

Failure to Pay Alimony Spells Doom for Debtor

By Craig D. Robins

Over the past decade or so, Congress has amended various bankruptcy statutes to protect innocent spouses in matrimonial situations. Those protections were at work in a recent case that Central Islip Bankruptcy Judge Louis A. Scarcella dismissed for cause, upon a motion brought by the debtor's ex-wife.

In his written decision, the Judge Scarcella demonstrated how important it is for a debtor who wants to succeed with a reorganization case to maintain the matrimonial obligations. *In re Mayer*, Case No. 15-73216-las (Bankr. E.D.N.Y., February 3, 2017).

The debtor, who happens to be an attorney with his own professional corporation, sought Chapter 11 relief in July 2015, stating that his financial problems were due to a decline in income and the results of an oner-

ous divorce settlement. (Consumer debtors who need or are required to engage in a payment plan bankruptcy may file for either Chapter 11 or Chapter 13 relief, depending on their particular situation.)

In 2011, the parties entered into a separation agreement and were soon divorced, after 35 years of marriage. The separation agreement provided that the debtor pay support to his ex-wife totaling 28 percent of his gross income for the remainder of his ex-wife's lifetime, with minimum payments of \$75,000 per year for 2013, 2014 and 2015.

The separation agreement contained the standard language that its terms could only be amended or modified in writing. However, the debtor alleged that in 2012, he and his ex-wife orally agreed to modify the terms of the



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agreement. According to the debtor, his ex-wife agreed that he could pay their daughter's tuition and expenses during 2013, 2014 and 2015, in lieu of making the required support payments.

Prior to the bankruptcy case, the ex-wife filed a motion in matrimonial court seeking to hold the debtor in contempt for willfully failing to comply with the terms of the separation agreement. In response, the debtor filed a motion for a downward modification based on the alleged oral agreement.

Before the matrimonial court reached a decision, the debtor filed his bankruptcy case. A month after filing, the debtor brought a motion seeking a determination that he did not owe any money to his ex-wife under their sepa-

ration agreement based on an alleged oral agreement that he overpaid his ex-wife \$70,000.

Shortly thereafter, the ex-wife filed a priority claim for pre-petition unpaid domestic support obligations in the amount of \$286,000, and post-petition support and maintenance of \$55,000.

Although Judge Scarcella gave the parties an opportunity to work out their differences, they reached an impasse in their negotiations which necessitated his ruling.

The ex-wife contended that cause existed to dismiss the bankruptcy case on several theories, including the debtor's unexcused failure to comply with certain Chapter 11 reporting requirements as well as his failure to pay post-petition domestic support obligations.

The judge noted that a debtor in Chapter 11 has a duty "to pay any

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domestic support obligation that first becomes payable after the date of the filing of the petition" and failure to do so, pursuant to Bankruptcy Code § 1112(b)(1) is cause to dismiss the case or convert it to one under Chapter 7.

Here, the debtor did not contend that his obligations under the separation agreement were not domestic support obligations, nor did he dispute that he failed to pay post-petition domestic support obligations owed to his ex-wife. (A "domestic support obligation" is basically any debt incurred before or after a bankruptcy filing that is owed to a spouse or former spouse, and which is in the nature of alimony, maintenance or support; and established pursuant to the terms of a divorce decree, separation agreement or court order).

Instead, he insisted that the oral agreement modified the terms of the separation agreement, relieving him of his obligation. Judge Scarcella disagreed, pointing out that neither the bankruptcy nor the matrimonial courts reached any judicial determination that the written agreement had been modified to reflect the alleged oral agreement.

In addition, cause to convert or dismiss a Chapter 11 case includes a debtor's "unexcused failure to satisfy timely any filing or reporting requirement established by this title or by any rule applicable to a case under this chapter."

Judge Scarcella found the debtor failed to comply with this section because he had a duty as debtor and 100 percent owner of his professional limited liability company to file periodic financial reports regarding the company and he did not do so. Although the debtor argued that he provided he ex-wife with bank statements for the business, the judge held that this did not fulfill his statutory duty.

Accordingly, for these two reasons, the judge found sufficient cause to dismiss the case.

Although this situation involved a Chapter 11 case, there are similar protections in Chapter 13 proceedings. Bankruptcy Code § 1328(a)(8) requires a debtor to be current with all domestic support obligations that became due after filing in order to have the plan confirmed.

It should be noted that there are numerous other provisions that protect innocent spouses regarding domestic support obligations in bankruptcy, a topic that could easily fill dozens of these columns.

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