

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF ILLINOIS

IN RE: )  
 )  
DAVID O. HOPKINS, ) Bankruptcy Case No. 98-31637  
 )  
Debtor. )  
 )  
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 )  
DAVID O. HOPKINS, )  
 )  
Plaintiff, )  
 )  
vs. ) Adversary Case No. 98-3151  
 )  
KAREN FLOYD, )  
 )  
Defendant. )

OPINION

This matter having come before the Court on a Complaint to Compel Release of Garnishment Pursuant to 11 U.S.C. 362(h), filed by the Plaintiff, on June 26, 1998, and Defendant's Answer to Plaintiff's Complaint to Compel Release of Garnishment Pursuant to 11 U.S.C. 362(h) and Defendant's Counterclaim to Determine Dischargeability of Indebtedness and Objection to Discharge of Indebtedness filed by the Defendant on July 31, 1998; the Court, having heard arguments of counsel and being otherwise fully advised in the premises, makes the following findings of fact and conclusions of law pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure.

In considering the Complaint and Counterclaim now before it, the Court first notes that it is not disputed and it is clear that the indebtedness owed by the Debtor/Plaintiff, David O. Hopkins, to the Defendant, Karen Floyd, is indebtedness which is non-dischargeable pursuant to 11 U.S.C. § 523(a)(5). The undisputed facts make it clear that all of the indebtedness owed by the Debtor to Karen Floyd is for either present child support or delinquent child support resulting from an Order entered in the Circuit Court of St. Clair County, Illinois, on December 27, 1991. As such, the Court finds, pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure and 11 U.S.C. § 523(a)(5), that both Counts I and II of the

Defendant's Counterclaim to Determine Dischargeability of Indebtedness and Objection to Discharge of Indebtedness should be allowed.

Next, the Court examines Count III of the Defendant's Counterclaim, in which Defendant's attorney requests that the sum of \$2,000 in attorney's fees awarded in the State Court and \$268 in costs incurred in locating and serving the Plaintiff in the State Court matter be held non-dischargeable pursuant to 11 U.S.C. § 523(a)(5), as being in the nature of support for the benefit of the Defendant and of the parties' minor children. As with Counts I and II of the Defendant's Counterclaim, there is little dispute over the facts surrounding Count III of the Counterclaim. As such, the Court can conclude that, although the attorney's fees and costs awarded by the State Court are to be paid to the Defendant's attorney, those fees were incurred in connection with the Defendant's efforts to collect child support payments from the Plaintiff/Debtor, and the Orders entered as a result of the Defendant's attorney's efforts benefitted both the Defendant and the parties' minor children. As such, those attorney's fees awarded in the State Court in the amount of \$2,000 and costs in the amount of \$268 are non-dischargeable pursuant to 11 U.S.C. § 523(a)(5), as being in the nature of support.

As for the Plaintiff/Debtor's Complaint to Compel Release of Garnishment Pursuant to 11 U.S.C. 362(h), the Court concludes that there has been no willful violation of the automatic stay in the instant case. Under 11 U.S.C. § 362(h), it is provided that:

(h) An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorney's fees, and, in appropriate circumstances, may recover punitive damages.

The facts of this matter are not in dispute and it is clear that the State Court entered a wage withholding Order well before the Debtor filed for a Chapter 7 bankruptcy, and the Defendant's failure to have that Order vacated upon the Plaintiff's request is in no way a willful act that would rise to the level necessary to find sanctions and damages appropriate under 11 U.S.C. § 362(h). Additionally, the Court notes that, not only is there not a willful violation of the automatic stay, under the circumstances it is apparent that there is actually no violation of the automatic stay at all by virtue of 11 U.S.C. § 362(b)(2), which states:

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an

application under section 5(a)(3) of the Securities Investor Protection Act of 1970 does not operate as a stay - . . .

(2) under subsection (a) of this section -

(A) of the commencement or continuation of an action or proceeding for -

(i) the establishment of paternity; or

(ii) the establishment or modification of an order for alimony, maintenance, or support; or

(B) of the collection of alimony, maintenance, or support from property that is not property of the estate;

In the instant case, the Debtor/Plaintiff wishes to argue that the exception to the automatic stay does not apply here because his wages which are being taken are property of the estate, and that he should be allowed to keep those wages to make payments in his Chapter 13 Plan. This argument ignores the fact that, pursuant to 11 U.S.C. § 1327(b):

(b) Except as otherwise provided in the plan or in the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.

and 11 U.S.C. § 1327(c), which states:

(c) Except as otherwise provided in the plan or in the order confirming the plan, the property vesting in the debtor under subsection (b) of this section is free and clear of any claim or interest of any creditor provided for by the plan.

As such, the Court concludes that the Defendant's failure to have the wage assignment order released is not a violation of the automatic stay by virtue of the exception of 11 U.S.C. § 362(b)(2).

In addition to seeking damages, the Plaintiff/Debtor also seeks an Order from this Court vacating the wage withholding Order entered in the State Court divorce proceeding. After considering the arguments of counsel, the Court is unable to find any compelling reason why it should grant the relief requested by the Plaintiff/Debtor. In fact, the Court finds that there is an overriding policy consideration to provide a flow of proper child support payments to the minor children of the Plaintiff/Debtor which must be considered. Even though the Debtor suggests a 100% Plan repayment of the child support arrearage now being paid via the withholding Order, the Court is aware that the security of a withholding Order for

support payments of the Plaintiff/Debtor's minor children would be seriously compromised were the Court to allow that Order to be vacated with reliance placed upon the Plaintiff/Debtor to make voluntary payments, which he was either unable or unwilling to make in the past. As such, the Court finds that the Debtor/Plaintiff's Complaint to Compel Release of Garnishment Pursuant to 11 U.S.C. 362(h) should be denied in total.

ENTERED: September 29, 1998.

/s GERALD D. FINES  
United States Bankruptcy Judge