UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

IN THE MATTER OF:	:	**CASE NUMBERS**
COREY ALAN FITZGERALD,	:	BANKRUPTCY CASE NO. 04-10304-WHD
Debtor.	:	
APRIL AVERA JAMES A. EIDSON,	:	
Plaintiffs,	:	ADVERSARY PROCEEDING NO. 04-1710
v.	:	
COREY ALAN FITZGERALD,	:	
Defendant.	:	IN PROCEEDINGS UNDER CHAPTER 7 OF THE BANKRUPTCY CODE

ORDER

Before the Court is the Motion for Summary Judgment filed by April Avera and James Eidson (hereinafter the "Plaintiffs"). The Motion arises from a complaint filed by the Plaintiffs against Corey Alan Fitzgerald (hereinafter the "Debtor"), in which the Plaintiffs seek a declaration of nondischargeability of certain divorce-related obligations owed by the Debtor to the Plaintiffs. This matter constitutes a core proceeding within the subject matter jurisdiction of the Court, *see* 28 U.S.C. § 157(b)(2)(I), and it shall be disposed of in accordance with the following reasoning.

FINDINGS OF FACT

1. Plaintiff Avera and the Debtor were divorced in 1996. [Complaint, ¶ 5; Answer, ¶ 5].

2. Avera and the Debtor have one minor child. [Complaint, ¶ 5; Answer, ¶ 5].

3. In March 2003, the Debtor filed suit in the Superior Court of Fulton County, Georgia to obtain sole custody of the minor child. [Complaint, ¶ 5; Answer, ¶ 5].

4. At the conclusion of this action, the parties were awarded joint custody of the minor child, with Avera maintaining primary physical custody, and the monthly child support owed by the Debtor to Avera was increased. [Complaint, ¶ 6; Answer, ¶ 6].

5. Avera and Plaintiff Eidson, Avera's attorney, requested an award of attorney's fees incurred in connection with defending the custody suit and in seeking the upward modification of support. [Complaint, ¶ 8].

6. The state court took the matter under advisement and issued an order granting the Plaintiffs an award of fees in the amount of $9,000, to be paid to Eidson in monthly installments of $375 per month for 24 consecutive months. [Complaint, ¶ 10; Answer, ¶ 10].

7. The Debtor filed a voluntary petition under Chapter 7 of the Bankruptcy Code on January 30, 2004.

CONCLUSIONS OF LAW

In accordance with Rule 56 of the Federal Rules of Civil Procedure (applicable to bankruptcy pursuant to Rule 7056 of the Federal Rules of Bankruptcy Procedure), the Court

will grant summary judgment only if "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). "Material facts" are those which might affect the outcome of a proceeding under the governing substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Furthermore, a dispute of fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* Lastly, the moving party has the burden of establishing the right of summary judgment. *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991); *Clark v. Union Mut. Life Ins. Co.*, 692 F.2d 1370, 1372 (11th Cir. 1982).

In determining whether a genuine issue of material fact exists, the Court must view the evidence in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Rosen v. Biscayne Yacht & Country Club, Inc.*, 766 F.2d 482, 484 (11th Cir. 1985). It remains the burden of the moving party to establish the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986); *see also* FED. R. CIV. P. 56(e). Once the movant has made a *prima facie* showing of its right to judgment as a matter of law, the nonmoving party must go beyond the pleadings and demonstrate that there is a material issue of fact which precludes summary judgment. *Celotex*, 477 U.S. at 324; *Martin v. Commercial Union Ins. Co.*, 935 F.2d 235, 238 (11th Cir. 1991). In the case *sub judice*, the Court will examine the record to determine whether the Plaintiffs' motion provides a sufficient legal basis which would entitle them to a

judgment as a matter of law. *Dunlap*, 858 F.2d at 632; *Kelly*, 924 F.2d at 358.

The Debtor contends that he is current with his child support payments, and, in any event, there appears to be no dispute that the child support obligations owed by the Debtor to the Plaintiff are in fact support payments that would not be dischargeable in the Debtor's bankruptcy, pursuant to § 523(a)(5) of the Bankruptcy Code. *See* 11 U.S.C. § 523(a)(5) ("a discharge under section 727, 1141, 1228(a), 1228(b) or 1328(b) of this title does not discharge an individual debtor from any debt . . . 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"). Accordingly, the Court may enter judgment as a matter of law in favor of Avera as to the nondischargeability of any arrearage, if any exists, in the actual child support payments.

However, the Plaintiffs also allege that the Debtor's obligation to pay the court-ordered attorney's fees is also nondischargeable pursuant to § 523(a)(5) because it is in the nature of support.[1] In order for a debt to be nondischargeable under § 523(a)(5), the plaintiff must establish that: 1) the debt at issue is owed to a "'spouse, former spouse, or child'" of the debtor; 2) the debt is "'actually in the nature of' (as opposed to simply designated as)

[1] In the complaint, the Plaintiffs contend alternatively that the fee award would be nondischargeable, notwithstanding § 523(a)(15). However, the Court need not address the alternative argument at this time.

alimony, maintenance, or support"; and 3) the debt was incurred "'in connection with a "separation agreement, divorce decree or other order of a court of record.'" *In re Maddigan*, 312 F.3d 589 (2d Cir. 2002) (citing 11 U.S.C. § 523(a)(5)).

Here, there is no dispute that the debt at issue is owed to the a former spouse of the Debtor,[2] or that the debt was incurred in connection with an order of a court of record, as the debt was imposed upon the Debtor by the Superior Court of Fulton County. Accordingly, the only remaining issue is whether the fee award is "actually in the nature of" support.

The question of whether a debt constitutes "support," within the meaning of § 523(a)(5), is a question of federal law, the determination of which can be guided by state law. *In re Strickland*, 90 F.3d 444 (11th Cir. 1996). Alimony, maintenance, or support may include an award of attorney's fees incurred for the purpose of determining custody or obtaining support if the award can "'legitimately be characterized as support.'" *Id.* at 447 (citing *In re Harrell*, 754 F.2d 902 (11th Cir. 1985)). "[I]f fees are awarded in connection with alimony or support awards, they are also considered to be in the nature of alimony or support because courts look at the same factors in making the awards," including the necessity for support and the disparity in income between the parties. *Matter of Monroe*, 121 B.R. 126, 127 (Bankr. N.D. Ga. 1990) (Drake, J.) (citing *In re Patrick,* 106 B.R. 743,

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[2] The fact that the state court ordered the debt paid to Eidson is irrelevant to this issue. See In re Maddigan, 312 F.3d at 593 ("The fact that the debt is payable to a third party . . . does not prevent classification of that debt as being owed to [the debtor's] child.").

744 (Bankr. S.D. Fla.1989)).

In this case, the state court determined that an award of fees was appropriate under O.C.G.A. § 19-6-19(d). That provision states that, "[i]In proceedings for the modification of alimony for the support of a spouse or child . . . , the court may award attorneys' fees, costs, and expenses of litigation to the prevailing party as the interests of justice may require." O.C.G.A. § 19-6-19(d). In the order granting the award, the state court noted that the award resulted from the fact that it was necessary for Avera to incur legal fees in order to achieve the upward modification of the child support award and the "disparity in the parties' financial conditions." Plaintiffs' Motion for Summary Judgment, Exhibit B.

Because of the language used in the state court's order, the Plaintiffs argue that this Court can reach only the conclusion that the state court intended its award of attorney's fees to be a form of support. In response, the Debtor submits that the fees awarded by the state court were "unreasonable" and that failing to discharge the fee award would work an "undue hardship" upon the Debtor with no corresponding benefit to Avera.

The state court's order suggests that the state court considered the relative financial conditions of the parties and concluded that Avera's financial needs required that the attorney's fees incurred by Avera in obtaining additional support for the minor child should be born by the Debtor. The Debtor has pointed to no evidence to controvert this conclusion or to establish that any remaining question of material fact remain as to this issue. The fact that the Debtor found the fee award to be unreasonably high has no bearing on the issue of

whether the state court intended to assess the fees as additional support. Accordingly, the Court finds that the fee award made by the state court was intended to provide additional child support to Avera, and the Plaintiffs are entitled to judgment as a matter of law.

CONCLUSION

Having given this matter its careful consideration, the Court hereby concludes that the Plaintiffs' Motion for Summary Judgment should be **GRANTED.** Judgment shall be entered declaring the child support and attorney's fee obligation awarded by the Superior Court of Fulton County, Georgia to be nondischargeable, pursuant to § 523(a)(5) of the Bankruptcy Code.[3]

IT IS SO ORDERED.

At Newnan, Georgia, this 7 day of January, 2005.

W. HOMER DRAKE, JR.
UNITED STATES BANKRUPTCY JUDGE

[3] The Plaintiffs have also requested that the Court determine the debt to be entitled to priority payment under § 507(a)(7) of the Bankruptcy Code. This portion of the complaint is hereby **DISMISSED** as moot, as the Chapter 7 Trustee has filed a report indicating that the Debtor's estate contains no assets for repayment to creditors.