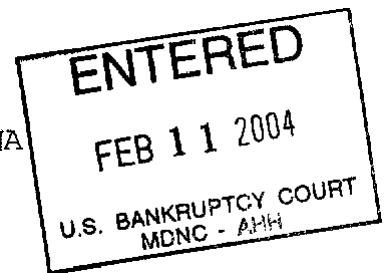


UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION



IN RE:

Christopher James Diaz,
Debtor.

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Case No. 03-14091C-7G

ORDER

This case came before the court on February 3, 2004, for hearing upon a motion for relief from the automatic stay filed on behalf of Allison Johnson Diaz. William L. Livesay appeared on behalf of Allison Johnson Diaz ("Movant") and Lee Laskody appeared on behalf of the Debtor.

Movant offered into evidence two State Court orders which reflect that an action currently is pending in State Court involving the Movant and the Debtor. One of these orders was entered on April 24, 2003, and the other was entered on July 31, 2003. Under these orders, the Debtor has been ordered to pay specified amounts of retroactive child support, medical expenses of the child, prospective temporary child support, child support arrearage and attorney's fees incurred by the Debtor in the State Court proceeding.

In the motion, the Movant seeks relief from the automatic stay in order (1) to pursue proceedings in the State Court to collect the unpaid amounts allegedly due under the State Court orders, (2) to obtain an order setting permanent child support and (3) to pursue proceedings in State Court to collect a property settlement

debt allegedly due under a separation agreement between the Debtor and the Movant.

1. Proceedings to Collect Child Support.

Movant first seeks relief from the automatic stay in order to collect the amounts allegedly due under the orders which already have been entered in State Court. Although it is not entirely clear that Movant is required to obtain relief from the automatic stay before doing so¹, the court is satisfied that the Movant should be allowed to pursue such enforcement proceedings in State Court as are necessary to collect all amounts of child support due

'Under § 362(b) (2) (B), the automatic stay does not apply to "the collection of alimony, maintenance, or support from property that is not property of the estate . . ." However, according to COLLIER, this provision does not authorize enforcement litigation against a debtor without obtaining relief from the automatic stay. COLLIER states:

However, it is important to note that, unlike some of the other exceptions to the stay listed in section 362(b), this exception does not extend to the "commencement or continuation of an action or proceeding" to enforce an obligation. Thus, section 362(b) (2) (B) protects an obligee who receives property on a prepetition obligation, for example, through a prior wage attachment, from claims that such receipt is improper, but does not authorize enforcement litigation against the debtor without relief from the automatic stay.

3 COLLIER ON BANKRUPTCY ¶ 362.05[2] (15th ed. rev. 2003). There is little case law regarding whether the exception in § 362(b) (2) (B) is as narrow as stated by COLLIER, although COLLIER's reading of § 362(b) (2) (B) was adopted in In re Lori, 241 B.R. 353, 354-55 (Bankr. M.D. Pa. 1999).

under the State Court orders, including the award of attorney's fees.² Child support is a nondischargeable indebtedness that will survive the bankruptcy proceeding and thus there is no sound reason for delaying collection of child support from property that is not property of the bankruptcy estate. Accordingly, to the extent that the automatic stay is applicable to future proceedings in the State Court to collect the amounts due under the orders that were entered in State Court on April 24, 2003, and July 31, 2003, the stay will be lifted to permit such proceedings to proceed.

2. Proceedings to Establish Permanent Child Support.

The Movant also requests relief from the stay in order to seek an order in the State Court proceeding establishing the amount of Debtor's permanent child support obligation. Relief from the automatic stay is not needed in order for the Movant to pursue this relief in State Court proceedings. Under § 362(b)(2)(A)(ii) the automatic stay is not applicable to "the commencement or continuation of an action or proceeding for . . . the establishment or modification of an order for alimony, maintenance, or support .

²The attorney's fees awarded under the State Court orders were incurred in obtaining the child support orders. Such attorney's fees take on the nature of the underlying obligation awarded in the proceeding, i.e., child support in the present case. See In re Azia, 159 B.R. 71, 75-76 (Bankr. D. Mass. 1993); In re Duncan, 122 B.R. 434, 435-36 (Bankr. N.D. Okla. 1991). This is true whether the attorney's fees are awarded to the non-debtor spouse or directly to her attorney. See In re Silanski, 897 F.2d 743, 744-45 (4th Cir. 1990).

. . .” Movant thus is free to seek an order in State Court establishing the amount of Debtor's permanent child support obligation without obtaining relief from the automatic stay.

3. Proceedings to Collect Property
Settlement Indebtedness.

The property settlement debt which the Movant wishes to pursue in State Court is based upon a provision in a separation agreement in which the Debtor agreed to pay a marital debt owed to Lowe's Home Improvement Warehouse. The Movant alleges that Debtor's obligation to pay the Lowe's debt is a nondischargeable property settlement debt pursuant to § 523(a)(15) of the Bankruptcy Code. Movant requests that the automatic stay be modified at this time in order to permit the Movant to initiate proceedings against the Debtor in State Court to recover the amount of the Lowe's debt. Pursuant to § 523(c) of the Bankruptcy Code, the dischargeability of indebtedness of the kind described in § 523(a)(15) must be determined in a proceeding brought in the bankruptcy court. Since the dischargeability of the property settlement debt referred to in the motion must be determined in the bankruptcy court and no such determination has been made as yet, the Movant is not entitled to relief from the stay to pursue the collection of such indebtedness in State Court at this time.

Now, therefore, it is ORDERED, ADJUDGED AND DECREED as follows:

(1) The automatic stay is hereby modified so as to permit

Allison Johnson Diaz to commence or continue proceedings in State Court to collect from the Debtor, Christopher James Diaz, all child support, including attorney's fees, awarded under the orders that were entered in the District Court of Alamance County on April 24, 2003, and on July 31, 2003, in Civil Action No. 02 CvD 2332; and

(2) Relief from the automatic stay is denied as to the commencement or continuation of any proceedings in State Court to collect property settlement indebtedness or other equitable distribution amounts pending further orders of this court and the automatic stay remains in full force and effect except as modified in the preceding paragraph.

This 9th day of February, 2004.



WILLIAM L. STOCKS
United States Bankruptcy Judge