UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	)	CHAPTER 7
	)	
BRETT JAMES WASHBURN,	)	CASE NO. 09-80842 - MHM
	)	
Debtor.	)	
	)	
RENEE JOHNS,	)	
	)	
Plaintiff,	)	
v.	)	**ADVERSARY PROCEEDING NO. 09-6620**
	)	
BRETT JAMES WASHBURN,	)	
	)	
Defendant.	)	

ORDER ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

The complaint filed by Renee Johns (Plaintiff) seeks a determination that debts owed to her by Brett James Washburn (Debtor) are nondischargeable. Plaintiff asserts that these debts were incurred in connection with a separation agreement between Plaintiff and Debtor and are nondischargeable under 11 U.S.C. § 523(a)(15). Plaintiff filed a motion for summary judgment. For the reasons set forth below, Plaintiff's motion is granted.

I. STATEMENT OF FACTS

Plaintiff and Debtor were formerly married. A settlement agreement dated July 12, 2005, was filed in the Superior Court of Fulton County, Georgia August 1, 2005 (the "Agreement"), and on September 14, 2005, a Final Judgment and Decree of Divorce was entered, incorporating the Agreement (the "Divorce Decree"). As part of the Agreement,

Debtor assumed responsibility for debts on a Capital One VISA account and a National City VISA Account (the "VISA Debts"). The parties also agreed that Debtor would assume responsibility for $25,000 of a second mortgage owed to North Atlanta National Bank and, within one year, either satisfy the debt or refinance to reduce the second mortgage to no more than $23,582.00.

Debtor later signed a Payment Contract to Plaintiff agreeing to pay her $1,400.00 a month to satisfy a $49,000.00 loan taken out by Plaintiff to reduce the North Atlanta line of credit to the $23,582.00 stipulated in the Agreement ("Payment Contract"). The contract states "this is in accordance to [sic] the divorce settlement filed in the Fulton County Courthouse September 14, 2005." It further states, "the funds [were] applied to the North Atlanta National Bank Line to pay off the portion Brett Washburn is responsible for plus the Settlement charges to the borrower (Renee Washburn)." Debtor currently owes Plaintiff $13,936.00 under the Payment Contract.

After the Divorce Decree was final, Debtor failed to pay the VISA debts so that, as Plaintiff continued to be liable for the VISA Debts, her credit standing was adversely affected. On July 23, 2009, Plaintiff satisfied the National City account debt shown as Debtor's responsibility in the Agreement. Debtor filed a Chapter 7 petition August 8, 2009. On May 10, 2010, Plaintiff satisfied the Capitol One VISA account debt shown as Debtor's responsibility in the Agreement. Schedule F[1] filed by Debtor with his bankruptcy petition lists the VISA Debts and the Payment Contract with Plaintiff as general unsecured debts.[2]

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[1] Schedule F is the schedule of creditors holding unsecured nonpriority claims.

[2] Debtor also disclosed a child support obligation to Plaintiff as a priority support obligation on Schedule E (a schedule of unsecured priority claims).

II. CONCLUSIONS OF LAW

Pursuant to FRCP 56(c), incorporated in Bankruptcy Rule 7056, a party moving for summary judgment is entitled to prevail if no genuine issue as to any material fact exists and the moving party is entitled to judgment as a matter of law. Only disputes of fact which might affect the outcome of the proceeding will preclude summary judgment. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242 (1986). *See also, Lyons v. U.S. Marshals,* 840 F. 2d 202 (3d Cir. 1988); *Donovan v. General Motors,* 762 F. 2d 701 (8th Cir. 1985). "[I]n ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden." *Anderson v. Liberty Lobby, Inc.,* at 254. The actual quantum and quality of proof necessary to support a finding in favor of the plaintiff must be considered to determine whether a **genuine** dispute of fact exists. *Id.*

Plaintiff seeks a ruling that debts owed to her by Debtor are nondischargeable under 11 U.S.C. § 523(a)(15). In relevant part, §523(a)(15) provides:

> A discharge under Section 727 ... of this title does not discharge an individual from any debt ... to a spouse, former spouse or child of the debtor and not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a court of record.

A debt that is nondischargeable under this provision must (1) be to a spouse, former spouse or child of the debtor, (2) not be the type of debt described in §523(a)(5), and (3) be incurred in the course of a divorce or separation, or in relation to a separation agreement, divorce decree or court order. Section 523(a)(5) excepts from discharge debts "for a domestic support obligation." A domestic support obligation is defined in 11 U.S.C. §101(14A) as a debt

> "owed to or recoverable by a spouse, former spouse or child of the debtor ... or a governmental unit in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of such spouse, former spouse, or child of the debtor ... by reason of applicable provisions of a separation agreement, divorce decree, or property settlement agreement; an order of a court of record."

Debts that are not support or maintenance but are, in fact, a division of property or debts between the two parties are not the type of debts described in §523(a)(5).

III. DISCUSSION

A debt excepted from discharge under § 523(a)(15) must not be alimony, maintenance or support; must be owed to a spouse, former spouse or child of the debtor; and must be incurred in the course of a divorce or separation or in connection with a separation agreement or divorce decree. A court can determine whether a debt is alimony, maintenance or support by looking to the language of the separation agreement to determine whether the parties intended for the debt to be a support obligation. *Gibson v. Gibson*, 219 B.R. 195, 200 (B.A.P. 6th Cir. 1998). The Agreement includes a section entitled "Waiver of Alimony," which states that both parties waive any right to alimony and do not intend to create an obligation for support or maintenance. Given the clear intent of the parties in the Agreement, the debts in question are not the type described in §523(a)(5).

The meaning of a debt "to a ... former spouse" and "incurred by the debtor in the course of a divorce or separation or in connection with separation agreement, divorce decree or other order of a court of record" must be examined to determine whether a division of pre-existing debts owed to third parties in a separation agreement falls under the statute. *Gibson* at 201. The Bankruptcy Code defines a "debt" in §101(12) as "liability on a claim." Section 101 defines a "claim" as a "right to payment ... or a right to an equitable remedy for breach of performance if such breach gives rise to a right to

payment." 11 U.S.C. § 101(5). Thus, the question at issue is whether Debtor has an enforceable obligation to his former spouse. *Gibson*, 219 B.R. at 202. So long as the former spouse has a right to compel performance, the debt is owed to her. *Burckhalter v. Burckhalter*, 389 B.R. 185, 190 (Bankr. D. Colo. 2008). Under Georgia law, a former spouse can enforce a debt created by a divorce decree by seeking a declaratory judgment against the debtor or filing a motion for contempt.[3] O.C.G.A § 9-4-2; O.C.G.A. § 15-1-4; *Royal v. Royal*, 246 Ga. 229, 229, 271 S.E.2d. 144, 145 (1980). Thus, assumption of responsibility for a pre-existing third party debt under a divorce decree is a debt to the former spouse under §523(a)(15). The debt to the former spouse is also incurred in the course of the divorce, despite the preexisting obligation to pay the third party, because the obligation to the former spouse did not exist prior to the divorce. *Johnson v. Johnson*, Adversary Proceeding No. 07-5054, 2001 Bankr. LEXIS 3645, at *16 (Bankr. N.D. Ohio Oct. 23, 2007); *Shreffler v. Shreffler*, 319 B.R. 113, 117 (Bankr. W.D. Pa. 2004); *Gibson*, 219 B.R. at 203-204.

Debtor argues that a debt is not owed to the former spouse and is not incurred in relation to a separation agreement or in the course of a divorce without "hold harmless" language in the separation. Debtor cites other bankruptcy courts' opinions upholding this reasoning. *See Burton v. Burton*, 242 B.R. 674, 678 (Bankr. W.D. Mo. 1999); *Owens v. Owens*, 191 B.R. 669, 674 (Bankr. E.D. Ky. 1996); *Stegall v. Stegall*, 188 B.R. 597, 598 (Bankr. W.D. Mo. 1995). The opinions cited by Debtor do not contain an analysis of the applicable nonbankruptcy law, none of which appears to have been decided under Georgia law. "Nonbankruptcy law that creates substantive claims" must be analyzed to determine the validity of a claim. *Grogan v. Garner*, 498 U.S. 279, 283-284 (1991). A lack of "hold harmless" language is not dispositive in determining whether §523(a)(15) is

[3] Debtor's Statement of Financial Affairs shows that a contempt proceeding filed by Plaintiff against Debtor was pending at the time the bankruptcy petition was filed.

applicable. *Johnson*, 2001 Bankr. LEXIS 3645, at *16. Debtor assumed responsibility for the VISA Debts and the obligation to reduce Plaintiff's responsibility on the second mortgage to $23,582.00 under the Agreement, which was later incorporated into the Divorce Decree. Once Plaintiff and Debtor divorced, Debtor incurred debts to Plaintiff under the Bankruptcy Code arising out of the divorce proceeding, despite a lack of "hold harmless" language in the Agreement. The VISA Debts and the obligation to reduce the mortgage fall within the scope of §523(a)(15).

Debtor also contends that he satisfied his obligation to reduce the second mortgage to $23,582.00 when Plaintiff secured a separate loan for Defendant's portion of the mortgage and he signed the Payment Contract, and that any debt to Plaintiff under the Payment Contract was not incurred in connection with the Agreement. O.C.G.A. §13-4-5 states, in part, "(a) simple contract regarding the same matter and based on no new consideration does not destroy another simple contract between the same parties...." A new note concerning the same debt as an old note with no new consideration does not extinguish the debt of the old note, but only extends the indebtedness. *Motor Contract Division of Trusco Finance Co. v. Southern Cotton Oil Co.*, 76 Ga. App. 199, 201, 45 S.E.2d 291, 293 (1947). Additionally, the substitution of a new note for an old debt does not satisfy the old debt until the new note is paid. *See Cohen's Department Stores, Inc. v. Siegel*, 60 Ga.App. 79, 79, 2 S.E.2d 762, 764 (1939); *Georgia National Bank v. Fry*, 32 Ga.App. 695, 695, 124 S.E. 542, 544 (1924). The issuance of a new note on a debt under a divorce decree does not remove the obligation to satisfy that debt under the divorce decree. *See Northington v. Northington*, 327 Ga. 616, 616, 229 S.E.2d 414, 415 (1976).

Debtor incurred a debt to Plaintiff under their Divorce Decree when he assumed responsibility for reducing her obligation on the second mortgage to $23,582.00. Although the loan obtained by Plaintiff on Debtor's behalf to reduce the second mortgage may have altered Debtor's obligation to North Atlanta National Bank, the new loan and

the Payment Agreement did not extinguish the original debt to Plaintiff arising under the divorce decree. The Payment Contract instead acted as an extension of that debt, and Debtor's obligation to Plaintiff under the Payment Contract falls within the scope of §523(a)(15).

IV. CONCLUSION

Both the VISA Debts and the debt under the Payment Contract are nonsupport debts owed to Plaintiff incurred in the course of divorce proceedings. Under 11 U.S.C. §523(a)(15), these debts are nondischargable. Accordingly, it is hereby

ORDERED that Plaintiff's motion for summary judgment is ***granted***.

The Clerk, U.S. Bankruptcy Court, is directed to serve a copy of this order upon Plaintiff's attorney, Defendant's attorney, and the Chapter 7 Trustee.

IT IS SO ORDERED, this the 15th day of September, 2010.

MARGARET H. MURPHY
UNITED STATES BANKRUPTCY JUDGE