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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH

In re

JOSEPH LOUIS ABEYTA and
SHERRI ROSSALIND ABEYTA,

Debtors.

) Bankruptcy Case No. 83C-02657

)
) *Unpublished*

)
) MEMORANDUM OPINION AND ORDER

INTRODUCTION AND BACKGROUND

This matter comes before the court on the ex parte motion of Joseph L. Abeyta and Sherri Rossalind Abeyta, debtors in a joint case under Chapter 7, for an order directing the Office of Recovery Services, an agency of the State of Utah, to appear and show cause why it should not be held in contempt of Section 362 of the Bankruptcy Code. For the reasons hereinafter set forth, I will deny the motion.

The facts germane to the resolution of this matter, as they appear from the record and the affidavit of Joseph L. Abeyta, are as follows:

On October 3, 1983, the debtors filed their petition. The Office of Recovery Services was scheduled as an unsecured creditor without priority in the sum of \$2,856.00. During the 120 days prior to the filing of the petition, approximately \$600.00 representing wages of Joseph Abeyta were recovered in garnishment proceedings by the Utah Department of Social Services, of which the Office of Recovery Services is a division.

After the filing of the petition, additional funds in an unspecified amount were recovered in garnishment proceedings by the Office of Recovery Services. On November 17, 1983, the trustee filed a no-asset report. The debtors were granted a discharge on December 19, 1983, and the case was closed on December 23, 1983.

On March 28, 1984, the debtors filed a motion, supported by the affidavit of Joseph L. Abeyta, seeking an order directing the Office of Recovery Services to appear and show cause why it should not be held in contempt of § 362 of the Bankruptcy Code for post-discharge garnishment of wages on a dischargeable debt. The affidavit states that the Office of Recovery Services has continued garnishment proceedings during the bankruptcy and since the discharge has garnished his income tax refund. According to the affidavit, Joseph L. Abeyta has never been divorced or separated and the claim of the Office of Recovery Services "was not in connection with a divorce decree, separation agreement or property settlement agreement, but was allegedly in connection with child support." The debtors assert that the claim of the Office of Recovery Services was discharged.

DISCUSSION

Section 727 of the Bankruptcy Code requires the court to grant a discharge to an individual Chapter 7 debtor unless one or more of ten enumerated conditions are present. Section 727 does

not operate to discharge a debtor from any debt excepted from discharge pursuant to Section 523. 11 U.S.C. § 727(b).

Section 523 of the Bankruptcy Code governs the dischargeability of debts. That section states in part:

(a) A discharge under section 727, 1141, or 1328(b) 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 property settlement agreement, but not to the extent that --

(A) such debt is assigned to another entity, voluntarily, by operation of law, or otherwise (other than debts assigned pursuant to section 402(a)(26) of the Social Security Act); or

(B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support;

* * *

Under § 523(a)(5) a debt must satisfy three requirements to be nondischargeable: (1) the debt must actually be for or in the nature of alimony or support; (2) the debt must be to a spouse or child;¹ and (3) the debt must be "in connection with a separation

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Subsection (A) of § 523(a)(5) was amended to provide that child support obligations assigned to the state are nondischargeable. Section 2334 of the Omnibus Budget Reconciliation Act of 1981, Public Law No. 97-35, 95 Stat. 863, which became effective on August 13, 1981, provides as follows: "Sec. 2334. (a) Section 456 of the Social Security Act is amended by adding at the end thereof the following new subsection: '(b) A debt which is a

agreement, divorce decree, or property settlement agreement." In re Marino, 29 B.R. 797, 799 (N.D. Ind. 1983).

From the evidence presented in Joseph Abeyta's affidavit, it appears that the claim of the Office of Recovery Services was not "in connection with a separation agreement, divorce decree, or property settlement agreement." The court in In re Leach, 15 B.R. 1005 (Bkrtcy. D. Conn. 1981), addressed the "in connection with" requirement. In Leach, the Chapter 7 debtor owed the state \$44,785.34 for child support payments it had made to the debtor's children. The obligation was assigned to the state pursuant to Section 402(a)(26) of Title IV of the Social Security Act. The issue was whether the debt occasioned by the grant of public assistance to the debtor's children was dischargeable under Section 523(a)(5) of the Bankruptcy Code. The court held that the debt was dischargeable because it was not "in connection with a separation agreement, divorce decree, or property settlement agreement." See also, In re Richards, 33 B.R. 56 (Bkrtcy D. Or. 1983) (judgment for child support obtained by the state of Oregon, which was not taken in connection with a divorce decree, separation agreement or property settlement agreement, was dischargeable); Matter of Fenstermacher, 31 B.R. 77 (Bkrtcy. D. Neb. 1983) (debt for child support arising out of paternity

child support obligation assigned to a State under section 402(a)(26) is not released by a discharge in bankruptcy under title 11, United States Code.'. (b) Section 523(a)(5)(A) of title 11, United States Code, is amended by inserting before the semicolon the following: '(other than debts assigned pursuant to section 402(a)(26) of the Social Security Act)'."

decree dischargeable). See generally, 3 COLLIER ON BANKRUPTCY ¶ 523.15[2], at 523-111 (15th ed. 1983). But cf. In re Bathazor, 36 B.R. 656 (Bkrtcy. E.D. Wis. 1984) (debts for child support arising out of a paternity decree are nondischargeable); In re Mojica, 30 B.R. 925 (Bkrtcy. E.D. N.Y. 1983) (child support obligations arising out of order from the Family Court of the State of New York held nondischargeable, with the court noting that the substance of the debt rather than its form, should prevail in determining issues of dischargeability); In re Cain, 29 B.R. 591 (Bkrtcy. N.D. Ind. 1983) (child support obligations established in state court paternity suit nondischargeable under § 523(a)(5) notwithstanding absence of separation agreement, divorce decree or property settlement agreement).

However, in ruling upon the debtors' motion, it is unnecessary to consider the "in connection with" requirement of the § 523(a)(5) exception to discharge, and the court expresses no opinion with respect thereto. The question presented is one of whether or not an order to show cause should issue respecting contempt of the automatic stay.

Upon filing a bankruptcy petition, property of the debtors' estate comes within the protection of the automatic stay, which operates to enjoin, inter alia, the following:

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

* * *

11 U.S.C. § 362(a).

The automatic stay of 11 U.S.C. § 362(a) does not prohibit the collection of child support obligations from property that is "not property of the estate." 11 U.S.C. § 362(b)(2). A Chapter 7 debtor's post-petition earnings are not property of the estate. 11 U.S.C. § 541(a)(6). Moreover, after discharge, the automatic stay is lifted pursuant to 11 U.S.C. § 362(c). Noble v. Yingling, 29 B.R. 998, 1002 (Bkrtcy. D. Del. 1983); In re Cruseturner, 8 B.R. 581, 589-90 (Bkrtcy. D. Utah 1981). Therefore, no basis exists in law to hold the Office of Recovery Services in contempt of the automatic stay. However, Section 524(a)(2) of the Bankruptcy Code provides that a discharge granted under Section 727 operates as an injunction against the commencement or continuation of any act to recover any discharged debt. Movants have not pleaded nor sought sanctions for a violation of the order of discharge pursuant to 11 U.S.C. § 524(a)(2).

This court has in the past been inundated by numerous motions similar to the debtors' in this case. The dischargeability provisions of the Bankruptcy Code are mistakenly considered by some practitioners to be self-executing.

Rule 4007 of the Bankruptcy Rules prescribes the procedure to be followed when a party requests a determination by the bankruptcy court that a particular debt has or has not survived discharge under Section 727. Rule 4007 provides in pertinent part as follows:

DETERMINATION OF DISCHARGEABILITY OF A DEBT

(a) Persons Entitled To File Complaint. A debtor or any creditor may file a complaint with the court to obtain a determination of the dischargeability of any debt.

(b) Time for Commencing Proceeding Other Than Under § 523(c) of The Code. A complaint other than under § 523(c) may be filed at any time. A case may be reopened without payment of an additional filing fee for the purpose of filing a complaint to obtain a determination under this rule.

The present circumstances are sufficient to justify the reopening of this case pursuant to 11 U.S.C. § 350(a), as implemented by Rule 5010 of the Bankruptcy Rules, to determine the dischargeability of the debt to the Office of Recovery Services. The proper procedure for such requests is to file a motion to reopen the case to determine the dischargeability of a particular debt, followed by service of a summons and complaint on the affected creditor pursuant to Rule 4007 of the Bankruptcy Rules.

It follows from the foregoing that movants are not entitled to an order directing the Office of Recovery Services to show cause why it should be held in contempt of the automatic stay.

IT IS THEREFORE ORDERED that the motion for order to show cause shall be, and the same hereby is, denied and dismissed.

DATED this 14 day of May, 1984.

BY THE COURT:



GLEN E. CLARK
UNITED STATES BANKRUPTCY JUDGE