

The court incorporates by reference in this paragraph and adopts as the findings and orders of this court the document set forth below. This document has been entered electronically in the record of the United States Bankruptcy Court for the Northern District of Ohio.

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CLERK U.S. BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
TOLEDO



Mary Ann Whipple  
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
WESTERN DIVISION

In Re:	)	Case No.: 08-32994
	)	
Justin Cody Pettijohn,	)	Chapter 7
	)	
Debtor.	)	Adv. Pro. No. 08-3207
	)	
Heather Pettijohn,	)	Hon. Mary Ann Whipple
	)	
Plaintiff,	)	
v.	)	
	)	
Justin Cody Pettijohn,	)	
	)	
Defendant.	)	
	)	

**MEMORANDUM OF DECISION AND ORDER**  
**GRANTING MOTION FOR SUMMARY JUDGMENT**

This adversary proceeding is before the court on Plaintiff’s Motion for Summary Judgment [Doc. # 8] and Defendant’s response [Doc. # 9]. In her complaint, Plaintiff requests that the court declare a debt owed to her by Defendant/Debtor, her ex-husband, to be nondischargeable in his Chapter 7 case under 11 U.S.C. § 523(a)(15). The district court has jurisdiction over this adversary proceeding pursuant to 28

U.S.C. §1334(b) as a civil proceeding arising under Title 11. This proceeding has been referred to this court by the district court under its general order of reference. 28 U.S.C. § 157(a); General Order 84-1 of the United States District Court for the Northern District of Ohio. Proceedings to determine dischargeability are core proceedings that the court may hear and decide. 28 U.S.C. § 157(b)(1) and (b)(2)(I).

After reviewing the motion, the opposing memorandum, and the exhibits submitted by the parties, the court will grant the Motion to the extent it seeks a determination that Defendant's obligation owed to Plaintiff is a debt that is nondischargeable under § 523(a)(15) but will deny the Motion to the extent it seeks an award of attorney fees and costs.

### **FACTUAL BACKGROUND**

The following facts are undisputed. On July 17, 2007, the Common Pleas Court of Paulding County, Ohio, entered judgment granting the parties a divorce. Before their divorce, a credit card in Plaintiff's name was used to purchase a 2005 Yamaha ATV. [Def. Aff. ¶3-4]. The ATV was titled in Plaintiff's name. [*Id.* at ¶ 5]. Pursuant to the divorce decree, Defendant was granted possession of the ATV and was ordered to pay the debt owed on Plaintiff's credit card account and to indemnify and hold Plaintiff harmless as to such debt in the event the vehicle was repossessed. [Pl. Ex. A, unnumbered p. 4]. He was also ordered to refinance the ATV if and when it became possible for him to do so. [*Id.*]. Also pursuant to the divorce decree, Plaintiff was ordered to promptly upon receipt deliver to Defendant the credit card statements and, upon completion of the payment of the vehicle, to immediately cause the title to be assigned to Defendant. [*Id.*].

Although Plaintiff received the credit card statements, she did not deliver them to Defendant. Rather, she simply notified him of the amount to be paid. [Def. Aff. ¶ 8]. In April 2008, Defendant contacted Plaintiff to inquire about selling the ATV to satisfy the debt owed on the credit card. Plaintiff advised him that she would not transfer the ATV into his name and that she would not agree to selling the vehicle. In July 2008, the ATV was repossessed. Had Plaintiff allowed a private sale of the ATV, the debt owed on the credit card would have been satisfied.

On June 9, 2008, Defendant filed for relief under Chapter 7 of the Bankruptcy Code. Plaintiff filed a timely complaint seeking a declaration that the debt owed to her by Defendant is nondischargeable under 11 U.S.C. § 523(a)(15) and an award of her attorney fees and costs of this action.

### **LAW AND ANALYSIS**

## I. Summary Judgment Standard

Under Rule 56 of the Federal Rules of Civil Procedure, made applicable to this proceeding by Federal Rule of Bankruptcy Procedure 7056, summary judgment is proper only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In reviewing a motion for summary judgment, however, all inferences “must be viewed in the light most favorable to the party opposing the motion.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-88 (1986). The party moving for summary judgment always bears the initial responsibility of informing the court of the basis for its motion, “and identifying those portions of ‘the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits if any’ which it believes demonstrate the absence of a genuine issue of material fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Where the moving party has met its initial burden, the adverse party “may not rest upon the mere allegations or denials of his pleading but . . . must set forth specific facts showing that there is a genuine issue for trial.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine issue for trial exists if the evidence is such that a reasonable factfinder could find in favor of the nonmoving party. *Id.*

## II. 11 U.S.C. § 523(a)(15)

Section 523(a)(15) was amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”), effective October 17, 2005. Because Defendant’s bankruptcy case was filed after that date, Plaintiff’s complaint is governed by the amended statute, which provides in relevant part as follows:

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

.....

(15) to a spouse, former spouse, or child of the debtor and not of the 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, or a determination made in accordance with State or territorial law by a governmental unit.

11 U.S.C. § 523(a)(15).

Generally, this section governs the dischargeability of debts incurred in connection with property settlements and hold harmless agreements set forth in divorce decrees and separation agreements. Prior to the enactment of BAPCPA, § 523(a)(15) provided certain affirmative defenses, which, if established, permitted a court to discharge such debts, notwithstanding that they otherwise fell within the scope of that

subsection. 11 U.S.C. § 523(a)(15)(A) & (B) (2004). Also before BAPCPA was enacted, debts that fell within the scope of § 523(a)(15) were automatically discharged unless a creditor timely invoked the equitable powers of the bankruptcy court by filing an adversary proceeding seeking a determination that the debt was nondischargeable. 11 U.S.C. § 523(c)(1) (2004). BAPCPA, however, eliminated the affirmative defenses in former subsections (A) and (B) and made property settlement debts encompassed under § 523(a)(15) unqualifiedly nondischargeable in a Chapter 7 case.<sup>1</sup> Thus, bankruptcy courts now have the following very narrow inquiry in determining whether a debt is excepted from discharge under this section: the debt must (1) be to a spouse, former spouse or child of the debtor; (2) not be of the type described in paragraph (a)(5) of § 523, which excepts domestic support obligations; and (3) have been incurred in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court.

Defendant concedes that the debt he owes to Plaintiff falls within the scope of § 523(a)(15). Nevertheless, he points to Plaintiff's failure to provide him with monthly credit card statements relating to the ATV debt and her refusal to allow Defendant to sell the vehicle in order to satisfy the debt, and argues that the doctrine of "unclean hands" should prevent Plaintiff from obtaining relief in this proceeding due to her conduct, which has not been disputed. For the following reasons, however, the court finds this doctrine inapplicable in the context of post-BAPCPA § 523(a)(15).

The doctrine of "unclean hands" is equitable in nature and "demands that a plaintiff act fairly in the matter for which he seeks a remedy." *Hopper v. Everett (In re Everett)*, 364 B.R. 711, 723 (Bankr. D. Ariz. 2007). It may be employed by a court to deny equitable relief "where the party applying for such relief is guilty of conduct involving fraud, deceit, unconscionability, or bad faith related to the matter at issue to the detriment of the other party." *Performance Unlimited, Inc. v. Questar Publishers, Inc.*, 52 F.3d 1373, 1383 (6<sup>th</sup> Cir. 1995). The doctrine is to be applied, however, only where the predicate act underlying an unclean hands defense "has immediate and necessary relation to the equity that [one] seeks in respect of the matter in litigation." *Everett*, 364 B.R. at 723 (quoting *Keystone Driller Co. v. General Excavator Co.*, 290 U.S. 240, 245-46 (1933)). As one court explained, "We are not open to arguments about a party's general moral fitness, but only apply the unclean hands doctrine to prevent a party from using the courts to reap the

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<sup>1</sup>Except where a debtor seeks a hardship discharge under 11 U.S.C. § 1328(b), § 523(a)(15) property settlement debts are dischargeable in Chapter 13 cases. See 11 U.S.C. § 1328(a).

benefits of wrongdoing.” *Republic of Rwanda v. Uwimana (In re Uwimana)*, 284 F.3d 806, 810-11 (4<sup>th</sup> Cir. 2001).

Defendant cites several cases for the proposition that bankruptcy courts may preclude a plaintiff with unclean hands from obtaining relief in the form of an order declaring the nondischargeability of a debt. *See Everett*, 364 B.R. at 723-24 (finding that the plaintiff’s unclean hands barred him from seeking to have the debt found nondischargeable under § 523(a)(2)); *Uwimana*, 284 F.3d at 810-11 (considering an “unclean hands” defense to the plaintiff’s claim that a debt was nondischargeable under § 523(a)(4) but finding that the defendant had failed to show the misconduct was attributed to the plaintiff). *But see Rossi, McCreery & Assocs. v. Abbo (In re Abbo)*, 192 B.R. 891, 898-99 (Bankr. N.D. Ohio 1996), *aff’d* 168 F.3d 930 (6<sup>th</sup> Cir. 1999). Those cases, however, are distinguishable. They address debts of a kind described in §§ 523(a)(2) and (a)(4). Under § 523(c)(1), such debts are automatically discharged unless the creditor invokes the court’s equitable power under the Bankruptcy Code to declare the debt nondischargeable.

By contrast, Plaintiff was not required to file a complaint to determine the nondischargeability of the debt owed her by Defendant. Congress has removed this determination from the power of the bankruptcy courts and has expressly provided that all debts of a kind described in § 523(a)(15) are nondischargeable. Plaintiff invoked the equitable powers of this court, not to determine the dischargeability of the debt, but simply to declare that the debt owed by Defendant is a debt described in § 523(a)(15). To apply the doctrine of unclean hands in this context and enter judgment in favor of Defendant would require the court to ignore the express provisions of § 523(a)(15), as amended by BAPCPA. This the court is not at liberty to do. *Cf. XL/Datacomp, Inc. v. Wilson (In re Omegas Group, Inc.)*, 16 F.3d 1443, 1453 (6<sup>th</sup> Cir. 1994) (quoting *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206 (1988) for the proposition that “whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code”). *But see Jackson v. Harris (In re Harris)*, Case No. 07-1587, 2008 Bankr. LEXIS 2329, 2008 WL 4279505 (Bankr. N.D. W. Va. Sept. 15, 2008)(in a § 523(a)(15) action with alleged misconduct similar to what Defendant’s affidavit establishes in this case, the bankruptcy court applies the doctrine of unclean hands but finds that it is inapplicable on the facts of that case). The court, therefore, rejects Defendant’s unclean hands defense and finds that it more appropriately should be raised in the context of any state court proceeding to enforce the provisions of the divorce decree. *See Bean v. Bean*, 14 Ohio App. 3d 358, 363-64 (1984) (holding that the trial court erred in finding husband in contempt for failure to sell jewelry where wife had “tarnished her clean hands” by refusing to surrender possession

to allow sale); *Neel v. Neel*, Case No. 96-6043, 1997 U.S. App. LEXIS 22700, \*8-\*9, 1997 WL 525366, \*3 (6<sup>th</sup> Cir. Aug. 21, 1997). Accordingly, Plaintiff is entitled to judgment declaring the debt at issue to be nondischargeable under § 523(a)(15) notwithstanding Plaintiff's conduct.

### **III. Attorney Fees**

In her Motion as well as in her prayer for relief, Plaintiff requests an award of her reasonable attorney fees. Generally, under the "American Rule," which applies to litigation in the bankruptcy courts, a prevailing litigant may not collect attorney's fee from his opponent unless authorized by federal statute or an enforceable contract between the parties. *In re Sheridan*, 105 F.3d 1164, 1166 (7th Cir. 1997). Plaintiff cites, and the court is aware of, no such authority for her request. Moreover, Rule 7008(b) of the Federal Rules of Bankruptcy Procedure provides: "A request for an award of attorney's fees shall be pleaded as a claim in a complaint, cross-claim, third-party complaint, answer, or reply as may be appropriate." Thus, attorney's fees must be sought in a bankruptcy adversary proceeding by a separate count of the complaint or other pleading and not merely in the prayer for relief. *E.g.*, *Leonard v. Onyx Acceptance Corp.*, Nos. 02-8125, Civ. 03-1117 ADM, 2003 U.S. Dist. LEXIS 6307, \*5, 2003 WL 1873283, \*2 (D. Minn. Apr. 11, 2003); *Hartford Police F.C.U. v. DeMaio (In re DeMaio)*, 158 B.R. 890, 892-93 (Bankr. D. Conn. 1993); *Garcia v. Odom (In re Odom)*, 113 B.R. 623, 625 (Bankr. C.D. Cal. 1990); *see V.M. v. S.S. (In re S.S.)*, 271 B.R. 240, 244 (Bankr. D.N.J. 2002). Plaintiff's complaint fails to set forth a separate claim for attorney's fees; rather, her request is included only in the prayer for relief.

**THEREFORE**, for the foregoing reasons, good cause appearing,

**IT IS ORDERED** that Plaintiff's Motion for Summary Judgment [Doc. # 8] be, and hereby is, **GRANTED** to the extent Plaintiff seeks a declaration that the debt owed by Defendant is nondischargeable under 11 U.S.C. § 523(a)(15) and **DENIED** to the extent she seeks an award of attorney fees and costs.<sup>2</sup> A separate judgment in accordance with this Memorandum of Decision will be entered.

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<sup>2</sup> Plaintiff presented no evidence regarding the amount owed her by Defendant, and her complaint does not demand a money judgment in addition to a declaration that the debt owed to Plaintiff is nondischargeable under § 523(a)(15).