

SEP 29 2006

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

IN RE:	)	CHAPTER 7
	)	
LAURA MILLICENT AMPEL	)	CASE NO. 05-94878-MHM
	)	
Debtor	)	
	)	
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	)	
PHILLIP AMPEL	)	
	)	
Movant	)	
v.	)	CONTESTED MATTER
	)	
LAURA MILLICENT AMPEL	)	
	)	
Respondent	)	

**ORDER REGARDING CLAIM FOR RECOUPMENT**

This matter arose in connection with Movant's motion for relief from the automatic stay to obtain a determination in state court of dischargeability under §523(a)(5) of certain obligations of Debtor. That motion was denied, but in connection with the motion, it appeared that Movant may have violated the automatic stay when he continued postpetition to deduct from Debtor's monthly alimony payments amounts to repay certain debts owed by Debtor. Because Movant had characterized those deductions as recoupment, which arguably would not be subject to the automatic stay,<sup>1</sup>

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<sup>1</sup> If the deductions from Debtor's alimony did not constitute recoupment, then the postpetition deductions violated the stay, which would at least require Movant to repay the amounts deducted and possibly subject Movant to imposition of sanctions under §362(h).

Movant was accorded the opportunity to brief the recoupment issue. Debtor is proceeding in this case *pro se* and also presented significant opposition to the deductions from her alimony payment;<sup>2</sup> therefore, her failure to file a responsive brief will not be deemed a lack of opposition.

The recoupment issue arises as a result of the parties' divorce and, specifically, from certain provisions of their divorce decree (the "Decree").<sup>3</sup> The Decree provided, *inter alia*, that Movant would pay Debtor alimony of \$1,500 for the first three months after the divorce and then \$1,000 per month for 24 months. The Decree also provided that:

- After Debtor vacated the marital residence and surrendered possession to Movant, Movant would pay the monthly mortgage payments until the residence was sold;
- Upon the sale of the residence, after the payment of all liens on the property and costs of sale, Movant would be reimbursed for those mortgage payments from the sale proceeds;
- Any net proceeds, after payments of liens, costs of sale and reimbursement to Movant, would be paid to Debtor;

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<sup>2</sup> Specifically, in addition to her opposition to the motion for relief from stay, Debtor has filed several motions for imposition of sanctions against Movant.

<sup>3</sup> The trial in the parties' divorce occurred November 16-18, 2004. The Decree was entered February 21, 2005, *nunc pro tunc* to November 19, 2004.

- To the extent that sale proceeds were insufficient to fully reimburse Movant, Debtor would be required to do so;
- Movant could obtain that reimbursement by setoff against Debtor's alimony.

Additionally, after the parties' divorce trial, in connection with Movant's emergency motion to modify Debtor's visitation rights with the parties' minor children, the fees for the services of the guardian *ad litem* in connection with that Emergency Motion were assessed against Debtor. The order on that emergency motion (the "Emergency Order") provided that Movant could recover those fees through setoff against Debtor's alimony.<sup>4</sup>

Sale of the residence produced proceeds sufficient to pay the costs of sale and to satisfy the liens but insufficient to fully reimburse Movant for the mortgage payments. Beginning with the third alimony payment, in February 2005, Movant began deducting amounts from the alimony payments to Debtor:

- \$250 per month for four months, to pay the attorneys fees assessed in the Emergency Order.
- Beginning in April, 2005, an additional \$750 per month towards reimbursement for the mortgage payments. The combination of the \$250 and \$750 resulted in Debtor receiving no alimony payment beginning in April 2005.

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<sup>4</sup> The Emergency Order was entered January 10, 2005, before entry of the Decree. It also assessed attorneys fees against Debtor, but those attorneys fees were deducted from Debtor's alimony prepetition.

- Beginning in June 2005, \$250 per month for payment of the guardian *ad litem* fees. The \$750 per month deduction for the mortgage payment reimbursement continued, so that Debtor continued to receive no alimony payment.
- In October, 2005, a final \$100 for the guardian *ad litem* fees was deducted and \$900 for the mortgage payment reimbursement was deducted. Debtor continued to receive no alimony payment.
- In November and December, 2005, \$1000 was deducted for the mortgage payment reimbursement. Debtor continued to receive no alimony payment.
- In January, 2006, \$436.32 was deducted to complete the mortgage payment reimbursement. Debtor received an alimony payment of \$563.68.
- Beginning in February, 2006, Debtor received her monthly alimony payments of \$1,000.

Debtor filed her bankruptcy petition July 29, 2005. Unless the deductions from Debtor's alimony payments are properly characterized as recoupment, all of the deductions after July 29, 2005 violated the automatic stay. 11 U.S.C. §362(a). Postpetition, Movant deducted \$600 for payment of the guardian *ad litem* fees and \$5,136.32 for reimbursement to Movant for the mortgage payments.

Recoupment is not a term defined or even used in the Bankruptcy Code. It is an equitable doctrine akin to but narrower than setoff. Setoff is recognized and addressed in §553 of the Bankruptcy Code, so that prepetition setoffs do not constitute avoidable

transfers except under certain limited conditions. Postpetition setoffs, however, are subject to the automatic stay, §362(a)(7). Recoupment, especially if viewed as merely a defense, is not subject to the automatic stay of §362 or the discharge injunction of §524. *See A and C Electric Co., Inc. v. Mead Electric Co., Inc.*, 211 B.R. 268 (Bankr. N.D. Ill. 1997); *Anthem Life Inc. Co. v. Izaquirre*, 166 B.R. 484 (Bankr. N.D. Ga. 1994)(J. Massey).

Recoupment is defined in *Black's Law Dictionary* (8th ed. 2004) as:

1. The recovery or regaining of something, esp. expenses. 2. The withholding, for equitable reasons, of all or part of something that is due. 3. Reduction of a plaintiff's damages because of a demand by the defendant arising out of the same transaction. 4. The right of a defendant to have the plaintiff's claim reduced or eliminated because of the plaintiff's breach of contract or duty in the same transaction. 5. An affirmative defense alleging such a breach. 6. Archaic. A counterclaim arising out of the same transaction or occurrence as the one on which the original action is based. • In modern practice, recoupment has been replaced by the compulsory counterclaim.

Equitable recoupment is defined as “[a] principle that diminishes a party's right to recover a debt to the extent that the party holds money or property of the debtor to which the party has no right.” A comparison of recoupment with setoff yields the following conclusions:

A party may not use recoupment to recover damages from the other party but only to reduce a liability that would otherwise be owed to the other party....

All that setoff requires is mutuality of claims – that the claims are asserted against the same entity in the same capacity; the mutual claims need not arise out of the same transaction. Accordingly, in a bankruptcy case, the availability of setoff turns on whether the claims of the creditor and the debtor both arose pre-petition or both arose post-petition.

*Izaquirre*, 166 B.R. 484 at 490-91. In the instant case, Movant's claims against Debtor, which he seeks to "recoup" from Debtor's alimony, arose prepetition but the obligation from which he seeks the recoupment arose postpetition. Therefore, the mutuality required by §553 is lacking.

Recoupment is a concept relying on equitable grounds such as unjust enrichment. *Id.* at 491. Most of the cases recognizing and applying the doctrine of recoupment are business cases and involve contracts. Movant cited no cases allowing recoupment in connection with a domestic relations matter and this court has found only one: *Walker v. Horton*, 31 B.R. 464 (Bankr. M.D. Pa. 1983).<sup>5</sup> That case allowed recoupment by the debtor of amounts owed under a property settlement from alimony owed to the non-debtor spouse, but with no discussion or citation of any statutory or case law.

Movant's claims and Debtor's rights to alimony arise from a single transaction, i.e. the parties' divorce. The instruments from which the claims arose expressly conveyed to Movant the right to set off his claims against Debtor's alimony; therefore, Movant's rights to setoff would have been heard in state court as defenses to any effort by Debtor to enforce her rights to alimony. The Decree provided no explanation for the state court's determination that Movant should have the right to receive reimbursement for his mortgage payments from Debtor's alimony, but that puzzling lack of explanation does not permit this court to ignore the terms of the Decree.

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<sup>5</sup> Two other cases were found which addressed setoff in domestic relations matters: *Rushlow v. Rushlow*, 277 B.R. 216 (Bankr. D. Vermont 2002); *Hart v. Hart*, 50 B.R. 956 (Bankr. D. Nev. 1985).


Nevertheless, a divorce decree, although appearing similar to a contract, is fundamentally different from a contract, especially when it is a court order following a divorce trial, as is the Decree in this case. Spousal or child support and equitable property division are fundamentally different concepts that are determined using fundamentally different principles for determining whether and in what amounts they should be awarded. The Decree and the Emergency Order gave Movant specific rights to set off one debt against another. That setoff right, however, does not mandate a conclusion that the actual setoff that occurred postpetition constituted equitable recoupment. No facts have been presented to suggest that denying Movant the right to set off the reimbursement for the mortgage payments against Debtor's alimony would result in any unjust enrichment for Debtor. The time for filing a complaint for determination of dischargeability of the reimbursement for the mortgage payments has passed and, thus, it can be concluded that Movant's claim is dischargeable under §523(a)(15). Therefore, as Movant has shown no equitable grounds to support his claim to engage in recoupment of the reimbursable mortgage payments against Debtor's alimony, and recoupment is narrowly construed, the amounts deducted by Plaintiff constitute an impermissible setoff and must be refunded to Debtor. Because Movant's actions were not willful, assessment of prejudgment interest or sanctions are inappropriate.

On the other hand, the amounts assessed against Debtor under the Emergency Order appear to be of the same type and character as alimony. They arose in connection with a proceeding focused solely on the well-being of the parties' children.

Additionally, as the Emergency Order addressed only the best interests of the minor children, and permitted the guardian *ad litem* to be paid by Movant while concomitantly allowing Movant to collect those payments from Debtor's alimony, characterization of those deductions as recoupment is supported. Only \$600 of the amounts deducted postpetition were payable for the guardian *ad litem* fees. Accordingly, it is hereby

ORDERED that, on or before October 31, 2006, Movant shall repay to Debtor \$5,136.32 deducted from Debtor's postpetition alimony payments in violation of the automatic stay. Movant shall file a report of such payment. Interest will accrue on any amount not paid by the above deadline at the rate of 12% per annum.

IT IS SO ORDERED, this the 28<sup>th</sup> day of September, 2006.

  
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MARGARET H. MURPHY  
UNITED STATES BANKRUPTCY JUDGE