

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	:	
	:	CASE NO. A99-70291-jb
ROSE A. CARINI COBB	:	
	:	CHAPTER 7
Debtor.	:	
_____	:	
	:	
ROSE A. CARINI COBB,	:	
	:	
Plaintiff,	:	
	:	
Vs.	:	ADVERSARY NO. 04-6506
	:	
JOHN J. COBB,	:	
	:	
Defendant.	:	

ORDER

On September 8, 2004, Rose A. Carini Cobb, a former Chapter 7 debtor, filed a Notice of Removal of a motion for contempt filed by her former husband, John J. Cobb, in the Superior Court of Gwinnett County, Case No. 04A-07508-4. Ms. Cobb's Chapter 7 case was closed on October 18, 1999. Since the Notice of Removal does not comply with procedural requisites, and it grows out of a domestic relations dispute previously adjudicated by the Gwinnett County Superior Court, this motion is remanded to Gwinnett County Superior Court.

From the Notice of Removal and attached motion for contempt, it appears that the parties divorced in 1999 pursuant to a Final Judgment and Decree and Separation Agreement. Subsequently, Ms. Cobb filed a Chapter 7 petition on July 14, 1999. She received a discharge under 11 U.S.C. § 727, on October 18, 1999. On July 8, 2004, Mr. Cobb filed a motion for contempt in Gwinnett County Superior Court, alleging his former wife had not complied with certain provisions

of the Final Judgment and Decree and Separation Agreement. Mr. Cobb alleges that Ms. Cobb owes him for payments he had made on their former marital residence, for certain taxes he had paid, and for attorney's fees. He also alleges that she has refused to allow him visitation with the parties' minor children. Ms. Cobb was served on July 31, 2004, by the sheriff of Gwinnett County. She filed an answer to the motion for contempt on August 23, 2004, and filed her Notice of Removal to the bankruptcy court on September 14, 2004. Mr. Cobb has not filed any response to the Notice of Removal.

Removal to bankruptcy court is governed by Bankruptcy Rule of Procedure 9027.

Fed. R. Bankr. P. 9027. Subsection (a)(3) provides:

If a claim or cause of action is asserted in another court after the commencement of a case under the Code, a notice of removal may be filed with the clerk, only within the shorter of (a) 30 days after receipt, through service or otherwise, of a copy of the initial pleading setting forth the claim or cause of action sought to be removed, or (B) 30 days after receipt of the summons if the initial pleading has been filed with the court but not served with the summons.

This subsection was amended, effective as of December 1, 2002, "to clarify that if a claim or cause of action is initiated after the commencement of a bankruptcy case, the time limits for filing a notice of removal of the claim or cause of action apply whether the case is still pending or has been suspended, dismissed, or closed." 2002 Advisory Committee Note to Fed. R. Bankr. P. 9027.

Additionally, removal statutes are to be strictly construed. In re Heinsohn, 231 B.R. 48, 52 (Bankr. E.D. Tenn. 1999) *citing* Holder v. City of Atlanta, 925 F. Supp. 783, 784 (N.D.Ga. 1996). Since Ms. Cobb was served by the Gwinnett County sheriff on July 31, 2004 and did not file her Notice of Removal until September 8, 2004, more than 30 days later, the Notice of Removal was not timely filed.

It appears that Mr. Cobb's motion for contempt may raise issues as to whether his monetary claims are in the nature of alimony, support, or maintenance within the meaning of 11 U.S.C. § 523(a)(5) such that they are not affected by the bankruptcy discharge or in the nature of a property settlement in which case they have been discharged. The touchstone for dischargeability of marital debts is the intent of the parties. Cummings v. Cummings, 244 F.3d 1263,1266 (11th Cir. 2001). State courts have concurrent jurisdiction with bankruptcy courts to determine whether marital debts are in the nature of alimony, support, maintenance and not dischargeable or in the nature of a property settlement and are dischargeable. Id., at 1267 *citing* Thaggard v. Pate, 180 B.R. 659, 662-63 (D.C.M.D. Ala. 1995). Here, it appears that, the only issue is whether these marital debts are alimony, support, or maintenance pursuant to 11 U.S.C. § 523(a)(5), as any claim pursuant to § 523(a)(15) expired 60 days after the first date set for the § 341 meeting of creditors. Fed. R. Bankr. P. 4007(c).¹

¹ 11 U.S.C. § 523. *Exceptions to discharge*

(a) *A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt-- . . .*

(5) *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, determination made in accordance with State or territorial law by a governmental unit, 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; . . .*

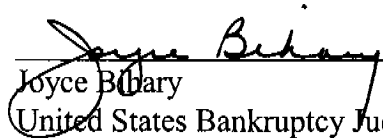
....

(15) *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, a determination made in accordance with State or territorial law by a governmental unit unless--*

In this instance, the Superior Court of Gwinnett County is in the best position to determine the intent of the parties and its own intent with regard to the debts in question and whether Ms. Cobb's debts are dischargeable. Additionally, Mr. Cobb's allegations regarding his wife's failure to allow him visitation rights with their children should be addressed by the superior court. Carver v. Carver (In re Carver), 934 F.2d 1573, 1579 (11th Cir. 1992) ("It is appropriate for bankruptcy courts to avoid incursions into family law matters out of consideration of court economy, judicial restraint, and deference to our state court brethren and their established expertise in such matters.") (citations omitted). Accordingly, it is

ORDERED that the motion for contempt is remanded to Gwinnett County Superior Court, and the Clerk is directed to close this adversary proceeding.

IT IS SO ORDERED, this 26th day of October, 2004.


Joyce B. Barry
United States Bankruptcy Judge

(A) the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor and, if the debtor is engaged in business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business; or

(B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor[.]

DISTRIBUTION LIST

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