

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re

KENNETH SAMUEL FARMER, SR.,

Debtor.

Case No. 97-32425-L

Chapter 7

CLAIRE BETTY KAISER FARMER,

Plaintiff

v.

Adversary Proceeding 97-1222

KENNETH SAMUEL FARMER, SR.,

Defendant.

MEMORANDUM

Before the Court is a request for an award of attorney's fees submitted by the Plaintiff, Claire Betty Kaiser Farmer, pursuant to Tennessee Code Annotated § 36-5-103(c). This memorandum contains the Court's findings of fact and conclusions of law pursuant to Fed. R. Bankr. P. 7052.

I. BACKGROUND

Plaintiff, Claire Betty Kaiser Farmer, filed a complaint for divorce against the Defendant, Kenneth Samuel Farmer, Sr., on July 18, 1995. The parties were unable to reach any settlement and did not execute a marital dissolution agreement. After a bench trial, the Honorable Janice M. Holder, Circuit Judge, awarded custody of the parties' children to the Plaintiff and ordered Mr. Farmer to pay \$1,500 per month in child support. Judge Holder also ordered Mr. Farmer to pay alimony in solido in the amount of \$50,000, attorney fees and expenses incurred in the

divorce proceedings in the amount of \$5,000, and any credit card debt that remained unpaid after the sale of the parties' residence.

On January 8, 1997, the Ms. Farmer filed a Petition for Contempt as a result of Mr. Farmer's failure to pay child support as ordered in the divorce decree. On March 13, 1997, the Honorable James F. Russell, successor to Judge Holder, concluded that Mr. Farmer had cured his default but awarded Ms. Farmer's attorney \$600 for fees incurred in enforcing the child support order.

Mr. Farmer filed a voluntary Chapter 7 bankruptcy petition on August 26, 1997. The Plaintiff subsequently filed a complaint to determine the dischargeability of certain marital debts provided for in the divorce decree pursuant to 11 U.S.C. §§ 523(a)(5) and 523(a)(15). After a bench trial, this Court rendered a judgment finding the Defendant's \$600 obligation of attorney fees non-dischargeable. The obligations of alimony in solido and the credit card indebtedness were held to be dischargeable.

Ms. Farmer filed an appeal of this Court's order with the United States District Court for the Western District of Tennessee. Upon review, the appellate court vacated the judgment of this Court as to the dischargeability of the alimony in solido and affirmed the dischargeability of the credit card debt. The District Court remanded the matter for resolution of the Plaintiff's request for attorney's fees, the dischargeability of the Debtor's child support arrearage, and the dischargeability of \$1,050.00 and \$5,000.00 attorney fee awards relating to state court attorney's fees.

On March 3, 1999, this Court conducted a hearing in accordance with the District Court's Order of Remand. Based upon the Court's prior findings and the record as a whole, the Court

concluded that the child support arrearage and the \$1,050.00 and \$5,000.00 state court attorney fee awards were non-dischargeable. The Plaintiff's request for attorney's fees arising out of this adversary proceeding was taken under advisement and the parties were directed to file supplemental briefs on the issue.

II. DISCUSSION

The issue before the Court is whether the Plaintiff, Claire Betty Kaiser Farmer, may be awarded attorney fees for professional services incurred in this adversary proceeding pursuant to Tennessee Code Annotated § 36-5-103(c).

The Plaintiff bases her request on T.C.A. § 36-5-103(c), which provides:

The plaintiff spouse may recover from the defendant spouse, and the spouse or other person to whom the custody of the child or children is awarded may recover from the other spouse, reasonable attorney fees incurred in enforcing any decree for alimony and/or child support, or in regard to any suit or action concerning the adjudication of the custody or the change of custody of any child, or children, of the parties, both upon the original divorce hearing and at any subsequent hearing, which fees may be fixed and allowed by the court, before whom such action or proceeding is pending, in the discretion of such court.

Ms. Farmer contends that she is entitled to an award of attorney fees incurred in prosecuting this dischargeability action because the legal activity undertaken for her benefit and for the benefit of her children was designed to obtain enforcement of support orders entered in the parties' divorce proceeding.

The Bankruptcy Code does not specifically authorize attorney fee awards for prevailing creditors in § 523 dischargeability actions. The only authorization for professional fees in dischargeability actions is found in § 523(d), which permits fees to successful debtors in § 523(a)(2) actions on consumer debts, in instances where the creditor's position was not

substantially justified. 11 U.S.C. § 523(d) (1998). In this action, the Plaintiff-creditor brought her non-dischargeability claims pursuant to §§ 523(a)(5) and 523(a)(15).

The Plaintiff relies on *In re Silverstein*, 186 B.R. 85 (Bankr. W.D. Tenn. 1995), as support for her request for professional fees. The issue before the *Silverstein* court was whether a 1988 state court judgment of \$10,278.00, awarded to the defendant for attorney's fees pursuant to T.C.A. § 36-5-103(c), was non-dischargeable as part of the debtor's support obligation. Judge G. Harvey Boswell held that the award of statutory attorney's fees by the state court was non-dischargeable as an ancillary obligation to the child support obligation. *Id.* at 87.

This Court finds *Silverstein* inapplicable in the instant case. The issue in *Silverstein* was whether a state court judgment for attorney fees was non-dischargeable, not whether the bankruptcy court was authorized to award attorney fees incurred in the prosecution of the dischargeability action. The fees sought by Ms. Farmer in this adversary proceeding are clearly distinguishable from those incurred and awarded in state court proceedings to enforce support obligations.

Other courts have considered the issue of whether attorney fees may be awarded in dischargeability proceedings involving support obligations. In *In re Morello*, 185 B.R. 753, 758 (Bankr. E.D. Tenn. 1995), the court considered whether the plaintiff-attorney could recover his fees and expenses incurred in prosecuting the § 523(a)(5) dischargeability action. The court, citing T.C.A. § 36-5-103(c), concluded that the state statute did not authorize the bankruptcy court to award attorney fees in a non-dischargeability action.

Similarly, the court in *In re Barbre*, 91 B.R. 846, 848 (Bankr. S.D. Ill. 1988), addressed

the plaintiff's request for attorney fees incurred in a § 523(a)(5) dischargeability action. The plaintiff in *Barbre* argued that since she had been compelled to litigate the issue of the debtor's support obligation in a federal forum, the court should apply substantive state law and award attorney fees as ancillary to the underlying debt for support. The court relied on *Matter of Myers*, 61 B.R. 891 (Bankr. N.D. Ga. 1986), and *In re Gedeon*, 31 B.R. 942 (Bankr. D. Colo. 1983), in determining whether attorney fees could be awarded.¹ Both *Myers* and *Gedeon* held that the bankruptcy court has no authority to award professional fees incurred in § 523(a)(5) actions. In addition to a lack of statutory authority for such an award, the *Myers* court noted that bankruptcy courts have no role in assessing the amount of support in domestic relations cases. *Myers*, 61 B.R. at 896. After thorough analysis, the *Barbre* court concluded that it had "no authority to award support and should not do so indirectly by awarding attorney fees pursuant to

¹ The *Barbre* plaintiff based her argument on two cases, *In re Scannell*, 60 B.R. 562 (Bankr. W.D. Wis. 1986), and *In re Teter*, 14 B.R. 434 (Bankr. N.D. Tex. 1981), in which attorney fees were awarded in bankruptcy proceedings brought to determine the dischargeability of support obligations. The *Teter* court, absent citation of authority, held that since the liability for attorney fees was created by state statute, state law should control and such fees should be established in a non-dischargeability context. *Teter*, 14 B.R. at 437.

The *Scannell* court, analogizing to a diversity action, stated that the "established state policy favoring attorney's fees in 'actions affecting the family,' and the presence of significant related questions of state law in the litigation justifies an award of attorney's fees. Such an award is proper since no federal law or rule purports to affirmatively proscribe the award." *Id.* at 567 (citation omitted).

The *Barbre* court found the holdings of *Scannell* and *Teter* unpersuasive, stating that the reasoning did not withstand critical analysis. "Unlike a state court action that has been removed to federal court as a diversity case, a dischargeability action is uniquely a bankruptcy matter and is determined by federal and not state law." *Barbre*, 91 B.R. at 848. Plaintiffs seeking an award of attorney fees in bankruptcy proceedings will have had an opportunity to obtain an award of attorney fees under state law and may, additionally, be awarded attorney fees in state court proceedings to enforce the judgment of support. *Id.*

Neither *Scannell* nor *Teter* were cited by Ms. Farmer in support of her request for attorney fees.

state statute.” *Barbre*, 91 B.R. at 849.²

Additionally, the court in *In re Colbert*, 185 B.R. 247 (Bankr. M.D. Tenn. 1995), considered whether it had authority to award attorney fees in non-dischargeability proceedings concerning support obligations. The *Colbert* court, also declining to follow the *Scannell* and *Teter* courts’ reasoning, concluded that “a bankruptcy court is simply not the proper court to make an award of attorney fees in this type of case. . . . [T]ennessee law has long treated an award of attorney fees related to a divorce action as alimony.” *Id.* at 249 (citing *Raskind v. Raskind*, 325 S.W.2d 617, 625 (1959); *Humphreys v. Humphreys*, 281 S.W.2d 270, 282 (1954)). The court held that the award of fees is uniquely related to state court support determinations, and the decision as to whether such an award is appropriate should be left to the state court. *Id.*³

² The *Barbre* court further noted that the purpose of a § 523 action is to determine the dischargeability of pre-petition debts. “Attorney fees incurred in the bankruptcy proceeding are post-petition debts and not properly a matter for consideration in a dischargeability action.” *Id.* at 849 (citing *In re Lathouwers*, 54 B.R. 205, 207 (Bankr. D. Colo. 1985)).

³ The *Colbert* court further noted that the state court has concurrent jurisdiction with the bankruptcy court to determine questions of non-dischargeability under § 523(a)(5). “[I]f the state court decided to award attorney fees . . . under T.C.A. § 36-5-103(c), it may also rule on the dischargeability of those fees and save the parties a potential return to this court for that determination.” *Id.* at 250 n.4.

Like the *Colbert* court, this Court is cognizant of the well-established principle of statutory interpretation, *expressio unius est exclusio alterius*.⁴ The inclusion of § 523(d) in the dischargeability provisions of the Bankruptcy Code, which permits professional fees for successful debtors in certain § 523(a)(2) actions on consumer debts, illustrates a congressional intent that each party sustain his own professional costs in all other dischargeability proceedings. *Colbert*, 185 B.R. at 248 (citing *Matter of Myers*, 61 B.R. 891, 896 (Bankr. N.D. Ga. 1986)). The identification of authorized fee requests for specific § 523(a)(2) debtors under § 523(d) implies the exclusion of other provisions in § 523.

This Court finds the reasoning of *Colbert* persuasive. It is well recognized that absent a federal statute or enforceable contract providing for professional fees, each party must bear the cost of his or her own attorney fees. *Alyeska Pipeline Serv. v. Wilderness Soc’y*, 421 U.S. 240, 257, 95 S. Ct. 1612, 1621, 44 L. Ed. 2d 141 (1975). In the instant proceeding, the parties do not have a contractual right to attorney fees, only a state statutory right. Tennessee Code Annotated § 36-5-103(c), by its terms, permits the state court rendering the alimony and child support decree to award attorney fees incurred in the enforcement of that decree. Although bankruptcy courts may determine whether an obligation imposed initially by the state court is dischargeable, it is not authorized to impose an obligation absent federal statutory authority. In the absence of a contractual right or statutory entitlement to attorney fees, this Court is without discretion to

⁴ “The expression of one thing is to the exclusion of the other.” See *In re Michigan-Wisconsin Trans. Co.*, 161 B.R. 628, 635 (Bankr. W.D. Mich. 1993); *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 188, 98 S. Ct. 2279, 2298, 57 L. Ed. 2d 117 (1978).

award attorney fees.

III. CONCLUSION

Based upon the foregoing and in accordance with the Order of Remand from the District Court, this Court concludes that judgment should be entered for the Plaintiff with respect to the alimony in solido in the amount \$50,000, the child support arrearage, and the state court attorney fee awards of \$1,050 and \$5,000. The Plaintiff's request for attorney fees arising out of this adversary proceeding is hereby DENIED. A separate order will be entered consistent with this Memorandum.

BY THE COURT:

JENNIE D. LATTA
United States Bankruptcy Judge

Date: April 1, 1999