United States Bankruptcy Court
Northern District of Illinois
Eastern Division

Transmittal Sheet for Opinions for Posting

Will this opinion be Published? No

Bankruptcy Caption: In re Frank G. Antonino

Bankruptcy No. 98 B 02324

Adversary Caption: Frank G. Antonino v. Thomas G. Kenny

Adversary No. 99 A 00586

Date of Issuance: August 5, 1999

Judge: John H. Squires

Appearance of Counsel:

Attorney Debtor/Plaintiff: Michael J. Desmond, Esq., Figliulo & Silverman, P.C., 10 South LaSalle Street, Suite 3600, Chicago, IL 60603

Attorney for Defendant: Linda R. Crohn, Esq., Jonathan Shimberg, Esq., Shimberg and Crohn, 59 East Van Buren Street, Suite 2501, Chicago, IL 60605

Trustee: David E. Grochocinski, Esq.,Grochocinski & Grochocinski, 800 Ravinia Place, Orland Park, IL 60562

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	)	
FRANK G. ANTONINO,	)	Bankruptcy No. 98 B 02324
Debtor.	)	Chapter 7
	)	Judge John H. Squires
	)	
FRANK G. ANTONINO,	)	
	)	
Plaintiff,	)	
	)	
	)	Adversary No. 99 A 00586
v.	)	
	)	
THOMAS G. KENNY,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

This matter comes before the Court on the motion of the Defendant, Thomas G. Kenny (the "Defendant"), to dismiss the complaint of the Debtor /Plaintiff Frank G. Antonino (the "Plaintiff") for failure to state a claim upon which relief can be granted, pursuant to Federal Rule of Civil Procedure 12(b)(6), incorporated by reference in Federal Rule of Bankruptcy Procedure 7012, or in the alternative, for summary judgment pursuant to Federal Rule of Civil Procedure 56, incorporated by reference in Federal Rule of Bankruptcy Procedure 7056. For the following reasons the motion for summary judgment and to dismiss is denied. Concurrently entered herewith is the Court's Preliminary Pretrial Order setting this matter for pretrial conference on September 3, 1999 at 9:00 a.m.

I. JURISDICTION AND PROCEDURE

The Court has jurisdiction to entertain this matter pursuant to 28 U.S.C. § 1334 and General Rule 2.33(A) of the United States District Court for the Northern District of Illinois. This matter is a core proceeding under 28 U.S.C. § 157(b)(2)(A) and (O).

II. FACTS AND BACKGROUND

Most of the facts are not disputed. On January 26, 1998, the Plaintiff filed a voluntary Chapter 13 petition. On February 20, 1998, the case was converted to Chapter 11 on motion of the Plaintiff. On July 28, 1998, the case was converted to Chapter 7.

The Plaintiff listed the law firm of Kenny & Kenny as an unsecured creditor in the amount of $20,000.00. Neither the law firm nor the Defendant filed a complaint objecting to discharge of this debt. On May 4, 1998, an order was entered modifying the automatic stay under 11 U.S.C. § 362(a) to allow the Plaintiff's spouse, Jennifer Antonino, to proceed with a state court marriage dissolution proceeding. On November 20, 1998, the Plaintiff received a Chapter 7 discharge.

On or about December 14, 1998, subsequent to the date of the petition and the date of the discharge, the Plaintiff entered into a settlement of the pending dissolution of marriage proceeding whereby the Plaintiff agreed to pay the Defendant, the attorney for the Plaintiff's spouse, $11,600.00 in attorney's fees. On January 26, 1999, a supplemental judgment was entered in the dissolution proceeding which provided for the payment of attorney's fees by the Plaintiff to the Defendant. The fees have not been paid. (The Defendant asserts that the Plaintiff has refused to pay the fees, but the Plaintiff asserts no demand for payment was

made upon him by the Defendant.).

On April 14, 1999, the Defendant filed a petition for adjudication of civil contempt against the Plaintiff in the state court proceeding. On April 28, 1999, the Plaintiff filed the instant complaint against the Defendant seeking sanctions for violation of the discharge injunction under 11 U.S.C. § 524(a)(2). On May 12, 1999, the state court entered an order in the dissolution proceeding finding that the award of attorney's fees against the Plaintiff in favor of the Defendant under the judgment of dissolution was in the nature of support. A motion to vacate the May 12, 1999 state court order was filed within thirty days of its entry. The Defendant asserts in his supporting affidavit, inter alia, that the subject attorney's fees he was seeking to collect from the Plaintiff, with the exception of $279.32, accrued after the filing of the Plaintiff's bankruptcy petition and that neither he nor his law firm seek payment of any claim arising prior to the date of the Plaintiff's bankruptcy petition.

The Plaintiff denies this last point and asserts that as of July 28, 1998, the date of conversion of the Plaintiff's bankruptcy case to Chapter 7, $18,394.28 was due the Defendant for services rendered to the Plaintiff's spouse. The Plaintiff asserts that he never agreed orally or in writing that the fees due the Defendant were in the nature of support. In his affidavit in opposition, the Plaintiff avers that he was advised by his attorney that the state court judge had told him that the dissolution case had to be settled on December 14, 1998. He was then aware that his spouse was terminally ill; that she went into the hospital four days later and subsequently died on January 5, 1999; and that there was never any hearing on the issue of the fees awarded to the Defendant on December 14, 1998.

III. APPLICABLE STANDARDS

A. Motion to Dismiss

In order for the Defendant to prevail on his motion to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6) and its bankruptcy analogue Rule 7012, it must clearly appear from the pleadings that the Plaintiff can prove no set of facts in support of his claims which would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Colfax Corp. v. Illinois State Toll Highway Auth., 79 F.3d 631, 632 (7th Cir. 1996) (citation omitted); Meriwether v. Faulkner, 821 F.2d 408, 411 (7th Cir.), cert. denied, 484 U.S. 935 (1987). The Seventh Circuit has emphasized that "[d]espite their liberality on pleading matters . . . the federal rules still require that a complaint allege facts that, if proven, would provide an adequate basis for each claim." Gray v. Dane County, 854 F.2d 179, 182 (7th Cir. 1988) (citations omitted). It is well established that alleging mere legal conclusions, without a factual predicate, is inadequate to state a claim for relief. Briscoe v. LaHue, 663 F.2d 713, 723 (7th Cir. 1981), aff'd, 460 U.S. 325 (1983). Moreover, the Court must take as true all well pleaded material facts in the complaint, and must view these facts and all reasonable inferences which may be drawn from them in a light most favorable to the Plaintiff. See Northern Trust Co. v. Peters, 69 F.3d 123, 129 (7th Cir. 1995); Infinity Broadcasting Corp. of Illinois v. Prudential Ins. Co. of America, 869 F.2d 1073, 1075 (7th Cir. 1989); Corcoran v. Chicago Park Dist., 875 F.2d 609, 611 (7th Cir. 1989); Marmon Group, Inc. v. Rexnord, Inc., 822 F.2d 31, 34 (7th Cir. 1987). The issue is not whether the Plaintiff will ultimately prevail, but whether he has pleaded a cause of action sufficient to entitle him to offer evidence in support of his claims. See Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). The

purpose of a motion to dismiss pursuant to Rule 12(b)(6) is to test the sufficiency of the complaint, not to decide the merits of the case. Demitropoulos v. Bank One Milwaukee, N.A., 915 F. Supp. 1399, 1406 (N.D. Ill. 1996) (citing Gibson v. City of Chicago, 910 F.2d 1510, 1520 (7th Cir. 1990)).

B. Motion for 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 Rule 402.M of the Bankruptcy Rules adopted for the Northern District of Illinois requires the party moving for summary judgment to file a detailed statement ("402.M statement") of material facts that the movant believes are uncontested. Local Bankr. R. 402.M. The 402.M statement "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." Id.

The Defendant filed a 402.M statement that substantially complied with the

requirements of Rule 402.M. It contained numbered paragraphs setting out assertedly uncontested facts with reference to parts of the record and other supporting materials relied upon to support the facts set forth in each paragraph.

The party opposing a summary judgment motion is required by Local Rule 402.N to respond ("402.N statement") to the movant's 402.M statement, paragraph by paragraph, and to set forth any material facts that would require denial of summary judgment, specifically referring to the record for support of each denial of fact. Local Bankr. R. 402.N. The opposing party is required to respond "to each numbered paragraph in the moving party's statement" and make "specific references to the affidavits, parts of the record, and other supporting materials relied upon." Local Bankr. R. 402.N(3)(a). The Plaintiff has complied with this rule.

IV. ARGUMENTS OF THE PARTIES

The Defendant argues that the complaint fails to state a cause of action under § 524(a) as the underlying debt for the attorney's fees awarded in favor of the Defendant constitutes a post-petition debt which arose after the Plaintiff filed his bankruptcy petition and after the date of his discharge. Thus, it is not a debt that arose before the order for relief as contemplated by 11 U.S.C. § 727(b), and thereby protected by the discharge injunction of § 524(a). In addition, the Defendant contends that the debt is in the nature of a claim for maintenance and support for the Debtor's former spouse, and is otherwise nondischargeable under 11 U.S.C. § 523(a)(5).

The Plaintiff counters that the "voluntary" agreement he made to pay the subject fees

was coerced at a time when his former spouse was terminally ill, and that the fees constitute a pre-petition debt which was discharged. He points out that 11 U.S.C. § 348(d) effectively requires that the Defendant's claim must be treated as a pre-petition claim. Moreover, he asserts that the fees were not in the nature of support given that the former spouse was so near death and the maintenance he was paying had equalized the parties' financial positions. Thus, he concludes that the agreement was suspect and void and that the subsequent state court order was not entered after a hearing based on any pleading properly raising the issue for decision after submissions from the parties.

In reply, the Defendant argues that his claim against the Plaintiff is a valid post-petition claim fully supported by new consideration because under Section 508 of the Illinois Marriage and Dissolution Act, 750 ILCS 5/508(a), awards thereunder are discretionary, not mandatory, and there was no order, request, application or agreement to pay attorney's fees at any time prior to, or during the bankruptcy case which gave rise to the claim the Defendant seeks to collect from the Plaintiff. To counter the Plaintiff's § 348(d) point, the Defendant notes that the fees owed him prior to the conversion date were owed only by his client, the Plaintiff's former spouse, not the Plaintiff, who subsequently voluntarily agreed to pay the sum in consideration for the former spouse's agreement to settle issues over visitation, custody, support and property divisions, which constitute the adequate new consideration to support the post-petition agreement. Therefore, it is not a reaffirmation agreement regarding an existing pre-petition agreement which requires compliance with § 524. The Defendant further argues that the Plaintiff's allegations of coercion are pure fallacy and unsupported. Moreover, the Defendant cites to various portions of the transcript of proceedings from the

state court action in support of his contentions that the agreement was not wrongfully coerced and is in the nature of nondischargeable support.

V. DISCUSSION

The Court denies the motion for summary judgment. Several material issues of fact exist which preclude the entry of summary judgment. First, a material issue of fact remains regarding whether the fees that the Defendant seeks to collect from the Plaintiff arose from a post-petition agreement. A material issue of fact remains as to whether the debt was pre-petition and thus discharged, or whether it was a post-petition debt. Based on a review of Exhibit A to the Plaintiff's Response to the Defendant's Motion, which consists of the law firm's time entries for work performed in connection with the dissolution proceeding, it appears that some of the services were rendered pre-petition. Further, an issue of fact exists as to whether the agreement to pay the attorney's fees was voluntarily made by the Plaintiff on December 14, 1998. Pursuant to the Plaintiff's affidavit, he entered into the agreement at a time when he knew that his former spouse was terminally ill. See Affidavit of Frank G. Antonino at ¶ 4. Next, a material issue of fact exists as to whether the debt due the Defendant was in the nature of alimony, maintenance or support for the Plaintiff's spouse and is otherwise nondischargeable under § 523(a)(5). The issue of whether the debt arose pursuant to a valid, voluntary post-petition agreement remains and precludes the entry of summary judgment. For these reasons, the motion for summary judgment must be denied.

The Court also denies the alternative motion to dismiss. The Defendant argues the merits of the complaint which is not proper on a motion to dismiss. Rather, the issue is not whether the Plaintiff will ultimately prevail, but whether he has pleaded a cause of action

sufficient to entitle him to offer evidence in support of his claims. The Court finds that the Plaintiff's complaint raises the issues of whether the agreement to pay the attorney's fees was voluntary," whether it was related in whole or in part to a pre-petition claim of the Defendant against the Plaintiff, and whether the agreement was in violation of § 524 or is nondischargeable under § 523(a)(5).

VI. CONCLUSION

For the foregoing reasons, the motion for summary judgment and to dismiss is denied. Concurrently entered herewith is the Court's Preliminary Pretrial Order setting this matter for pretrial conference on September 3, 1999 at 9:00 a.m.

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:	)	
FRANK G. ANTONINO,	)	Bankruptcy No. 98 B 02324
Debtor.	)	Chapter 7
	)	Judge John H. Squires
	)	
FRANK G. ANTONINO,	)	
	)	
Plaintiff,	)	
	)	
	)	Adversary No. 99 A 00586
v.	)	
	)	
THOMAS G. KENNY,	)	
	)	
Defendant.	)	

O R D E R

For the reasons set forth in a Memorandum Opinion dated the 5th day of August, 1999, the Court hereby denies the motion of Thomas G. Kenny to dismiss the complaint, or in the alternative, for summary judgment. Concurrently entered herewith is the Court's Preliminary Pretrial Order setting this matter for pretrial conference on September 3, 1999 at 9:00 a.m.

ENTERED:

DATE: _____

John H. Squires
United States Bankruptcy Judge

cc: See attached Service List