

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

IN RE: : CASE NO. 00-42992
: :
DAVID C. NIVENS : CHAPTER 13
SSN: XXX-XX-XXXX : :
: :
SHARON A. NIVENS :
SSN: XXX-XX-XXXX : :
: :
Debtors. : :
: :
DAVID C. NIVENS and :
SHARON A. NIVENS : :
: :
Movants, : :
: :
vs. : :
: :
LOANS FOR MILITARY : :
: :
Respondent. :

MEMORANDUM OPINION

On June 5, 2001, the court held a hearing on Debtors' motion for contempt against Loans For Military ("Respondent") for failure to pay Debtors' attorney's fees and costs pursuant to a prior order of the court. The court took under advisement the issue of whether Debtors' counsel's recourse was filing a fi. fa. rather than obtaining another contempt order. At the conclusion of the hearing, Debtors' counsel was given an opportunity to submit a letter brief. After considering Debtors' brief and the applicable statutory and case law, the court will deny Debtors'

motion for contempt.

FACTS

In August 2000, Debtors obtained a personal unsecured loan from Respondent in which monthly payments in the amount of \$245.46 were to be made. Debtors made these payments to Respondent by way of an allotment which was deducted from the husband debtor's U.S. Army payroll. On December 26, 2000, Debtors filed their voluntary petition under Chapter 13 of the Bankruptcy Code ("Code"). On January 29, 2001, Debtors' counsel mailed Respondent a letter requesting that Respondent turn over any payments received post-petition for payment on any prepetition debt. (Doc.# 6, Exh. "A").

On March 6, 2001, Debtors filed a motion for civil contempt. On April 6, 2001, the court held a hearing on Debtors' motion and found Respondent in contempt. Respondent did not appear at this hearing. The court ordered Respondent to turn over \$981.84 to Debtors. This amount represented four payments which Respondent had received post-petition. The court also awarded Debtors attorney's fees and costs in the amount of \$250.00. (Doc.# 8).¹

On April 19, 2001 Debtors' counsel received a check from Respondent in the amount of \$981.84. (Doc.# 9, Exh. "M-1"). However, Respondent failed to remit the \$250.00 attorney's fees

¹ The language of the order regarding the attorney's fees award read "Movant's attorney is awarded attorney's fees and costs in the total amount of \$250.00, pursuant to 11 U.S.C. §§ 105(c), 362(h), to which let judgment issue against Respondent(s)."

award. In a phone conversation between Debtors' counsel and Respondent on April 17, 2001, Respondent indicated that it contested the attorney's fees award and would "forward it over to their legal counsel." (Doc.# 9, Exh. "M-2").

On May 8, 2001, Debtors' counsel filed a second motion for contempt based on Respondent's failure to pay the \$250.00 attorney's fees which was awarded in the court's April 6, 2001 order. On June 6, 2001, the court held a hearing on Debtors' motion. Like the prior hearing, Respondent did not appear at this hearing. The court inquired into the issue of whether its April 6, 2001 order was a money judgment in which Debtors' counsel needed to file a fi fa or whether another contempt order was proper. At the conclusion of the hearing, the court gave Debtors' counsel an opportunity to brief this issue.

DISCUSSION

The law is clear that a court may use the remedy of contempt to enforce a prior judgment entered by that court. See Combs v. Ryan's Coal Co., 785 F.2d 970, 980 (11th Cir. 1986). "It is equally clear that when a party fails to satisfy a court imposed money judgment the appropriate remedy is a writ of execution, not a finding of contempt." Combs, 785 F.2d at 980 (citing FED. R. Civ. P. 69(a) ("Rule 69(a)")) which provides, "[p]rocess to enforce a judgment for the payment of money shall be a writ of execution,

unless the court directs otherwise."). As to the "otherwise" language, the court held that this clause is to be read narrowly. Id. (citing 7 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 69.02[2] at 69-10 to -10.1 (2d ed. 1985) providing that "a federal court should not . . . enforce a money judgment by contempt or methods ther [sic] than a writ of execution, except in cases where established principles so warrant.").

In Combs, the order in question was a consent order. However, this fact was inconsequential. The order provided for the payment of money due and owing, the amount was not contingent, and the obligation to pay was not conditioned on the appellants' purging themselves of contempt. Therefore, the court held that "the consent decree [was] properly characterized as a money judgment." Id. Accordingly, the court held that the consent decree was not enforceable by contempt. Id.

In the case before the court, the court finds that the April 6, 2001 order relating to the award of Debtors' attorney's fees is in the nature of a money judgment. The order provided that the amount of \$250.00 was due and owing, an amount which was neither contingent nor conditioned on Respondent's purging itself of contempt. Therefore, the award of attorney's fees is not enforceable by contempt.

Unlike the cases² cited by Debtors' counsel, the language in the order pertaining to the Debtors' award of attorney's fees does not direct Respondent to pay Debtors' counsel. Instead, the order reads "[m]ovant's attorney is awarded . . . \$250.00 . . . to which let judgment issue against Respondent(s). (emphasis added). Accordingly, the court finds those cases inapplicable.

Debtors further argue that enforcement by contempt should be allowed because "[r]espondent has no tangible money, property or other assets subject to levy or execution" (Debtors' Brief pp. 2 at (j)). The bankruptcy court for the Southern District of Georgia has indirectly addressed this narrow issue. See Eickhoff v. Eickhoff (In re Hickhoff), 258 B.R. 234 (Bankr. S.D. Ga. 2000) (Davis, J.).

In Eickhoff, the debtor and his former spouse reached a consent agreement regarding nondischargeability litigation costs and attorney's fees. The debtor's former spouse moved for contempt based on the debtor's failure to pay the attorney's fees. Relying on Combs and Rule 69(a), the debtor argued that a writ of execution was proper and that the remedy of contempt was not available. The debtor's spouse, however, contended that there was an exception to Rule 69(a). Because all of the

² See Gokey v. McIntosh (In re McIntosh), 137 B.R. 967 (D. Colo. 1992) (order compelling Plaintiff's counsel to pay sanctions to Debtors' counsel within 10 days); Waldschmidt v. Columbia Gulf Transmission Co. (In re Fulghum), 20 B.R. 925 (Bankr. M.D. Tenn. 1982) (discovery order compelling Defendant to pay attorney's fees to trustee).

debtors's assets could not be reached by writ of execution, the former spouse asserted that the remedy of contempt was available.

The fact that there may have been no assets subject to levy or execution added nothing to the court analysis. Consequently, the court denied the former spouse's motion for contempt. Eickhoff, 259 B.R. at 238. The court further explained: "It is true Rule 69 severely limits the right of the Court to employ the contempt power for the collection of a money judgment and that the Combs decision reinforces that provision." Id. at 236.

Similarly, the court finds Debtors' argument to be without merit. The fact that Respondent has no tangible property or assets subject to levy or execution is no exception to the Eleventh Circuit's analysis of Rule 69(a).

Finally, Debtors' argue that the remedy of contempt should be allowed because the "prior contempt order that was disobeyed was a non-final, interlocutory order. . . ." (Debtors' Brief, pp. 2 at (1)). The court likewise finds this argument without merit. In order for an order in bankruptcy to be final, it "must end the litigation on the merits and leave nothing more for the court to do but execute the judgment . . . for purposes of appeal." Wicheff v. Baumgart (In re Wicheff), 215 B.R. 839, 843 (B.A.P. 6th. Cir. 1998). A civil contempt order is final as long as a finding of contempt is issued and a sanction is imposed. See id.

As to the order in question in this case, nothing about the order was interlocutory or non-final. It resolved the issue on

the merits, a finding of contempt was issued and sanctions were imposed. Accordingly, the court finds that its April 6, 2001 order was final and appealable.

In conclusion, the court finds that its April 6, 2001, order awarding Debtors attorney's fees and costs was a money judgment which is not enforceable by contempt. The court further finds that the April 6, 2001 order was a final order. Therefore, the court will deny Debtors' motion for contempt.

An order in accordance with this Memorandum Opinion will be entered.

DATED this _____ day of July, 2001.

JOHN T. LANEY, III
UNITED STATES BANKRUPTCY JUDGE