

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE**

In re:

Bk. No. 02-11794-JMD
Chapter 13

John N. Hoxie,
Debtor

Lawrence P. Sumski, Chapter 13 Trustee,
Plaintiff

v.

Adv. No. 02-1127-JMD
Adv. No. 02-1140-JMD

Debra (Hoxie) Daggett,
Defendant

*Raymond J. DiLucci, Esquire
Raymond J. DiLucci, P.A.
Concord, New Hampshire
Attorney for Plaintiff*

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Concord, New Hampshire
Attorney for Defendant*

MEMORANDUM OPINION

I. INTRODUCTION

On July 7, 2003 the Court commenced a consolidated evidentiary hearing on three matters: two adversary proceedings filed on behalf of the Chapter 13 Trustee against Debra Daggett, the Debtor's ex-spouse (the "Defendant"), and the Debtor's objection to the Defendant's proof of claim filed in the main bankruptcy case. All of these proceedings arise out of a final divorce

decree, and related proceedings, between the Debtor and the Defendant during the two and one-half years preceding the filing of the Debtor's Chapter 13 bankruptcy petition.

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the "Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire," dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

II. PROCEDURAL BACKGROUND

The Debtor commenced this Chapter 13 bankruptcy proceeding on June 7, 2002 (the "Petition Date"). On July 24, 2002, the Defendant filed a proof of claim in the amount of \$248,656.71 plus interest (Proof of Claim No. 2) (the "Claim") on account of various obligations arising from her divorce from the Debtor. On August 30, 2002, the Debtor's counsel, as special counsel for the Chapter 13 Trustee, filed a complaint (the "Preference Complaint"), Adv. Proc. No. 02-1127-JMD, seeking to avoid a prepetition attachment lien obtained by the Defendant in connection with her attempts to enforce certain terms of the divorce decree. On October 9, 2002 the Debtor filed an objection to the Claim (Doc. No. 25) (the "Objection") in which he alleged that the Defendant's Claim (1) was subject to setoff because of her failure to account and deliver to the Debtor tangible personal property awarded to him in the divorce proceeding, and (2) was seeking attorney's fees and/or expense reimbursement that she was not entitled to under the terms of one or more orders of the superior court in the divorce proceeding. On October 14, 2002, the Debtor's counsel, on behalf of the Chapter 13 Trustee, filed a second complaint (the "Turnover Complaint"), Adv. Proc. No. 02-1140-JMD, seeking to compel the Defendant to turnover all

property in her possession, custody or control which belonged to the Debtor on the Petition Date and, therefore, was part of the bankruptcy estate.

On July 2, 2002, the Debtor filed his Chapter 13 Plan (Doc. No. 5) which proposed to pay all claims in full. The terms of the Debtor's plan reflect the confirmation requirements under the Bankruptcy Code and the substantial equity held by the Debtor in his personal residence and non-exempt antiques and other collectibles.¹ On February 5, 2003, the Court entered an order authorizing the sale of the Debtor's personal residence (Doc. No. 58) (the "Sale Order"). Under the terms of the Sale Order, sufficient funds either have been held by the Trustee for payment of allowed claims in full or have been disbursed to creditors in payment of undisputed claims. In addition, approximately \$313,000.00 of those proceeds are being held by the Trustee, pending further order of this Court, to provide for payment of the allowed amount of the Claim.

III. DISCUSSION

A. The Preference Complaint

In the Preference Complaint, the Trustee is seeking to avoid under 11 U.S.C. § 547(b) an attachment on property of the Debtor, now of the bankruptcy estate, perfected by the Defendant in August of 2001, less than twelve months, but more than ninety days, before the Petition Date. Because the date of perfection of the attachment is more than ninety days before the Petition Date, the Trustee can be successful only if the Defendant was an "insider" of the Debtor at the time the attachment was perfected. See 11 U.S.C. § 547(b)(4)(B). At the hearing on July 7, 2003, the

¹ The "best interest of creditors" under 11 U.S.C. § 1325(a)(4) requires, as a condition of confirmation, that the Court find that the value of the property to be distributed under the plan is not less than the amount that would be paid to holders of allowed unsecured claims if the bankruptcy estate were liquidated under chapter 7 of the Bankruptcy Code.

parties stipulated on the record to the following chronology of events in the divorce and bankruptcy proceedings:

- a) On December 1, 2000, the Belknap County Superior Court, docket No. 99-M-0023, entered an order approving the permanent stipulation between the Debtor and the Defendant dated November 30, 2000 (the “Permanent Stipulation”) and approved the Decree of Divorce, all as recommended by the marital master (the “Divorce Decree”). See Exhibit 1.
- b) An appeal of the Divorce Decree was subsequently filed by the Debtor.
- c) In connection with proceedings to enforce the Divorce Decree, the Defendant was granted permission in July of 2001 to attach certain property of the Debtor, which attachment was perfected in August of 2001.
- d) In April of 2002 the Debtor’s appeal of the Divorce Decree was decided in the Defendant’s favor by the New Hampshire Supreme Court.
- e) The Petition Date for this bankruptcy proceeding is June 7, 2002.

The parties agreed to the admission into evidence of Exhibits 1 (the Divorce Decree), 104 (Defendant’s motion to enforce provisions of the Divorce Decree and request for attorneys fees dated June 12, 2002) and 110 (Belknap County Superior Court Order dated March 15, 2001) and agreed to submit the issue of the Defendant’s status as an insider to the Court on the stipulated record.

The Debtor contends that the Divorce Decree did not become final until the Debtor’s appeal to the New Hampshire Supreme Court was decided in April of 2002 and, therefore, the Defendant was the Debtor’s spouse, and an insider, when the attachment was perfected in August of 2001. The Defendant responds that the Divorce Decree became effective on December 1, 2000

pursuant to Rule 38 of the Rules for Regulating the Practice in Domestic Relations.² Rule 38 provides:

Effective Date: Uncontested Matters. Decrees in uncontested cases where the parties have filed a permanent stipulation shall become effective on the date signed by the judge unless otherwise specified by the court.

The Defendant also argues that even if Rule 38 is not controlling, the Defendant is not a “relative” of the Debtor, and therefore not an insider, because spouses are not related to each other by affinity.

Under the Bankruptcy Code a “relative” of a debtor is an insider. 11 U.S.C. § 101(31)(A)(i). A “relative” is an individual “related by affinity or consanguinity within the third degree.” 11 U.S.C. § 101(45). The parties agree that the Debtor and Defendant were not related by consanguinity and, therefore, if the Defendant were related to the Debtor by affinity at the time of the attachment in August of 2001, she would be an “insider” for purposes of the Bankruptcy Code. The word affinity refers to a relationship by marriage, as distinguished from a relationship by blood, or consanguinity. See Garner, A Dictionary of Modern Legal Usage, 2d ed. (1995); Black’s Law Dictionary, 7th ed. (1999). However, for purposes of descent and distribution the term “affinity” refers to the relationship between one spouse and the blood relations of the other, and not to the relationship between the spouses. See Barnhill v. Vaudreuil (In re Busconi), 177 B.R. 153, 157 (Bankr. D. Mass 1995), citing 23 Am.Jur. 2d Descent and Distribution § 52 (1983). In Barnhill, the bankruptcy court found that under applicable state law statutes of descent and distribution, spouses were not related by affinity and that Congress had not expressly mentioned spouses in the definition of “relative.” Id. The bankruptcy court held that a non-debtor spouse

² These rules were adopted as temporary rules by the New Hampshire Supreme Court on March 6, 1998 to be effective in all domestic relations cases filed in the superior court on or after May 1, 1998.

was not an insider of the debtor spouse for purposes of the Bankruptcy Code. Barnhill, 177 B.R. at 161.

The decision in Barnhill is based, in part, upon a detailed analysis of a state statute of descent and distribution which was likely drafted with different policy objectives than those used in drafting the Bankruptcy Code. The meaning Congress ascribed to the term “relative” is reflected in the legislative history of the Bankruptcy Code when discussing the statutory definition of the term:

[a] former spouse is not a relative, but if, for example, for purposes of the preference section, proposed 11 U.S.C. 547(b)(4)(B), the transferee was a spouse of the debtor at the time of the transfer sought to be avoided, then the transferee would be a relative and subject to insider rules, even if the transferee were no longer married to the debtor at the time of commencement of the case or at the time of the commencement of the preference recovery proceeding.

H.R. Rep. No. 95-595, at 313 (1977); S. Rep. No. 95-989, at 26 (1978). In substance, the Debtor contends that the facts of this case are identical to the example in the legislative history of the definition of a “relative” under the Bankruptcy Code and that the Defendant is a “relative.”

However, the Court need not explore the meaning of the word “affinity” under the Bankruptcy Code or determine if it may or should look to the legislative history of the Bankruptcy Code to resolve the Defendant’s status as an insider. The order of the New Hampshire Superior Court of March 15, 2001 (the “March Order”) was entered into evidence through a stipulation between the parties. See Exhibit 110. The March Order provides:

The [Debtor] claims that the Order of January 1, 2001 granting the divorce and approving the Permanent Stipulation is not final. The plaintiff is incorrect. The conduct of marital cases in Superior Court is governed by the “Rules for Regulating the Practice in Domestic Relations”, which became effective to all domestic relations cases filed or brought forward in the Superior Court on or after May 1, 1998. . . . This case is, therefore, controlled by those Rules. [quoting Rule 38] . . . [Under Rule 38, the Divorce Decree], therefore, became final on December 1, 2000, the date when the Court approved the Master’s recommendation. Even if

not controlled by Rule 38, Rule 39 provides that the decree becomes final after the expiration of the appeal period, which in this case would be January 2, 2001. The [Debtor's] objection and Motion to Vacate were filed in this Court on January 3, 2001 and were therefore untimely. . . . There was and is a final divorce decree which became effective prior to the date of [Defendant's] Motions.

Exhibit 110, pp. 3-4 (emphasis added). No evidence was presented that the March Order was appealed or vacated on appeal. Therefore, the March Order is a final state court order which under the Rooker-Feldman doctrine cannot be collaterally attacked in this Court. See Rooker v. Fidelity Trust Co., 263 U.S. 413, 44 S.Ct. 149 (1923); District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 103 S.Ct. 1303 (1983). Under the terms of the March Order, the Divorce Decree was final on December 1, 2000 and the Defendant was an ex-spouse of the Debtor in August of 2001. Therefore, in the absence of any allegations that the Defendant was in a position to control or influence the Debtor in August of 2001, the Defendant was not an insider of the Debtor in August of 2001.

The Court shall enter a separate judgment for the Defendant on the Preference Complaint, Adv. Proc. No. 02-1127-JMD.

B. The Turnover Complaint

In the Turnover Complaint, the Trustee alleges that the Divorce Decree awarded to the Debtor numerous items of family furnishings, heirlooms and collectibles of substantial value which the Defendant has refused or failed to turnover to the Debtor. At trial the Trustee amended his claim to the extent that the Defendant had turned over some of the items claimed by him. He further alleged that some of the items turned over had been damaged while in the Defendant's custody, care and control, and that many items had not been turned over or accounted for by the Defendant. The Trustee filed a motion claiming that the bankruptcy estate is entitled to setoff against the final amount of the Defendant's Claim for the value of any such items not returned to the Debtor and

damages for any items damaged while in the care of the Defendant (Doc. No. 8) (the “Setoff Motion”). The parties agree that the property sought by the Trustee was valued by the Debtor and the Defendant at approximately \$100,000.00 on November 30, 2000, at the time the Permanent Stipulation was executed by the parties, but do not agree on the current value of such items. The Defendant denies that any property has been lost, stolen or destroyed and contends that the Debtor is not yet entitled to the property because no final order regarding the property settlement has been issued by the superior court due to the stay imposed by the Debtor’s bankruptcy filing.

The Debtor was unable to produce any meaningful list of the property which he claims has not yet been turned over to him because the Defendant will not permit him to enter the formal marital home and her current residence to review the contents of the house and compile a list. The Permanent Stipulation executed by the Debtor and the Defendant on November 30, 2000 includes a Schedule A which was annotated by the parties to reflect an agreed upon division of the items of tangible personal property listed in Schedule A. Schedule A also reflected an agreement between the parties that other items of tangible personal property were not listed in Schedule A and remained to be divided by agreement of the parties.³ No such agreement has been consummated by the parties or approved by the superior court. It appears to this Court that the Debtor and the Defendant cannot agree even on the list of such items, let alone a division of any such items.

The resolution of any disputes over the identity of such items, the division of such items between the parties and the efforts of the parties to resolve such disputes involve the interpretation of the Divorce Decree and New Hampshire domestic relations laws regarding property settlements

³ Schedule A contains the following handwritten entry: “There are items of personal property located in marital the (sic) domicile, whether sentimental or over \$100. The parties further agree to use good faith effort to resolve any disputes about these items.”

and the obligations of parties in possession of items awarded to an opposing party. Under principals of comity and out of deference to the superior court's expertise in applying state domestic relations law to the resolution of disputed property settlements, this Court shall enter a separate order lifting the automatic stay to permit the parties to return to superior court for a determination of the division of the remaining tangible personal property and a determination of the value of any items awarded to the Debtor which the Defendant has not or cannot turnover to the Debtor and the amount of any damages for property turned over to the Debtor which was damaged while in the care, custody and control of the Defendant. Once the superior court has determined which items of property should awarded to the Debtor and the amount of any damages for the Defendant's failure to turn over or properly care for such items, the parties shall return to this Court for a determination of the impact of the superior court's determination on the allowed amount of the Claim and/or any setoff by the Debtor against such amount. The Court shall schedule a continued status conference hearing on the Turnover Complaint and the Setoff Motion for the purpose of determining the status of any proceedings in superior court.

C. The Claim

On July 24, 2002, the Defendant file her Claim in the amount of \$248,656.71 plus interest based upon the following elements:

\$115,000.00	Amount due under paragraph 15C of Permanent Stipulation
\$ 95,000.00	Mortgage payoff on marital homestead under paragraph 18 of Permanent Stipulation
\$ 1,733.80	June & July, 2002 mortgage payments plus late fee under paragraph 18 of Permanent Stipulation
<u>\$ 36,922.91</u>	Attorney's fees for Divorce Decree enforcement
\$248,656.71	Total claim

At the hearing the parties agreed that the \$115,000.00 due under paragraph 15C of the Permanent Stipulation was undisputed and that the mortgage on the marital homestead had been paid in full,

eliminating \$95,000.00 from the claim. The parties could not agree on whether the Defendant had actually paid any mortgage payments or the amount of such payments. The Defendant also conceded that the superior court had not as yet made any ruling on her entitlement to attorney's fees or the amount of any such award. Finally the parties could not agree on whether the Defendant was entitled to any interest on any claims arising under the Divorce Decree or, if entitled to interest, what rate or starting date would be applicable in the computation of such interest.

Based upon the agreement of the parties, the Defendant's Claim is allowed to the extent of \$115,000.00 due under paragraph 15C of the Permanent Stipulation and disallowed as to the \$95,000.00 due under paragraph 18 of the Permanent Stipulation. The determination of the remaining two elements of the Claim depend primarily upon the interpretation of the Divorce Decree and the rights and responsibilities of the parties subsequent to a final divorce decree under New Hampshire law. The liquidation of those portions of the Claim involving the mortgage payments, the Defendant's claim for attorney's fees and interest, if any, on any amounts due under the Divorce Decree are best determined by the superior court interpreting its own order and its expertise in applying New Hampshire domestic relations law. Once those portions of the Claim are liquidated, or in the case of the interest claim the applicable rate and starting date are determined, this Court can determine the final allowed amount of the Claim, apply any setoff resulting from a decision on the issues in the Turnover Complaint and direct the Chapter 13 Trustee to pay any remaining net claim to the Defendant. The Court shall issue a separate order granting stay relief to the parties for the limited purpose of returning to superior court for a liquidation of the remaining elements of the Claim.

IV. CONCLUSION

This opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. The Court will issue a separate judgment on the Preference Complaint and a separate order on the Turnover Complaint and the Claim consistent with this opinion.

DATED at Manchester, New Hampshire.

July 24, 2003

/s/ J. Michael Deasy
J. Michael Deasy
Bankruptcy Judge