

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

ENTERED ON DOCKET
MAY 24 2005

IN THE MATTER OF:	:	CASE NUMBERS
	:	
JOHNNIE HOLCOMBE,	:	BANKRUPTCY CASE
	:	NO. 04-12733-WHD
	:	
Debtor.	:	
_____	:	
	:	
JANICE COFIELD,	:	ADVERSARY PROCEEDING
	:	NO. 04-1059
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
JOHNNIE HOLCOMBE,	:	IN PROCEEDINGS UNDER
	:	CHAPTER 7 OF THE
Defendant.	:	BANKRUPTCY CODE

ORDER

On March 18, 2005, the Court granted the Motion to Compel Discovery, filed by Janice Cofield (hereinafter the "Plaintiff") in the above-captioned adversary proceeding. The Court ordered defendant Johnnie Holcombe (hereinafter the "Defendant") to respond fully to the Plaintiff's request for production of documents by the close of business on Friday, April 8, 2005. On April 20, 2005, the Plaintiff filed the instant motion for sanctions, in which the Plaintiff contends that the Defendant has failed to respond as ordered. This motion arises in connection with the Plaintiff's complaint seeking a determination that a debt owed by the Defendant to the Plaintiff is nondischargeable in the Defendant's Chapter 7 bankruptcy proceeding. Accordingly, this matter constitutes a core proceeding, over which

this Court has subject matter jurisdiction. *See* 28 U.S.C. § 1334; 157(b)(2)(F);(I).

As a sanction for failing to comply with the Court's order, the Plaintiff requests that the Court strike the Defendant's answer, enter default judgment in favor of the Plaintiff, and award the Plaintiff judgment for the fees and expenses incurred in filing the instant motion for sanctions. The Defendant has not responded to the Plaintiff's Motion, and it is therefore deemed unopposed. *See* BLR 7007-1(b).

Pursuant to Rule 37(b)(2) of the Federal Rules of Civil Procedure, made applicable to this proceeding by Rule 7037 of the Federal Rules of Bankruptcy Procedure, upon the failure of a party to comply with the Court's order compelling discovery, the Court may impose such sanctions as the Court finds just upon the non-performing party, including: 1) entry of an "order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order"; 2) entry of an order preventing the "disobedient party" from supporting or opposing certain claims or defenses, "or prohibiting the party from introducing designated matters in evidence"; 3) entry of an order striking the disobedient party's pleadings, staying or dismissing the proceeding, or entering judgment against the disobedient party; or 4) finding the disobedient party in contempt of court. FED. R. CIV. P. 37(b)(2).¹ The Court may award fees and costs incurred in filing the motion for

¹ Under separate order, the Court granted the Plaintiff's request for attorney's fees, made pursuant to Rule 37(a)(4) of the Federal Rules of Civil Procedure and Rule 7037 of the Federal Rules of Bankruptcy Procedure, and has entered judgment in the amount of the fees requested.

sanctions either as an alternative to or in addition to the sanctions outlined above.

Given the fact that the Defendant has not responded to either the Plaintiff's motion to compel or the motion for discovery sanctions, the Court finds that striking the Defendant's answer is an appropriate sanction for his failure to comply with the Court's March 18th Order. The Defendant's answer is hereby **STRICKEN** from the record. The Court will now consider the Plaintiff's request for entry of default judgment.

According to the Plaintiff's complaint, prior to filing his bankruptcy petition, the Defendant was ordered to pay the Plaintiff \$26,100.64, in monthly installments of \$500, by virtue of a Judgement and Final Decree of Divorce entered by the Superior Court of Carroll County, Georgia. The Plaintiff asserts that this debt remains unpaid and is nondischargeable pursuant § 523(a)(15) of the Bankruptcy Code.

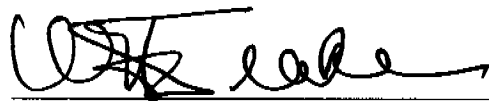
To establish that a debt is nondischargeable under § 523(a)(15), the "creditor bears the initial burden of establishing that the debt owed to [her] actually arose in connection with a divorce or separation agreement." *Cleveland v. Cleveland (In re Cleveland)*, 198 B.R. 394, 397 (Bankr. N.D. Ga. 1996) (Drake, B.J.) "From and after that point, however, the burden of coming forth shifts to the debtor, thereby requiring him to demonstrate either (1) that he lacks the ability to pay the debt in question from income and property not necessary for the support of himself and his dependents, or (2) that the allowance of a discharge would produce benefits exceeding any consequent harm to the Creditor." *Id.* at 397-98; *see also Simons v. Simons (In re Simons)*, 193 B.R. 48, 50 (Bankr. W.D. Okla. 1996).

In this case, the Plaintiff's pleadings allege that the debt at issue arose under a divorce decree. Accordingly, the Plaintiff is entitled to a presumption of dischargeability. In his answer, the Defendant raised the fact that he cannot afford to pay the debt at issue as a defense. However, because the Defendant's answer has been stricken, the Court must consider the Plaintiff's allegations to be deemed admitted and cannot consider the Defendant's defense. Accordingly, the Plaintiff has satisfied the elements of § 523(a)(15) and is entitled to a finding that the debt of \$26,100.64, created by the Judgment and Final Decree of Divorce entered by the Superior Court of Carroll County, Georgia, is **NONDISCHARGEABLE** pursuant to § 523(a)(15) of the Bankruptcy Code. See 11 U.S.C. § 523(a)(15).

Considering the fact that the Court has already granted the Plaintiff a judgment for fees incurred in filing the original motion to compel and the fact that the relief granted to the Plaintiff is the harshest penalty that the Court can fashion for failure to cooperate in discovery proceedings, the Court finds that an additional award of fees and costs would not be just. Accordingly, the Plaintiff's Motion for Sanctions is hereby **GRANTED** as discussed above.

IT IS SO ORDERED.

At Newnan, Georgia, this 24 day of May, 2005.



W. HOMER DRAKE, JR.
UNITED STATES BANKRUPTCY JUDGE