

Dated: May 03, 2012
The following is ORDERED:



Jennie D. Latta

Jennie D. Latta
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re JEFFREY LEE MASSEY,
Debtor.

Case No. 11-32774-L
Chapter 7

WANDA GAIL HANNA,
Plaintiff

v.

Adv. Proc. No. 12-00189

JEFFREY LEE MASSEY,
Defendant.

**ORDER GRANTING JUDGMENT ON THE PLEADINGS
AND DECLARING DOMESTIC SUPPORT OBLIGATIONS
NON-DISCHARGEABLE**

BEFORE THE COURT is the COMPLAINT TO DETERMINE DISCHARGEABILITY OF DEBT filed by Wanda Gail Hanna, former spouse of the Debtor-Defendant, Jeffrey Lee Massey, on February 10, 2012. The Debtor-Defendant filed his ANSWER on March 9, 2012, admitting that

his debt for alimony in the amount of \$50,000 is non-dischargeable pursuant to 11 U.S.C. § 523(a)(5), averring that he had paid the Plaintiff for all alimony wrongfully credited to him, and contending that his debt to the Plaintiff for attorneys fees should be discharged because the Plaintiff was able to discharge her debt for attorney fees in her own bankruptcy case. Therefore, Debtor-Defendant avers that there is no longer a “debt owed” and that the Plaintiff would be unjustly enriched if he were ordered to reimburse her for these attorney fees.

The Plaintiff filed a MOTION FOR JUDGEMENT ON THE PLEADINGS on March 21, 2012, and the Debtor-Defendant has now responded. The Plaintiff acknowledges that the Debtor-Defendant has admitted that his debt for alimony is nondischargeable, but asks that the court declare that the debt for attorneys fees be declared nondischargeable as well. The Plaintiff asserts that the Defendant’s defense is insufficient, relying on Section 523(a)(15) of the Bankruptcy Code. That section excepts from discharge a debt “to a spouse, former spouse, or child of the debtor and not of a 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” 11 U.S.C. § 523(a)(15). The complaint and answer demonstrate that the debt owed by the Debtor-Defendant to the Plaintiff is one owed to his former spouse and incurred in connection with their divorce. The Debtor-Defendant’s obligation is not contingent upon the Plaintiff’s obligation to pay attorney fees. Her debt for attorney fees was used as the *measure* for the award in her favor, but the debt is owed to her, not to her attorney.

Thus the remaining question for the court is whether the debt owed to the Plaintiff for attorney fees is a domestic support obligation, and thus non-dischargeable pursuant to section 523(a)(5), or is a non-support spousal debt, and thus non-dischargeable pursuant to section 523(a)(15). A domestic support obligation is a debt owed to a spouse, former spouse, or child of the

debtor . . . in the nature of alimony, maintenance, or support,...established [by] an order of a court of record.” 11 U.S.C. § 101(14A). In order to determine whether a debt is in the nature of support, the court looks first to determine whether the awarding court and/or the parties intended the obligation as support. *See Sorah v. Sorah (in re Sorah)*, 163 F.3d 397, 402 (6th Cir. 1998); *Fitzgerald v. Fitzgerald (In re Fitzgerald)*, 9 F.3d 517, 520 (6th Cir. 1993); *Long v. Calhoun (In re Calhoun)*, 715 F.2d 1103 (6th Cir. 1983). The Mississippi Supreme Court indicated in its *Ferguson* opinion that in the final analysis “all awards are to be considered together to determined that they are equitable and fair.” 639 So. at 929. In a later opinion, the Mississippi Supreme Court outlined the process courts must follow in applying the *Ferguson* factors in *Johnson v. Johnson*, 650 So.2d 1281 (Miss.1994).

First, the character of the parties' assets, i.e., marital or nonmarital, must be determined.... The marital property is then equitably divided.... If there are sufficient marital assets which ... will adequately provide for both parties, no more need be done. If the situation is such that an equitable division of marital property, considered with each party's nonmarital assets, leaves a deficit for one party, then alimony based on the value of nonmarital assets should be considered.

Id. at 1287. In *Ferguson*, the Mississippi Supreme Court abandoned the “title theory” and adopted the doctrine of equitable distribution with respect to marital property, with the result that the Mississippi courts rely upon an equitable distribution of property to provide spousal support.

The burden of proving the true nature of a debt to a spouse or former spouse lies with the creditor. *Van Aken v. Van Aken (In re Van Aken)*, 320 B.R. 620, 626 (6th Cir. BAP 2005); *In re Rustin*, 2011 WL 5443067, at *7 (Bankr. S.D. Miss. 2011). The Fifth Circuit Court of Appeals has held that a debt for attorney fees “is deemed nondischargeable if the award itself reflects a balancing of the parties’ financial needs.” *Matter of Joseph*, 16 F.3d 86, 88(5th Cir. 1994). This decision

would seem to raise a presumption that awards of attorney fees in connection with a divorce decree are in the nature of support, and this seems to be the majority opinion. Once the creditor has shown that she is a former spouse and that an award of attorney fees was made to her in connection with a divorce proceeding, the burden of going forward with evidence shifts to the debtor to show unusual facts surrounding a particular award that would take it out of the presumption of support and necessitate a trial. The ultimate burden of proof, however, remains with the creditor.

In this case, the DECREE OF DIVORCE, entered January 6, 2011, indicates that the Mississippi Chancellor considered “the factors set forth in *Ferguson v. Ferguson*, [639 So. 2d 921 (Miss. 1994)] to determine the division of parties’ marital assets and marital debts” . . . and took into consideration “the parties’ financial status before and during the marriage and the parties’ lifestyle and their dissipation of assets.” With respect to the attorney fees, the Chancellor said,

That due to the Husband withdrawing his 401k immediately prior to the filing of this divorce action and taking into consideration this Husband’s ~~contemptuous~~ [strikeout in original] action in regards to the Wife’s vehicle, this Court finds that the Husband shall be responsible for a portion of the Wife’s attorney’s fees in the amount of \$10,000.00. That said amount shall be paid within sixty (60) days of the date of this Order.

The language of the award indicates that there had been some wrongdoing on the part of the Debtor-Defendant that caused the Chancellor to want to balance the equities by awarding the Plaintiff an additional amount to cover a portion of her attorney fees. This intent to balance the equities of the parties is consistent with the adoption of the doctrine of equitable distribution in *Ferguson* and with the Fifth Circuit’s indication that an award of attorney fees that reflects a balancing of the parties’ financial needs is nondischargeable. The Debtor-Defendant has not pointed to any facts that would support an alternative result. Based upon this stipulated record, I find that the award of attorneys fees was intended to be and is actually in the nature of support.

The Debtor-Defendant does indicate a desire for the bankruptcy court to label the attorney fee award as not in the nature of support because of his hope to obtain a discharge of some portion of that debt. In Chapter 13 cases, a debtor may obtain a discharge of that portion of a section 523(a)(15) debt that he is not able to pay from his projected disposable income over the life of his plan. Such a plan must nevertheless be proposed in good faith, and a debtor's prior failure to make any attempt to pay certain debts may weigh against a good faith determination. In this case, as I have said, I find that the award of attorney fees is in the nature of support. And a Chapter 13 case may still be of some benefit to the Debtor-Defendant. He may be able to convert his case to Chapter 13 and make regular plan payments toward his debts including his non-dischargeable debts. Regular payments through a Chapter 13 plan should protect him from accusations of contempt in the state court. Any portion of his non-dischargeable debts that he is not able to pay through his plan will remain to be paid after his plan is completed, but at that time he should have additional disposable income as the result of the discharge of his dischargeable debts.

Accordingly, the motion for judgment on the pleadings is **GRANTED** and the court declares that the debts owed by the Debtor-Defendant to his former spouse, the Plaintiff, both for alimony in solido and attorneys fees is **NON-DISCHARGEABLE**.