THIS OPINION IS NOT INTENDED FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE	)	CASE NO. 00-50313
	)	
RALPH H. KASHNIER, JR.	)	CHAPTER 7
	)	
DEBTOR	)	JUDGE MARILYN SHEA-STONUM
	)	
	)	**ORDER RE: MOTION OF**
	)	**ROBERTA DONNELLY FOR**
	)	**RELIEF FROM STAY**

This matter came on for hearing on April 5, 2000 on the "Motion of Roberta Donnelly for Relief from Stay and Abandonment" (the "Motion") and debtor's response in opposition to the Motion. Appearing were Mitchell Naumoff, counsel for movant, Roberta Donnelly, and Jennifer Hensal, counsel for debtor. During the hearing, counsel jointly submitted documentary evidence and presented legal argument. Neither party called any witnesses to testify. At the conclusion of the hearing the matter was taken under advisement.

This proceeding arises in a case referred to this Court by the Standing Order of Reference entered in this District on July 16, 1984. It is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(G) over which this Court has jurisdiction pursuant to 28 U.S.C. §1334(b). Based upon the pleadings filed herein, the Court makes the following findings of fact and conclusions of law.

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FACTS

In 1979, debtor and Roberta Donnelly were divorced. Under the terms of their divorce decree, debtor was to pay Ms. Donnelly $30.00 per week for support of a child (Ralph Kashnier III) born during their marriage. In July 1999, the Medina County Domestic Relations Court entered judgment in favor of Ms. Donnelly and against debtor for $14,720.00.[1] The basis for that judgment, as set forth in the court's judgment entry, was a finding that debtor "is in arrears of a child support obligation previously ordered in this matter." *See* Joint Exhibit C.

On February 10, 2000, debtor filed a voluntary chapter 7 bankruptcy petition. Ms. Donnelly is listed on debtor's Schedule D (Creditors Holding Secured Claims) as holding a fully secured judgment claim in the amount of $14,700.00.[2] On Schedule E (Creditors Holding Unsecured Priority Claims), debtor checked the box indicating that he has no creditors holding unsecured priority claims. On April 4, 2000, the chapter 7 trustee in debtor's bankruptcy case filed a report indicating that there is no property available for

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[1] On November 15, 1999, the Medina County Domestic Relations Court entered a *nunc pro tunc* order amending the last sentence of the July 29, 1999 judgment so as to include costs and interest on the judgment.

[2] Also on his Schedule D debtor listed the full amount of Ms. Donnelly's claim ($14,700.00) under the column header "Unsecured Portion if Any." Despite that reference, Ms. Donnelly's claim is not listed on debtor's Schedule F (Creditors Holding Unsecured Nonpriority Claims) and, to date, debtor's Schedules have not been amended.

In the Motion, Ms. Donnelly alleges: "This motion is for relief from stay for collection of unpaid child support, which has been in collection by wage garnishment. There is no secured property, and no note." *See* Motion at unnumbered pg. 2. During the April 5th hearing, neither party raised an issue as to whether Ms. Donnelly's claim in this bankruptcy should be classified as secured or unsecured. Accordingly, that matter is not before this Court and will not be addressed any further.

distribution to creditors from debtor's bankruptcy estate.

Pursuant to the Motion, Ms. Donnelly contends that she is entitled to relief from the automatic stay "under Section 362(d)(1) and due to the fact that judgment is for unpaid child support obligations of the Debtor and is a non-dischargeable debt under [the] U.S. Bankruptcy Code . . . ." *See* Motion at unnumbered pg. 2. In his objection, debtor contends that the 1999 judgment in Ms. Donnelly's favor is not actually in the nature of support and is, therefore, dischargeable is his chapter 7 bankruptcy case. Debtor's contention is based upon a 1979 document between debtor and Ms. Donnelly which states:

> I, Roberta Lynn Kashnier have agreed with Ralph Henry Kashnier, Jr. that as of December 12, 1979 I will not except [sic] any child support for Ralph Kashnier III. As agreed upon by myself and Ralph Jr..

See Joint Exhibit A at pg. 2.[3] To date, neither party has filed an adversary proceeding requesting that this Court determine the dischargeability of the debt owed to Ms. Donnelly.

DISCUSSION

The only issue before this Court is whether or not Ms. Donnelly is entitled to relief from the automatic stay. Although the parties framed their dispute over that issue in terms of whether the debt owed to Ms. Donnelly is dischargeable, the matter of

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[3] A copy of this 1979 document was not entered into evidence during the April 5th hearing. Instead, the parties jointly submitted a copy of a "Decision and Journal Entry" entered by the Ninth Judicial District Court of Appeals on February 27, 1991. The text of the 1979 document between Ms. Donnelly and debtor was cited in that opinion and neither party raised any issue that such citation was improper or inaccurate.

[4] Federal Rule of Bankruptcy Procedure 7001 provides in relevant part:

> An adversary proceeding is governed by the rules of this Part VII. It is a

dischargeability is not properly before this Court. *See* Fed. R. Bank. P. 7001(6).[4] *See also In re Miller*, 228 B.R. 203, 207 (Bankr. N.D. Ill. 1999) (arguments about the nondischargeability of a debt must be determined in an adversary proceeding, not by motion); *In re Neal*, 176 B.R. 30, 33 (Bankr. D. Idaho 1994) (determination of dischargeability of debt is an adversary proceeding and may not be determined by motion); *Wood v. Jasperson (In re Jasperson)*, 116 B.R. 740, 743 (Bankr. S.D. Cal. 1990) (proper way to allege nondischargeability is to initiate an adversary proceeding).[5] Therefore, whether or not the debt owed to Ms. Donnelly is dischargeable in debtor's chapter 7 case cannot and will not be determined at this time.

Ms. Donnelly requests relief from the automatic stay pursuant to §362(d)(1) of the Bankruptcy Code. That provision provides in relevant part:

> (d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay -
>
> > (1) *for cause*, including the lack of adequate protection of an interest in property of such party in interest.

See 11 U.S.C. §362(d)(1) (emphasis added). A creditor's right to collect on a

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proceeding . . . (6) to determine the dischargeability of a debt, . . . [or] (9) to obtain declaratory judgment relating to any of the foregoing . . . .

[5] In addition to the fact that this case is not procedurally postured for a determination of the dischargeability of the debt owed to Ms. Donnelly, the Court also notes that insufficient evidence was provided during the April 5th hearing to enable such a determination to be made. For instance, the parties submitted only a portion of the record of the underlying state court proceedings between the parties. Also, no testimonial evidence regarding the intent of the 1979 document between debtor and Ms. Donnelly was provided.

nondischargeable debt can constitute "cause" pursuant to §362(d)(1). However, because the determination of the dischargeability of the debt owed to Ms. Donnelly has yet to be determined, relief from the automatic stay cannot be granted on the grounds of nondischargeability.

Congress has not chosen to specifically enumerate what constitutes "cause" for purposes of §362(d). However, the legislative history of that section suggests that such "cause" can include the existence of an alternative forum for consideration of matters in dispute:

> [I]t will often be more appropriate to permit proceedings to continue in their place of origin, when no great prejudice to the bankruptcy estate would result, in order to leave the parties to their chosen forum and to relieve the bankruptcy court from any duties that may be handled elsewhere.

In re Johnson, 153 B.R. 49, 51 (Bankr. D. Idaho 1993), quoting S.Rep. No. 989, 95th Cong., 2d. Sess. 50, *reprinted in* 1978 U.S.C.C.A.N. 5787, 5836.

Debtor and Ms. Donnelly have a long history in the Medina County Domestic Relations Court and it is the correct interpretation of that court's order that the parties now question. In light of the fact that state courts have concurrent jurisdiction to make dischargeability determinations under the Bankruptcy Code provision setting forth discharge exceptions for child support, *see, e.g. In re Antonio*, 241 B.R. 883, 889-90 (Bankr. N.D. Ill. 1999), an alternative forum for consideration of the parties' dispute exists in this case. Accordingly, Ms. Donnelly should be granted relief from automatic stay to seek redress in the Medina County Domestic Relations Court. *See Quisenberry v. Quisenberry*, 632 N.E.2d 916, 921, 91 Ohio App. 3d 341, 348 (Ohio Ct. App. 1993) ("Ohio law clearly establishes that a judgment may be interpreted if it is ambiguous"). *See also Carver v. Carver*, 954 F.2d 1573, 1578 (11th Cir. 1992) ("When requested, such

relief [from the automatic stay] should be liberally granted in situations involving alimony, maintenance, or support in order to avoid entangling the federal court in family law matters best left to state court"), *cert. denied*, 506 U.S. 986 (1992), *citing In re White*, 851 F.2d 170, 173 (6th Cir.1988).

CONCLUSION

Based upon the foregoing, movant, Roberta Donnelly, is granted limited relief from the automatic stay to permit her to seek clarification from the Medina County Domestic Relations Court as to whether that court's 1999 judgment (or any other order that the parties question) was for child support and to request a determination regarding the dischargeability of that debt in debtor's chapter 7 bankruptcy case. If the state court ultimately determines that its 1999 judgment is for child support and that the debt owed by debtor to Ms. Donnelly is not dischargeable in his chapter 7 case, then Ms. Donnelly shall be free to pursue collection on the judgment without seeking any further relief in this Court from the automatic stay (if still applicable in this case) or from the post-discharge injunction established by §524 of the Bankruptcy Code. If, however, the state court ultimately determines that the 1999 judgment is not in the nature of support and that the debt owed by debtor to Ms. Donnelly is dischargeable in his chapter 7 case, then Ms. Donnelly shall be barred by the automatic stay (if still applicable in this case) and the §524 post-discharge injunction from pursuing collection on the judgment.

IT IS SO ORDERED.

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MARILYN SHEA-STONUM
Bankruptcy Judge

DATED: 4/21/00