UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE

In re:

Edward Hochhauser, III **Case No. 01-27514-WHB**

Debtor.

Edward Hochhauser, III

Plaintiff, **Adv. No. 04-097**

v.

Annelle G. Hochhauser,

Defendant.

OPINION AND ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

This matter is before the Court on the summary judgment motion of Edward Hochhauser,

III ("Debtor" or "Plaintiff"). The Plaintiff alleges that he is entitled to judgment as a matter of law on the issue of dischargeability of a marital debt. Ms. Hochhauser ("Defendant") contends that an issue of fact exists as to dischargeability, as the debt is nondischargeable under §§ 523(a)(5) and (a)(15) of the Bankruptcy Code. For the reasons set forth below, the Court finds that the joint debt at issue is dischargeable and that the Plaintiff is entitled to judgment as a matter of law. The following represents the Court's findings and conclusions pursuant to Fed. R. Bankr. P. 7052. This is a core proceeding. 28 U.S.C. § 157 (b)(2)(I).

FACTUAL SUMMARY

The material facts of this proceeding are undisputed. At the time the Debtor commenced his bankruptcy case, he was already a party to a divorce case in state court, which was eventually resolved in settlement. The Debtor listed in his bankruptcy schedules a secured debt to Matsco Financial ("Matsco"). The Defendant is a co-obligor on the loan from Matsco, and it is that debt that is now at issue in this adversary proceeding.

After the Debtor filed his Chapter 7 bankruptcy case, the Defendant timely commenced an adversary proceeding seeking to have the $158,335 Matsco debt declared nondischargeable under § 523(a)(15), based on allegations that "it would work a hardship on [Mrs. Hochhauser] to be required to pay said debts, as [she] could not afford to repay such debts. That Debtor makes more money than Plaintiff and is better able to repay the indebtedness owed." (Annelle Hochhauser's Complaint to Determine Dischargeability of Debt, ¶ 6).

A final decree of divorce was then entered in the state divorce case, and provided that "Husband shall be responsible for the [debt] to . . . Matsco in the amount of One Hundred Fifty-eight Thousand Three Hundred Thirty-five ($158,335) Dollars remaining as contingent liabilities

to Wife pending the dischargeability determination in Husband's Chapter 7 bankruptcy." (Final Decree of Absolute Divorce, ¶ 14). In apparent reliance on this provision, the bankruptcy court complaint to determine dischargeability was subsequently withdrawn pursuant to an order stating that Ms. Hochhauser "would now like to withdraw her Complaint . . . as the issues involved have been resolved through the parties' divorce action." (Order Withdrawing Annelle Hochhauser's Complaint to Determine Dischargeability of Debt, entered June 4, 2002).

The Debtor now brings his adversary proceeding seeking a determination that his obligation to the Defendant arising out of the Matsco debt is dischargeable under § 523(a), which would leave the Defendant solely responsible for repayment. The Defendant filed a response to the complaint on February 24, 2004 and a supplemental response on June 4, 2004, contending that the debt is nondischargeable under § 523(a)(5) as a debt for alimony or support, and/or under (a)(15), as "it would cause a hardship on the Defendant to be required to pay the debt owed to Matsco and would be more equitable for Plaintiff to pay the debt owed to Matsco." (Response to Debtor's Complaint to Determine a Debt to be Dischargeable, ¶ 12). The Debtor filed a motion for summary judgment, alleging that the Defendant's affirmative defense under § 523(a)(15) is time-barred, as the bar date for filing dischargeability complaints expired on September 10, 2001, that the order withdrawing Ms. Hochhauser's adversary proceeding is res judicata to a determination in this case, and also alleging that the debt is not in the nature of support or alimony. In support of the § 523(a)(5) allegation, the Defendant has filed the affidavit of Joe Duncan, the Debtor's state court divorce attorney, which states that the obligation at issue was not in the form of alimony or child support, which were addressed in other parts of the divorce decree.

The Defendant has filed her own competing affidavit, which states that the debt was incurred

solely for the Debtor's benefit and use for his dental practice, and essentially points out that the Debtor is financially better equipped than the Defendant to repay the Matsco debt.

ISSUES

A. Is the Defendant's § 523(a)(15) affirmative defense barred by the limitations period for filing a complaint to determine dischargeability ?

B. Is the Debtor's obligation arising from the Matsco debt dischargeable under § 523(a)(5), thus entitling the Debtor to summary judgment ?

C. What is the res judicata effect, if any, of the order withdrawing the Defendant's complaint to determine dischargeability ?

DISCUSSION

A. The limitations period

As an affirmative defense to this adversary proceeding the Defendant relies on § 523(a)(15), contending that the Debtor's obligation arising from the Matsco debt is nondischargeable even if it is not actually support, as it would cause an undue hardship on the Defendant to be required to pay the Matsco debt, and it would be more equitable to require the Debtor to pay. As another bankruptcy court recently noted, however, "[t]he problem with this affirmative defense is that when Congress added [§ 523(a)(15)] to the Bankruptcy Code in 1994 it required that any such claim be made within 60 days after the date first set for the meeting of creditors. 11 U.S.C. § 523(c); Fed. R. Bankr. P. 4007(c)." *Moberly v. Johnston (In re Moberly),* 266 B.R. 187, 189-90 (Bankr. N.D. Cal. 2001). Section 523(c)(1) of the Bankruptcy Code provides, in pertinent part:

> [T]he debtor shall be discharged from a debt of a kind specified in paragraph (2), (4), (6), or (15) of subsection (a) of this section, unless, on request of the creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from

> discharge under paragraph (2), (4), (6), or (15), as the case may be, of subsection (a) of this section.

11 U.S.C. § 523(c)(1). Bankruptcy Rule 4007(c) places a temporal restriction on such a claim, however, and provides:

> A complaint to determine the dischargeability of a debt under § 523(c) shall be filed no later than 60 days after the first date set for the meeting of creditors under § 341(a). The court shall give all creditors no less than 30 days' notice of the time so fixed in the manner provided in Rule 2002. On motion of a party in interest, after hearing on notice, the court may for cause extend the time fixed under this subdivision. The motion shall be filed before the time has expired.

Fed. R. Bankr. P. 4007(c). There is, therefore, a significant difference between actions filed under § 523(a)(5), which can be "filed at any time," Fed. R. Bankr. P. 4007(b), and actions under § 523(a)(15), which have the 60-day time bar. The Court requested counsel for the parties to further brief the timeliness issue in light of the holding of *Kontrick v. Ryan,* 540 U.S. 443 (2004), that the time bar for complaints under Rule 4004 (and presumably Rule 4007) was not jurisdictional and was subject to waiver by a debtor. Specifically, the Court asked counsel to comment upon whether the Debtor's general pleading of dischargeability under § 523 waived the 60-day time bar for § 523(a)(15) causes of action.

Although the Debtor's complaint merely asked that the Court determine the debt to be dischargeable under 11 U.S.C. § 523, with no specific subsection asserted as a basis, in light of the facts that the Defendant's § 523(a)(15) complaint had been previously dismissed, that the Debtor had received a discharge, and that the Debtor promptly objected to the Defendant's renewed § 523(a)(15) affirmative defense, the Court can't conclude that the Debtor waived the 60-day time bar for filing § 523(a)(15) complaints. The Debtor's complaint, therefore, can only be read to plead

for a determination of dischargeability under Code sections that have no time bar, in this instance § 523(a)(5). This case is both factually and legally distinguishable from the *Kontrick* holding.

Moreover, the Court can find no compelling reason to distinguish a complaint based on § 523(a)(15) from an affirmative defense based on that subsection for purposes of the 60-day limitation period for raising such a claim. The Defendant voluntarily withdrew her timely § 523(a)(15) complaint, and, although voluntary dismissals are typically without prejudice under Fed. R. Civ. P. 41(a), the order dismissing her complaint did not address any extension of time to refile such a complaint. As a result, the dismissal order had a prejudicial effect by virtue of the fact that the bar date for filing § 523(a)(15) complaints had already expired when the dismissal order was entered. In addition, the Debtor received a Chapter 7 discharge subsequent to the dismissal, and that discharge would include a discharge of claims based upon § 523(a)(15).

Therefore, because the deadline for raising a dischargeability claim under § 523(a)(15) expired on September 10, 2001, the Court finds that the Defendant's affirmative defense based on § 523(a)(15), raised in the Defendant's response to the Debtor's complaint on February 24, 2004, is untimely and therefore barred under Rule 4007(c).[1]

B. Dischargeability Under § 523(a)(5)

As noted above, unlike claims under § 523(a)(15), a claim under § 523(a)(5) may be brought

[1] The Court notes that this is not like those cases where the original plaintiff in a § 523(a)(5) complaint moves to amend that complaint to add an otherwise untimely § 523(a)(15) count. *See Beasley v. Adams (In re Adams),* 200 B.R. 630, 633 (N.D. Ill. 1996); *Farmer v. Osburn (In re Osburn),* 203 B.R. 811, 812 (Bankr. S.D. Ga. 1996). There, the courts held that the § 523(a)(15) count related back to the original complaint, under Fed. R. Civ. P. 15(a), because both counts relied upon the same facts. Here, this Defendant dismissed her § 523(a)(15) complaint after its bar date and her attempted defense under that section can't survive on a relation back to a complaint that was filed after that bar date.

at any time. Fed. R. Civ. P. 4007(b). The Debtor's complaint alleges that the Matsco obligation is not in the nature of support or alimony, and is therefore dischargeable under § 523(a)(5). The Defendant supplemented her response to the Debtor's complaint, this time raising § 523(a)(15) in a defensive posture. In support of his motion for summary judgment, the Debtor has filed the affidavit of Mr. Joe Duncan, the Debtor's divorce attorney, which unequivocally asserts that the Matsco "obligation judicially imposed upon [the Debtor] was not in the form of alimony or child support, which support obligations were addressed in other parts of the Final Decree of Divorce." The Defendant has filed a competing affidavit, but there is nothing in that affidavit to refute or rebut Mr. Duncan's testimony, which now stands unopposed in the record. The Defendant's affidavit is seemingly drafted in support of a § 523(a)(15) defense, pointing out the Defendant's perception of the Debtor's financial ability to repay the Matsco debt, and it doesn't speak to whether the obligation is or is not in the nature of support or alimony as required for a determination of nondischargeability under § 523(a)(5). Because the testimony of Mr. Duncan stands unopposed, there is no dispute as to whether the Matsco obligation is in the nature of support or alimony, and the Debtor is entitled to judgment as a matter of law. Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56 (c), incorporated into the Bankruptcy Rules under Fed. R. Bankr. P. 7056. The Court would note, in addition, that its independent evaluation of the state court's provision that the Debtor would be responsible for the Matsco debt, pending a determination of dischargeability in the bankruptcy case, does not support a finding that this had the obvious effect of a support obligation. This type of debt assumption is typically what is now covered by § 523(a)(15) rather

than (a)(5). Without something to indicate that the state court or the parties intended to create a support obligation in this debt assumption, this Court can't assume it is a support obligation covered by § 523(a)(5).

C. Res Judicata Effect of the Order Withdrawing the Defendant's Prior Complaint

The Debtor raises the argument that the order withdrawing the Defendant's prior complaint to determine dischargeability has a res judicata effect and effectively bars the Defendant's § 523(a)(15) defense. Because the Court has determined that the § 523(a)(15) affirmative defense is time-barred and that summary judgment in favor of the Debtor is appropriate under § 523(a)(5) based on the record in this proceeding, it is unnecessary to separately determine the res judicata effect, if any, of the order withdrawing the Defendant's prior complaint to determine dischargeability.

CONCLUSION

Because the Defendant's claim under § 523(a)(15) is barred pursuant to the temporal restrictions set forth in Bankruptcy Rule 4007(c), and because the debt is not in the nature of support or alimony for purposes of dischargeability under § 523(a)(5), the Court finds there is no issue of material fact regarding the dischargeability of the Debtor's obligation to the Defendant arising from the parties' debt to Matsco, and the Debtor is entitled to judgment in this proceeding as a matter of law. The Debtor's debt-assumption obligation to the Defendant arising from the Matsco indebtedness is therefore discharged in the Debtor's bankruptcy case. The Clerk shall enter a judgment on this Opinion and Order.

Service List:

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