

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI**

IN RE:

**DAVID S. MOYER,
DEBTOR.**

CASE NO. 04-53693-NPO

CHAPTER 7

DAVID S. MOYER

PLAINTIFF

VS.

ADV. PROC. NO. 11-05002-NPO

COURTNEY A. SCHLOEMER

DEFENDANT

ORDER DISMISSING ADVERSARY PROCEEDING

There came before the Court for hearing on March 28, 2011 (the “Hearing”), the Defenant’s Motion to Dismiss (the “Motion”) (Adv. Dkt. No. 5) filed by Courtney A. Schloemer (“Schloemer”), and the Plaintiff’s Response to Motion to Dismiss (Adv. Dkt. No. 8) filed by the Debtor, David S. Moyer (“Moyer”). At the Hearing, Schloemer appeared *pro se*, and Nicholas Van Wiser appeared on behalf of Moyer.¹ After considering the pleadings, arguments of counsel, and the law, the Court granted the Motion on narrow grounds, pursuant to Rule12(h)(3) of the Federal Rules of Civil Procedure, as made applicable by Rule 7012 of the Federal Rules of Bankruptcy Procedure. This Order supplements the bench opinion given at the conclusion of the Hearing.

This is the third adversary proceeding initiated by Moyer against Schloemer, who is his former wife. At issue here are the second and third adversary proceedings, namely, Case No. 09-

¹ Both Schloemer and Moyer are licensed attorneys.

05055-NPO, the “Second Adversary” and Case No. 11-05002-NPO, the “Third Adversary.” After the Second Adversary was tried on September 15, 2010, this Court issued a Memorandum Opinion on (1) Complaint Seeking Declaratory Relief Determining the Defendant’s Estoppel to Assert Non Dischargeability of Certain Debts, or in the Alternative, to Adjudicate the Discharge of Support Obligations under 11 U.S.C. Section 523(a)(5) and (15); (2) Motion for Judgment on the Pleadings or, in the Alternative, Motion for Summary Judgment; and (3) Motion to Strike and for Sanctions (the “Memorandum Opinion”) (Case No. 09-05055-NPO, Adv. Dkt. No. 154); and a Final Judgment (Case No. 09-05055-NPO, Adv. Dkt. No. 155). In the Memorandum Opinion, this Court ruled:

The Court has reviewed the evidence and has found no proof indicating that any amounts are currently owed Schloemer on any of the Disputed Marital Debts. Because [11 U.S.C.] § 523 applies to the dischargeability of “debt,” a debt must exist before that statute can be invoked. Accordingly, this Court need not determine which, if any, of the Disputed Marital Debts are in the nature of alimony, maintenance, or support.

Memorandum Opinion at 23. Schloemer filed a notice of appeal to the district court from the Memorandum Opinion on November 15, 2010. (Case No. 09-05055-NPO, Adv. Dkt. No. 158). That appeal is currently pending before the district court.

Then, on December 14, 2010, Schloemer filed a motion in state court (in the same civil action as her previous divorce case) seeking to have the parties’ judgment of divorce set aside for fraud under Rule 60(b)(1) of the Mississippi Rules of Civil Procedure (the “State Court Motion”). See Ex. 4, Complaint (Adv. Dkt. No. 1). Moyer initiated this Third Adversary seeking a permanent injunction against Schloemer prohibiting her from initiating (or, presumably, from continuing to litigate) any state court action related to the judgment of divorce. See Complaint (Adv. Dkt. No. 1). Schloemer raises many issues in the Motion to support her contention that this Court should dismiss

the Third Adversary. The Court finds it necessary only to address her claim “that the [Third Adversary] seeks to circumvent required appellate procedure” See Motion ¶ 2.

The filing of a notice of appeal divests a bankruptcy court of “its control over those aspects of the case involved in the appeal.” Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58 (1982). Although “the bankruptcy court retains jurisdiction to address elements of the bankruptcy proceeding that are not the subject of that appeal,” once a notice of appeal is filed, jurisdiction is conferred upon the appellate court. Texas Comptroller of Public Accounts v. Transtexas Gas Corp. (In re Transtexas Gas Corp.), 303 F.3d 571, 580 & n.2 (5th Cir. 2002). The bankruptcy court, for example, may not enter an order addressing a post-judgment motion or any other aspect of a proceeding that is the subject of a pending appeal. Id.

In determining whether the Third Adversary would interfere with the pending appeal of the Memorandum Opinion entered in the Second Adversary, the Court is guided by the Fifth Circuit’s recent decision in Bank of New York Trust Co. v. Pacific Lumber Co. (In re SCOPAC), 624 F.3d 274 (5th Cir. 2010). There, the Fifth Circuit adopted a functional test: “[o]nce an appeal is pending, it is imperative that a lower court may not exercise jurisdiction over those issues which, although not themselves expressly on appeal, nevertheless so impact the appeal so as to interfere with or effectively circumvent the appeal process.” Id. at 280 (quoting Whispering Pines Estates, Inc. v. Flash Island, Inc. (In re Whispering Pines Estates, Inc.), 369 B.R. 752, 759 (1st Cir. BAP 2007).

Here, the issues raised in the Third Adversary are inseparable from those presented in the pending appeal in the Second Adversary. The gist of the Third Adversary is whether Schloemer’s conduct violates the permanent discharge injunction, which necessarily requires this Court to revisit

its ruling in the Memorandum Opinion.² In effect, the Third Adversary is a post-judgment motion related to another proceeding, the Second Adversary. For this reason, the Court lacks subject matter jurisdiction, and the Third Adversary must be dismissed.

As the Court announced from the bench at the end of the Hearing, the Court does not address any of the other issues raised by Schloemer in the Motion. By granting the Motion, it should not be construed that this Court agrees with Schloemer's interpretation of the Memorandum Opinion set forth in the State Court Motion. This Court does not intend for its dismissal of the Third Adversary to adjudicate the merits of the claims asserted therein by Moyer. Pending appeal of the Memorandum Opinion, the Court simply lacks jurisdiction to consider any of these matters.

IT IS THEREFORE ORDERED that the Motion hereby is granted, as specified herein.

IT IS FURTHER ORDERED that the Third Adversary hereby is dismissed without prejudice.

IT IS FURTHER ORDERED that the parties each are to bear their own costs.

SO ORDERED.



Neil P. Olack
United States Bankruptcy Judge

Dated: March 29, 2011

² Notably, the first seven pages of the Complaint filed by Moyer in the Second Adversary are nearly identical to the Complaint he filed in the Third Adversary. (Case No. 09-05055-NPO, Adv. Dkt. No. 1; Case No. 11-05002-NPO, Adv. Dkt. No. 1).