UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE: Joshua Paul Silver, Debtor.	CASE NO. 12-73950-BEM CHAPTER 13
Rebecca O'Brien, Plaintiff, v. Joshua Paul Silver, Defendant.	ADVERSARY PROCEEDING NO. 13-5081-BEM

ORDER

A trial was held in this adversary proceeding on July 18, 2013, (the "Trial"). Plaintiff Rebecca O'Brien ("Plaintiff") seeks a determination that certain obligations contained in a Final Judgment and Decree of Divorce entered by the Superior Court of Cobb County, Georgia on October 20, 2010, (the "Judgment") are non-dischargeable in Defendant-Debtor Joshua Paul Silver's ("Defendant") Chapter 13 case pursuant to 11 U.S.C. §§ 523(a)(5) and (a)(15). [Doc. No. 1, Ex. 1]. The matters raised in Plaintiff's complaint are within this Court's jurisdiction and subject to entry of a final judgment as core matters that involve "a substantive right created by the Bankruptcy Code . . . ." *In re Toledo*, 170 F.3d 1340, 1344 (11th Cir. 1999); 28 U.S.C. § 157(b)(2)(I).

After carefully considering the pleadings, the evidence presented, and the applicable authorities, the Court enters the following findings of fact and conclusions of law in accordance with Fed. R. Bankr. P. 7052.

I. FINDINGS OF FACT

Plaintiff and Defendant were married for just over three and one-half years. [Plaintiff's Exhibit 1; Defendant's Exhibit A]. During that time, Plaintiff was a student and not employed while Defendant worked, receiving approximately $2,513.32 in monthly gross income. [Plaintiff's Exhibit 1; Defendant's Exhibit C]. Defendant's income was not sufficient to support the parties and their daughter, so the parties supplemented their income through Plaintiff's student loans and through credit cards. Plaintiff testified that at the time of the divorce the parties were "scraping by." In the child support worksheet prepared at the time of the divorce, the parties estimated each of their gross monthly income at $2,513.32. Plaintiff testified that this was done by assuming she had a minimum wage job, but that at the time she was not employed. Plaintiff further testified that she is currently unemployed, but has earned approximately $1,100.00 this year from interior renovation work.

The Judgment incorporates a Settlement Agreement, negotiated between Plaintiff and Defendant (the "Agreement"). [Plaintiff's Exhibit 1; Defendant's Exhibit A, pg. 8]. The Agreement provides for custody, support and insurance for the parties' daughter in paragraphs 2, 5 and 7. [Plaintiff's Exhibit 1; Defendant's Exhibit A, pgs. 12-24]. The Agreement further provides, in paragraph 8, that Plaintiff will retain the marital residence and is responsible for paying the mortgage, and in paragraph 9, that Plaintiff will retain a 2002 Honda Accord and Defendant is responsible for the car payment. The amount of child support Defendant was required to pay was reduced by the amount of the monthly car payment until the car loan was paid in full. [Plaintiff's Exhibit 1; Defendant's Exhibit A, pgs. 12-26]. Paragraph 9 also provides that Defendant will retain a 2006 Chevrolet truck and a motorcycle and make all payments due

on account of the truck. *Id.* In paragraph 10, entitled "Alimony," the Agreement provides that "[n]either party shall pay alimony to the other . . . ." and that "[e]ach party hereby waives his and her respective statutory rights to future modifications, up or down, of the periodic alimony payments for which this Agreement provides upon a change, upward or downward, in the income or financial status of either party." [Plaintiff's Exhibit 1; Defendant's Exhibit A, pgs. 26-27].

Paragraph 12, entitled "Debts," provides that Plaintiff and Defendant are each responsible for their individual obligations and will hold the other harmless on the same. Paragraph 12 further provides that Plaintiff shall pay:

> 1. The principal on the SunTrust loan, account number in the name of the Defendant, Joshua Silver, in the amount of Twenty Thousand Dollars ($20,000.00) plus outstanding interest balance. This loan was borrowed from the IRA account of Robert O'Brien, father of Plaintiff Rebecca Silver and used for the down payment of the marital residence. The [Plaintiff] shall pay this loan in full within ten days of receiving her settlement from her November 11, 2009 motor vehicle accident;
> 2. One-half of First Revenue Assurance, for AT&T Mobility (formerly Cingular), account number: 13392652, in the amount Four Hundred Forty Four Dollars and Nine cents ($444.09);
> 3. Certegy Check Services, claim number: 54375210, in the amount of One Hundred Thirty-Three Dollars and Eighty-Seven cents ($133.87);
> 4. Commercial Check Control, account number: 4553915-25, In the amount of Five Hundred Sixty-Six Dollars and Thirty-Seven Cents ($566.37);
> 5. One-half of the Delta Employees Credit Union Visa Card . . . in the amount of approximately Three Thousand Eight Hundred Dollars ($3,800.00);
> 6. One-half of the Delta Employee Credit Union . . . with an approximate balance of One Thousand Dollars ($1,000.00);
> 7. One-half of the Capital One Bank, NA, account ending in 3581, credit card that has been turned over to NCO Financial Systems, with an approximate balance of One Thousand Eight Dollars and Twenty-Six Cents ($1,008.26);
> 8. One-half of the Brandsmart, GE Money Bank, credit card that has been turned over to Encore Receivable Management, Inc, account number ending In 8656, with an approximate balance of Three Thousand Twelve Dollars ($3,012.00);
> 9. One-half of the Merrick Bank, Visa credit card, account number ending in 3581, with an approximate balance of One Thousand Eight Hundred Dollars ($1,800.00);

10. One-half of the personal loan from Robin Sellman in the amount of Eight Thousand Dollars ($8,000.00);
11. The current amount of student loans that the Plaintiff has received and used to help support the family is Twenty Nine Thousand Five Hundred Twenty-One Dollars and Sixty-Eight Cents ($29,521.88). The Mother shall be responsible for the repayment of Eighteen Thousand Five Hundred Twenty-One Dollars and Sixty-Eight Cents ($18,521.88) and all interest accrued on loan.

And Defendant shall pay:

1. One-half of First Revenue Assurance, for AT&T Mobility (formerly Cingular), account number: 13392652, in the amount Four Hundred Forty Four Dollars and Nine Cents ($444.09);
2. The Comcast Cable bill, account ending in: 0999, In the amount of Five Hundred Seventeen Dollars and Fifty-Nine Cents ($517.59);
3. One-half of the Delta Employee Credit Union . . . with an approximate balance of One Thousand Dollars ($1,000.00);
4. The dental bill in his name payable to Chip Hill, with an approximate balance of ___;
5. One-half of the Delta Employees Credit Union Visa Card . . . in the amount of approximately Three Thousand Eight Hundred Dollars ($3,800.00);
6. One-half of the Capital One Bank, NA, account ending in 3581, credit card that has been turned over to NCO Financial Systems, an approximate balance of One Thousand Eight Dollars and Twenty-Six Cents ($1,008.26);
7. One-half of the Brandsmart, GE Money Bank, credit card that has been turned over to Encore Receivable Management, Inc, account number ending in 8656, with an approximate balance of Three Thousand Twelve Dollars ($3,012.00);
8. One-half of the Merrick Bank, Visa credit card, account number ending in 3581, with an approximate balance of One Thousand Eight Hundred Dollars ($1,800.00);
9. One-half of the personal loan from Robin Sellman In the amount of Eight Thousand Dollars ($8,000.00);
10. The current amount of student loans that the Plaintiff has received and used to help support the family is Twenty Nine Thousand Five Hundred Twenty-One Dollars and Sixty-Eight Cents ($29,521.68). The Father shall be responsible for the repayment of Eleven Thousand Dollars ($11,000.00) of the student loans.

[Plaintiff's Exhibit 1; Defendant's Exhibit A, pgs. 28-32].

Defendant defaulted on his obligation to pay the debts listed in paragraph 12 (the "Obligations"), and on September 4, 2012, the Superior Court entered a Final Order granting a request for modification of child support and finding Defendant in willful contempt for his

failure to pay the Obligations (the "Contempt Order"). [Plaintiff's Exhibit 2]. The Contempt Order provides that Defendant owes Plaintiff $22,774.59 for the Obligations, because Plaintiff has paid or was paying these obligations directly such that Defendant owed Plaintiff $22,774.59. Defendant was ordered to make an initial lump sum payment of $3,000 to Plaintiff within ten days and thereafter make payments of $125.00 per month for six months, $150.00 for the next six months, $175.00 per month for the following six months, and $200.00 thereafter until paid in full. Defendant was also ordered to pay $5,000 in attorney's fees within 60 days to Plaintiff's attorney in the contempt proceeding, or on alternate payment terms as agreed by the parties. Defendant filed his chapter 13 case on September 26, 2012.

Plaintiff alleges in the Complaint that the Obligations are in the nature of support and/or maintenance and constitute expenditures made and to be made for the benefit of the family and the minor child of the parties, and as such are non-dischargeable pursuant to 11 U.S.C. § 523(a)(5). Plaintiff further alleges that Defendant has the ability to repay the Obligations such that the indebtedness is non-dischargeable pursuant to 11 U.S.C. § 523(a)(15).

II. CONCLUSIONS OF LAW

Section 523(a)(5) excepts a debt that constitutes a "domestic support obligation" from discharge. A domestic support obligation is:

> 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) not 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.

11 U.S.C. § 101(14A).[1]

In contrast to § 523(a)(5), § 523(a)(15) "generally . . . has one effect – to make all divorce-related obligations subject to a presumption of nondischargeability." *See Humiston v. Huddleston (In re Huddleston),* 194 B.R. 681, 685 (Bankr. N.D.Ga. 1996) (Drake, J.). Section 523(a)(15) provides that a 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 separation agreement, divorce decree or other order of a court of record or, a determination made in accordance with State or territorial law by a governmental unit" will be excepted from discharge. 11 U.S.C. § 523(a)(15).

Section 1328 of the Code sets forth the provisions of a chapter 13 discharge. Section 1328 states in relevant part:

> . . . [A]s soon as practicable after completion by the debtor of all payments under the plan, and in the case of a debtor who is required by a judicial or administrative order, or by statute, to pay a domestic support obligation, after such debtor

[1] The only issue in dispute in determining if the Obligations constitute Domestic Support Obligations is whether the Obligations are in the nature of alimony, maintenance or support because Defendant admitted that Plaintiff is his former spouse, that the parties were divorced by the Superior Court of Cobb County prior to the bankruptcy and that the Agreement was incorporated into the divorce decree. [Complaint ¶¶ 3, 5, 11; Defendant's Answer (Doc. No. 3) ¶¶ 3, 5, 11]. The evidence at trial established that the Obligations have not been assigned.

certifies that all amounts payable under such order or such statute that are due on or before the date of the certification (including amounts due before the petition was filed, but only to the extent provided for by the plan) have been paid, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this, except any debt—

(1) provided for under section 1322(b)(5);

(2) of the kind specified in section 507(a)(8)(C) or in paragraph (1)(B), (1)(C), (2), (3), (4), (5), (8), or (9) of section 523(a) . . .

11 U.S.C. § 1328(a).

The plain language of § 1328 makes clear that obligations that are non-dischargeable under § 523(a)(5) are similarly not dischargeable in Chapter 13 while, § 523(a)(15) obligations that would be non-dischargeable in a Chapter 7 case, are generally dischargeable in Chapter 13.[2] *See Edenfield v. Fussell (In re Fussell),* 303 B.R. 539, 546 (Bankr.S.D.Ga. 2003); *Plyant v. Plyant (In re Plyant)*, 467 B.R. 246, 252 (Bankr.M.D.Ga. 2012) (noting that property divisions are not dischargeable if the debtor receives a hardship discharge).

Plaintiff argues that because § 1328(a)(1) provides for the exception of long term debt from discharge, and the Contempt Order effectively caused the Obligations to be a long term debt, that the Obligations are not discharged under § 1328(a)(1). This argument is contrary to the plain language of § 1328(a)(1), which requires not only the existence of a long term debt but treatment of such debt in accordance with § 1322(b)(5). 11 U.S.C. § 1328(a)(1); *See* 8 COLLIER ON BANKRUPTCY ¶ 1328.02[3][b] (16th ed. 2013)(citing *In re Chappell*, 984 F2d 775, (7th Cir. 1993)). Debtor's First Amended Plan provides for treatment of Plaintiff's claim as a general unsecured claim, not as long term debt. [Complaint ¶¶ 8, 9; Answer ¶¶ 8, 9]. Thus, even

[2] Prior to 2005, § 523(a)(15) contained a balancing test such that relative ability to pay was relevant to a determination of dischargeability under § 523(a)(15). That is no longer the case. *See* 11 U.S.C. §523(a)(15); *See* 4 COLLIER ON BANKRUPTCY, ¶523.23, 523-126 (16th ed. 2013); *See also Taylor v. Taylor (In re Taylor),* 478 B.R. 419, 428 (10th Cir. BAP 2012).

assuming Plaintiff's argument that the Obligations are long term debt pursuant to the Contempt Order, the Obligations are dischargeable under § 1328 because the Obligations have not been treated as long term debt in Defendant's chapter 13 plan.

With respect to § 523(a)(5), Plaintiff argues that the Obligations are in the nature of alimony, maintenance or support because they were in the nature of support when the debts were incurred and are for reimbursement of amounts used to support the parties during the marriage. Plaintiff argues that the nature of the indebtedness is not altered by the Agreement. Defendant argues that the nature of the original debt is irrelevant. Rather, Defendant argues that the nature of the obligation is determined by the parties' intentions at the time the Agreement was executed.

Whether a debt is in the nature of support is a question of federal law. *See In re Strickland,* 90 F.3d 444 (11th Cir. 1996); *see also In re Bolar*, 2008 WL 7880900 (Bankr.N.D.Ga. 2008) (Drake, J.). "Thus, a label placed upon the obligation by the consent agreement or court order which created it will not determine" whether it is in the nature of support in bankruptcy. *In re Robinson,* 193 B.R. 367, 372 (Bankr.N.D.Ga. 1996) (Drake, J.); *see also Bolar*, 2008 WL 7880900 at *5. Rather than accept the label placed on the obligation, the Court "should undertake 'a simple inquiry as to whether the obligation can legitimately be characterized as support, that is, whether it is in the *nature* of support.'" *Cummings v. Cummings,* 244 F.3d 1263, 1265 (11th Cir. 2001) (citing *In re Harrell,* 754 F.2d 902, 904 (11th Cir. 1985)). "A debt is in the nature of support or alimony if at the time of its creation the parties intended the obligation to function as support or alimony." *Id.*

The courts have identified numerous factors that assist in determining the intention of the parties. In *Bolar,* the Court identified nine factors relevant to divining the

intention of the parties as: 1) whether the obligation is tied to a contingency, such as death or remarriage of the former spouse; 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 physical health of the spouses and their work experience and levels of education; 5) whether additional amounts of "alimony" were awarded; 6) the length of the marriage; 7) whether there was an actual need for support at the time of the divorce; 8) the number and age of children; and 9) the standard of living during the marriage. *Bolar*, 2008 WL 7880900 at *6-7.

More recently, the Eleventh Circuit cited with approval the following factors for determining the intent of the court issuing a divorce decree: (1) the agreement's language; (2) the parties' financial positions when the agreement was made; (3) the amount of the division; (4) whether the obligation ends upon death or remarriage of the beneficiary; (5) the frequency and number of payments; (6) whether the agreement waives other support rights; (7) whether the obligation can be modified or enforced in state court; and finally (8) how the obligation is treated for tax purposes. *Benson v. Benson (In re Benson)*, 441 Fed. Appx. 650, 651 (11th Cir. 2011) (*citing In re McCollum,* 415 B.R. 625, 431 (Bankr.M.D.Ga. 2009)). The creditor has the burden of proving by the preponderance of the evidence that the parties intended the obligation as support. *Cummings*, 244 F.3d at 1265. "No single factor is controlling or more important than any other." *Plyant*, 467 B.R. at 252.

Plaintiff did not cite, and the Court did not find upon conducting its own research, any authority to support Plaintiff's argument that the nature of indebtedness continues regardless of its treatment in a divorce decree. Indeed, it seems likely that most divisions of debt obligations upon dissolution of a marriage relate to obligations originally incurred in maintaining

or supporting the parties' lifestyle. Thus, logic and Eleventh Circuit authority require that the Court hold that the inquiry relevant to determining if the Obligations are in the nature of support is to determine the intention of the parties' as expressed in the Agreement at the time of its execution.

III. ANALYSIS

Considering the treatment of the Obligations in the Agreement, the Agreement as a whole and the parties' relative earning capacity at the time of the Agreement, the Court finds that the Obligations are in the nature of a property settlement. The terms of the Agreement do not tie payment of the Obligations to any contingency such as remarriage or death, as is usually the case for a support obligation. Further, the terms of the Agreement expressly waive any claim Plaintiff may have had for alimony. Although the parties, apparently incorrectly, reported in the child support worksheet equal income, Defendant's gross income at that time was not so great as to support a finding of great disparity in financial standing at the time of the divorce.

In addition, the Agreement does not contain any language indicating that the Obligations were intended to support Plaintiff; rather the terms of the Agreement indicate an intention to divide martial debts. Section 12 of the Agreement provides that Plaintiff is required to pay the entire amount of the loan for the down payment on the marital residence. This provision is consistent with a division of property because Plaintiff was retaining the home. All other debts in section 12 were divided equally between the parties. Thus, the provisions of paragraph 12 have all of the hallmarks of a property division. *See Santry v. Santry (In re Santry),* 481 B.R. 824, 831 (Bankr.N.D.Ga. 2012) (stating that an allocation of pre-existing debts usually suggests that an order reflects a property settlement). Plaintiff testified that if she had

known that Defendant was not going to pay the Obligations that she would have sought alimony in lieu of payment of the Obligations. This testimony does not change the parties' intention at the time of the Agreement – at that time, the parties intended to divide the debts incurred during their short marriage and have each party pay one half of the debts. The Court finds and concludes that the Obligations were in the nature of a property settlement and are not excepted from discharge pursuant to 11 U.S.C. § 523(a)(5).

Pursuant to Fed. R. Bankr. 7058 a separate judgment will be entered contemporaneously herewith.

IT IS SO ORDERED, this 22nd day of July, 2013.

BARBARA ELLIS-MONRO
UNITED STATES BANKRUPTCY JUDGE

Distribution List

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Chad R. Simon
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