

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ENTERED ON
MAR 20 2009
DOCKET

IN RE:)	CHAPTER 7
FREDERICK LOUIS CAVALLI, JR.,)	CASE NO. 08-63340
Debtor.)	
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SHAYLE JEAN CAVALLI,)	ADVERSARY PROCEEDING
)	NO. 08-6338
Plaintiff,)	
v.)	
FREDERICK LOUIS CAVALLI, JR.,)	
Defendant.)	

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

This adversary proceeding is before the court on Plaintiff's motion for summary judgment. Plaintiff seeks a determination that Debtor's obligations arising from a Settlement Agreement filed July 20, 2007, in connection with the parties' divorce (the "Settlement Agreement") are nondischargeable. Debtor opposes Plaintiff's motion. For the reasons set forth below, Plaintiff's motion will be granted.

The Settlement Agreement provided that Debtor would have permanent, exclusive right, title and interest in the marital residence (the "Property"). In return, Debtor was required to refinance the Property to remove all financial liability from

Plaintiff or sell the Property. Also, the Settlement Agreement provided that Debtor would indemnify Plaintiff and hold her harmless from any financial liability associated with the Property. Debtor did not refinance or sell the Property.

The Settlement Agreement also provided Debtor would be responsible for payment of four other marital debts owed to Wells Fargo Financial Bank (\$5,317.92); Bank of America (\$12,600); Wells Fargo Financial Bank equity line (\$14,158.31); and Capital One (\$2,753.94) (the "Four Debts"). These obligations appear to be outstanding and were listed in Debtor's bankruptcy Schedules.¹

Paragraph 9 of the Settlement Agreement provides:

The parties agree and acknowledge that the payments set forth herein constitute equitable division of property rights by and between the parties, made in fulfillment of [Debtor's] and [Plaintiff's] legal obligations under Georgia law to equitably divide between them all marital property acquired during the marriage....The parties further acknowledge that, but for said payments, [Plaintiff] will not be able to be financially independent and will depend upon [Debtor] for support on a regular basis in order to provide herself with the necessaries and meet her monthly expenses. Therefore, it is the parties' intention and agreement that if [Debtor] seeks bankruptcy protection, the amount payable hereunder shall be considered alimony and/or a division of marital property and shall not be dischargeable in bankruptcy under the provisions of 11 USC §523(a)(5), as amended, as the payments are in the nature of support and maintenance.

Plaintiff asserts that all the obligations arising under the Settlement Agreement are

¹ Section 521(a) and Bankruptcy Rule 1007(b) require 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").

nondischargeable under 11 U.S.C. §523(a)(5) or (a)(15). Debtor's response to Plaintiff's motion for summary judgment argues that the obligations under the Settlement Agreement are not and were not intended by the parties to be support and thus §523(a)(5) is not applicable to render the obligations nondischargeable. Debtor's response does not discuss or mention §523(a)(15).

Section 523(a)(5) of the Bankruptcy Code provides that a debt is nondischargeable if it is owed for a domestic support obligation. "Domestic support obligation" is defined in 11 U.S.C. §101(14A) as follows:

The term 'domestic support obligation' means a debt that accrues before, on, or after the date of the order for relief in a case under this title, including interest that accrues on that debt as provided under applicable nonbankruptcy law notwithstanding any other provision of this title, that is—

- (A) owed to or recoverable by—
 - (i) a spouse, former spouse, or child of the debtor or such child's parent, legal guardian, or responsible relative; or
 - (ii) a governmental unit;
- (B) in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of such spouse, former spouse, or child of the debtor or such child's parent, without regard to whether such debt is expressly so designated;
- (C) established or subject to establishment before, on, or after the date of the order for relief in a case under this title, by reason of applicable provisions of—
 - (i) a separation agreement, divorce decree, or

- property settlement agreement;
 - (ii) an order of a court of record; or
 - (iii) a determination made in accordance with applicable nonbankruptcy law by a governmental unit; and
- (D) not assigned to a nongovernmental entity, unless that obligation is assigned voluntarily by the spouse, former spouse, child of the debtor, or such child's parent, legal guardian, or responsible relative for the purpose of collecting the debt.

Section 523(a)(15) of the Bankruptcy Code provides that a debt is nondischargeable if it is owed:

to a spouse, former spouse, or child of the debtor and not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, or a determination made in accordance with State or territorial law by a governmental unit[.]

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. Isenhowe*, 29 Bankr. 591 (Bankr. N.D. Ind. 1983). That Congressional policy was augmented by the amendments to the Bankruptcy Code in 2005 in the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA"). Those amendments render all support *and*

property division obligations nondischargeable.² All of the obligations of Debtor to Plaintiff arising under the Settlement Agreement are nondischargeable.

The extent to which demands may have been made upon Plaintiff on the obligations arising under the Settlement Agreement were not set forth in any detail in Plaintiff's Complaint or motion for summary judgment. To the extent that demands from creditors, including the Four Debts, have not been made upon Plaintiff, the obligations are contingent but are nevertheless nondischargeable.

Plaintiff includes in her motion for summary judgment a request for imposition of costs and attorneys fees upon Debtor, presumably under Bankruptcy Rule 9011.

Bankruptcy Rule 9011 provides:

A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 7004.

A Rule 9011 motion filed before a ruling on the merits of the underlying action is premature because the ruling is unknown and because the movant cannot fully itemize the amount of the attorneys fees and expenses incurred in connection with an action in which the claims, defenses, and other legal contentions are not warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law. Following entry of this order, the undersigned will entertain a motion under Bankruptcy Rule 9011, which motion should include an

² The language in Paragraph 9 of the Settlement Agreement makes it apparent that the drafter of the Settlement Agreement was unaware of the significant changes wrought by BAPCPA to §523(a)(5) and (a)(15).

affidavit setting forth in detail the attorneys fees incurred. Accordingly, it is hereby

ORDERED that Plaintiff's motion for summary judgment is *granted*: the obligations of Debtor arising under the parties' Settlement Agreement are nondischargeable. It is further

ORDERED that, within 21 days of the date of entry of this order, Plaintiff may file a motion under Bankruptcy Rule 9011 for imposition of attorneys fees and expenses, which motion must include details of the attorneys fees incurred,³ and must be served upon Defendant in accordance with Bankruptcy Rule 7004. Within ten (10) days thereafter, Defendant may file a response the said motion.

IT IS SO ORDERED, this the 19th day of March, 2009.



MARGARET H. MURPHY
UNITED STATES BANKRUPTCY JUDGE

³ For guidance about preparation of the request for attorneys fees, Plaintiff's attorney may consult http://www.usdoj.gov/ust/eo/rules_regulations/guidelines/docs/feeguide.htm