

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MASSACHUSETTS  
CENTRAL DIVISION**

In re:	)	
	)	Chapter 7
JOAN GERVAIS	)	Case No. 11-43531-MSH
Debtor	)	
JOAN GERVAIS	)	
Plaintiff	)	Adversary Proceeding
v.	)	No. 11-4139
KEVIN GERVAIS	)	
Defendant	)	
	)	

**MEMORANDUM OF DECISION ON PLAINTIFF’S MOTION FOR DEFAULT  
JUDGMENT  
AGAINST DEFENDANT KEVIN GERVAIS**

This adversary proceeding was commenced on October 28, 2011, by the chapter 7 debtor in the main case, Joan Gervais, against her former husband, Kevin Gervais, and the attorneys who represented him in divorce proceedings in the Massachusetts probate and family court. The complaint seeks a determination that certain actions taken by Mr. Gervais and his attorneys in the divorce proceeding after Ms. Gervais had filed her bankruptcy petition on August 20, 2011, violated the automatic stay provisions of the Bankruptcy Code. The complaint also seeks damages for such violations and demands that Mr. Gervais be ordered to turn over to Ms. Gervais one-half of Mr. Gervais’ Morgan Stanley Smith Barney IRA and certain income and

ownership interests in Mr. Gervais' company, AKM Environmental, LLC. Ms. Gervais has resolved her claims against the attorney defendants and the attorneys are no longer parties in this proceeding.

Mr. Gervais was served with the summons and complaint by mail on October 31, 2011. He did not respond and on February 7, 2012, the clerk's notice of default entered against him. On August 19, 2013, Mr. Gervais filed a motion to set aside the default. At the hearing on Mr. Gervais' motion on September 12, 2013, the parties agreed that the only relief which Ms. Gervais sought against Mr. Gervais was with respect to the IRA account and the income and equity in AKM Environmental, which they agreed are asserted in the last two "counts" of Ms. Gervais' complaint identified as "Violation #1" and "Violation #2" under the section entitled "Section 542-Recovery of Property".<sup>1</sup> On September 12, 2013, I denied Mr. Gervais' motion to set aside the default. On January 7, 2014, after some procedural false starts, Ms. Gervais filed a motion for default judgment against Mr. Gervais on her counts Violation #1 and Violation #2.

After review of the record in this adversary proceeding, in particular the June 16, 2011 Judgment of Divorce Nisi entered by the probate and family court, and the schedules of assets and liabilities filed by Ms. Gervais in the main bankruptcy case, including schedule C (schedule of exemptions),<sup>2</sup> I will enter default judgment against Mr. Gervais on Violation #1 and order Mr. Gervais to turn over to the chapter 7 trustee one-half the value of Mr. Gervais' Morgan Stanley Smith Barney IRA In accordance with the Judgment of Divorce Nisi. The Judgment of Divorce

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<sup>1</sup> In reality, Ms. Gervais' demand for a share of the equity in AKM is not found in either Violation #1 or #2 but in her request for judgment at the conclusion of the complaint.

<sup>2</sup> Ms. Gervais has not exempted her claim to one-half of Mr. Gervais' IRA.

Nisi requires this and Mr. Gervais does not seriously dispute that he is required to comply.

As to Ms. Gervais request for judgment against Mr. Gervais with respect to the income and equity in AKM Environmental, I will deny her motion and *sua sponte* dismiss this adversary proceeding, in which this requested relief is the only matter remaining, by invoking my power of abstention and directing the parties to the probate and family court for a resolution of their dispute over this remaining issue. Consistent therewith, I will lift the automatic stay to allow the parties to proceed in the probate and family court.

The Judgment of Divorce Nisi is silent as to the division of income and equity of AKM Environmental. Indeed, it was Mr. Gervais' ill-fated request to the probate and family court to amend the Judgment of Divorce Nisi to address the AKM issues without first obtaining stay relief here which prompted this adversary proceeding in the first place. While the probate and family court entered an Amended Judgment of Divorce Nisi on January 7, 2011, that order is void as having been obtained in violation of the automatic stay. *Soares v. Brockton Credit Union (In re Soares)*, 107 F.3d 969, 976 (1st Cir. 1997)]. None of this, however, derogates from the inescapable conclusion that the probate and family court is the appropriate forum for the Gervais' to do battle over their respective rights in AKM Environmental.

“Divorce and attendant issues of alimony, child support, and division of marital property are the province of state courts, implicating concerns for comity.” *Agin v. Kirby (In re Kirby)*, 403 B.R. 169, 172 (Bankr. D. Mass. 2009). Like *Kirby*, this is not a situation where the state court has finished its work and the only remaining chore is to determine the consequences of or to enforce its order. The Judgment of Divorce Nisi in the Gervais' divorce proceeding is silent as to Ms. Gervais' rights if any in the income and equity of AKM Environmental. “Comity requires

that [divorce and attendant issues] be addressed in the Commonwealth's Probate and Family Court. The interest of justice requires the same, as these issues are better served by resolution in a single forum with jurisdiction to address all these issues together.” *Kirby*, 403 B.R. at 172.

Separate orders consistent with this memorandum shall enter.

At Worcester, Massachusetts this 27th day of August, 2014.

By the Court,



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Melvin S. Hoffman  
U.S. Bankruptcy Judge

Counsel Appearing: Raymond Thomas Weicker, Esq.  
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