IT IS ORDERED as set forth below:

Date: September 24, 2010

C. Ray Mullins

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U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE: LINDA W. BARKLEY, Debtor.	CASE NO: 09-73572-CRM CHAPTER 7
LINDA W. BARKLEY, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	ADVERSARY PROCEEDING NO. 09-06549-CRM

ORDER GRANTING SUMMARY JUDGMENT

THIS MATTER is before the Court on the Defendant's Motion for Summary Judgment (the "Motion"). Plaintiff initiated this adversary proceeding by filing a Complaint to Determine Dischargeability of a Debt ("Complaint"). Plaintiff asserts in her Complaint that her tax liabilities from the tax years 1999, 2000, and 2001 are dischargeable under section 727 of the Bankruptcy Code because section 523(a)(1)(C)–excepting indebtedness from discharge–does not apply. The Court disagrees and holds the tax liabilities are not dischargeable. Defendant's Motion is therefore granted.

Standard of Review

In accordance with Rule 56 of the Federal Rules of Civil Procedure, made applicable to the Bankruptcy Courts by 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); FED.R. BANKR. P. 7056. "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). A dispute of fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id.

In determining whether a genuine issue of material fact exists, courts 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 and its right to summary judgment. Celotex Corp. v. Catrett, 477 U.S. 317, 323–24 (1986); Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11th Cir.1991); see also FED.R.CIV.P. 56(e). Here, Defendant must prove by a preponderance of the evidence that their claim against Plaintiff should be excepted from discharge under section 523(a)(1)(C). Grogan v. Garner, 498 U.S. 279, 287–88 (1991); United States v. Fretz (*In re* Fretz), 244 F.3d 1323, 1327 (11th Cir. 2001). 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.

Undisputed Facts

Plaintiff estimates that at the time of filing this Chapter 7 case she owed over $330,000 in taxes (including penalties and interest) to the IRS for tax years 1999 through 2001. Plaintiff has been employed as the Coca-Cola Company's ("Coke") Global Compensation Manager since August 1999. According to her reported W2 income, Plaintiff's annual salary at Coke began at $90,755 in 1999 and has increased to $166,818 as of 2008. Her duties include interacting with financial services companies and working with in-house tax counsel to assist employees with questions about benefits provided by Coke. Prior to her employment at Coke, Plaintiff worked at AT&T for thirty-two years. She retired from AT&T in 1998 with a sizeable pension which she "rolled-over" into a Fidelity IRA account ("IRA"). Plaintiff has always paid taxes on her annual salary–both at Coke and at AT&T. Her tax problems have occurred because she failed to withhold a sufficient percentage from draws she made on her IRA.

Around the time Plaintiff began work at Coke "difficult years with her husband" ensued. "To help support the household based on the emotional and abusive treatment . . . and in order to establish some normalcy to her life,"[1] Plaintiff withdrew funds from the initial balance of over $600,000 in her Fidelity IRA. From January 1999 to July 1999, Plaintiff elected to withhold ten percent from her IRA draws for tax purposes. Prior to August 1999, Plaintiff

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[1] This and all other statements by Plaintiff come from the Deposition of Linda W. Barkley taken by cross-examination by Defendant on Thursday, June 3, 2010.

realized withholding ten percent was insufficient to cover the tax obligations associated with these IRA draws and in August 1999 she increased the associated tax withholdings to twenty percent. Plaintiff continued to withhold twenty percent from the IRA draws until early 2000. For February and March 2000, however, she subsequently *decreased* the withholdings to roughly eleven percent.

Around March or April 2000, Plaintiff learned her unpaid tax liability for 1999 was over $95,000. At this time she was making an annual salary of $78,901 at Coke and had over $300,000 in her Fidelity IRA. In accordance with an installment agreement with the IRS, Plaintiff made a lump-sum payment of $10,000 and agreed to a monthly payment plan of roughly $750. During this same time period, Plaintiff also separated from her husband and needed to establish a separate residence. Rather than pay her tax obligations in full, Plaintiff used her salary and significant IRA draws to establish a very comfortable separate residence from her husband. (She purchased a home for $380,000 and completely furnished it, including pool furniture). Despite awareness of her tax liabilities and her installment agreement with the IRS, Plaintiff continued to draw on her IRA from spring 2000 to December 2001 (when her IRA was essentially depleted). The amount Plaintiff elected to withhold from her IRA draws during this time fluctuated between ten and thirty-five percent.

Plaintiff asserts that she simply made an initial miscalculation for her IRA withholdings–partly because she was used to her husband managing their joint filings. However Plaintiff's elected withholding amount varied as she drained her IRA–at times dipping back down to ten percent–after the point in time when she knew ten percent was insufficient to cover her tax obligations. In addition, Plaintiff claims she never made any extravagant purchases. However during 2003–after she had depleted her IRA, taken a second mortgage on her home, and filed for Chapter 11–she made purchases at Saks Fifth Avenue, The Sharper Image, Brookstone, Bloomingdales, Nordstrom, Garnet Hill, Chanel, Ethan Allen, and Burberry. Plaintiff does not consider purchases at Nordstrom and Bloomingdales extravagant: "I still think Bloomy's is [a] middle-end [department store]." Plaintiff claims in part that these high-end purchases were made because "there is a dress code for professional people at the Coca-Cola Company [that] impact[s] how the Plaintiff is viewed in terms of being qualified for her position."

The IRS levied Plaintiff's wages in June 2002. Plaintiff then filed Chapter 11. Plaintiff's Chapter 11 filing was dismissed in October 2003 for failure to propose a plan. After her Chapter 11 case was dismissed, Plaintiff rejected the IRS's proposed payment plan of $4,600 per month. In 2008 Plaintiff began dealing in cash, keeping large sums of cash in a drawer in her house, stopped directly depositing her salary into the bank account the IRS levied, and opened a new bank account.

Relevant Law

There is a presumption that all debts owed by the debtor are dischargeable unless the party contending otherwise proves, by competent evidence, nondischargeability. The purpose of this "fresh start" is to protect the "honest but unfortunate" debtors. United States v. Fretz (*In re* Fretz), 244 F.3d 1323, 1326 (11th Cir. 2001). The burden is on the creditor to prove the exception. St. Laurent v. Ambrose (*In re* St. Laurent), 991 F.2d 672, 680 (11th Cir. 1993). Courts should narrowly construe exceptions to discharge against the creditor and in favor of the debtor. Equitable Bank v. Miller (*In re* Miller), 39 F.3d 301 (11th Cir. 1994); *In re* St. Laurent, 991 F.2d at 680. A creditor must prove its debt be excepted from discharge by a preponderance of the evidence. Grogan v. Garner, 498 U.S. 279, 287–88 (1991).

A tax liability is nondischargeable if the debtor "made a fraudulent return or willfully attempted in any manner to evade or defeat such tax." 11 U.S.C. § 523(a)(1)(C). The Eleventh Circuit has held that the tax authority must prove two requirements–the conduct requirement and the mental state requirement–by a preponderance of the evidence. *In re* Fretz, 244 F.3d at 1327.

I. The Defendant has Satisfied the Conduct Requirement of Section 523(a)(1)(C)

The conduct requirement can be satisfied by an "affirmative act" or "culpable omission" by the debtor to avoid the payment or collection of taxes. United States v. Fretz (*In re* Fretz), 244 F.3d 1323, 1329 (11th Cir. 2001). A debtor's mere nonpayment of taxes–without more–is insufficient to warrant an exception to discharge under section 523(a)(1)(C). Id. at 1328; Haas v. IRS (*In re* Haas), 48 F.3d 1153, 1156 (11th Cir. 1995). Although the Eleventh Circuit has found failing to file tax returns coupled with nonpayment of taxes satisfies the conduct requirement, filing tax returns does not prevent the satisfaction of the conduct requirement. The Eleventh Circuit specifically addressed this issue and found that the conduct requirement can be satisfied by affirmative acts to avoid the assessment *or payment* of taxes. Griffith v. United States (*In re* Griffith), 206 F.3d 1389, 1395–96 (11th Cir. 2000) (The Eleventh Circuit reaffirmed its primary holding in Haas that "mere nonpayment of taxes, without more, does not constitute a willful attempt to evade or defeat taxes" but overruled its secondary Haas holding which had prevented affirmative acts to evade *payment* of taxes from satisfying the conduct requirement.).

Here, Plaintiff filed all of her tax returns and so it is clear Plaintiff did not attempt to avoid the assessment of taxes owed. However, Plaintiff actively concealed assets in order to avoid payment of taxes she knew she owed. These affirmative acts include dealing in cash, stopping direct deposit of her salary and bonuses to the bank account the IRS had levied, and opening a new bank account through which she quickly converted her compensation into cash. Additionally, although Plaintiff's initial insufficient withholding from her IRA draws may have been an innocent miscalculation, Plaintiff's subsequent actions reflect an attempt to draw as much money from the IRA without paying taxes to the IRS. Plaintiff reduced the withholding amount on her IRA draws back to ten percent after she knew ten percent would not cover her tax obligations on these draws.

Per Eleventh Circuit authority, Plaintiff's actions are more than sufficient to satisfy the conduct requirement. In both *Hamm* and *Hassan*, the courts noted that the debtor dealing in cash is an affirmative act satisfying the conduct requirement of section 523(a)(1)(C). Hamm v. United States (*In re* Hamm), 356 B.R. 263, 283 (Bankr. S.D. Fla. 2006); Hassan v. United States (*In re* Hassan), 301 B.R. 614, 623 (S.D. Fla. 2003). In *Griffith* the Eleventh Circuit found an intra-family transfer of property for little or no consideration satisfied the conduct requirement. *In re* Griffith, 206 F.3d 1389. Likewise, in *Jacobs* the conduct requirement was satisfied by transferring funds to a business to pay personal expenses and by engaging in intra-family transfers. United States v. Jacobs (*In re* Jacobs), 490 F.3d 913, 926 (11th Cir. 2007). Plaintiff's actions are similar to transferring funds to a third party (either to a family member or a business) in that the debtors took money that would otherwise be subject to an IRS levy and moved it out of the IRS's reach. The only distinction between a third party transfer and Plaintiff's actions is that Plaintiff moved the money out of the IRS's reach by converting it to cash which she directly controlled in her house.

In *Peterson*, the conduct requirement was satisfied in part because the debtor failed to file tax returns. 317 B.R. 556, 563 (Bankr. N.D. Ga. 2004) (Diehl, J.). However the court noted that even absent failing to file, the conduct requirement would be satisfied because the debtor earned enough money to satisfy his tax obligations and yet spent the money on his excessive lifestyle instead. Id. In *Peterson*, the court noted that debtor's lifestyle choices of renting housing and leasing cars were "suspicious" and found this to be an attempt to avoid collection efforts by the IRS. Id. Although Plaintiff has acquired assets, rather than renting and leasing, she has more-blatantly attempted to avoid IRS collection by dealing in cash and otherwise generally preventing her money from being taken by the IRS.

As *Peterson* demonstrates, courts have found excessive spending or a lavish lifestyle is an indicia of attempts to evade taxes–satisfying the conduct requirement of section 523(a)(1)(C). 317 B.R. at 563. See also *In re* Jacobs, 490 F.3d at 926 ; *In re* Hamm, 356 B.R. at 277. Plaintiff used cash from depleting her IRA, a second mortgage on her home, and her bonuses at Coke to furnish a lavish lifestyle–including expensive gift-giving, vacations, gambling, high-end clothing, and shoes. Rather than pay her obligations to the IRS, Plaintiff chose to keep her and her family in the lifestyle they preferred.

Given Plaintiff's failure to pay tax obligations, her affirmative actions to shield her money from collection by the IRS, and her excessive spending habits, the Court is satisfied that the Defendant has established by a preponderance of the evidence that Plaintiff attempted to evade payment of her tax obligations. The conduct requirement of section 523(a)(1)(C) of the Bankruptcy Code is therefore satisfied.

II. The Defendant has Satisfied the Mental State Requirement of Section 523(a)(1)(C)

The mental state requirement requires the tax authority prove: "(1) the debtor had a duty under the law, (2) the debtor knew he had that duty, and (3) the debtor voluntarily and intentionally violated that duty." Griffith v. United States (*In re* Griffith), 206 F.3d 1389, 1396 (11th Cir. 2000). It is undisputed that Plaintiff had a duty and knew that she had that duty.

Frequently, as is the case here, for the mental state requirement to be satisfied the IRS must prove that "(3) the debtor voluntarily and intentionally violated" the duty to pay taxes. The mere failure to pay taxes does not establish willfulness. Id. at 1395. The mental state requirement "'prevents the application of the exception to debtors who make inadvertent mistakes.'" United States v. Fretz (*In re* Fretz), 244 F.3d 1323, 1330 (11th Cir. 2001) (quoting *In re* Birkenstock, 87 F.3d 947, 952 (7th Cir. 1996)). On the other hand, the taxing authority does not need to prove that the debtor committed actual fraud only that his acts were "knowing and deliberate." United States v. Jacobs (*In re* Jacobs), 490 F.3d 913, 924–25 (11th Cir. 2007).

Because it is rare to have direct evidence of exactly what the debtor was thinking at the time of nonpayment, courts rely on circumstantial evidence commonly referred to as the "badges of fraud." The "badges of fraud" are examples of conduct by a debtor that indicate "willful" evasion of tax liability. This conduct may include (i) the understatement of income for more than one tax year; (ii) implausible or inconsistent behavior; (iii) the debtor's failure to cooperate with the IRS; (iv) inadequate record keeping; (v) transfers of assets for inadequate consideration; (vi) transfers that greatly reduce assets subject to IRS execution and (vii) any other conduct that is likely to mislead or conceal. *In re* Griffith, 206 F.3d 1389 (11th Cir. 2000); Hassan v. United States (*In re* Hassan), 301 B.R. 614, 622 (S.D. Fla. 2003) (quoting *In re* Spiwak, 285 B.R. 744, 751 (S.D. Fla. 2002)); see also United States v. Sternberg (*In re*

Sternberg), 229 B.R. 238, 246 (S.D. Fla. 1998); Huber v. IRS (*In re* Huber), 213 B.R. 182, 184 (Bankr. M.D. Fla. 1997). Not one of these factors is determinative since the court considers the totality of the circumstances in each individual case. *In re* Hassan, 301 B.R. at 623. However, the presence of multiple factors gives rise to a rebuttable presumption of willful evasion. Id. at 621.

Here, Plaintiff's actions satisfy at least two "badges of fraud." First, Plaintiff engaged in "implausible or inconsistent behavior" when she altered the percentage withholding from her IRA draws over time. Although it is plausible that her initial insufficient withholding could have been a mistake, her subsequent reduction back to insufficient levels, when she knew the lower level would not satisfy her tax obligations, makes her overall actions with regard to her IRA withholdings inconsistent with that of an innocent mistake. Rather this fluctuation indicates willfulness by the Plaintiff to receive as much money from her IRA without paying the required taxes.

Second, Plaintiff engaged in "transfers that greatly reduce assets subject to IRS execution." After the IRS levied Plaintiff's bank account, Plaintiff began dealing in cash–keeping large sums of money (including a $30,000 bonus check from Coke) in a drawer in her house, rather than in a bank account as she previously had been accustomed to doing. Plaintiff opened a second bank account through which she facilitated converting her income to cash. The second bank account and dealing in cash are obvious attempts to reduce assets subject to IRS execution. Specifically, Plaintiff drained and discontinued using the bank account on which the IRS levy was placed. Additionally, Plaintiff drained her IRA–an asset that may have been subject to IRS execution–after she learned of her tax obligations. She spent the money on maintaining her and her family's lifestyle rather than paying her taxes owed.

Given Plaintiff engaged in inconsistent behavior with regard to IRA withholdings, dealt in cash, used an alternate bank account, and drained her IRA, the Court is satisfied the Defendant has established by a preponderance of the evidence that Plaintiff willfully avoided payment of her tax liability. The mental state requirement of section 523(a)(1)(C) of the Bankruptcy Code is therefore satisfied.

Conclusion

Having proved the conduct requirement and the mental state requirement of section 523(a)(1)(C) of the Bankruptcy Code by a preponderance of the evidence, the Court finds Defendant has met its burden. Plaintiff's answer and response to Defendant's Motion fail to credibly challenge the facts Defendant asserted. Plaintiff relies on a self-serving affidavit asserting she lacked the mental state required for willful evasion under section 523(a)(1)(C). Therefore, Plaintiff has failed to go beyond the pleadings and demonstrate that there is a material issue of fact which precludes summary judgment

Because of the reasons set forth, the Court finds the Defendant's debt excepted from discharge under section 523(a)(1)(C). Accordingly, **IT IS ORDERED** that the Motion be and is hereby **GRANTED**, as set forth in this Order.

The Clerk's Office shall serve a copy of this Order to the Plaintiff, Plaintiff's Counsel, Defendant, Defendant's Counsel, and the Chapter 7 Trustee.

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