

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

IN RE:	)	CHAPTER 7
	)	
ROBERT T. VAUGHAN,	)	CASE NO. 12-55199 - MHM
	)	
Debtor.	)	
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ROBERT T. VAUGHAN,	)	
	)	
Movant,	)	
v.	)	CONTESTED MATTER
	)	
MARIA DARLENE VAUGHAN,	)	
MERIWETHER & THARP, LLC,	)	
	)	
Respondents.	)	

**ORDER**

This matter is before the court on Debtor's *Motion for Contempt and Sanctions Against Maria Darlene Vaughan and Meriweather & Tharp, LLC* (Doc. No. 19) (the "Motion"). Respondents filed an *Answer* to the Motion (Doc. No. 27). Hearing was held August 10, 2012, at the conclusion of which the parties were afforded the opportunity to file briefs on the issues, and they did so (Docs. No. 28, 29, 32, 33, 36). Pursuant to 11 U.S.C. §102, no further hearing is necessary.

On February 29, 2012, Debtor filed this Chapter 7 petition. Debtor and Respondent Maria Vaughan are former spouses who obtained a divorce in 2008. Two children were born during the marriage. Prepetition, on December 7, 2011, Ms. Vaughan, represented by Respondent Meriwether & Tharp, LLC, filed an *Emergency Motion for*

*Contempt of Child Support* in the Superior Court of Fulton County,<sup>1</sup> seeking a finding of contempt and imposition of sanctions against Debtor for failure to pay child support, alleging an arrearage of \$4,400, and seeking payment of the arrearage and award of attorneys fees and expenses (the “State Court Contempt Motion”).

In connection with the State Court Contempt Motion, an *Order on Motion for Attorney’s Fees* was entered January 26, 2012, by Fulton Superior Court, the Honorable Judge Bensonetta Tipton Lane, awarding to Ms. Vaughan \$20,000 in attorneys fees, payable by Debtor within 30 days (the “Fee Order”). In the Fee Order, the court expressly refused to award attorneys fees under O.C.G.A. 19-6-15,<sup>2</sup> because, as the parties settled their dispute, neither party “prevailed” within the meaning of that code section. The court also expressly declined to award fees under O.C.G.A. §19-9-3.<sup>3</sup> (Title 19 is the Domestic Relations title in the Georgia Code.) The court noted that Ms. Vaughan’s income

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<sup>1</sup> Civil Action File No. 2010cV186883.

<sup>2</sup> This code section is titled “Child Support Guidelines,” and subsection (k)(5) provides for an award of attorneys fees to the prevailing party in a child support modification proceeding “as the interests of justice may require.”

<sup>3</sup> O.C.G.A. §19-9-3(g) provides:

Except as provided in Code Section 19-6-2, and in addition to the attorney’s fee provisions contained in Code Section 19-6-15, the judge may order reasonable attorney’s fees and expenses of litigation, experts, and the child’s guardian *ad litem* and other costs of the child custody action and pretrial proceedings to be paid by the parties in proportions and at times determined by the judge. Attorney’s fees may be awarded at both the temporary hearing and the final hearing. A final judgment shall include the amount granted, whether the grant is in full or on account, which may be enforced by attachment for contempt of court or by writ of *fiery facias*, whether the parties subsequently reconcile or not. An attorney may bring an action in his or her own name to enforce a grant of attorney’s fees made pursuant to this subsection.

O.C.G.A. 19-6-2 requires the court to consider the financial circumstances of both parties as a part of the court’s determination of the amount of attorney fees.

exceeded Debtor's, and that Debtor was unemployed and receiving disability income. The attorneys fees in the Fee Order were awarded pursuant to O.C.G.A. §9-15-14, which allows an award in any civil action of attorneys fees against a party who asserts a claim, defense or other position lacking in substantial justification or asserts such claim, defense or other position for purposes of delay or harassment.

When Debtor did not pay the fees within 30 days, Respondents filed a *Motion for Contempt of Respondent's Failure to Pay Attorneys Fees Pursuant to Order* (the "Fee Contempt Motion"), which is the proceeding that is the subject of Debtor's Motion. The Fee Contempt Motion was sent by Respondents to the Clerk of Fulton Superior Court (and was served on Debtor) February 28, 2012, but it was not actually filed by the Clerk until March 1, 2012. As Debtor's bankruptcy petition was filed February 29, 2012, the Fee Contempt Motion was filed in violation of the automatic stay of 11 U.S.C. §362(a) unless it was excepted from the stay under one of the provisions of 11 U.S.C. §362(b). Even if it was filed in violation of the stay, however, its filing was not "willful" within the meaning of §362(k) because Respondents had no actual notice of the filing of Debtor's bankruptcy petition. Debtor asserts, however, that Respondents willfully violated the automatic stay when they continued the Fee Contempt Motion after receiving notice of Debtor's bankruptcy filing.

On March 13, 2012, Debtor's attorney sent notice to Respondents of Debtor's position that the Fee Contempt Motion violated the automatic stay and that Respondents must immediately "rescind" the Fee Contempt Motion. On April 9, 2012, Debtor's §341(a) meeting of creditors was held, at which Respondents were present. On April 10,

2012, Respondents sent a letter to Judge Lane, Fulton Superior Court, requesting that the Fee Contempt Motion be scheduled for hearing (the “Letter”).<sup>4</sup> (A copy of the Letter was sent to Debtor, but not to Debtor’s bankruptcy attorney, despite the March 18 letter from Debtor’s attorney.<sup>5</sup>) The Letter discusses at some length, and with substantially inaccurate<sup>6</sup> representations of the law, whether the Fee Contempt Motion is subject to the automatic stay of 11 U.S.C. §362(a), and seeks a hearing for Judge Lane to determine whether the automatic stay is applicable to the Fee Contempt Motion. No hearing was held because Debtor filed the Motion, which is the subject of this order.

In determining whether Debtor is entitled to imposition of sanctions against Respondents for violation of the automatic stay, a threshold issue is whether the Fee Contempt Motion falls within one of the exceptions set forth in §362(b). The only exception in §362(b) that may be applicable to the Fee Contempt Motion is §362(b)(2)(B), which provides that the automatic stay does not apply to “the collection of

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<sup>4</sup> Apparently, Respondents took this action in partial reliance upon what Respondents report as oral statements made by the Chapter 7 Trustee at the §341 meeting. As the parties provided neither a transcript of the §341 meeting nor an affidavit from the Chapter 7 Trustee, Respondents’ assertion of reliance upon what the Chapter 7 Trustee may have said carries little or no weight.

<sup>5</sup> At the time Respondents sent the letter, Respondents were clearly aware of this bankruptcy case and were aware that Debtor is represented in this case by an attorney. Nevertheless, Respondents apparently neglected to send a copy of the Letter to Debtor’s bankruptcy attorney, even though they were asking for an interpretation by Judge Lane of the effect of the bankruptcy case on the Fee Contempt Motion. Such failure of, at the very least, professional courtesy, if not intentional violation of due process, evidences a disappointing lack of professionalism.

<sup>6</sup> Respondents initial response to Debtor’s Motion and the Letter to Judge Lane stated that Respondents’ claim under the Fee Order was non-dischargeable under §523(a)(5) or (a)(15) and *therefore* the automatic stay was not applicable to prohibit continuation of the Fee Contempt Motion. Dischargeability, however, is not a factor in determining the applicability of the automatic stay. Section 523 merely prevents discharge of non-dischargeable claims, but it does not except such claims from the automatic stay. For example, creditors holding a non-dischargeable claim for a student loan are nevertheless prohibited by the automatic stay from pursuing that claim until after the discharge is entered.

a domestic support obligation from property that is not property of the estate[.]”

“Domestic support obligation” is defined in 11 U.S.C. §101(14A):

(14A) The term “domestic support obligation” means a debt that accrues before, on, or after the date of the order for relief in a case under this title, including interest that accrues on that debt as provided under applicable nonbankruptcy law notwithstanding any other provision of this title, that is--

(A) owed to or recoverable by--

(i) a spouse, former spouse, or child of the debtor or such child's parent, legal guardian, or responsible relative; or

(ii) a governmental unit;

(B) 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 or such child's parent, without regard to whether such debt is expressly so designated;

(C) established or subject to establishment before, on, or after the date of the order for relief in a case under this title, by reason of applicable provisions of--

(i) a separation agreement, divorce decree, or property settlement agreement;

(ii) an order of a court of record; or

(iii) a determination made in accordance with applicable nonbankruptcy law by a governmental unit; *and*

(D) assigned to a nongovernmental entity, unless that obligation is assigned voluntarily by the spouse, former spouse, child of the debtor, or such child's parent, legal guardian, or responsible relative for the purpose of collecting the debt.

The factors to be considered in determining whether a particular obligation is an item of support include (1) the disparity of earning power of the parties, (2) the intent of the parties or the court, (3) the adequacy of support, and (4) the specific substance of the obligation assumed. *Balthazor v. Winnebago County*, 36 Bankr. 656 (Bankr. E.D. Wisc. 1984).<sup>7</sup> Based upon the plain language in the Fee Order, the attorneys fees awarded to Respondent Maria Vaughan were not intended as or in the nature of alimony, maintenance, or support for Ms. Vaughan or the parties' children. The court noted that Ms. Vaughan's earning power exceeded Debtor's.<sup>8</sup> Additionally, the court's discussion in the Fee Order and the court's choice of O.C.G.A. §9-15-14 as the legal basis for the award shows that the court's intent was to sanction Debtor for abusive litigation. Therefore, the attorneys fees that are the subject of Respondents' Fee Contempt Motion do not constitute a domestic support obligation and are not excepted from application of the automatic stay.

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<sup>7</sup> In the 2005 amendments to the Bankruptcy Code, the term "Domestic Support Obligation" was defined in §101(14A) and then used throughout the Code (in §362(b) [exception to automatic stay]; §507 [priority claims], §523(a)(5) [dischargeability of support obligations in a divorce decree]; §547 [preference exception]; §704 [notice]; §707 [dismissal of Ch7 case]; §1129, §1225 and §1325 [plan confirmation]; and §1328 [Ch13 discharge], most notably replacing the provisions of §523(a)(5) with a simple statement that Domestic Support Obligations are not dischargeable. The definition of a Domestic Support Obligation in §101(14A) is almost identical to the pre-2005 definition of a non-dischargeable support obligation contained in §523(a)(5). Therefore, the body of case law interpreting §523(a)(5) is instructive in interpreting the meaning of Domestic Support Obligation. In a post-2005 opinion examining the dischargeability of divorce-related obligations, including an attorneys fees award, the court applied the same analytical principles used in pre-2005 §523(a)(5) dischargeability issues. *Phegley v. Phegley*, 443 B.R. 154 (8<sup>th</sup> Cir. BAP 2011).

<sup>8</sup> Debtor represents that the State Court Contempt Motion was resolved by the parties' agreement to relieve Debtor of the child support obligation because of a decrease in Debtor's income due to his disability.

Respondents argue, however, that their Letter to Judge Lane was not an attempt to continue their efforts to collect the fees but was instead a request to schedule a hearing for Judge Lane to determine the applicability of the automatic stay. The state courts have concurrent jurisdiction to determine the applicability of the automatic stay, but exclusive jurisdiction to grant relief from the stay resides with the bankruptcy court.<sup>9</sup> *Pope v. Wagner*, 209 B.R. 1015 (Bankr. N.D. Ga. 1997) (J. Drake); *Farley v. Henson*, 2 F.3d 273 (8th Cir. 1993). Respondents chose to put the question of applicability of the stay to Judge Lane without seeking or obtaining relief from the automatic stay from the bankruptcy court<sup>10</sup>; had Respondents proceeded in bankruptcy court instead, Debtor's Motion would not have been filed and all these briefs would have been unnecessary.<sup>11</sup> Respondents contend that seeking a determination from the state court that the automatic stay did not apply did not constitute a continuation of the proceeding to collect the unpaid attorneys fees; and they are correct. Respondents' letter to Judge Lane requesting determination of the applicability of the automatic stay did not constitute a continuation of a proceeding to collect a debt. See *Pope v. Wagner*, 209 B.R. 1015.

Respondents have requested a determination regarding the dischargeability of the attorneys fees awarded in the Fee Order. Dischargeability, however, is not an issue raised

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<sup>9</sup> Which begs the question of why Respondents would not have sought relief in the bankruptcy court, which could have accorded complete relief if it was determined that the Fee Contempt Motion was subject to the automatic stay.

<sup>10</sup> The court in *Pope* opines that caution would militate in favor of seeking relief from the automatic stay from the bankruptcy court.

<sup>11</sup> Additionally, if Respondents' claim is found to be dischargeable under §523(a)(5) and (a)(15), Respondents would not have missed the bar date for seeking a determination of dischargeability under §523(a)(2), (4), or (6).

in Debtor's Motion and is not necessary to an adjudication regarding Respondents' violation of the automatic stay. Pursuant to Bankruptcy Rule 7001, a proceeding in bankruptcy court to determine dischargeability must be commenced as an adversary proceeding. Neither Debtor nor Respondents have commenced such an adversary proceeding. Additionally, although the bankruptcy court has exclusive jurisdiction to determine the dischargeability of certain debts resulting from false financial statements, fraud, embezzlement, larceny or willful and malicious injury by a debtor, 11 U.S.C. §523(c), state courts have concurrent jurisdiction to determine the dischargeability of other potentially nondischargeable debts, including debts arising in domestic law proceedings that may be nondischargeable under §523(a)(5) or (15). *Cummings v. Cummings*, 244 F.3d 1263 (11<sup>th</sup> Cir. 2001); *Eden v. Robert A Chapski, Ltd.*, 405 F.3d 582 (7<sup>th</sup> Cir. 2005).

The discharge order in this case was entered June 20, 2012, discharging Debtor from all dischargeable debts. The bar date under §523(c) and Bankruptcy Rule 4007(c) for filing complaints to determine dischargeability under §523(a)(2), (4) or (6) was June 8, 2012. Complaints to determine dischargeability under any other subsection of §523(a) may be filed at any time. Bankruptcy Rule 4007(b). Debtor or Respondents may proceed in this court or in state court to seek a determination of dischargeability under §523(a)(5)<sup>12</sup> or (15). Additionally, upon entry of the discharge order, the automatic stay was replaced by the discharge injunction of §524. Accordingly, it is hereby

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<sup>12</sup> Although this order does not contain a determination that Respondents' claim under the Fee Order is dischargeable under §523(a)(5), it does contain a determination that the claim is not a domestic support obligation, which determination may be preclusive in any proceeding to determine dischargeability under §523(a)(5).



ORDERED that Debtor's Motion is *denied*.

**The Clerk, U.S. Bankruptcy Court, is directed to serve** a copy of this order upon Debtor, counsel for Debtor, counsel for Respondents, and the Chapter 7 Trustee.

IT IS SO ORDERED, this the 29<sup>th</sup> day of January, 2013.

  
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MARGARET H. MURPHY  
UNITED STATES BANKRUPTCY JUDGE