light most favorable to the party opposing the motion. Parkins v. Civil Constructors of Ill., Inc., 163 F.3d 1027, 1032 (7th Cir. 1998). The existence of a material factual dispute is sufficient only if the disputed fact is determinative of the outcome under applicable law. Anderson, 477 U.S. at 248; Frey v. Fraser Yachts, 29 F.3d 1153, 1156 (7th Cir. 1994). "Summary judgment is not an appropriate occasion for weighing the evidence; rather the inquiry is limited to determining if there is a genuine issue for trial." Lohorn v. Michal, 913 F.2d 327, 331 (7th Cir. 1990).

Local Bankruptcy Rule 402.M of the Local Bankruptcy Rules for the United States Bankruptcy Court for the Northern District of Illinois, which deals with summary judgment motions, was modeled after Rule 12(M) of the General Local Rules of the United States District Court for the Northern District of Illinois. Hence, the case law construing Rule 12(M) applies to Local Bankruptcy Rule 402.M.

Pursuant to Local Bankruptcy Rule 402, a motion for summary judgment imposes special procedural burdens on the parties. Specifically, Rule 402.M requires the moving party to supplement its motion and supporting memorandum with a statement of undisputed material facts. Rule 402.M provides in relevant part:

> With each motion for summary judgment filed pursuant to Fed.R.Civ. P. 56 (Fed.R.Bankr.P. 7056), the moving party shall serve and file–
>
> (1) any affidavits and other materials referred

> to in Fed.R.Civ.P. 56(e);
> (2) a supporting memorandum of law; and
> (3) a statement of material facts as to which the moving party contends there is no genuine issue and that entitles the moving party to judgment as a matter of law that includes:
>
> (a) a description of the parties; and
> (b) all facts supporting venue and jurisdiction in this Court.
>
> The statement of facts referred to in (3) shall consist of short numbered paragraphs, including within each paragraph specific references to the affidavits, parts of the record, and other supporting materials relied upon to support the facts set forth in that paragraph. *Failure to submit such a statement constitutes grounds for denial of the motion.*

Local Bankruptcy Rule 402.M. (emphasis supplied).

The Creditor has not filed a 402.M statement of material facts as to which he contends there is no genuine issue. This is fatal to his motion. The Seventh Circuit has upheld strict application of local rules regarding motions for summary judgment. See Dade v. Sherwin-Williams Co., 128 F.3d 1135, 1140 (7th Cir. 1997); Feliberty v. Kemper Corp., 98 F.3d 274, 277-78 (7th Cir. 1996); Bourne Co. v. Hunter Country Club, Inc., 990 F.2d 934, 938 (7th Cir.), cert. denied, 510 U.S. 916 (1993); Schulz v. Serfilco, Ltd., 965 F.2d 516, 519 (7th Cir. 1992); Maksym v. Loesch, 937 F.2d 1237, 1240-41 (7th Cir. 1991). Compliance with Local Rule 402.M is not a mere technicality. See generally Brasic v. Heinemann's Inc., 121 F.3d 281, 283 (7th Cir. 1997). Courts rely greatly upon the information presented in this statement in separating the facts about which there is a genuine dispute from those about which there is none. American Ins. Co. v. Meyer Steel Drum, Inc., No. 88 C 0005, 1990 WL 92882, at *7 (N.D. Ill. June 27, 1990); Deberry v. Sherman Hosp. Ass'n, 769 F. Supp. 1030,

1033 n.2 (N.D. Ill. 1991). The objective is also designed to insure the nonmoving party an opportunity to respond to such statement. Pasant v. Jackson Nat. Life Ins. Co. of America 768 F. Supp. 661, 664 n.2 (N.D. Ill. 1991).

As Local Rule 402.M specifically provides, the movant's failure to file a statement of material facts is grounds for denial for the motion. See Deberry, 769 F. Supp. at 1033 n.2. The rigorous requirements of the Rule are not arbitrary or petty, but rather were enacted in order to aide the Court in ascertaining the factually supported claims from those which are defenseless. See Bell, Boyd & Lloyd v. Tapy, 896 F.2d 1101, 1103-04 (7th Cir. 1990). Based on Local Bankruptcy Rule 402.M and the applicable case law, the Court denies the Creditor's motion for failure to comply with the procedural requirements of the Rule. The substantive merits of the motion will, however, be considered.

B. The Standards for Dischargeability in the Seventh Circuit

The party seeking to establish an exception to the discharge of a debt bears the burden

of proof. Selfreliance Fed. Credit Union v. Harasymiw (In re Harasymiw), 895 F.2d 1170, 1172 (7th Cir. 1990); Banner Oil Co. v. Bryson (In re Bryson), 187 B.R. 939, 961 (Bankr. N.D. Ill. 1995). The United States Supreme Court has held that the burden of proof required to establish an exception to discharge is a preponderance of the evidence. Grogan v. Garner, 498 U.S. 279, 291 (1991); In re McFarland, 84 F.3d 943, 946 (7th Cir.), cert. denied, 519 U.S. 931 (1996); In re Thirtyacre, 36 F.3d 697, 700 (7th Cir. 1994). To further the policy of providing a debtor a fresh start in bankruptcy, "exceptions to discharge are to be construed strictly against a creditor and liberally in favor of a debtor." In re Scarlata, 979 F.2d 521,

524 (7th Cir. 1992) (quoting In re Zarzynski, 771 F.2d 304, 306 (7th Cir. 1985)). Accord In re Reines, 142 F.3d 970, 972-73 (7th Cir. 1998), cert. denied, 525 U.S. 1068 (1999). "The policy of protecting and favoring the debtor is tempered, however, when the debt arises from a divorce or separation agreement." In re Crosswhite, 148 F.3d 879, 881 (7th Cir. 1998) (citation omitted). The § 523(a)(5) exception from discharge is construed more liberally than other § 523 exceptions. Id. at 882.

C. 11 U.S.C. § 523(a)(5)

The Creditor maintains that the Debtor's obligation to pay the attorneys' fees is not dischargeable under 11 U.S.C. § 523(a)(5). Section 523(a)(5) provides in relevant part:

> (a) A discharge under section 727. . .of this title does not discharge an individual debtor from any debt–
>
> > (5) to a spouse, former spouse or child of the debtor for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement. . . .

11 U.S.C. § 523(a)(5).

Section 523(a)(5) sets out three requirements that must be met in order for a debt to be non-dischargeable: (1) the underlying debt must be in the nature of alimony, maintenance, or support; (2) the debt must be owed to a former spouse or child; and (3) the debt must be incurred in connection with a separation agreement, divorce, or property settlement agreement or other order of a court of record. Reines, 142 F.3d at 972 (citing Kinnally v.

Fonnemann (In re Fonnemann), 128 B.R. 214, 217 (Bankr. N.D. Ill. 1991)); Wawak v. Smolenski (In re Smolenski), 210 B.R. 780, 782 (Bankr. N.D. Ill. 1997). The Creditor bears the burden of proving these elements by a preponderance of the evidence. Crosswhite, 148 F.3d at 881; Reines, 142 F.3d at 973. The first element is the focus of the dispute, although it is also clear that the second element is not present.

IV. DISCUSSION

The Creditor relies on this Court's decision in Shevick v. Brodsky (In re Brodsky), 239 B.R. 365 (Bankr. N.D. Ill. 1999). In Brodsky, this Court held that the court-appointed attorney, who represented the interests of a minor child, and was awarded fees taxed against a parent who later filed bankruptcy, held a non-dischargeable claim against the debtor-parent under § 523(a)(5). Brodsky followed the majority of the reported decisions on this point and was decided in the absence of any controlling precedent from the Seventh Circuit. Arguing the result in Brodsky by analogy, the Creditor concludes that this is an issue of first impression and that the debt should be viewed as one owed "to a child of the debtor, in that the child was the only party who benefitted from [the Creditor's] services. . . .[and] the services rendered . . were clearly for his welfare and support. . . ." There is undoubtedly some logic and merit in that argument, given that the best interests of the child are the paramount interests implicated in any child custody award made by an Illinois domestic relations court. Unfortunately for the Creditor, however, the issue is not one of first impression, but is the subject of contrary precedent from the Seventh Circuit, which this Court must follow. See In re Rios, 901 F.2d 71 (7th Cir. 1990).

Rios held that attorneys' fees owed by the debtor-client were not excepted from discharge under § 523(a)(5). The Rios court noted that in every reported case save one, the fees were to be paid by the party from whom support was being sought. In Rios, just as in the matter at bar, the creditor-attorney represented the debtor. The Rios court agreed with the reasoning in Frey, Lach & Michaels, P.C. v. Lindberg (In re Lindberg), 92 B.R. 481 (Bankr. D. Colo. 1988), which held that a debtor's liability for his own attorneys' fees incurred in a child support dispute is not a debt owed "to a spouse" for purposes of § 523(a)(5). Id. at 483.

Those cases which deny discharge for attorneys' fees to obtain child support, are based on the theory that the spouse's or child's expenses of collection are part of the underlying obligation. "That theory cannot stretch to cover fees for an attorney hired by the debtor, unless there is some legal obligation to hire an attorney on behalf of the spouse or child." Rios, 901 F.2d at 72. Thus, Rios concluded that that debtor's contract with the attorney did not generate a debt to the child so the debtor's obligation to her attorney was not in the nature of child support.

The same result occurs here as the Debtor's contract with the Creditor did not generate a debt owed by the minor child. Thus, the unpaid legal fees owed by the Debtor in the sum of $41,146.82, for which judgment was awarded by the state court on May 19, 1997 (See Creditor's Exhibit B to Exhibit No. 6), was not in the nature of child support.

Rios has not been overruled, and thus, appears to be good law. In fact, Rios was cited with approval by the Seventh Circuit in In re Platter, 140 F.3d 676 (7th Cir. 1998). In part, Platter held that the exception did not run in favor of a county which paid support for

a debtor's child. The Platter court cited Rios for the proposition that the ability of third parties to recover for aiding in the collection of child or spouse support is not unlimited. Id. at 682. Thus, the Platter court held that the collection theory would not be stretched to include the recovery by a government agency of its costs incurred in providing services to a debtor's child, because the state statute requiring reimbursement from the parent does not generate a debt to the child and was not a debt owed to the protected parties under §523(a)(5). Id. at 676.

Part of the underlying rationale for the holdings in Rios and its precursor, Lindberg, is that the attorneys' fees owed there, as in this matter, were obligations owed by those debtors, and this Debtor, to their own attorneys, not an obligation of the debtor to a former spouse or child or their respective attorneys. As aptly noted by the Lindberg court and equally applicable here: "[c]ounsel [for the creditor] is asking this Court to look behind the attorneys' fees to their nature and determine them nondischargeable since they were incurred in a child support and custody dispute. To accept Counsel's argument would mean that *any* attorney's fees resulting from a case involving child support, maintenance, or alimony would be nondischargeable. . . . . This is absurd." 92 B.R. at 483 (emphasis in original).

Clearly, under Rios, a debtor's own attorneys' fees incurred in a pre-petition state court domestic relations dispute, which remain unpaid as of the time the debtor files a bankruptcy petition, are not excepted from discharge under § 523(a)(5). Consequently, the Creditor is not entitled to judgment as a matter of law. Therefore, the Court denies the motion for summary judgment. This adversary proceeding is dismissed and the trial set for October 6, 2000 at 1:00 p.m. is stricken.

V. CONCLUSION

For the foregoing reasons, the Court denies the Creditor's motion for summary judgment as both procedurally and substantively deficient.

This Opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. A separate order shall be entered pursuant to Federal Rule of Bankruptcy Procedure 9021.

ENTERED:

DATE: _____ _____

John H. Squires
United States Bankruptcy Judge.

cc: See attached Service List

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	)	
ALEXANDER MICELI,	)	Bankruptcy No. 99 B 24641
Debtor.	)	Chapter 7
	)	Judge John H. Squires
	)	
WILLIAM R. AXLEY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Adversary No. 99 A 01497
	)	
ALEXANDER MICELI,	)	
	)	
Defendant.		

O R D E R

For the reasons set forth in a Memorandum Opinion dated the 11th day of September 2000, the Court hereby denies the motion of William R. Axley for summary judgment. This adversary proceeding is dismissed and the trial set for October 6, 2000 at 1:00 p.m. is stricken.

ENTERED:

DATE: _____

_____
John H. Squires
United States Bankruptcy Judge.

cc: See attached Service List