

IT IS SO ORDERED.

Dated: 02:56 PM August 26 2005


MARILYN SHEA-STONUM *JS*
U.S. Bankruptcy Judge



**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

IN RE:)	CASE NO. 03-56778
)	
JOHN LOGAN MACKEY, IV, and TONI)	CHAPTER 7
LEA MACKEY,)	
)	
DEBTOR(S))	
)	ADVERSARY NO. 04-5079
ROBIN J. MACKEY,)	
)	JUDGE MARILYN SHEA-STONUM
PLAINTIFF(S),)	
)	
vs.)	
)	
JOHN L. MACKEY)	MEMORANDUM OPINION RE:
)	DISCHARGEABILITY
DEFENDANT(S).)	

This matter comes before the Court on the complaint (the "Complaint") of Robin J. Mackey (the "Plaintiff") seeking a determination that (a) the indebtedness of John Mackey (the "Defendant")

regarding certain credit card payments is not dischargeable under 11 U.S.C. § 523(a)(6); (b) the Defendant's obligation to pay Plaintiff \$4,500, as and for attorney's fees (including \$750 for attorney's fees in connection with Plaintiff's show cause motion) as set forth in the parties Judgment Entry of Divorce, dated October 3, 2002 (the "Divorce Decree"), is not dischargeable under 11 U.S.C. §§ 523(a)(5) and/or (6); and (c) the Defendant's obligation to pay Plaintiff \$950.76, as and for attorney's fees as ordered in an April 7, 2003 Judgment Entry (the "Judgment Entry"), is not dischargeable under 11 U.S.C. §§ 523(a)(5) and/or (6).

The Court conducted a trial in this adversary proceeding on June 13, 2005. Appearing at the trial were Heidi Cisan, counsel for Plaintiff, and Terry Kane, counsel for Defendant. At the beginning of the trial, Defendant agreed, with respect to the certain credit card debt, to hold Plaintiff harmless for the credit card debts incurred after the entry of the restraining order and to the nondischargeability of that obligation. During the trial the Court received evidence in the form of exhibits and in the form of testimony from the Plaintiff and the Defendant. At the conclusion of the trial, the Court took the matter under advisement.

JURISDICTION

This proceeding arises in a case referred to this Court by the Standing Order of Reference entered in this District on July 16, 1984. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (I) over which this Court has jurisdiction pursuant to 28 U.S.C. § 1334. In reaching its determination and whether or not specifically referenced in this Memorandum Opinion, the Court considered the demeanor and credibility of the testifying witnesses. Based upon such

testimony, the stipulations of the parties filed on October 1, 2004 and April 9, 2005, the evidence presented at the trial, the arguments of counsel, the pleadings in this adversary proceeding and the Defendant - Debtor's main chapter 7 case and pursuant to Fed. R. Bankr. P. 7052, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

The Plaintiff and Defendant were married to each other. On October 3, 2002, their marriage was terminated by divorce, in the case of *Mackey v. Mackey*, Geauga County Common Pleas Court, Case No. 02 DC 000160.

During the course of the divorce proceeding, the court entered a Temporary Restraining Order (the "Restraining Order") prohibiting the parties from incurring debts other than for necessary expenses, and from incurring debts on the credit of the other party.

The domestic relations court held a trial on the issues of property division, spousal support, and on the motion to show cause filed by the Plaintiff for the Defendant's failure to comply with the terms of the Restraining Order, and rendered its decision in the Divorce Decree journalized on October 3, 2002. *See* Joint Exhibit 1.

The Divorce Decree provides, in pertinent part,

The Court further finds that the defendant is in contempt of this Court's temporary restraining order of February 22, 2001, and that he expended funds and incurred debts for other than necessary expenses.

The Court further finds that the plaintiff incurred reasonable and necessary attorney's fees in the amount of \$750.00 in connection with the motion for contempt; and that defendant is able to pay such fees.

...

IT IS FURTHER ORDERED that the defendant shall pay spousal support to the plaintiff in the amount of \$425.00 per month, for a period of six (6) years, terminable upon either party's death, or upon the plaintiff's remarriage or cohabitation. The Court shall not retain jurisdiction to modify this provision.

IT IS FURTHER ORDERED that the defendant pay to the plaintiff the sum of \$4,500.00 as and for attorney's fees, which shall include \$750.00 for attorney's fees in connection with the plaintiff's motion to show cause.

When the Debtor failed to comply with the terms of the Divorce Decree which required him to sell his Harley Davidson motorcycle and to pay the minimum payments on the certain credit card obligations and to make payments towards the outstanding attorney fees owed, the Plaintiff filed a motion to show cause against the Debtor. The Debtor was found in contempt as set forth in the Judgment Entry. *See* Joint Exhibit 2. Pursuant to the Judgment Entry, the Debtor was ordered to pay to Plaintiff "the sum of \$950.76 in attorney fees incurred in connection with the prosecution of the within Motion to Show Cause and he shall pay court costs." Judgment Entry, page 2.

On December 29, 2003, the Debtor filed a voluntary petition for relief under chapter 7. On April 26, 2004, the Plaintiff filed the Complaint.

DISCUSSION

Plaintiff argues that the attorney's fees incurred in pursuing the Defendant's contempt of the Restraining Order (\$750) and the Divorce Decree (\$950.76) are not dischargeable pursuant to § 523(a)(6), and the remaining unpaid attorney's fees (\$3,750) are spousal support and, thus, are not dischargeable pursuant to § 523(a)(5). The Defendant counters that Plaintiff has failed to meet her burden to prove, by a preponderance of the evidence, that the debt is nondischargeable. *Grogan v. Garner*, 498 U.S. 279 (1991); *Spilman v. Harley*, 656 F.2d 224 (6th Cir. 1981).

11 U.S.C. § 523(a)(6)

Pursuant to 11 U.S.C. § 523(a)(6) a debt may be declared nondischargeable “for willful and malicious injury by the debtor to another entity or to the property of another entity.” The Supreme Court has explained that “[t]he word ‘willful’ in (a)(6) modifies the word ‘injury,’ indicating that nondischargeability takes a deliberate or intentional *injury*, not merely a deliberate or intentional *act* that leads to injury.” *Geiger v. Kawaauhau*, 523 U.S. 57, 61 (1998) (emphasis in original). The Sixth Circuit has concluded that a malicious injury is one that is wrongful and without just cause or excuse; it does not require a showing of hatred, spite or ill-will. *Hooker v. Hoover*, (*In re Hoover*) 289 B.R. 340, 353 (Bankr. N.D. Ohio 2003); *Murray v. Wilcox* (*In re Wilcox*), 229 B.R. 411, 419 (Bankr. N.D. Ohio 1998)(under §523(a)(6) a person is deemed to have acted maliciously when that person acts in conscious disregard of his duties or without just cause or excuse).

Some Court’s have found that a debtor’s failure to comply with a court order constitutes willful and malicious conduct as a matter of law within the meaning of § 523(a)(6). *See, e.g., PRP Wine International, Inc. v. Allison* (*In re Allison*), 170 B.R. 60, 64 (Bankr. S.D. Fla. 1994). Those courts reason that a failure to comply with court directives contained in an injunction order satisfies the definition of “willful and malicious” within 11 U.S.C. § 523(a)(6). *Phipps v. Commonwealth of Kentucky, Natural Resources and Environmental Protection Cabinet*, 1992 WL 358480 (6th Cir.1992), reported as Table Case at 980 F.2d 730; *see also Sullivan v Hallagan* (*In re Hallagan*), 241 B.R. 544 (Bankr. N.D. Ohio 1999).

In *Telcom Credit Union v. Leslie (In re Leslie)*, 271 B.R. 508, 510 (Bankr. E.D. Mich. 2001), the bankruptcy court found that the debtor's failure to comply with its prior orders in a prior case was willful and malicious within the meaning of § 523(a)(6). The court reasoned that the debtor knew injuries were likely to result from her failure to comply with the court order, and therefore, her action was willful. In addition, the court reasoned that the debtor consciously disregarded the court order, and determined that such conscious disregard constituted a malicious act.

In the instant case, the domestic relations court found the Defendant in contempt for failure to comply with its prior court orders and ordered the Defendant to pay the attorney's fees which resulted from the enforcement of those court orders. Based on the testimony of the Defendant at trial and the findings of the domestic relations court in the Divorce Decree and the Judgment Entry, the Court finds that Defendant was aware of the orders of the domestic relations court. He understood that injury to the Plaintiff (in the form of having to incur attorney's fees to enforce the orders) was likely to result from his failure to comply with those order. Nonetheless, the Defendant chose to disregard the prior court orders. Therefore, the Court finds that the Defendant caused "willful and malicious injury" to the Plaintiff within the meaning of § 523(a)(6). The attorney's fees incurred in pursuing the Defendant's contempt, totaling \$1700.76, plus interest at the rate of 10% per annum (as allowed by Ohio Rev. Code § 1343.03), are not dischargeable.

11 U.S.C. § 523(a)(5)

The Plaintiff must prove, by a preponderance of the evidence, that the remaining unpaid attorney's fees (\$3,750) are spousal support and thus, are not dischargeable pursuant to § 523(a)(5).

Section 523(a)(5) of the Bankruptcy Code states:

(A) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt -

. . .

(5) to a spouse, former spouse . . . for alimony to, maintenance for, or support of such spouse . . . in connection with a separation agreement, divorce decree or other order of a court of record . . .

In *In re Calhoun*, 715 F.2d 1103, 1109 (6th Cir. 1983), the Sixth Circuit stated that

the initial inquiry must be to ascertain whether the state court ... intended to create an obligation to provide support ... If [it] did not, the inquiry ends there. There is no basis for the bankruptcy court to create a non-dischargeable obligation for the debtor that the state court granting the divorce decree ... did not create. In making this determination the bankruptcy court may consider any relevant evidence including those factors utilized by state courts to make a factual determination of intent to create support.

In this instance, in one paragraph of the Divorce Decree, the domestic relations court awarded the Plaintiff a specific amount of monthly payments over a specified period of time as and for support. In a completely separate paragraph of the Divorce Decree the domestic relations court awarded the Plaintiff attorney fees without labeling that award as spousal support. Plaintiff's counsel argues that, as a matter of Ohio law, attorney's fees awarded in connection with a divorce case are deemed to constitute spousal support. Further, she suggests that the close proximity of the

paragraphs in the Divorce Decree reveal that the domestic relations court intended to award the attorney fees as and for support.

The award of spousal support in Ohio is governed by Ohio Rev. Code § 3105.18. Ohio Rev. Code § 3105.18(H) provides:

In divorce or legal separation proceedings, the court may award reasonable attorney's fees to either party at any stage of the proceedings, including, but not limited to, any appeal, any proceeding arising from a motion to modify a prior order or decree, and any proceeding to enforce a prior order or decree, if it determines that the other party has the ability to pay the attorney's fees that the court awards. When the court determines whether to award reasonable attorney's fees to any party pursuant to this division, it shall determine whether either party will be prevented from fully litigating his rights and adequately protecting his interests if it does not award reasonable attorney's fees.

This statutory provision leaves “[t]he award of attorney fees in a divorce proceeding ... to the sound discretion of the trial court.” *Williams v. Williams*, 116 Ohio App.3d 320, 328 (1996). Plaintiff has not cited to any provision of Ohio law which deems the award of attorney fees to be support. Under Ohio law, the award of attorney fees is not as a matter of law an award of support.¹ See *Fraiberg v. Fraiberg*, 1998 WL 842077, *7 (Ohio App. 8 Dist. Dec 03, 1998); see also *Pinkstaff v Pinkstaff (In re Pinkstaff)*, 163 B.R. 504, 507 (Bankr. N.D. Ohio 1994); and *In re*

¹ This finding is underscored by the recent revisions to the Ohio Revised Code, effective April 27, 2005, which deleted subsection H from § 3105.18 and added § 3105.73 - Award of attorney's fees and litigation expenses. This new section of the Ohio Revised Code governs the award of attorney's fees in a divorce proceeding. Section 3105.73(D) reads “Nothing in this section prevents an award of attorney's fees and litigation expenses from being designated as spousal support” This provision suggests that if attorney's fees are being awarded as support, the court or the parties will designate them as such.

Shaw, 66 B.R. 399, 402-03 (Bankr. N.D. Ohio 1986). As noted above, the domestic relations court in this case did not specifically label the award of attorney fees as support; nor did it make a finding regarding the ability of the plaintiff to fully litigate her rights and adequately protect her interests without an award of attorney's fees. From the face of the Divorce Decree, it does not appear as though the domestic relations court intended to award attorney's fees as and for support. Plaintiff did not present any evidence or argument to carry her burden of proving otherwise.

Therefore, the Court finds that the remaining unpaid attorney's fees (\$3,750) awarded in the Divorce Decree were not awarded as and for support, and thus, they are not excepted from discharge under § 523(a)(5).

CONCLUSION

Based upon the foregoing discussion, the attorney's fees incurred in pursuing the Defendant's contempt of the Restraining Order (\$750) and the Divorce Decree (\$950.76) are not dischargeable pursuant to § 523(a)(6). With respect to the remaining unpaid attorney's fees (\$3,750), the Plaintiff failed to prove that they were awarded as and for support. Therefore, they are not excepted from discharge in Defendant's chapter 7 bankruptcy case pursuant to 11 U.S.C. § 523(a)(5). An entry of judgment consistent with this Memorandum Opinion will be entered separately in this case.

###

cc: Heidi Cisan
Terry Kane