

ORDER ON EMERGENT APPLICATION

GAIL WEINSTEIN,

Plaintiff-Respondent,

vs.

BARRY WEINSTEIN,

Defendant-Appellant.

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

DOCKET NO.

MOTION NO.

PART: G

JUDGE(S) :KEEFE

COLLESTER

EMERGENT APPLICATION

FILED: APRIL 6, 2000

ANSWER(S) FILED: APRIL 7,

2000

for respondent

By: David Perry Davis

attorney for appellant

By: Edward Fradkin, attorney

ORDER

THIS MATTER HAVING BEEN Duly Presented To THE COURT, IT IS ON THIS 7th DAY OF April, 2000, HEREBY ORDERED AS FOLLOWS:

EMERGENT APPLICATION FOR	GRANTED	DENIED	OTHER
WAIVER OF FILING FEES AND	(X)	(X)	(X)
EMERGENT RELIEF FROM ORDER OF			
INCARCERATION ENTERED ON MARCH			
31, 2000			

SUPPLEMENTAL:

Defendant seeks a waiver of filing fees and emergent relief from an order entered on March 31, 2000, committing him to the Monmouth County Correctional Institution until such time as he pays the sum of \$28,163.10 toward the arrears on his outstanding support obligation totaling \$140,0815.50 plus interest. On appeal before this court defendant, through counsel, contends that: 1) he was incarcerated in violation of his constitutional right to counsel; 2) the trial judge erred in determining that he remains obligated to pay arrears notwithstanding a final decree in bankruptcy entered by Judge Gonzalez for the United State Bankruptcy Court on August 12, 1999; and 3) the trial judge erred by admitting the Probation Department's records into

evidence for the propose of establishing the amount of the arrears.

Defendant's application for waiver of filing fees in connection with this appeal is granted. We shall address the issues raised on appeal in the reverse order of their presentation in defendant's brief.

The admission of the Probation Department records into evidence over defendant's objection is affirmed. The records in question are admissible pursuant to N.J.R.E. 803(c) (6) and (8). Defendant offered no evidence to call the accuracy of those records into dispute. The trial judge's determination that defendant's support obligation was not discharged in the Bankruptcy judgment is also affirmed. Support obligations established under state law are not, as a general rule, dischargeable in bankruptcy. 11 U.S.C.A. §523(a) (5). The judgement signed by Judge Gonzalez does not set forth any exception to the statutory provision. Paragraph 2(b) of the judgement only discharges "debts alleged to be excepted from discharge under 11 U.S.C.A. §523(a) (2), (4), (6), or (15)" The judge did not include in paragraph 2(b) of the judgment support obligations that are not dischargeable pursuant to 11 U.S.C.A. §523(a) (2), (4), (6), or (15), nor did he make finding that defendant's support obligation, payable through the Probation Department, was in reality a debt that fit within the provision of 11 U.S.C.A. §523(a) (2), (4), (6) or (15).

At the conclusion of the enforcement hearing, the trial judge made findings of fact. In summary, the judge found that defendant had exhibited the capacity to earn substantial sums of money in the past and continues to have hat potential. he found that defendant was healthy, physically able to work, and intelligent but chooses not to seek gainful employment for no reason other than his desire to fight the system that he believes has wronged him. In electing that course of action, the judge found that defendant has lost sight of his duty to support his child. Those findings are amply supported by

the record and therefore must be affirmed. Rova Farms Resort, Inc. V. Investors Ins. Co. of Am., 65 N.J. 474, 484 (1974). Case law in this State is clear on the subject of an obligor-spouse's duty to support in accord with a final judgment of divorce addressing that issue. An obligor-spouse can not escape that obligation by willfully diminishing his/her income. Even if the obligor-spouse becomes unemployed through no fault of his/her own, he/she is required to seek gainful employment and make a good faith effort in meeting that obligation. If a judge finds that an obligor-spouse is not acting in good faith, he judge may impute income to the obligor. See generally, Bonnano v. Bonnano, 4 N.J. 268, 275 (1950); Arribi v. Arribi, 186 N.J. Super. 116, 117-18 (Ch. Div. 1982); Lynn v. Lynn, 165 N.J. Super. 328, 341 (App. Div.), certif. denied, 81 N.J. 52 (1979); and Mowery v. Mowery, 38 N.J. Super. 92, 100 (App. Div 1955) certif. denied, 20 N.J. 307 (1956). Our review of the record satisfies us that there was ample evidence to find that defendant is willfully violating prior court orders concerning his support obligation. The judge, therefore, was warranted in entering an order in aid of litigant's rights. R. 5:7-5 and R. 1:10-3.

We disagree only with the remedy chosen by the judge. An order incarcerating a debtor-spouse in aid of litigant's rights which contains an amount to be paid as a condition for release presupposes that the "judgment debtor has assets that have been secreted or otherwise placed beyond the reach of execution." R. 1:10-3. The purpose of such an order, and its legal justification, is to induce compliance with a lawful order. In re Acceturo, 343 N.J. Super. 281, 287 (App. Div.) certif. denied, 127 N.J. 324 (1990). In such cases, the incarcerated party has the key o freedom in his/her hands because the debtor-spouse has the ability to comply with the order as a condition for release. The record before us is devoid of any evidence that

defendant has assets that can be used to satisfy the release amount ordered by the court. Indeed, the judge made no such finding, and, thus, violated the rule of Pierce v. Pierce, 122 N.J. Super. 359 (App. Div. 1973). The recent amendment to R. 1:10-3 makes "clear that enforcement by incarceration was never intended to create a so-called debtor's prison." Pressler, Current N.J. Court Rules, Comment R. 1:10-3.

The appropriate remedy when, as here, a court finds that a debtor-spouse has willfully refused to obtain gainful employment is to order that he do so and report back to the court within a specified period of time. See Arribi, supra, 186 N.J. Super. at 119. If, on the return date, the judge finds that the debtor spouse has failed to comply and willfully continues to do so, incarceration may then be considered in an effort to encourage compliance, or the judge may consider referring the matter to the prosecutor for proceedings pursuant to N.J.S.A. 2C:24-5 (making it a fourth degree offense for willfully failing to provide support).

Accordingly, we remand the matter to the Family Part for the purpose of entering an appropriate order in compliance with this opinion. Defendant shall be released forthwith and brought before the trial judge, or such other judge as the Presiding judge of the Family Part shall designate, who enter the order in his presence.

This order shall constitute a final decision of the court with respect to the preceding issues. R. 2:8-3(b). In light of our order releasing defendant, we need not decide on an emergent basis the question of whether an indigent debtor-spouse is entitled to counsel at an enforcement hearing brought pursuant to R. 5:7-5. Rather, we shall place this matter on the court's plenary calendar and address the remaining issue after full briefing on the subject.

The Clerk of the Appellate Division shall forward a copy of this order and opinion to the Attorney General and invite his participation. Thereafter, the Clerk shall establish a briefing schedule and schedule the matter for hearing in due course.

FOR THE COURT:

JOHN E. KEEFE, J.A.D.