

AUG 16 2007

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

IN RE:	)	CHAPTER 7
	)	
REBECCA D. MATAR,	)	CASE NO. 05-67948-MHM
	)	
Debtor.	)	

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REBECCA D. MATAR,	)	
	)	
Plaintiff,	)	<b>ADVERSARY PROCEEDING</b>
	)	<b>NO. 05-9096</b>
v.	)	
	)	
BASSAM E. MATAR,	)	
	)	
Defendant.	)	

**ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

Before the court is Plaintiff's motion for summary judgment (the "Motion").

Plaintiff and Defendant are former spouses. In their Divorce Decree, Plaintiff was awarded the marital residence and Defendant was ordered to make the mortgage payments on the Property (the "Mortgage Obligation"). In the Motion, Plaintiff seeks a determination that the Mortgage Obligation is nondischargeable under §§523(a)(5) or (15). Defendant filed a response opposing the Motion.

Section 523(a)(5) of the Bankruptcy Code<sup>1</sup> provides, in part, that a debt is nondischargeable if it is owed:

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<sup>1</sup> Debtor's bankruptcy case was filed April 29, 2005. Therefore, the changes to the Bankruptcy Code effected by the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA"), which took effect October 17, 2005, are not applicable to this adversary proceeding.

to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree, or other order of a court of record, or property settlement agreement, but not to the extent that—

- (A) such debt is assigned to another entity, voluntarily, by operation of law, or otherwise (other than debts assigned pursuant to section 408(a)(3) of the Social Security Act, or any such debt which has been assigned to the Federal Government or to a State or any political subdivision of such State); or
- (B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support.

The general bankruptcy rule is that exceptions to dischargeability should be construed in favor of the debtor. *In re Hunter*, 780 F. 2d 1577 (11th Cir. 1986). This general rule in favor of the debtor is overcome, however, by the Congressional policy which favors enforcement of obligations for spousal and child support. *Harrell v. Sharp*, 754 F. 2d 902 (11th Cir. 1985); *Shine v. Shine*, 802 F. 2d 583 (1st Cir. 1986); *Cain v. Isenhower*, 29 Bankr. 591 (Bankr. N.D. Ind. 1983).

Determining whether a particular claim is "actually in the nature of alimony, maintenance, or support" is a matter of federal bankruptcy law, not state law. *In re Strickland*, 90 F. 3d 444 (11<sup>th</sup> Cir. 1996); *Harrell v. Sharp*, 754 F. 2d 902. The focus of the determination of the nature of the obligation is on the intent underlying the award. *Cummings v. Cummings*, 244 F. 3d 1263 (11<sup>th</sup> Cir. 2001); *See also, Harrell*, 754 F. 2d 902. If the divorce decree was obtained by agreement between the parties, the intent of the parties is the focus; if the divorce proceeding was contested, the intent of the trier of fact is the focus. *West*, 95 Bankr. at 399. *See also Cummings v. Cummings*, 244 F. 3d 1263

(11th Cir. 2001). In the instant case, the Divorce Decree was entered by the court following a hearing in the Superior Court of Gwinnett County. Therefore, the intent of the parties in this matter is both irrelevant and absent. All evidence, both direct and circumstantial, is relevant to determining the court's subjective intent." *Cummings v. Cummings*, 244 F. 3d 1263 (11<sup>th</sup> Cir. 2001).

The following factors are relevant in ascertaining intent:

1. Whether the obligation terminates upon the death or remarriage of Defendant, as is common with support obligations. *In re Basile*, 44 Bankr. 221 (Bankr. M.D. Fla. 1984).
2. Whether the payments are periodic or lump sum payments. Lump sum payments or payments for a specified period for a sum certain tend to indicate property division. *In re Bedingfield*, 42 Bankr. 641 (S.D.Ga. 1983); *In re Vickers*, 24 Bankr. 112 (Bankr. M.D.Tenn. 1982).
3. The disparity between the relative earning powers of the parties. *Balthazor v. Winnebago County*, 36 Bankr. 656; *Mitchell v. Mitchell*, 132 B.R. 585 (S.D. Ind. 1991).
4. The structure and terms of the Decree itself. *Mitchell v. Mitchell*, 132 B.R. 585 (S.D. Ind. 1991).
5. Enforceability by attachment for contempt. *In re Coffman*, 52 Bankr. 667 (Bankr. D. Md. 1985).
6. Whether the parties have children whose support is in question. *Mitchell v. Mitchell*, 132 B.R. 585 (S.D. Ind. 1991).

7. Whether the former spouse is directly or only indirectly benefitted. Payment to a third party on behalf of the former spouse, where the former spouse would be responsible for the debt if not paid, is a direct benefit. *Mitchell v. Mitchell*, 132 B.R. 585 (S.D. Ind. 1991).
8. The ages, and the physical and emotional conditions of the parties. *McHenry v. McHenry*, 131 B.R. 669 (Bankr. N.D. Ind. 1989).
9. The existence of a legal or moral "obligation" to pay alimony or support. *In re Stone*, 79 B.R. 633 (Bankr. D. Md. 1987).
10. The circumstances contributing to the estrangement of the parties. *Stone*, 79 B.R. 633.
11. The tax treatment of the payment by the debtor spouse. *Stone*, 79 B.R. 633; *Parrott v. Parrott*, 1:95-cv-635-FMH (N.D. Ga., April 24, 1995).

In the Motion, Plaintiff addresses none of the above factors. Plaintiff relies upon two facts: First, that Debtor failed to list the Mortgage Obligation in his bankruptcy schedules;<sup>2</sup> and second, that the transcript of a hearing held December 7, 2005, "is replete with the Court's opinion as to this issue...." Debtor, however, did list the Mortgage Obligation. It is listed in Schedule D as a secured debt owed to Chase Home Finance ("Chase"). As Chase is the entity to whom the mortgage payments were owed, the Mortgage Obligation was properly disclosed in the Schedules. Additionally, as every debtor has a duty under 11 U.S.C. §521 to list *all* his assets and liabilities, whether such

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<sup>2</sup> Bankruptcy Rule 1007 requires a debtor to file schedules of assets and liabilities, a schedule of current income and expenditures, a schedule of executory contracts and unexpired leases, and a statement of financial affairs (the "Schedules").

assets are exempt or such liabilities are nondischargeable, the failure to include a debt in the Schedules would be indicative of nothing but the failure to comply with the requirements of the Bankruptcy Code.

The hearing held December 7, 2005, was a hearing on Plaintiff's motion to vacate a consent order. No evidence was taken except as to that issue. Any *dicta* regarding Debtor's duty to pay the Mortgage Obligation was based upon the existing issues and circumstances at the time, *i.e.* that the Mortgage Obligation existed and had not been declared nondischargeable. The undersigned neither intended nor made any findings of facts upon which a dispositive judgment regarding dischargeability could be based.

Accordingly, it is hereby

ORDERED that Plaintiff's motion for summary judgment is denied. It is further

ORDERED that, within 20 days of the date of entry of this order, Plaintiff and

Defendant shall each file the following:

- A separate list, prepared by each party, of the witnesses, their addresses and telephone numbers, whom that party will have present at the trial and whom that party may have present at the trial, including impeachment and rebuttal witnesses whose use can or should be reasonably anticipated. A representation that a witness **will** be present may be relied on by other parties unless notice is given one (1) week prior to trial to permit other parties to subpoena the witness or obtain the testimony by other means. Witnesses not included on the witness list will be not be permitted to testify.

- A list of all documentary or physical evidence which will be tendered at trial. Exhibits should be described with particularity; e.g., "Exhibit 1: 1/1/87 \$25,000 Note"; not "Exhibit 6A: Note." Each party shall also provide to opposing party copies of any exhibits which will be tendered at trial and which have not previously been provided during discovery. Documents and physical exhibits may not be submitted by counsel after filing of these Exhibit Lists.

Following the filing of the Witness Lists and the Exhibit Lists, trial will be scheduled. All trials in this court are specifically set to commence on a date certain and, except for good cause, shall not be continued. If, however, the parties stipulate, subject to court approval, that by reason of a completed settlement or other good cause, this adversary proceeding should not be tried as scheduled, counsel are directed to notify the court immediately to allow the time set aside for the trial in this adversary proceeding to be promptly reassigned to other litigants.

**The Clerk, U.S. Bankruptcy Court, is directed to serve a copy of this order upon Plaintiff's attorney, Defendant's attorney, and the Chapter 7 Trustee.**

IT IS SO ORDERED, this the 16<sup>th</sup> day of August, 2007.

  
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MARGARET H. MURPHY  
UNITED STATES BANKRUPTCY JUDGE