

IT IS SO ORDERED.

Dated: 04:02 PM March 15 2006


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

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:)	CASE NO. 04-53293
)	
KATHRYN A. McCONKEY,)	CHAPTER 7
)	
DEBTOR(S))	
)	ADVERSARY NO. 04-5119
)	
KATHRYN A. McCONKEY,)	JUDGE MARILYN SHEA-STONUM
PLAINTIFF(S),)	
)	
vs.)	
)	
MICHAEL A. OLMEDO,)	MEMORANDUM AND OPINION
DEFENDANT(S).)	

This matter commenced with the debtor Kathryn A. McConkey's ("Debtor") complaint to seeking a declaration that a claim is non-dischargeable because it is not of the kind covered by 11 U.S.C. § 523(a)(5). Defendant Michael A. Olmedo, *pro se*, ("Defendant") timely filed an answer and counterclaim seeking a determination that the debt is nondischargeable under 11 U.S.C. § 523(a)(5) and (15) (docket #15). The Court held a trial of the matter on August 23, 2005, at which Debtor, Debtor's counsel, and Defendant, *pro se*, appeared. At the conclusion of the trial, the matter was taken under advisement.

This proceeding arises in a case referred to this Court by the Standing Order of Reference entered in this District on July 16, 1984. It is determined to be a core proceeding pursuant to 28 U.S.C. §157(b)(2)(I) over which this Court has jurisdiction pursuant to 28 U.S.C. §§1334(b), 157(a) and (b).

FINDINGS OF FACT

The following facts are not in dispute and are the subject of Stipulations of Facts (docket #21) filed by the parties:

1. Debtor and Defendant were married and from that marriage, two children were born, Lauren A. Olmedo and Dillon C. Olmedo.
2. Debtor and Defendant were divorced pursuant to an “Agreed Final Decree of Divorce” (the “Decree”) signed October 30, 1997 in the 309th Judicial District Court of Harris County, Texas (the Harris County Court).
3. The Decree named Debtor the sole managing conservator (under O.R.C. 3109.04 she is the residential parent entitled to receive support) and Defendant the possessory conservator (under O.R.C. 3109.04 he is the non-resident parent with visitation rights and support obligations).
4. Both parties resided in Houston, Texas, in Harris County, at the time of the divorce.
5. In February 1998, Debtor and the children relocated to Akron, Ohio.
6. In May 1998, Debtor filed a Motion for Modification of Visitation in the Harris County Court. In May 1998, Defendant also filed a Motion for Modification asking for a reduction in child support because of increased expenses incurred in exercising his visitation periods with the children. Defendant’s motion was denied.
7. In 2001, Debtor filed another Motion for Modification of Visitation in the Harris County Court. Defendant again filed a counter-motion seeking a reduction in child support on the same basis as his previous motion.

8. On July 26, 2002, the Harris County Court entered its Order Modifying Prior Order in Suit Affecting the Parent-Child Relationship (the “Order Modifying Support”), which reduced Defendant’s child support \$150 per month (from \$650 to \$500 per month).
9. On June 7, 2004, Debtor received a notice of garnishment pursuant to O.R.C. 2716.02.
10. On June 14, 2004, Defendant obtained a Order of Full Faith and Credit from the Summit County Court of Common Pleas.
11. On June 15, 2004, Debtor filed for chapter 7 bankruptcy in the Akron Bankruptcy Court.
12. On July 26, 2004, Debtor filed this adversary to determine dischargeability.

The Court makes the additional findings of fact based on the evidence presented at trial and record of the pleadings:

13. The Order Modifying Support ordered Debtor to pay \$3,500, plus 6 percent compounded interest per year to Walter Mahoney (“Mahoney”), Defendant’s attorney, for attorney’s fees related to the proceeding (the “Debtor’s Obligation”). (See Order Modifying Support, ¶ 20.).
14. Defendant voluntarily obtained a general assignment from Mahoney on March 24, 2004, for Debtor’s Obligation to Mahoney. (See Proof of Claim #1, page 6).
15. Debtor’s income in 2002 was \$35,135, in 2003 was \$35,583, and in 2004 was 39,889. Additionally, Debtor received \$6,000 per year in child support from Defendant.
16. In November 2004, Debtor began using advance check cashing services 2-3 times per month to help meet her monthly expenses when they came due. Debtor continued to use the services throughout 2005 to help her meet expenses.
17. Defendant is married and living in Texas with his wife, Leigh Ann Olmedo, and two minor children, one of whom is from their marriage. Defendant’s wife has completed law school and was employed as a contract law clerk from September 2004 to January 2005;

she is not currently employed.

18. Defendant's income in 2004 was \$37,495. Defendant has been employed on a commission basis in 2005 with an average monthly income of \$1,788.
19. The parties agree that the Debtor's Obligation at issue is not in the nature of alimony, maintenance, or support pursuant and is therefore not excepted from discharge under 11 U.S.C. § 523(a)(5); therefore, the issue before the Court relates solely to a determination of the applicability of 11 U.S.C. § 523(a)(15) to the claim which Defendant took by assignment.

CONCLUSIONS OF LAW

Here, the parties have agreed the debt is not excepted from discharge under § 523(a)(5). Defendant asserts, however, that Debtor's Obligation is nondischargeable under 11 U.S.C. § 523(a)(15), which excepts a debt from discharge that is:

not the kind in paragraph (5) that is incurred by the debtor in the course of a divorce or separation . . . unless:

- (A) the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor . . . ; or
- (B) discharging the debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor.

The objecting claim holder bears the burden to prove that the debt is the type that is excepted from discharge under § 523(a)(15); once the creditor meets this burden, the burden of proof then shifts to the debtor to prove one of the exceptions in § 523(a)(15)(A) or (B) by a preponderance of the evidence. *In re Molino*, 225 B.R. 904, 907 (6th Cir. B.A.P. 1998).

In order to properly frame the issue before the Court in this case, however, the Court must first look to the circumstances that gave rise to the Debtor's Obligation at issue. Here, in an Order Modifying Support, the state domestic relations court entered judgment against the Debtor for payment of Defendant's attorney's fees to Mahoney. Therefore, the lens through

which this Court must view the Debtor's Obligation in this case is from the perspective of judgement creditor Mahoney who, but for Defendant seeking assignment of Mahoney's judgment, in the context of this bankruptcy proceeding, would be a third-party unsecured creditor.

Though Debtor did not raise the issue of standing in this case, the Court notes that the majority of courts that have addressed this issue have found that a third party creditor does not have standing to assert a nondischargeability claim under § 523(a)(15). *See In re Dollaga*, 260 B.R. 493 (9th Cir. B.A.P. 2001); *In re Euell*, 271 B.R. 388 (Bankr. D.Colo. 2002); *In re Bryant*, 260 B.R. 839, 847 (Bankr. W.D. Ky. 2001); *In re Winneman*, 210 B.R. 115 (Bankr. N.D. Ohio 1997); *In re Smith*, 205 B.R. 612 (Bankr. E.D. Cal. 1997); *In re Beach*, 203 B.R. 676 (Bankr. N.D. Ill. 1997); *In re Harris*, 203 B.R. 558 (Bankr. D. Del. 1996); *In re Douglas*, 202 B.R. 961 (Bankr. N.D. Ill. 1996); *In re Finaly*, 190 B.R. 312 (Bankr. S.D. Ohio 1995); *In re Dressler*, 194 B.R. 290 (Bankr. D.R.I. 1996); *but see In re Soderlund* 197 B.R. 742 (Bankr. D. Mass. 1996). While the text of § 523(a)(15) does not expressly restrict standing, courts that have analyzed the language of the statute, in conjunction with the legislative history, have concluded that the scope of § 523(a)(15) is limited "to debts owed directly to the Debtor's spouse or former spouse, and therefore, only a spouse or former spouse [or dependent] has standing to bring an action under § 523(a)(15)." *Bryant*, 260 B.R. at 847 (Bankr. W.D. Ky. 2001); *accord Beach*, 203 B.R. at 678-80, *Harris*, 203 B.R. at 561; *Smith*, 205 B.R. at 616. The legislative history of the Bankruptcy Reform Act of 1994 (which created this additional provision to the then-existing exceptions to discharge) supports a finding that, while not reflected in the plain language of the statute, § 523(a)(15) does not grant standing to third-party creditors. *Harris*, 203 B.R. at 561-62. In addition, courts are to narrowly construe exceptions to discharge and view such exceptions in favor of the debtor. *Kawaauhau v. Geiger*, 523 U.S. 57 (1998); *Gleason v. Thaw*, 236 U.S. 558, 562 (1915); *In re Ward*, 857 F.2d 1082, 1083 (6th

Cir. 1988). Therefore, the debt must fit squarely within the provisions under § 523(a)(15) for it to be dischargeable, which here it does not.

Furthermore, because of the disjunctive nature of § 523(a)(15)(A) and (B), the Debtor need only prove one of the provision's two exceptions to have the debt discharged. As the *Smith* court correctly concluded, a debtor will always prevail against a creditor seeking an exception to discharge under this provision, because:

[i]f a debt is owed to someone other than a spouse, former spouse, or child of the debtor, discharge of the debt will always result in a benefit to a debtor that is greater than the detriment to his or her spouse, former spouse or child. This is true because, in this circumstance, the benefit to a debtor is necessarily positive, and the detriment to the spouse, former spouse, or child is necessarily zero.

Smith, 205 B.R. at 616. Because Defendant had no original liability on Debtor's Obligation as imposed by the Order Modifying Support, Defendant would suffer no detrimental consequence if the debt were discharged in bankruptcy; Defendant's act to accept assignment of Mahoney's judgment does not alter that original premise.

In this case, Defendant's voluntary act to seek assignment of Mahoney's judgment against Debtor does not change the nature of Debtor's Obligation, nor does it confer on Defendant standing, as an ex-spouse, to pursue a determination of nondischargeability under § 523(a)(15).¹

CONCLUSION

Because Mahoney would have lacked standing to challenge the dischargeability of his fees

¹ Even if Defendant had standing to pursue Debtor's Obligation in this case, the Court considers Debtor's regular use of advance check cashing services to bridge her financial gaps between pay periods, combined with her role as the custodial parent of two teen-age children with increasing expenses, to be satisfactory evidence that Debtor does not have the ability to pay the debt, therefore it would be dischargeable pursuant to § 523(a)(15)(A).

under § 523 (a)(15), so, too, does the Defendant in this case. Therefore, the Court finds that the Debtor's Obligation at issue in this case is dischargeable. The Court will enter a separate Entry of Judgement declaring the Debtor's Obligation dischargeable in the above captioned case.

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cc: Michael Moran (via electronic mail)
Michael Olmedo (via regular mail)
Kathryn McConkey