

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION**

IN RE:	:	CASE NO. G10-25701-REB
	:	
ELIZABETH M.S. DAVIS,	:	
	:	
Debtor.	:	
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ELIZABETH M.S. DAVIS,	:	ADVERSARY PROCEEDING
	:	NO. 11-2028
Plaintiff,	:	
	:	
v.	:	CHAPTER 7
	:	
GEORGIA DEPARTMENT OF REVENUE,	:	
	:	JUDGE BRIZENDINE
Defendant.	:	

**ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT,
DENYING PLAINTIFF-DEBTOR'S MOTION FOR SUMMARY JUDGMENT,
AND DENYING PLAINTIFF-DEBTOR'S MOTION TO AMEND COMPLAINT**

Before the Court are several motions with responses thereto as follows: (1) the motion of Defendant Georgia Department of Revenue, filed on May 5, 2011, for summary judgment on Plaintiff-Debtor's complaint; (2) Plaintiff-Debtor's motion for summary judgment filed on May 25, 2011; and, (3) Plaintiff-Debtor's motion for leave to amend complaint filed on June 9, 2011. Based upon a review of the record, the Court concludes that Defendant's motion should be granted, and that Debtor's motions should be denied.

In the complaint, Debtor asserts that the tax indebtedness claimed by Defendant in the sum of \$112,114.57 as assessed in 1988, 1989, 1990, 1991, 1992, and 1993 is not enforceable because a certain state tax execution, recorded by Defendant on the Polk County, Georgia General Execution Docket on July 11, 1996 in the total amount of \$55,879.54, was improperly

entered and improperly and untimely re-entered such that it became dormant and unenforceable under state law. Debtor further contends that this debt is dischargeable. In its motion for summary judgment, Defendant argues that it is entitled to summary judgment on the issue of nondischargeability concerning the subject tax debt under 11 U.S.C. § 523(a)(1)(B)(i) because Debtor failed to file Georgia income tax returns for the years in question as required under O.C.G.A. § 48-7-56. In her response to Defendant's statement of facts, Debtor does not dispute Defendant's allegation regarding the failure to file these returns by her or her deceased husband, though she does dispute the amounts claimed in the tax execution. Therefore, the Court finds that Defendant is entitled to summary judgment and the tax indebtedness at issue is excepted from discharge herein.

With respect to Debtor's motion for summary judgment, Debtor contends that Defendant did not comply with applicable state law in filing its nulla bonas in the county where Debtor or her spouse resided, and that its tax execution was neither properly nor timely re-recorded. As a result, Debtor asserts, it is dormant and Defendant may not enforce collection of the tax debt based upon same. Upon review of the authority cited in Defendant's response, and the evidence supplied in connection with the pleadings as filed herein, the Court finds that Debtor is not entitled to judgment on this issue. These allegations do not appear addressed to the issue of dischargeability and sound more as seeking a determination of her tax liability and amount of same. In addition, it appears that under Georgia law, it is no longer necessary to file a tax execution in the county of residence of the taxpayer, but that it may be filed in the county where the real property is located. See O.C.G.A. § 48-3-21; 48-2-56(e)(2). Further, it appears that Defendant complied with the requirements of O.C.G.A. § 9-12-60 in re-recording its tax

execution by filing nulla bonas on March 4, 2003 and January 7, 2009, respectively, as performed by an authorized agent of the office of the state revenue commissioner.

Finally, Debtor filed a motion for leave to amend her complaint to seek a determination of her tax obligation and liability, if any, on various grounds under 11 U.S.C. § 505. In her affidavit filed on May 25, 2011, Debtor avers that she received W-2 forms during some of the period in question and that she and her now deceased husband paid withholding taxes that do not appear to have been taken into account in Defendant's claim. She also states that she had custody of three minor biological children. In its response, Defendant states, among other things, that the motion is untimely and further, that it intends to move for abstention if said motion is granted since the Chapter 7 Trustee has reported that Debtor's estate has no assets for distribution to creditors in this case. *See Defendant's Memorandum in Reply to Plaintiff's Motion for Summary Judgment.* Upon review of these contentions and statements, the Court finds that although it may determine such liability, the parties can best arrive at a good faith determination of the amount of Debtor's tax obligation and basis for liability, and consider the reasons she offers to adjust and reduce said amount as claimed against her, outside this forum, and thus, the motion to amend will be denied.

In accordance with the foregoing discussion, it is

ORDERED that the motion of Defendant Georgia Department of Revenue for summary judgment herein be, and the same hereby is, **granted**; and, it is

FURTHER ORDERED that the state income tax obligation owed by Debtor Elizabeth M.S. Davis for the years 1988, 1989, 1990, 1991, 1992, and 1993, in an amount to be determined, be, and the same hereby is, **excepted** from discharge under 11 U.S.C. §

523(a)(1)(B)(i); and, it is

FURTHER ORDERED that the motion of Plaintiff-Debtor for summary judgment herein be, and the same hereby is, **denied**; and, it is

FURTHER ORDERED that the motion of Plaintiff-Debtor for leave to amend complaint herein be, and the same hereby is, **denied**.

A separate written judgment will be entered contemporaneously herewith.

The Clerk is directed to serve a copy of this Order upon counsel for Plaintiff-Debtor, counsel for Defendant, the Chapter 7 Trustee, and the United States Trustee.

IT IS SO ORDERED.

At Atlanta, Georgia this 29th day of September, 2011.



ROBERT E. BRIZENDINE
UNITED STATES BANKRUPTCY JUDGE