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UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT

In re:

ELLIOTT DRIGGS MORSE **Chapter 13**
Debtor. **Case #99-10025**

CEYLAN ONOR,
Plaintiff, **Adversary Proceeding**
v. **#00-1006**

ELLIOT DRIGGS MORSE
Defendant.

Appearances of Counsel:	*Paul S. Kulig, Esq.* *Keyser Crowley, P.C.* *Rutland, Vermont* *Attorney for Debtor/Defendant*	*Rebecca A. Rice, Esq.* *Cohen & Rice* *Rutland, Vermont* *Attorney for Plaintiff*

MEMORANDUM OF DECISION
GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

The plaintiff, Ceylan Onor, filed a Motion for Summary Judgment on October 3, 2000. On October 11, 2000, the defendant/debtor, Elliott Driggs Morse, filed a Memorandum of Law in Opposition to Motion for Summary Judgment. The Plaintiff's Statement of Undisputed Facts was filed on November 6, 2000, and the defendant filed his Objection to Plaintiff's Statement of Undisputed Facts on November 13, 2000. This court has jurisdiction over this matter pursuant to 28 U.S.C. §§157 and 1334. Based upon the foregoing documents and all matters filed of record, the Motion for Summary Judgment is granted.

FACTS

The parties, Ceylan Onor and Elliott Driggs Morse, were married in 1988. They separated and ultimately filed for divorce in the Washington Family Court, Washington County, Vermont. Upon agreement of the parties, the family court referred certain issues of property division, spousal maintenance, allocation of marital debt and attorney's fees to a Property Master. A Property Master's Hearing on Spousal Maintenance, Property Division and Attorney's Fees was held on December 15, 1997.

The Master's Findings Regarding Spousal Maintenance, Property Division, and Attorney's Fees was filed on January 2, 1998 (herein "Master's Findings"). The Master's Findings contain extensive findings of fact regarding the parties' financial, employment and educational history, and their status prior to and at the time of the divorce. [*See* Complaint to Determine Dischargeability of Debt, at Exhibit C-1; Master's Findings, pp. 1-10]. It was noted that the parties' principal asset, the marital residence, had already been sold during the pendency of the divorce with each receiving one-half of the net proceeds [$14,067 each]. After a thorough examination of the parties' respective economic circumstances, the Master awarded to the plaintiff, *inter alia,* primary physical custody of their two children, the defendant's half of the proceeds of the sale of the parties' residence (i.e. $14,067) in lieu of rehabilitative maintenance, and spousal maintenance in the amount of $1.00 per year for ten (10) years. Specifically, the Master's Findings provide as follows:

> **Property Division**
>
> . . . Considering all the factors set out in 15 V.S.A. §751, Ceylan [Onor] is entitled to all of the proceeds from the sale of the house. She has an inferior earning power at this point because she has been the homemaker and primary care provider of the children. In addition, her inheritance money made it possible to purchase the property and its appliances. It was her contributions as a homemaker that made the home function.

> The statute favors awarding the marital residence to the spouse who has custody of the children. Ceylan sold the marital residence because she believed that Elliott [Morse]'s father might foreclose on the property. The statute also provides for a property award in lieu of maintenance. Elliott [Morse] has no current ability to pay Ceylan maintenance. Because Ceylan is currently unemployed and intends to continue her studies, has physical responsibility for the children and Elliott is unable to pay her maintenance, all the proceeds should be awarded to her. . . .
>
> **Spousal Maintenance**
>
> . . . Since Ceylan [Onor] has no employment experience other than furniture sales and has been out of the job market during most of the marriage, an award of rehabilitative maintenance is warranted until June, 2000, while she completes her studies. However, Elliott [Morse] currently earns $33,000.00 per year, and his income is allocated for his living expenses, payment of joint marital debt and child support. Accordingly, he has no ability to pay rehabilitative maintenance. **In lieu of Elliott paying rehabilitative maintenance, Ceylan has been awarded the property listed above.**
>
> Ceylan is granted spousal maintenance in the amount of one dollar per year for ten years.

[emphasis added] Master's Findings, at pp. 11-13.

After applying applicable Vermont law and based upon findings related to the relative economic position of the parties, the Master also awarded the plaintiff reasonable attorneys fees in the amount of $7,634.82 incurred during the divorce proceedings, to be paid by the defendant. Upon objection by the defendant, the Property Master reconsidered the nature and amount of attorneys fees incurred by the plaintiff during the divorce proceedings and reduced the award to a total of $2,500. [*See* Complaint to Determine Dischargeability of Debt, at Exhibit C-2; Master's Findings Regarding Attorney's Fees Following Defendant's Objection, filed February 17, 1998]. Pursuant to the Entry Order - Master's Report dated March 10, 1998, the family court adopted the Property Master's findings and conclusions, and the reports filed January 2, 1998 and February 12, 1998. Neither party filed an appeal of this Entry Order. Thereafter, the family court entered its Order on April 7, 1998 regarding certain child custody and

related issues and incorporating by reference the Entry Order. Subsequently, on July 14, 1998, the family court entered an Order Regarding Post-Hearing Attorney's Fees, whereby the defendant was further ordered to pay the plaintiff an additional $1,581.85 for her attorneys fees incurred after the Property Master's Hearing and the Final Hearing on April 7, 1998.

Upon the defendant's failure to comply with the foregoing orders, the family court entered an Order Regarding Motion to Enforce on November 16, 1998, finding the defendant in contempt for his failure to pay the following sums: (1) $14,067.00 pursuant to the Entry Order of March 10, 1998; (2) $ 2,500.00 pursuant to the Entry Order of March 10, 1998; and (3) $ 1,581.85 pursuant to July 14, 1998 Order.

The November 16th order also required the defendant to pay to the plaintiff an additional award of attorney's fees in the amount of $296.95 incurred in the successful Motion to Enforce. The defendant was ordered to make payment of the total sum of $18,445.80 in full by January 11, 1999 or risk contempt sanctions. Instead, the defendant filed a petition under chapter 13 of the Bankruptcy Code on January 8, 1999.

The plan was confirmed on April 16, 1999, notwithstanding the plaintiff's Objection to the treatment of her claim as a general unsecured claim rather than a priority claim, and to the failure of the plan to pay her claim in full. However, the Findings and Order Confirming the Plan acknowledge that the plaintiff had yet to file an adversary proceeding to determine if her claim was non-dischargeable. The plaintiff thereafter filed a proof of claim on May 7, 1999 in the amount of $18,445.80, classifying the debt as an unsecured priority claim in the nature of alimony, maintenance, or support owed to a former spouse pursuant to 11 U.S.C. §507(a)(7). The defendant filed his Objections to Proofs of Claim on June 4, 1999 indicating, *inter alia,* that the plaintiff's claim constituted a property division, and was not alimony or

spousal maintenance. It is undisputed that the defendant has been making the payments to plaintiff required under his chapter 13 plan.

On January 8, 2000, the plaintiff filed this adversary proceeding seeking a determination that her claim of $18,445.80 is actually in the nature of support pursuant to 11 U.S.C. §523(a)(5) and §507(a)(7). The defendant denies the material allegations of the complaint and asserts that only the amount of $1.00 per year constitutes maintenance or support pursuant to the Entry Order, and that the remaining amount being claimed constitutes a property division. Pursuant to her summary judgment motion, the plaintiff requests this court enter an order ruling that the debt owed to her by the defendant is actually in the nature of support, and hence that it is non-dischargeable pursuant to §523(a)(5) and entitled to treatment as a priority claim under §507(a)(7). The defendant opposes the relief sought by plaintiff and contends that since the intent of the family court decision on the issue of property division and alimony or maintenance between the parties is in dispute, summary judgment is not appropriate; and further that the subject debt is not actually in the nature of support.

ISSUE

The issue presented is whether the pleadings and matters filed of record reflect that there is no genuine issue of material fact as to whether the obligations arising from the divorce action and set forth in the orders of the Vermont family court are "actually in the nature of support" as that term is defined under 11 U.S.C. §§523(a)(5) and 507(a)(7). If there is no material fact in dispute the plaintiff would be entitled to a judgment declaring her debt to be a priority debt and non-dischargeable as a matter of law.

SUMMARY JUDGMENT STANDARD

Summary judgment is proper only if the record reflects that there is no genuine issue as to any material fact and if so, that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); Bankr. R. 7056. A genuine issue exists only when "the evidence is such that a reasonable [trier of fact] could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986); *see also* Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)(movant need only illustrate by reference to record opponent's failure to introduce evidence in support of essential element of claim). "The substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Liberty Lobby, 477 U.S. at 247, 106 S.Ct. at 2509. Furthermore, materiality is determined by assessing whether the fact in dispute, if proven, would satisfy a legal element under the theory alleged or otherwise affect the outcome of the case. Id. In making its determination, the court's sole function is to determine whether there is any material dispute of fact that requires a trial. *See* Waldridge v. American Hoechst Corp., 24 F.3d 918 (7th Cir. 1994). Credibility determinations, weighing evidence, and drawing reasonable inferences are jury functions, not those of a judge deciding a summary judgment motion. Liberty Lobby, 477 U.S. at 255, 106 S.Ct. 2513-14. A genuine issue of material fact precludes summary judgment relief.

DISCUSSION

Section 523(a)(5) of Title 11 U.S.C. ("the Bankruptcy Code") provides

(a) A discharge under section 727... or 1328(b) of this title does not discharge an individual debtor from any debt - -

(5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that –

(A) such debt is assigned to another entity, voluntarily, or by operation of law, or otherwise ... ; or

(B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support.

[emphasis added]

The spouse seeking a determination that an obligation is non-dischargeable on the grounds that it was "actually in the nature of alimony, maintenance, or support" has the burden of proof. *See* In re Kaufman, 115 B.R. 435, 439 (Bankr. E.D.N.Y. 1990) and the cases cited therein. Federal bankruptcy law, not state law, controls the determination of whether an obligation is "in the nature of" support. *See* In re Spong, 661 F.2d 6 (2nd Cir. 1981); In re Kaufman, 115 B.R. at 439; In re Peters, 133 B.R. 291, 295 (Bankr.S.D.N.Y. 1991).

Section 507(a)(7) contains virtually identical language to §523(a)(5) and in listing priority debts indicates that the seventh priority is for debts that are in actually in the nature of support.[1]

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[1] (a) The following expenses and claims have priority in the following order:

(7) Seventh , allowed claims for debts to a to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that –

(A) such debt is assigned to another entity, voluntarily, or by operation of law, or otherwise ... ; or

(B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support.

[emphasis added]

Courts in the second circuit take a broad reading of the term "in the nature of support" in dischargeability disputes. In re Peters, 133 BR 291, 296 (Bankr. S.D.N.Y. 1991). "[C]ongress has clearly required the bankruptcy court to protect the rights of a former spouse receiving alimony at the expense of a debtor seeking a fresh start." Forsdick v. Turgeon, 812 F.2d 801, 804 (2nd Cir. 1987). "By virtue of §523(a)(5), congress has chosen between two competing interests - those of bankrupts and those of their former spouses and offspring - and it chose in favor of the latter." Forsdick v. Turgeon, 812 F.2d at 802.

In seeking to determine the nature of a spousal obligation pursuant to a divorce decree, labels do not control the determination of a dischargeability issue. Forsdick v. Turgeon, 812 F.2d 801; In re Spong, 661 F.2d at 9. In order to reach an adjudication of dischargeability, this court must determine the intent of the document which created the liability as manifested by the nature of the obligation and the consideration of the rights and interests of the parties. In this instance, while the defendant merely asserts in his Objection to Plaintiff's Statement of Undisputed Fact that the intent of the family court decision is disputed, no specific facts or circumstances are presented by the defendant underlying this contention of disputed facts. Therefore, this court considers the undisputed matters filed of record and the Master's Findings upon which the divorce judgment is based. Where the intent is clear from the document in question and this intent is consistent with the function actually served by the provisions of the divorce decree and it is otherwise not contrary to public policy or equitable considerations, there is no reason for the court to look beyond the four corners of the document. *See* In re Brody, 120 B.R. 696, 698-99 (Bankr. E.D.N.Y. 1990)

Courts in this circuit have considered various factors in making a determination as to whether a marital debt is actually in the nature of support, including: (1) whether the obligation terminates on the death or remarriage of either spouse; (2) the characterization of the payment in the decree and the context in which the disputed provisions appear; (3) whether payment appears to balance disparate income; (4) whether the payment is due in a lump sum or over time; (5) whether the payments are to be made directly to the former spouse or to a third party; (6) whether the parties intended to create an obligation of support; (7) whether an assumption of a debt or creation of an obligation has the effect of providing the support necessary to ensure that the daily needs of the former spouse and any children of the marriage are met; and (8) whether an assumption of debt or creation of an obligation has the effect of providing the support necessary to ensure a home for the former spouse and any minor children. *See* In re Kaufman, 115 B.R. 435, 440 (Bankr. E.D.N.Y.1990); In re Brody, 120 BR at 698.

In this instance, the Property Master undertook an extensive and detailed assessment of the relative circumstances of the parties in allocating the marital resources and obligations. As indicated above, the Property Master determined that the plaintiff was entitled to maintenance and support from the defendant based upon her inferior earning power and relative educational and economic need. Because the defendant was deemed unable to provide the necessary support reasonably required by the plaintiff over time, the Property Master awarded the plaintiff the defendant's share of the net proceeds from the sale of the family residence in lieu of rehabilitative maintenance. Vermont law expressly provides that a property settlement may be in lieu of or in addition to maintenance. 15 V.S.A. §751(b)(7). Moreover, the clear intention to award the defendant's share of the net proceeds of the sale of marital residence to the plaintiff in lieu of maintenance is unambiguously articulated in the Masters Findings under her determination of property

division under §751 and spousal maintenance pursuant to §752. Since the Master Findings reflect a thorough assessment of the relative economic circumstances of the parties by the Property Master and were adopted by the family court in their entirety, and clearly treat the award of the defendant's $14,067 share of the net proceeds as spousal support, I find that there is no factual dispute on this critical point. I further find that there is no genuine dispute as to any material fact.

Based upon the undisputed facts, I find that the award of the defendant's net proceeds from the sale of the marital residence to the plaintiff is, for bankruptcy purposes, not a property settlement, but rather, nondischargeable maintenance and support pursuant to §523(a)(5) and is a priority debt under §507(a)(7).

Similarly, a debtor's obligation to pay his former spouse's attorney fees may constitute a nondischargeable support obligation to the extent the payment is necessary to the spouse's ability to maintain her matrimonial action. *See* In re Spong, 661 F.2d 6 (2nd Cir. 1981); In re Rosen, 151 B.R. 648 (Bankr.E.D.N.Y. 1993). In this instance, it is clear from the determination of the relative circumstances of the parties in the Master's Findings and the Master's Findings Regarding Attorney's Fees Following Defendant's Objections as adopted by the family court, that the award of $2,500 of attorneys fees incurred in the divorce in favor of the plaintiff was deemed reasonable and necessary to allow the plaintiff to maintain her matrimonial action. As such, the obligation the defendant owes to the plaintiff in the amount of $2,500 likewise constitutes a nondischargeable obligation pursuant to §523(a)(5) and a priority debt under §507(a)(7).

Just as it was the clear and express intent of the family court to impose upon the defendant the obligation to pay to the plaintiff the sum of $2,500 for her attorneys fees, it is also apparent that the two

subsequent attorneys fees award in the amount of $1,581.85 and $296.95 were awarded by the family court in order to implement and enforce the prior award. The purpose of categorizing attorneys fees as support is to enable the less financially able spouse to get effective divorce relief and must encompass not only the actual order directing payment of attorneys fees but also subsequent orders necessitated by the other party's failure to comply with the original order. There is nothing in the record to indicated that the non-debtor spouse was in any less need at the time of the two subsequent orders than she was at the time of the initial order directing the debtor to pay her attorney's fees and hence they fall within the category of support. *See* In re Rosenblatt, 176 BR 76 (Bankr. S.D.Fla 1994). Where attorneys fees are awarded on a show cause petition to obtain compliance with a court's support order, an award of fees may be imposed upon a determination that the noncomplying spouse is financially better able to pay the fees than the spouse seeking enforcement of the support order. In re Beattie, 150 BR 699 (Bankr. S.D.Ill. 1993) Hence, I find that these two awards of attorneys fees granted in connection with the hearing to enforce the original award of support and attorney's fees are also in the nature of support, for purposes of §523(a)(5).

Since the definition for priority claims under §507(a)(7) is identical to the criteria set forth for non-dischargeability in §523(a)(5), the award of the family court, including the attorney's fees specified above is also entitled to priority treatment under §507(a)(7).

CONCLUSION

Accordingly it is my ruling that the award in favor of the plaintiff set forth in the Master's Reports and adopted by the family court in the amount of $18,455.80 constitutes nondischargeable maintenance and support, pursuant to §523(a)(5), and is properly classified as a priority debt under §507(a)(7). Thus,

the plaintiff's motion for summary judgment is granted.

The debtor is directed to classify the subject claim as a priority claim and to amend the plan to comport with this classification.

/s/

March 19, 2001
Rutland, Vermont

Colleen A. Brown
United States Bankruptcy Judge