

IT IS ORDERED as set forth below:



Date: July 19, 2013

A handwritten signature in black ink, appearing to read "W. Homer Drake".

W. Homer Drake
U.S. Bankruptcy Court Judge

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION**

IN THE MATTER OF:	:	CASE NUMBERS
THOMAS M. HOWERTON, IV,	:	BANKRUPTCY CASE
Debtor.	:	NO. 12-10613-WHD
<hr/>		
THOMAS M. HOWERTON, IV,	:	ADVERSARY PROCEEDING
Movant,	:	NO. 12-01055
v.	:	
JENNIFER HOWERTON,	:	IN PROCEEDINGS UNDER
Respondent.	:	CHAPTER 7 OF THE
	:	BANKRUPTCY CODE

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

The above-styled Chapter 7 case comes before the Court on Cross-Motions for Summary Judgment (hereinafter collectively the "Motion"), submitted by Thomas

M. Howerton, IV (hereinafter the "Debtor" or "Movant") and Jennifer Howerton (hereinafter the "Creditor" or "Respondent") on April 30, 2013 and May 22, 2013, respectively. The Motion was filed in relation to the Debtor's Complaint to Determine Dischargeability of Debt Pursuant to 523(c)¹ (hereinafter the "Complaint") filed on August 20, 2012. This Court has subject matter jurisdiction over this matter pursuant to 28 U.S.C. § 157(b)(1) as a core proceeding defined under 28 U.S.C. §§ 157(b)(2)(I) & (J); 1334.

Because there are no material issues of factual dispute in this case, an evidentiary hearing would be unnecessary. See McMillen v. Syndicated Office Sys., Inc., 440 B.R. 907, 910 (Bankr. N.D.Ga. 2010) (Bihary, B.J.) ("[A] judgment on the pleadings is appropriate when there are no issues of material facts in dispute, and judgment may be rendered by considering the substance of the pleadings and any judicially noticed facts." (citing Hawthorne v. Mac Adjustment, Inc., 140 F.3d 1367, 1370 (11th Cir. 1998))); see also In re Faillace, Case No. A04-93282-PWB, slip op. at *1 (Bankr. N.D.Ga. Sept. 17, 2004) (Bonapfel, B.J.) ("Because there is no factual dispute in this case, an evidentiary hearing is not required."). In reviewing the cross-motions, the Court accepts the facts as stated in the pleadings and views them in the "light most favorable to the non-moving party on each motion." Chavez v.

¹ While the title of the complaint filed by the Debtor originally questioned dischargeability under 523(c), further examination into the matter reveals that the actual issue in this case is whether the debt is dischargeable under 523(a).

Mercantil Commercebank, N.A., 701 F.3d. 896, 899 (11th Cir. 2012). A ruling in favor of a particular party is appropriate where the undisputed material facts show that the party is entitled to judgment as a matter of law. Id.

STATEMENT OF FACTS

On March 2, 2012 (hereinafter the "Petition Date"), the Debtor filed a voluntary petition for relief under Chapter 7 of the United States Bankruptcy Code² (hereinafter the "Code") in the Northern District of Georgia, Newnan Division.

The Debtor and the Respondent are former spouses that were divorced on February 19, 2009. In the final divorce decree, the Respondent was designated as the custodial parent of their child, and the Debtor was ordered to pay child support. Throughout the divorce process, the Debtor expressed concern that the representations made by the Respondent regarding her income were inconsistent, ranging from \$3,333.00 to \$5,000.00 per month, and thus inaccurate.

Despite these concerns, the parties incorporated specific findings into that portion of the final decree pertaining to child support, as required by the Official Code of Georgia Annotated (hereinafter the "O.C.G.A.") § 19-6-15 "Child Support Guidelines." This decree was presented to the court as a consent order and signed by each party's attorney. The order specifically mentioned that the Respondent was self-employed, and that although her income fluctuated, she earned an average salary of \$3,333.00 per month. The Debtor's average gross monthly income was

² 11 U.S.C. §§ 101 *et seq.*

undisputed as \$10,833.33.

Following the divorce, the Debtor filed two actions—a Complaint for Modification of Child Support and a Complaint to Set Aside the Divorce Decree and Settlement Agreement—on November 11, 2009 and December 28, 2010, respectively. The Complaint for Modification of Child Support initially claimed that (1) anticipated increases in the Debtor’s income failed to occur as planned, and (2) the Respondent understated her income in computing child support under the guidelines. While that complaint was still pending, the Debtor filed the second action against the Respondent, seeking to set aside the divorce decree and separation agreement by virtue of O.C.G.A. § 19-11-60. Pursuant to that statute, the Debtor requested relief from the divorce decree based upon fraud, accident, or mistake or upon acts of the Respondent “unmixed” with the negligence or fault of the Debtor, as set out in O.C.G.A. § 19-11-60.

The Coweta Superior Court consolidated these complaints and heard oral argument on April 7, 2011. The Superior Court found the Debtor’s actions to be without merit and issued an order denying both of the Debtor’s complaints. In reaching its conclusion, the Superior Court determined that no material change in income or financial status of either party had occurred since the date of the divorce decree. Consequently, the Debtor was not entitled to changes in the child support payments. The Superior Court also found, “with respect to . . . [Debtor’s asserted claims,] there existed such a complete absence of any justiciable issue of law or fact

that it could not be reasonably believed that a court would accept them”³ and ordered the Debtor to pay Respondent’s Attorney Fees (hereinafter the “Award”) in the amount of \$43,526.39 pursuant to O.C.G.A. § 9-15-14⁴ with accumulated interest of 6.25% per annum.⁵

The Debtor filed a Chapter 7 bankruptcy case on March 2, 2012 and received a discharge on July 5, 2012. On July 2, 2012, the Respondent filed a contempt action regarding the attorney fees and other issues, but did not move forward with the action per agreement of both parties’ counsel. Thereafter, the Debtor filed this adversary proceeding seeking a determination as to the dischargeability of the Award.

The Respondent challenges the discharge, as it relates to the Award, stating that the Attorney Fee Award should be considered a domestic support obligation and thus non-dischargeable under 11 U.S.C. § 523(a)(5); or, alternatively, should be

³ This language parallels O.C.G.A. § 9-15-14(a) which states in full that “fees . . . shall be awarded to any party against whom another party has asserted a claim, defense, or other position with respect to which there existed such a complete absence of any justiciable issue of law or fact that it could not be reasonably believed that a court would accept the asserted claim, defense, or other position.” GA. CODE ANN. § 9-15-14(a).

⁴ Id.

⁵ O.C.G.A. § 7-4-12(a) provides “[a]ll judgments in this state shall bear annual interest upon the principal amount recovered at a rate equal to the prime rate as published by the Board of Governors of the Federal Reserve System, as published in statistical release H. 15 or any publication that may supersede it, on the day the judgment is entered plus 3 percent.” GA. CODE ANN. § 7-4-12 (a).

considered another obligation incurred in the course of the divorce proceedings or other order of the Superior Court, which may qualify as non-dischargeable pursuant to § 523(a)(15) of the Code.

CONCLUSIONS OF LAW

Generally, a Chapter 7 debtor is entitled to a discharge from all pre-petition debts. See 11 U.S.C. § 727(a). This discharge is intended to promote one of the Bankruptcy Code's objectives of providing an opportunity for certain debtors to discharge their debts and enjoy a fresh start. In re Montgomery, 489 B.R. 609 (Bankr. N.D. Ga. 2013). Relief under Chapter 7 does not shelter debtors from every type of debt owed, and to that end, Congress created various exceptions to the dischargeability of certain debts. See generally 11 U.S.C. § 523(a)(1)–(19). In the instant case, the Court addresses whether payment of attorney's fees by a Chapter 7 debtor, awarded to a party under O.C.G.A. § 9-15-14's abusive litigation provisions, is a non-dischargeable debt.

For the purposes of this opinion, the Court chooses to assume 523(a)(5) is inapplicable. In Chapter 7 cases,

the distinction between a domestic support obligation and other types of obligations arising out of a marital relationship is of no practical consequence in determining the dischargeability of the debt. . . . The enactment of subsection 523(a)(15) and the increase in the scope of the discharge exception effected by the 2005 amendments, expresses Congress's recognition that the economic protection of dependent spouses and children under state law is no longer accomplished solely through the traditional mechanism of support and alimony payments. State courts do not

always draw a sharp distinction between support and property division in providing for the post-divorce economic security of dependent family members.

In re Golio, 393 B.R. 56, 61-62 (Bankr. E.D.N.Y. 2008) (quoting 4 *Collier on Bankruptcy*, ¶ 523.21, at 523-118 (15th ed. rev. 2008) (internal citation omitted)).

Therefore, this Court need not make a determination as to whether the Award constitutes a domestic support obligation under 11 U.S.C. § 523(a)(5), if the Respondent demonstrates that the Award would alternatively be nondischargeable in any event under 11 U.S.C. § 523(a)(15).⁶

I. Dischargeability: 11 U.S.C. §523 (a)(15)

“A debt is nondischargeable pursuant to 11 U.S.C. § 523(a)(15) if, although not a domestic support obligation, it is incurred in the course of a divorce or separation or in connection with a separation agreement, divorce decree, or court order.” In re Santry, 481 B.R. 824, 829 (Bankr. N.D. Ga. 2012) (Murphy, B.J.). As this Court has previously established, the exception to discharge provided by 523(a)(15) protects “all divorce-related obligations,” not otherwise safeguarded by subsection 523(a)(5). Humiston v. Huddelston, 194 B.R. 681, 685 (Bankr.N.D.Ga.1996) (Drake, B.J.). Moreover, it must be owed to a spouse, former

⁶ As a minor note, the Debtor asserts that the Respondent did not timely take affirmative action to establish the Award as non-dischargeable pursuant to 11 U.S.C. § 523(a)(6). The Respondent concedes that she failed to take affirmative action pursuant to 11 U.S.C. § 523(c) and Rule 4007, which provide the procedure for excepting from discharge any debts “for a willful and malicious injury” under 11 U.S.C. § 523(a)(6).

spouse, or child of the Debtor. In re Santry, 481 B.R. 824, 829 (Bankr. N.D. Ga. 2012) (Murphy, B.J.). Assuming that 523(a)(5) does not apply to the Award, then the dischargeability of the Award can be determined by evaluating whether (1) the Award is a debt owed to a former spouse and (2) it was incurred by the debtor in connection with a separation agreement, divorce decree or other order of a court of record. The Court will evaluate the Award under both prongs of this subsection to determine whether the Debtor's obligation to pay the Attorney Fee Award is a non-dischargeable obligation under 11 U.S.C. § 523(a)(15).

A. Debt Owed to a Former Spouse

The first question to be addressed is whether the debt being considered for discharge is owed to a spouse, former spouse, or child of the Debtor. Whether a fee is due to a former spouse or to the attorney of a former spouse has been determined to be irrelevant in the application of this portion of 523(a)(15). See In re Koscielski, 2011 WL 338634 (N.D.Ill. 2011) (rejecting the literal interpretation and specifically finding that the award of attorney's fees, even if awarded to the attorney, was a right belonging to the former spouse to have the fees paid on her behalf). Notwithstanding even this broad interpretation, in the instant case, the Award handed down by the Superior Court was awarded directly to the Debtor's former spouse, Jennifer Howerton. Thus, it appears obvious, and the Court finds, that this section of the requirements for non-dischargeability under § 523(a)(15) has clearly been met.

B. Nature of the Award

Second, the Court must determine whether the debt owed to the former spouse is non-dischargeable under 523(a)(15). Based on the statutory language, debts incurred by a debtor are non-dischargeable if they are acquired: (1) in the course of a divorce or a separation, or (2) in connection with a separation agreement, divorce decree or order of a court of record, or (3) a determination made in accordance with State or territorial law by a governmental unit. 11 U.S.C. § 523(a)(15).

In In re Santry, the bankruptcy court found that the divorce decree gave an ex-wife the right to compel the performance of obligations set forth in the decree through a motion for contempt. In re Santry, 481 B.R. 824, 831-32 (Bankr. N.D. Ga. 2012) (Murphy, B.J.). Moreover, the fees the ex-wife incurred as a direct result of forcing compliance with the divorce decree were determined by the Court to be non-dischargeable under 523(a)(15). Id.; see also In re Washburn, 2010 WL 4117680 (Bankr. N.D. Ga. Oct. 1, 2010) (Murphy, B.J.) (holding the divorce decree gave creditor ex-spouse justification to compel performance in compliance with the decree and finding the debt owed to creditor ex-spouse was a non-dischargeable obligation under 523(a)(15)).

In the instant case, the Respondent had to retain counsel because the Debtor filed actions post-divorce involving elements set forth in their divorce

decree. In both Santry and the present case, action was taken by the respondent ex-wife to ensure that the debtor ex-husband would uphold the terms agreed upon in the divorce decree. In re Santry, 481 B.R. 824, 831-32 (Bankr. N.D. Ga. 2012) (Murphy, B.J.). Although, the respondent in Santry initiated the action to force compliance with the divorce decree, and in the present matter, the Respondent defended against Debtor's attempts to alter the decree, the Court sees no reason to distinguish the outcomes based on who initiated the proceeding. Therefore, just as the attorney fees awarded in Santry were "in connection with divorce proceedings," this Court also finds that the Award granted to Respondent in connection with defending her rights under the divorce decree falls within the meaning of 523(a)(15).

This position is supported by the conclusions of other courts. In In re Koscielski, the debtor ultimately complied with the terms of a divorce decree but "only after the Debtor's ex-wife was forced to bring numerous motions in the divorce court and incur[red] costs and attorney's fees." In re Koscielski, 2011 WL 338634, *2 (Bankr. N.D. Ill. Jan. 31, 2011). Those fees were found to be non-dischargeable under Section 523(a)(15). Id. Similarly, in In re Cavagnetto, 2012 WL6585560 (Bankr.N.D.Ill. 2012), the court held that an award of attorney's fees as a sanction against the debtor by filing a baseless complaint in connection with divorce proceedings was non-dischargeable pursuant to 11 U.S.C. 523(a)(15). In re Cavagnetto, 2012 WL 6585560 at *5; see also Reissig v. Gruber, 436 B.R. 39,

44 (Bankr. N.D.Ohio, 2010) (holding that attorney fees awarded for improper litigation tactics are non-dischargeable under both 523(a)(5) and 523(a)(15)); Zimmerman v. Hying, 477 B.R. 731 (Bankr. E.D.Wis. 2012) (holding that attorney fees ordered pursuant to post-divorce contempt proceedings non-dischargeable under both 523(a)(5) and 523(a)(15)). This Court is aware that at least one case in this district has found that under different factual circumstances, i.e. the debtor's earnings being less than the respondent's, that fees extracted because of abusive litigation do not meet the definition of a domestic support obligation pursuant to 11 U.S.C. §§ 523(a)(5) & 101(14); however, this finding does not preclude attorney fees derived from abusive litigation to be declared non-dischargeable obligations under 11 U.S.C. § 523(a)(15). See In re Vaughan, 2013 WL 636052 (Bankr. N.D. Ga. Jan. 31, 2013) (Murphy, B.J.); see also 11 U.S.C. § 523(a)(15).

Accordingly, after a review of the statute and relevant case law, the Court concludes that the debt is non-dischargeable because of the provisions contained in 11 U.S.C. § 523(a)(15). In this case, the Award was in connection with a divorce decree. The Debtor filed a Complaint for Modification of Child Support and a Complaint to Set Aside the Divorce Decree and Settlement Agreement. Both motions filed by the Debtor pertained to the initial decree. The Superior Court determined that the Debtor's claims were without merit and that "there existed such a complete absence of any justiciable issue of law or fact that it could not be reasonably believed that a court would accept them." Accordingly, the Superior

Court awarded fees to the Respondent. Those fees were incurred in the course of upholding the provisions of the divorce decree, and as a result, they satisfy the second prong of 11 U.S.C. § 523(a)(15).

CONCLUSION

In the present case, the first requirement for non-dischargeability under 523(a)(15) has been met because the debt is owed directly to the former spouse of the Debtor. The second requirement has also been met because the debt arose out of a court order and in the course of proceedings seeking to modify the divorce decree and child support. Therefore, the Court finds that the Award is a non-dischargeable debt pursuant to 11 U.S.C. § 523(a)(15).

For the reasons set forth above, the Court must deny Debtor's Motion for Summary Judgment and grant Respondent's Cross-Motion for Summary Judgment. Accordingly, it is hereby

ORDERED that Debtor's Motion for Summary Judgment is **DENIED** and Respondent's Cross-Motion for Summary Judgment is **GRANTED**.

The Clerk is **DIRECTED** to serve a copy of this Order upon the Debtor, Respondent, respective counsel, the Chapter 7 Trustee, and the U.S. Trustee.

END OF DOCUMENT