UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Central Division

In re:	)	Bankr. No. 96-30056
	)	
GARY O. ZILVERBERG	)	Chapter 7
Soc. Sec. No. 504-56-5727	)	
Debtor.	)	
	)	
RAMONA L. BYRNE	)	Adv. No. 96-3010
fka Ramona L. Zilverberg	)	
Plaintiff,	)	MEMORANDUM OF DECISION
	)	RE: DEFENDANT'S
-vs-	)	MOTION TO RECONSIDER
GARY O. ZILVERBERG	)	
Defendant.	)	

The matter before the Court is the Motion to Reconsider and supporting brief filed by Defendant-Debtor Gary O. Zilverberg on February 3, 1999, and Plaintiff Ramona L. Byrne's response. This is a core proceeding under 28 U.S.C. § 157(b)(2). This Memorandum of Decision and accompanying Order shall constitute the Court's findings and conclusions under F.R.Bankr.P. 7052. As set forth below, the Court concludes that Defendant-Debtor's Motion must be denied.

I.

Gary O. Zilverberg (Zilverberg) filed a Chapter 7 petition in mid 1996. His former wife, Ramona L. Byrne (Byrne), commenced an adversary proceeding seeking a determination that certain debts incurred during the marriage were non dischargeable. Following a trial, the Court determined that a debt for attorneys' fees and interest was a non dischargeable family support debt under 11 U.S.C. § 523(a)(5) and that several debts were non dischargeable as property settlement-related debts under 11 U.S.C. § 523(a)(15).

26.

A judgment for Byrne was entered January 8, 1997.[1]

On June 18, 1997, Byrne filed her own Chapter 7 petition. Although not all entries were exactly the same, it appears that she scheduled most of the same debts that had been declared non dischargeable in Zilverberg's bankruptcy. Byrne listed Zilverberg as a co-debtor but she did not include him on her mailing list of creditors. Hence, Zilverberg did not receive timely, formal notice of the commencement of her case. Byrne received a discharge of debts on October 7, 1997.

Zilverberg's bankruptcy attorney learned of Byrne's bankruptcy about September 10, 1998 from Byrne's attorney.[2] On February 3, 1999, Zilverberg filed a Motion to Reconsider. Therein, he asked the Court to reopen this adversary proceeding and discharge the previously non dischargeable debts. He argued that because Byrne had these debts discharged, the Court's rationale for holding him responsible for the debts was vitiated. He stated

> [t]hat the intent and purpose of 11 U.S.C. § 523(a)(15) is to prohibit an ex-spouse from discharging a debt for spousal maintenance or support, leaving an ex-wife or ex-husband to bear the obligation solely on their own.

Zilverberg did not cite any federal rule of civil procedure nor any federal or local bankruptcy rule as the basis for his Motion.

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[1] The Judgment erroneously lumps all the non dischargeable debts under spousal support and maintenance. The Court relies on the more specific hearing minutes for an accurate summary of the Court's disposition.

[2] Zilverberg's pleading and brief do not clearly state when he, rather than his attorney, learned of Byrne's bankruptcy.

In her response, Byrne relayed Zilverberg's continued failure to pay the debts after the non dischargeability judgment was entered and his absence from the United States. She argued that her bankruptcy was immaterial to the attorneys' fees debt declared non dischargeable under § 523(a)(5). Finally, Byrne argued that Zilverberg did not come with clean hands in seeking equitable relief.

II.

When a "motion to reconsider" is filed without citation to a rule, the Court may consider it under one of two: under F.R.Civ.P. 59(e) as a motion to alter or amend a judgment or under F.R.Civ.P. 60(b) as a motion for relief from judgment for a mistake or other reason. *Sanders v. Clemco Industries*, 862 F.2d 161, 168-69 (8th Cir. 1988). However, since Zilverberg did not meet the ten-day filing window for a motion under Rule 59(e), Rule 60(b) is his only option.

Relief under Rule 60(b) is an extraordinary remedy that may be granted only upon a showing of exceptional circumstances. *Mitchell v. Shalala*, 48 F.3d 1039, 1041 (8th Cir. 1995). It is committed to the Court's sound discretion. *Id.* The exceptional circumstances warranting relief are those that are new and unforeseen and that "cause extreme and unexpected hardship so that the decree is oppressive." *Stokors S.A. v. Morrison*, 147 F.3d 759, 761 (8th Cir. 1998)(quoting *ARC v. Sinner*, 942 F.2d 1235, 1239 (8th

Cir. 1991)(quotes and cites therein)). The movant bears the burden of proof by clear and convincing evidence. *Id.*

A motion under Rule 60(b) must be brought within a reasonable time. Reasonableness is determined after an assessment of all attendant facts. *Federal Land Bank of St. Louis v. Cupples Bros.*, 889 F.2d 764, 767 (8th Cir. 1989). Any delay in bringing the motion should be adequately explained. *Id.* The motion should not be brought for the purpose of delaying implementation of the underlying judgment. *Id.*

Of the several subsections of Rule 60(b), only two appear to apply here. Subsection (b)(5) provides for relief from a final judgment when "the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application[.]" Most courts, including the Court of Appeals for this Circuit, have concluded that a money judgment does not have prospective application. *Stokers S.A.*, 147 F.3d at 762-63. Relief from a final money judgment is therefore not available under the equitable leg of Rule 60(b)(5), as long as no double recovery is shown. *Id.* That a party has failed to pay a judgment does not make it prospective under the rule. *Id.* at 762.

Subsection (b)(6) of Rule 60 is the catchall provision. Under it, relief may be granted for "any other reason justifying relief

from the operation of the judgment." It is intended for exceptional circumstances that bar adequate redress through ususal channels. *Atkinson v. Prudential Property Co.*, 43 F.3d 367, 373 (8th Cir. 1994). Such exceptional circumstances are not present, however, "every time a party is subject to potentially unfavorable consequences as a result of an adverse judgment properly arrived at." *Id.*

III.

Byrne's own bankruptcy has no impact on the attorneys' fees that Zilverberg was ordered to pay by the divorce court and that were declared non dischargeable by this Court. That debt was and is in the nature of family support and is specifically non dischargeable under § 523(a)(5). Unlike divorce-related property debts under § 523(a)(15), there is no consideration in this Court of the debtor's ability to pay nor any weighing of the advantages and disadvantages for the respective parties if the debt is or is not discharged. Therefore, this Court's judgment that declared the attorneys' fees non dischargeable under § 523(a)(5) must stand.

Zilverberg makes an interesting point that there is now no harm to Byrne if the Court reverses its decision regarding the debts under § 523(a)(15) since she has discharged them in bankruptcy. From a practical standpoint, however, any debtor could force such a result by continuing to refuse to pay non dischargeable debts and ultimately forcing their former spouse into bankruptcy. That surely is not the intent of § 523(a)(15) and this

Court will not condone it here. The exceptional circumstances warranting relief under Rule 60(b)(5) would then be inappropriately ones that Zilverberg created. They would not be "new" and "unforeseen." *Stokors S.A.*, 147 F.3d at 761.

The non dischargeability judgment is also in the nature of a money judgment to which the equitable leg of Rule 60(b)(5) does not apply. The obligations, originating in the divorce court, do not become prospective just because Zilverberg continues to refuse to pay them. *Stokors S.A.*, 147 F.3d at 761. Moreover, Byrne and their creditors are not getting a double recovery - there will be only a single recovery when Zilverberg pays the creditors what they are owed.

The facts also do not support relief under Rule 60(b)(6). Again, no exceptional circumstances exist that were not the foreseeable creation of Zilverberg. The non dischargeability judgment, though adverse to him, was entered after both parties were given a full and fair opportunity to litigate the non dischargeability action. *Atkinson*, 43 F.3d at 373-74.

Finally, Zilverberg's request to have the Court reconsider its decision is untimely. While Zilverberg may not have gotten formal notice of Byrne's bankruptcy, he knew about it (through his attorney) as early as September 1998 but took no action until February 1999. That is not a reasonable delay and no explanation has been offered.

An order denying Defendant-Debtor Zilverberg's Motion to Reconsider will be entered.

Dated this 2nd day of April, 1999.

BY THE COURT:

Irvin N. Hoyt
Bankruptcy Judge

ATTEST:
Charles L. Nail, Jr., Clerk

By: M. Kay Rauer
Deputy Clerk

(SEAL)

NOTICE OF ENTRY
Under F.R.Bankr.P. 9022(a)
Entered

APR 02 1999

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota

I hereby certify that a copy of this document was mailed, hand delivered, or faxed this date to the parties on the attached service list.

APR 02 1999

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court, District of South Dakota
By M. Kay Rauer

Case: 96-03010 Form id: 122 Ntc Date: 04/02/1999 Off: 3 Page : 1
Total notices mailed: 4

Defendant Zilverberg, Gary O. HC 63, Box 36, Holabird, SD 57540
Aty Arendt, Al #1, 201 N. Euclid, Pierre, SD 57501-2571
Trustee Lovald, John S. PO Box 66, Pierre, SD 57501
Aty Viken, Linda Lea M. 1617 Sheridan Lake Road, Rapid City, SD 57702-3483