

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

IN RE:	:	CASE NO. G13-20512-REB
	:	
JOEL SMITH,	:	
	:	
Debtor.	:	
	:	
	:	
	:	
	:	
	:	ADVERSARY PROCEEDING
	:	NO. 13-2027
	:	
PAMELA H. SMITH,	:	
	:	
Plaintiff,	:	
	:	
	:	
v.	:	
	:	CHAPTER 13
	:	
JOEL SMITH,	:	
	:	
	:	
Defendant.	:	JUDGE BRIZENDINE

J U D G M E N T

Before the Court is the complaint of Plaintiff Pamela H. Smith, former spouse of Defendant-Debtor Joel Smith, as filed herein on March 28, 2013. In the complaint, Plaintiff seeks a determination that certain obligations as created in the Final Judgment and Decree of Divorce entered by the Superior Court for White County, Georgia, on March 2, 2012, and the Joint Order entered on August 13, 2012 (*Smith v. Smith*, Civil Action File No. 2011-CV-0022-DB and 2012-CV-0200, respectively), should be excepted from Debtor's discharge in this Chapter 13 case as they are domestic obligations covered under 11 U.S.C. § 523(a)(5) and 11 U.S.C. § 1328. *See* Exhibits "A" and "B," attached to Plaintiff's Complaint.¹ This adversary

¹ As discussed below, analysis into whether an obligation is in the nature of support remains very relevant herein since an obligation that is characterized as a property settlement, even if arising in the context of marital dissolution proceedings, can be discharged under Chapter 13. *See* 11 U.S.C. § 1328(a)(2) and 11 U.S.C. § 523(a)(15).

proceeding came on for trial on August 21, 2013, and based upon the Court's evaluation of the documentary evidence and testimony presented, as well as upon its review of the applicable legal authority, the Court finds and concludes as follows.

As set forth in the Final Judgment and Decree of Divorce, Plaintiff and Debtor were divorced on March 2, 2012. Debtor commenced this Chapter 13 case on February 25, 2013. In her complaint, Plaintiff identifies certain obligations contained in the Judgment that she contends are not dischargeable herein including an award of alimony, health insurance coverage, and attorney's fees, along with other obligations as set forth in the Joint Order subsequently entered by the state superior court on August 13, 2012, that include compensation for personal property, attorney's fees, and a truck fund. *See* Complaint, ¶¶ 3, 4, & 7 (Docket Entry No. 1).²

Specifically, with respect to the first of these allegations, the relevant provision regarding alimony states as follows:

Alimony. Due to the greater number of debts Husband [Debtor herein] is to assume, the Husband shall pay to the Wife [Plaintiff] *as periodic alimony* the sum of \$1,200.00 per month beginning April 1, 2012, and continuing on the first day of each month thereafter *until March 1, 2013. Thereafter*, she shall receive \$600.00 per month until such time as the Wife remarries or dies. The husband's aforesaid alimony obligation *shall be reduced* by the amount of the defendant's regular payments of the outstanding mortgage, taxes and insurance for the marital residence *until such time as the marital residence is sold.* Thereafter, the periodic alimony shall be the amount described above.

Final Judgment, page 7 (emphasis supplied).³ In the Judgment, the state court also directed

² In the Joint Order, the state court awarded Plaintiff the total sum of \$1,000.00 in attorney's fees. The truck fund, addressed below, totals \$4,200.00. Further, the Court is informed that the award pertaining to compensation for removed personal property is currently on appeal before the Georgia Supreme Court.

³ The Court observes that Debtor was ordered to pay periodic alimony of \$1,200.00 per month for a twelve-month period, which was the same amount of time until Debtor

Debtor to pay COBRA insurance coverage on Plaintiff “for a period of 18 months” (\$498.83 x 18) (Judgment, page 7), and to pay Plaintiff directly for attorney’s fees (\$7,000.00) (Judgment, page 6).⁴

* * * *

Section 523(a)(5), as referenced in Section 1328(a)(2), provides that “domestic support obligations” are excepted from discharge and, therefore, are not dischargeable. These obligations are defined in Section 101(14A) and include an indebtedness owed to a former spouse that is “in the nature of alimony, maintenance, or support” as set forth in a “separation agreement, divorce decree, or property settlement agreement,” and are not assigned unless done so voluntarily for purposes of collecting same. *See* 11 U.S.C. § 101(14A). The determination of 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. Nov. 5, 2008). Accordingly, the label as used in connection with either a consent agreement by the parties or a state court is not conclusive, though it is taken into account. In analyzing whether the debt is in the nature of support, the bankruptcy court examines each term in relation to the overall structure of the divorce decree to decide whether the state court, as in this instance, intended the

commenced this bankruptcy case.

⁴ At the trial, Plaintiff attempted to supplement her claim beyond that set forth in her complaint by contending she is also owed additional alimony in the amount of \$1,430.68 for fifteen months (\$21,460.20) as arising from Debtor’s obligation to pay the mortgage on the former marital residence. *See* Plaintiff’s Exhibit No. P-35. The Court will address the treatment of this amount for dischargeability purposes later in this Order. The Court also notes that the figure listed on this Exhibit for insurance is shown as \$483.00 per month, which is different from the amount stated in the complaint of \$498.83. In sum, based on this Exhibit, Plaintiff claims the total amount of \$56,004.00 as nondischargeable support.

pre-filing debts of Debtor in question to function as alimony or support as contrasted with a division of property.⁵

As mentioned above, because this case is pending under Chapter 13, this distinction is significant because if the Court finds a particular obligation is not in the nature of support, but is more properly characterized as a property settlement, then it may be discharged upon completion of plan payments. Certain property division obligations are excepted from discharge under Section 523(a)(15) if they arise in the context of marital dissolution proceedings as a result of changes to the law in 2005.⁶ This amendment means that the difference between support debt and property division has become less important, but *only* in individual cases under Chapter 7 and Chapter 11, as well as cases under Chapter 12.

In the present Chapter 13 case, however, and despite counsel for Plaintiff's continuing insistence at trial, while debts properly described under Section 523(a)(5) as support cannot be discharged, debts for property division otherwise encompassed by Section 523(a)(15) as amended in 2005 *are* dischargeable. This result follows because Section 1328(a)(2), as applicable herein, *omits* any reference to Section 523(a)(15). In other words, property settlement obligations arising in a marital dissolution context that are payable pre-filing and might come within Section 523(a)(15) in another chapter of the Bankruptcy Code *are* dischargeable in this

⁵ See *Bolar*, 2008 WL 7880900, at *2; see also *In re Silver*, 2013 WL 4498813 (Bankr. N.D.Ga. July 22, 2013), citing *Cummings v. Cummings*, 244 F.3d 1263, 1265 (11th Cir. 2001).

⁶ See Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA").

case upon Debtor's completion of a Chapter 13 plan.⁷

* * * *

Bankruptcy courts use numerous factors to guide the inquiry into whether the evidence shows that a state court intended to divide certain marital property between the parties as a settlement of property, or, instead, whether it sought to provide for the support of the non-debtor former spouse through the obligation in question. *Bolar, supra*, at * 3; *Silver, supra*, at * 6. Among these, courts examine whether the non-debtor spouse had a need for support at the time of the award in question, as well as his or her respective age, health, work skills, experience, and level of education, and relative ability to generate income. The duration of the marriage, the financial resources at the disposal of each spouse, and whether the award seems intended to balance any disparity in income are also relevant. Other factors include whether the obligation is to be made in periodic payments, or in a lump sum, and whether the obligation terminates upon death or remarriage of the spouse. The parties' standard of living during the marriage, circumstances contributing to their estrangement, whether there are minor children in the care of the non-debtor spouse, and the tax treatment of the award(s) by the parties are also considerations. *See e.g. Bolar, supra*, at * 3.

Each of these factors, especially Plaintiff's relative ability to earn an income, tends to show that Plaintiff needed support. In its Judgment, the state superior court observed that "throughout the marriage between the parties, the defendant [Debtor herein] was the bread-

⁷ Therefore, the same factors used before 2005 to analyze an obligation (i.e., whether it is in the *nature* of support or a division of property) still apply as the distinction between domestic support obligations and *other* debt obligations arising from the dissolution of a marital relationship *remains critical* in Chapter 13 cases where the debtor is not receiving a hardship discharge under Section 1328(b).

winner and was generally employed full-time...[while] the plaintiff was generally unemployed” but contributed in caring for the household and their children. Judgment, pages 1-2. The record also reveals that Plaintiff suffers from certain health issues. Reviewing the above-cited factors on the record presented, the Court finds evidence of Plaintiff’s need as ascertained by the state court in connection with Debtor’s obligation to pay COBRA health insurance coverage in the amount of \$8,978.94 (\$498.83 x 18) (Complaint, ¶ 3(b)), as well as the obligation to pay Plaintiff’s attorney’s fees to her directly in the amount of \$7,000.00 in the Judgment, plus an additional sum of \$1,000.00 as awarded in the Joint Order, for a total amount of \$8,000.00 in attorney’s fees. (Complaint, ¶ 3(c), ¶ 4(a)). Thus, this Court finds that these particular debts are in the nature of support and, therefore, they are not dischargeable.

Next, this Court turns to Debtor’s obligation to pay Plaintiff the sum of \$1,200.00 per month as alimony, which is structured in terms of periodic payments over a *twelve* month duration, at the expiration of which the monthly amount is reduced to \$600.00, contingent on Plaintiff’s remarriage or death. *See* Judgment, page 7. Further, as quoted above, by its terms during this twelve month period, the alimony award is subject to reduction based on any amount Debtor pays on the mortgage and related expenses with respect to the former marital residence.

Here, Debtor had an option—he could either pay the mortgage and related expenses and receive credit for the payment and not have to pay the alimony, or, he could pay the stated amount of the alimony. The record shows, however, that Debtor chose neither option and made no payments on the mortgage or paid Plaintiff any alimony. Based upon an examination of the factors mentioned above, the Court finds that Debtor’s obligation to pay Plaintiff \$14,400.00 (\$1,200.00 per month for 12 months) is in the nature of support or alimony, and is, therefore, not

dischargeable herein as a domestic support obligation. *See* Complaint, ¶ 3(a), citing Judgment at page 7.

Toward the end of the trial on this matter, Plaintiff sought to supplement the balance of her claim by insisting that the Debtor's obligation (by reason of the option) to pay the mortgage should also be declared nondischargeable. Plaintiff's claim is unfounded. Debtor received no credit for such payments, because he never made them, so the only obligation remaining is for alimony.⁸ Moreover, Plaintiff is not entitled to be paid \$1,430.68 per month plus \$1,200.00 per month for twelve months. In this Court's view, the state court intended only one award and did not intend the Debtor to pay both during this period. Treatment of the award herein for purposes of dischargeability depends upon how the parties' responded to their respective obligations as specifically structured in the Judgment. Since neither one followed through with the direction therein stated, the Court finds that the obligation to pay \$1,200.00 per month as alimony, and not \$1,430.68, is the relevant figure for consideration herein.

As further explanation with respect thereto, the Court observes that the alimony provision option is so obviously intertwined with the liquidation of the former marital residence that it must be construed in reference to such provision to determine whether said award, as designed by the state court, constituted a division or settlement of property between the parties or alimony, maintenance, or support. Here, the state court specifically ordered that Plaintiff "shall have exclusive possession of the residence," but further ordered that "[s]aid property *shall be immediately listed for sale* with a realtor agreed upon by the parties." (Judgment, page 5)

⁸ As discussed herein, Debtor could discharge pre-petition mortgage payments if a property settlement.

(emphasis supplied). The Judgment stresses that "it is the *intention* of the Court that the house be *sold* at the *earliest* possible time...and that the Plaintiff shall keep the house and property in a neat and clean condition, including the yard, so as to *facilitate* its sale." (Judgment, page 6) (emphasis supplied). Debtor was obligated to "make each monthly mortgage payment" (page 6), and could reduce payments of periodic alimony by each monthly mortgage payment made, along with payments for "taxes and insurance for the marital residence *until* such time as the marital residence is sold." (Page 7).

In the present case, it unquestionably appears from the clear language and precision of the Judgment, that with respect to the payments as they related to the former marital residential real property, the state court designed a division of property. The wife was awarded exclusive possession of the residence for a limited period of time with the explicit intent that she cooperate in selling this real property "at the earliest possible time." (Page 6). As such, Plaintiff was allowed possession under the expectation that same would be short-term only and not a long-term arrangement. The Judgment specifically contemplates that she take all necessary steps to list the property and have it sold as soon as possible with the total participation of each party.

The detail provided by the state court regarding such sale in terms of the precise apportionment of net proceeds is further evidence that the state court judge intended to structure a property settlement with respect to the residence (Judgment, page 6). Upon its sale, the court believed Plaintiff could use her 60% share of the proceeds to make her own arrangements for a place to live and get established. But again, as stated above, the record reflects that neither Debtor nor Plaintiff performed their obligations as set out in the Judgment. Debtor made no payments of "alimony" including the mortgage for the twelve-month period prior to the filing

of this case, and Plaintiff did not cooperate in selling the residence.⁹

It is clear to this Court that the benefit Plaintiff would derive from the residence was expected to be temporary, and that the state court's intent was to have the property liquidated with a division of each spouse's respective interest through payment of a set percentage of the proceeds. Based on the structure of the Judgment, and given the fact that the "alimony" award on page 7 of the Judgment could be adjusted by crediting Debtor's payments on the marital residence, which the court expected to be sold, along with the state of the real estate market, and the state court's assessment of the circumstances, this Court finds that Plaintiff's claim of \$1,430.68 per month is in the nature of a property settlement and not support. Further, in any event, because Debtor did not elect this option, he does not owe that amount. In sum, Plaintiff's claim that she is owed an additional \$21,460.20 based on this obligation as a nondischargeable debt is, therefore, denied.

With respect to the obligations set forth in the Joint Order of August 10, 2012, which is closely related to the Judgment, as mentioned above, the Court finds that the \$1,000.00 award of attorney's fees is in the nature of support and nondischargeable. *See* Complaint, ¶ 4(a). The \$4,200.00 obligation for a truck fund for the son does not appear to represent a debt, but rather a gift or a promise between him and the Debtor, though awarded to Plaintiff. The Court heard

⁹ Upon review of this Judgment, it is clear to this Court that Chief Judge David Barrett of the White County Superior Court, after a three-day trial, went to especially extraordinary lengths in a difficult situation to craft an arrangement between these parties, through a complicated yet, realistic design, to encourage the sale of their home so that they could take advantage of this opportunity to restructure their affairs apart from each other and move forward in their own personal lives. His efforts are to be commended and it is, indeed, truly unfortunate and a real loss that both parties here did so little to help realize what this Judge sought to accomplish on their behalf through his award.

very little testimony with respect to this award, and it may have been related to the transportation needs of Plaintiff's son. Though this obligation may have originated as a voluntary commitment on the part of Debtor, given its placement in the Judgment and Joint Order, the Court finds that same was intended to serve as support since Plaintiff would have otherwise needed to address her son's need in this regard. *See* Complaint, ¶ 4(c).

Lastly, regarding the award of \$33,791.00 for compensation for certain personal property as removed (Complaint, ¶ 4(b)), as noted above the Court is informed that the parties are currently appealing this claim to the Georgia Supreme Court for decision concerning the means for satisfying this obligation. Thus, no determination is made at this time regarding whether same is in the nature of support or a division of property, and same may be addressed at a future time as necessary once a state court appellate decision becomes final.

Based upon the foregoing discussion, it is

ORDERED, ADJUDGED, AND DECREED that relief is granted on Plaintiff's complaint to the extent stated above, and that, accordingly, the obligations of Debtor in question are treated in accordance with Section 523(a)(5) and Section 1328(a)(2) as follows:

Debtor's obligation as set forth in the Final Judgment and Decree of Divorce entered by the Superior Court of White County, Georgia, on March 2, 2012, to pay COBRA health insurance coverage in the amount of \$8,978.94 (\$498.83 x 18) (Complaint, ¶ 3(b)), as well as Debtor's obligation to pay Plaintiff's attorney's fees to her directly in the amount of \$7,000.00 (Complaint, ¶ 3(c)), are in the nature of support, and, therefore, not dischargeable.

Debtor's obligation to pay alimony as set forth therein for a twelve-month period in the sum of \$14,400.00 (\$1,200.00 x 12) is in the nature of support, and same, therefore, is not

dischargeable herein as a domestic support obligation. Complaint, ¶ 3(a).

Debtor's pre-filing obligation to pay the mortgage on the former marital residence as set forth therein, which was not timely performed, is in any event in the nature of a property settlement and is, therefore, dischargeable herein.

With respect to the obligations set forth in the Joint Order as entered by the Superior Court of White County, Georgia on August 10, 2012, Debtor's obligation to pay Plaintiff \$1,000.00 for attorney's fees is in the nature of support and, therefore, is not dischargeable. *See* Complaint, ¶ 4(a).

Debtor's obligation to pay \$4,200.00 for a truck fund for the son is found to be in the nature of support and may not be discharged herein. *See* Complaint, ¶ 4(c).

Based on the foregoing, the Court finds that Debtor's nondischargeable obligations to Plaintiff total the sum of \$35,578.94.

Finally, no ruling is entered at this time concerning the nature of Debtor's obligation to pay \$33,791.00 for compensation in relation to certain personal property (Complaint, ¶ 4(b)), and on this particular issue, the Court will await the decision of the Georgia Supreme Court finalizing the award and means for its satisfaction before entering judgment on this issue in this adversary proceeding if necessary.

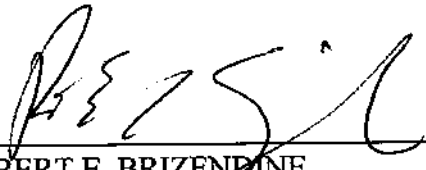
Therefore, based upon the above, this Court enters final judgment on each of the above claims in accordance with Federal Rule of Civil Procedure 54(b), applicable herein through Federal Rule of Bankruptcy Procedure 7054, with the exception of the issue pertaining to the personal property as currently on appeal before the Georgia Supreme Court.

The Clerk is directed to serve a copy of this Order upon counsel for Plaintiff, counsel for

Defendant-Debtor, the Chapter 13 Trustee, and the United States Trustee.

IT IS SO ORDERED.

At Atlanta, Georgia this 3rd day of October, 2013.



ROBERT E. BRIZENDINE
UNITED STATES BANKRUPTCY JUDGE