IT IS ORDERED as set forth below:

Date: October 7, 2013

W. Homer Drake
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

IN THE MATTER OF:	:	**CASE NUMBERS**
BRIAN DALY VANCE TIGNER,	:	BANKRUPTCY CASE NO. 12-13209-WHD
Debtor.	:	
HEATHER LASHA WALLACE,	:	ADVERSARY PROCEEDING NO. 13-1009
Plaintiff.	:	
v.	:	
BRIAN DALY VANCE TIGNER,	:	IN PROCEEDINGS UNDER CHAPTER 13 OF THE BANKRUPTCY CODE
Defendant.	:	

ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

The above-styled Chapter 13 case comes before the Court on a Motion for Summary Judgment (hereinafter the "Motion") filed by Heather Lasha Wallace

(hereinafter the “Plaintiff”) against Brian Daly Vance Tigner (hereinafter the “Defendant”) on August 28, 2013, as amended on September 3, 2013. The Motion was filed in relation to the Plaintiff’s Complaint to Determine Dischargeability (hereinafter the "Complaint") filed on February 4, 2013, seeking a declaration that a certain divorce related obligation owed to the Plaintiff by the Defendant is nondischargeable pursuant to Sections 523(a)(5) and 523(a)(15) of the United States Bankruptcy Code.[1] 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); 1334.

STATEMENT OF FACTS

From June 16, 2007 to March 17, 2011, the parties were husband and wife, and no children were born of this union. On the date of March 17, 2011, the Plaintiff and the Defendant were officially divorced pursuant to a Final Divorce Decree entered in the Superior Court of Meriwether County, Georgia. At the time of the divorce, the Plaintiff earned approximately $42,700 per year working as a teacher with a Master’s Degree. The Defendant earned approximately $35,000 per year as an employee of The Coca Cola Company. Additionally, the Defendant’s highest level of education was a high school diploma, and he possessed a commercial driver’s licence (CDL).

The divorce decree incorporated by reference the settlement terms agreed

[1] 11 U.S.C. § 101 *et. seq.*

to between the parties and memorialized by their "Contract of Settlement" (hereinafter the "Contract"). Pertinent to this Court was the treatment of real property known as 101 Beach Road, Greenville, Meriwether County, Georgia (hereinafter the "Property"). The Property was purchased during the marriage under the joint names of the Plaintiff and Defendant. Likewise, the financing for the purchase was obtained in the names of both parties. The Contract provided for the disposition of the Property in the following manner:

4.

> The parties have acquired during the coverture of their marriage assets which the parties intend to equitably divide in the manner and form set forth hereinafter. All transfers contained herein are done so with the intention of making tax free transfers of marital assets as contemplated by the Tax Reform Act of 1984, as amended. Specifically the parties agree that the transfers will be transfers "incident to a divorce" and therefore non-taxable.
>
> (A) The parties shall immediately place the marital residence located at 101 Beach Road, Greenville, Meriwether County, Georgia, on the market for sale through a licensed real estate agent. The wife shall have the right to exclusive use and possession of said marital residence until such time as the house is sold. The wife shall be responsible for the utility expense as well as any related expenses for the marital residence related to her use of the marital residence, including, but not limited to, telephone, cable and/or satellite television. The parties agree to split equally the mortgage payment on the marital residence currently with BB&T Bank until such time as the property is sold. To the extent that the homeowners insurance and/or ad valorem taxes on the marital residence are not already escrowed, the parties shall be equally responsible for the same as they come due. Upon the sale of the marital residence, the parties agree to split equally any net equity realized from said sale, or any debt remaining on said property after the sale of the same. The husband further agrees to maintain the yard of the marital

> residence until such time as the house is sold. The wife agrees to maintain the interior of the house and make it presentable for showing until such time as the house is sold. Both parties stipulate and agree to pay split equally any and all necessary and major repairs that need to be made to the marital residence before the same is sold.

Pl.'s Ex. B., 2-3. To date, the Property has not sold, and as of the date of the request for relief under the Code, the Defendant was in arrears on his mortgage obligation with respect to the Property in the amount of $5,313. The Plaintiff has been making the full payment to the bank, despite the Defendant's failure to contribute his share. Accordingly, the Plaintiff filed an "Application for Attachment for Contempt" with the Superior Court, but before the application could be heard, the Defendant requested protection under the Bankruptcy Code.

The Defendant filed a voluntary petition under Chapter 7 of the Code on November 6, 2012. The petition initially provided for the reaffirmation of all secured debts with the sole exception of the above-mentioned mortgage debt. In response, the Plaintiff commenced the current adversary proceeding, seeking relief under both 11 U.S.C. § 523(a)(5) and (a)(15). Almost immediately thereafter, the case was converted to Chapter 13.[2] The Defendant's Chapter 13 Plan provides for the surrender of the collateral. The Plan was confirmed on August 29, 2013.

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[2] The Plaintiff initially objected to the conversion of the case on the basis of improper service and bad faith, but subsequently withdrew the objection on the belief that the issue was moot.

CONCLUSIONS OF LAW

A. *Summary Judgment Standard*.

In accordance with Federal Rule of Civil Procedure 56 (applicable to bankruptcy under FED. R. BANKR. P. 7056), this 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(a). A fact is material if it 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. The moving party has the burden of establishing the right of summary judgment, Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11th Cir. 1991); Clark v. Union Mut. Life Ins. Co., 692 F.2d 1370, 1372 (11th Cir. 1982), and the Court will read the opposing party's pleadings liberally. Anderson, 477 U.S. at 249.

In determining whether a genuine issue of material fact exists, the Court 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). The moving party must identify those evidentiary materials listed in Rule 56(c) that establish the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986); see also FED. R. CIV. P. 56(e). Once the moving party makes a prima facie showing that it is entitled 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; Martin v. Commercial Union Ins. Co., 935 F.2d 235, 238 (11th Cir. 1991).

B. Whether the Debt is Nondischargeable under 11 U.S.C. § 523(a)(5).

Section 1328 provides that, upon completion of all payments under a Chapter 13 plan, the Court shall grant a debtor a discharge of all debts, excepting those identified as a "domestic support obligations" under 11 U.S.C § 523(a)(5). See 11 U.S.C. § 1328(a)(2). In order for a debt to be nondischargeable under Section 523(a)(5), it must satisfy all elements of the Code's definition, which is designated as "a debt that accrues before, on, or after the date of the order for relief . . . including interest that accrues on that debt as provided under applicable nonbankruptcy law . . . that is": (1) "owed to or recoverable by" a spouse or former spouse; (2) "in the nature of alimony, maintenance, or support" of such spouse or former spouse "without regard to whether such debt is expressly so designated;" (3) "established or subject to establishment before, on, or after the date of the order for relief . . . by reason of applicable provisions of . . . a separation agreement, divorce decree, or property settlement;" and (4) "not assigned to a nongovernmental entity . . . ." 11 U.S.C. § 101(14A).

In this case, the parties do not contest that the debt in question is owed to a former spouse and that it was incurred in connection with the Superior Court's divorce decree and the parties' Settlement Contract, without assignment to a

nongovernmental entity. Accordingly, the Court need only determine whether the Plaintiff has satisfied her burden that the Defendant's obligation to pay half of the monthly mortgage payment is "in the nature of alimony, maintenance, or support."

The question of whether a party establishes that a debt is "in the nature of alimony, maintenance, or support" is a question of federal law. In re Strickland, 90 F.3d 444 (11th Cir. 1996). "Thus, a label placed upon the obligation by the consent agreement or court order which created it will not determine its subsequent dischargeability in bankruptcy." In re Robinson, 193 B.R. 367, 372 (Bankr. N.D.Ga. 1996) (Drake, B.J.). Instead, the Court should consider the intent of the court and/or the parties in including certain provisions within the divorce decree. If the evidence suggests that the obligation was imposed upon the Defendant as a means of providing support for the Defendant's former spouse, the Court should find that the obligation is in the nature of support. On the other hand, if the evidence suggests that the obligation was an attempt to divide the marital property or liabilities, the Court should find that the obligation is not in the nature of support.

In determining the intent of the parties, it is helpful for the Court to consider such factors as: (1) whether the obligation is tied to a contingency, such as a child reaching the age of majority; (2) whether the obligation appears to have been imposed as a means of balancing the disparate incomes of the parties; (3) whether the obligation is payable in a lump sum or in installments; (4) the respective health of the spouses and their levels of education; and (5) whether there was an actual need for support at the time of the divorce. Id.; see also In re O'Neal, 2012 WL

1940594, *3 (Bankr. N.D.Ga. 2012) (Drake, B.J.); In re Shealey, 2006 WL 6592071, *2 (Bankr. N.D.Ga. 2006) (Drake, B.J.).

Having considered the provisions of the divorce decree and the Contract, and the remaining evidence and arguments associated with this Motion, and having interpreted everything in a light most-favorable to the Defendant, the Court finds that the Plaintiff has failed to satisfy her burden that the obligation was in the "nature of alimony, maintenance, or support." Although the Defendant's debt was tied to a contingency, selling the home, it was not a contingency tied to the Plaintiff's need for support. See In re O'Neal, 2012 WL 1940594, *3 (Bankr. N.D.Ga. 2012) (Drake, B.J.) (suggesting that a contingency does not weigh in a creditor's favor where the debt in question would have continued to be owed by the debtor in the event of the ex-spouse's death, remarriage, or other life-event linked to the need for support). There is no evidence that the provision in question was inserted to balance the disparate incomes of the parties or to make up for a party's poor health or lack of education and opportunity for advancement. In fact, it appears that the Plaintiff earned a higher salary at the time of divorce, had a higher degree of education and enjoyed greater opportunities for advancement. Additionally, other than the fact that neither could allegedly afford the house on his or her own, there appears to be no apparent need for support. Finally, the payments were to be made in installments, but this arrangement merely reflects the fact that a mortgage is paid in installments but does not necessarily indicate an intention to address periodically the needs of

the Plaintiff. To the contrary, it appears that the mortgage obligation was but one component of the means used for dividing the parties' only joint asset and joint debt. The agreement provides that mortgage payments, insurance, taxes, and costs for repairs were to be split equally between the parties. Net gain or loss, likewise, was to be split equally between the parties. The Contract called for the Plaintiff to remain in the house until it was sold, but she was responsible for any and all costs associated with her presence on the Property. Presumably, neither of the parties anticipated the house remaining on the market for more than two years. As such, it is difficult for the Court to come to any other conclusion but that the parties intended to divide the Property equally.

Other indicators support the Court's determination. The parties incorporate into the Contract a provision from the Tax Code,[3] designating the obligation as a non-taxable transfer that is "incident to divorce." However, the general rule in the Tax Code is that "alimony or separate maintenance payments" to a spouse are to be included in the gross income of the recipient and deducted from the gross income of the payer. See 26 U.S.C. §§ 71(a) & 215(a). Moreover, part of the component definition of "alimony or separate maintenance payments," as defined in Section 71 of the Tax Code, states that "the divorce or separation instrument [cannot] designate such payment as a payment which is not includible in gross income under this section and not allowable as a deduction under section 215." 26

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[3] 26 U.S.C. § 1 *et. seq.*

U.S.C. § 71. However, a transfer of property from one former spouse to another, that is in the nature of a gift and "incident to divorce," may be made without realizing a taxable gain or loss. See 26 U.S.C. § 1041. Therefore, it seems that by the very language of the Contract the parties intended this arrangement to constitute a property settlement and not alimony, maintenance or support.

Additionally, the Plaintiff appears to have previously admitted to the fact that this debt was designed as a property settlement, as opposed to alimony, maintenance, or support. After the Plaintiff filed her application for contempt in the Superior Court of Meriwether County, the Defendant filed a counterclaim requesting that the relevant provisions be modified. The Plaintiff responded in turn by filing a Motion to Dismiss and accompanying brief. Relevant to the Court are the Plaintiff's following statements:

> There is a "firm rule" established by the appellate courts of this State "against modifying the property divisions of a final divorce decree." . . . There cannot be any doubt that this was property division and not a support obligation by either party to the other. . . . The relevant provisions which are the subject of the Application for Contempt and the Counterclaim of the Defendant fall clearly in paragraph 4(A) of the Agreement, which specifically states that it deals with property division. It is admitted that substance shall take precedence over form, but it cannot be denied by the Defendant that the issue of the house and the mortgage thereon was an issue of property division, including the division of debt. This provision was not terminable upon the death or remarriage of the Plaintiff, nor was it contingent upon anything other than the sale of the residence. . . . Again, this is property and debt division, not support; that is, it isn't a terminable allocation. . . .
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> Respectfully submitted,
> David A. Fowler, P.C.

[signed]
David A Fowler
Attorney for Plaintiff.

Def.'s Ex. A., 2-5 (citations omitted). Inconsistent allegations contained in prior pleadings are admissible in subsequent litigation as substantive evidence of the fact in question. See Barnes v. Owens-Corning Fiberglass Corp., 201 F.3d 815, 829 (6th Cir. 2000); Dugan v. EMS Helicopters, Inc., 915 F.2d 1428, 1432 (10th Cir. 1990); and Thyssen Elevator Co. v. Drayton-Bryan Co., 106 F.Supp.2d 1355, 1360 (S.D.Ga. 2000). By the same token, an attorney's admissions directly related to the management of litigation are imputed to the client. See Hanson v. Walker, 888 F.2d 806, 814 (11th Cir. 1989). Accordingly, by the Plaintiff's own admission, this obligation appears to be in the nature of an equitable division of assets and liabilities and not alimony, maintenance, or support.

Finally, although the label placed by the parties on an obligation is not conclusive, it provides some evidence as to the intent of the parties in adopting the relevant language. Paragraph 2 of the Contract states "[t]here shall be no alimony paid by either party to the other under the terms of this agreement." Additionally, Paragraph 4 provides that "[t]he parties have acquired during the coverture of their marriage assets which the parties intend to equitably divide . . ." and proceeds to list the house and accompanying mortgage debt. This language supports the conclusion that the parties intended the payment as a means to divide their assets and liabilities, rather than as a method of providing alimony, maintenance, or

support.

Having considered everything before it in the light most favorable to the Defendant, the Court concludes that the Plaintiff has failed to carry her burden of demonstrating that the mortgage obligation owed was in the nature of alimony, maintenance, or support and that she is entitled to judgment as a matter of law pursuant to 11 U.S.C. § 523(a)(5).

C. Whether the Debt is Nondischargeable under 11 U.S.C. § 523(a)(15).

The debt in question appears to be of the type described in Section 523(a)(15), in that it looks as if it is a debt owed to a former spouse "and not of the kind described in paragraph [523(a)(5)] that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record. . . ." 11 U.S.C. § 523(a)(15). However, an ordinary discharge under Chapter 13 excepts from discharge only those 523(a) debts specifically enumerated in Section 1328(a) of the Code. See 11 U.S.C. § 1328(a). Omitted from the list are debts encompassed by Section 523(a)(15). See Id.

In a Chapter 7 case, the distinction between a domestic support obligation and other types of obligations arising out of a marital relationship is of no consequence, since both are nondischargeable under Section 727. See 11 U.S.C. §§ 523(a) & 727(b). However, in a Chapter 13 case, the distinction becomes relevant because debts comprised by Section 523(a)(15) are dischargeable under

Chapter 13, unless a debtor requests and receives a "hardship discharge" pursuant to Section 1328(b). See 11 U.S.C. §§ 523(a) & 1328(b).

Therefore, in the event that the Defendant completes all of the requirements under Section 1328(a) of the Code, the Court must conclude that the Plaintiff is not entitled, as a matter of law, to the relief requested.

CONCLUSION

For the above-stated reasons, the Plaintiff has failed to establish that she is entitled as a matter of law to judgment on her claim that the mortgage debt owed to the Plaintiff by the Defendant is nondischargeable under Sections 523(a)(5) and (15) of the Code. Therefore, having carefully considered the pleadings and evidence of record, the Court concludes that the Plaintiff's Motion for Summary Judgment should be denied. Accordingly, it is hereby

ORDERED that Plaintiff's Motion for Summary Judgment is **DENIED.**

The Clerk is **DIRECTED** to serve a copy of this Order upon the Plaintiff, Defendant, respective counsel, and the Chapter 13 Trustee.

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