SO ORDERED,

Judge Katharine M. Samson
United States Bankruptcy Judge
Date Signed: August 15, 2016

The Order of the Court is set forth below. The docket reflects the date entered.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

IN RE: JERRY W. ROBINSON	**CASE NO. 15-51611-KMS**
DEBTOR	**CHAPTER 13**
KAREN W. ROBINSON	**DEBTOR/PLAINTIFF**
V.	**ADV. NO. 15-06029-KMS**
JERRY W. ROBINSON	**CREDITOR/DEFENDANT**

ORDER DENYING MOTION FOR SUMMARY JUDGMENT AND GRANTING SUMMARY JUDGMENT IN FAVOR OF NONMOVANT

This matter is before the Court on the Amended Motion for Summary Judgment (Adv. Dkt. No. 35)[1] filed by Jerry W. Robinson and the Response (Adv. Dkt. No. 40) filed by Karen W. Robinson. The Court finds that, because there are no disputed issues of material fact, summary judgment should be granted in favor of Karen W. Robinson on all issues in the adversary complaint.

[1] Unless stated otherwise, citations to the record are as follows: (1) citations to docket entries in the adversary proceeding, Adv. Proc. No. 15-06029-KMS, are cited as "Adv. Dkt. No. ___"; and (2) citations to docket entries in the main bankruptcy case, Case No. 15-51611-KMS, are cited as "Dkt. No. ___".

I. Jurisdiction

The Court has jurisdiction over the parties to and the subject matter of this proceeding pursuant to 28 U.S.C. § 1334. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (I) & (O).[2]

II. Findings of Fact

Jerry W. Robinson ("Jerry") and Karen W. Robinson ("Karen") were divorced on November 28, 2007, in the Smith County Chancery Court after thirty-six years of marriage. Adv. Dkt. No. 36 at 1. On November 19, 2009, the chancery court entered an Agreed Final Judgment Approving Property Settlement Agreement. Adv. Dkt. No. 39 at 1-2. Jerry and his attorney prepared the settlement agreement.[3] Relevant to this adversary proceeding, Jerry and Karen agreed:

(1) Karen would retain the marital home. Adv. Dkt. No. 39 at 4.

(2) Jerry would pay the indebtedness[4] on the marital home and quitclaim his interest in the home to Karen. Adv. Dkt. No. 39 at 5, 7.

(3) Jerry would pay Karen $1,200.00 per month in alimony until she reached sixty-five years of age. Adv. Dkt. No. 39 at 10.

The settlement agreement also included a section entitled "Bankruptcy and Hold Harmless Agreement:"

> With respect to the parties' responsibility for the payment of those certain debts and liabilities and their obligations to hold each other harmless for payment thereof, as any such liabilities and obligations described herein, the parties

[2] Pursuant to Federal Rule of Civil Procedure 52, made applicable here by Federal Rules of Bankruptcy Procedure 9014(c) and 7052, the following constitutes the findings of fact and conclusions of law of the Court.

[3] Adv. Dkt. No. 38 at 2. Karen's counsel in this case also represented her during the divorce and negotiation of the settlement agreement. *See* Adv. Dkt. No. 39 at 11 (listing attorneys for Jerry and Karen). Jerry did not contest the allegation that he drafted the settlement agreement in his response.

[4] The mortgage was in Karen's name. Adv. Dkt. No. 38 at 2.

> understand and agree that any such obligations are in the form of spousal support and are non-dischargeable debts under the Bankruptcy Code and are spousal support and in the event that either shall hereafter file for bankruptcy under any chapter of the code, they shall reaffirm any debt they have agreed to pay by the terms and conditions of this document, this obligation being part of the financial support settlement between the parties.

Adv. Dkt. No. 39 at 8.

On September 29, 2012, the Smith County Chancery Court entered an Order of Contempt of Court and Other Relief against Jerry for failure to comply with the terms of the property agreement. Adv. Dkt. No. 1-1 at 1-4. Karen was awarded $72,876.00. Adv. Dkt. no. 1-1 at 4. The chancellor noted that, on May 11, 2010, Karen had previously obtained a contempt judgment against Jerry for failure to meet the financial obligations of the settlement agreement. Adv. Dkt. No. 1-1 at 2. On January 25, 2015, the Jasper County Chancery Court (where, according to his bankruptcy filings, Jerry currently resides and owns property) enrolled Karen's contempt judgment and entered a writ of *fieri facias*.[5] Adv. Dkt. No. 1-1 at 11-16. A sheriff's sale on Jerry's property was noticed out on September 17, 2015, with the sale[6] to be conducted on October 7, 2015. Adv. Dkt. No. 1-1 at 18-19.

Jerry filed a petition for Chapter 13 relief on October 6, 2015. Dkt. No. 1. Jerry listed Karen as an unsecured nonpriority creditor with a claim of $72,876.00. Dkt. No. 3 at 13. Jerry also scheduled his 100-acre property in Jasper County as his homestead with a value of $70,000.00. Dkt. No. 3 at 3. Jerry is claiming an exemption for the entire $70,000.00 value through the homestead exemption under Mississippi Code Section 85-3-21. Dkt. No. 3 at 8.

[5] A writ of *fieri facias* (from the Latin for "that you cause to be done") is "[a] writ of execution that directs a marshal or sheriff to seize and sell a judgment debtor's property to satisfy a money judgment." *Fieri facias*, Black's Law Dictionary (10th ed. 2014); *see also* Miss. Code Ann. § 11-5-81 (1972).

[6] The sheriff's sale was completed the day after Jerry filed for bankruptcy. On October 14, 2015, Jerry initiated an adversary proceeding against Karen for turnover based on this improper sheriff's sale. Dkt. No. 12; *see also* No. 16-06025-KMS. Jerry is seeking damages for violation of the automatic stay and rescission of the sheriff's sale. This opinion does not resolve that adversary proceeding.

Karen filed a proof of claim, listing an unsecured debt of $72,876.00 for domestic support obligations ("DSO"). Claim 3-1. On December 1, 2015, Karen initiated this adversary complaint, objecting to the discharge of her debt. Dkt. No. 16; Adv. Dkt. No. 1. On January 11, 2016, Jerry objected to the proof of claim, asserting that the debt is for "property settlement rather than spousal support." Dkt. No. 25. On March 17, 2016, the Court held a hearing on the objection and decided to hold the objection in abeyance pending the resolution of this adversary proceeding. Dkt. Nos. 41, 46.

In the adversary, Jerry moved for summary judgment on April 19, 2016. Adv. Dkt. No. 35. Karen responded on April 19, 2016. Adv. Dkt. No. 38. And Jerry filed a reply on May 16, 2016. Adv. Dkt. No. 40. In the main case, Karen filed a motion for relief from the automatic stay as to Jerry's property in Jasper County on June 15, 2016. Dkt. No. 66. On July 22, 2016, Jerry filed a motion to avoid Karen's lien on his property arguing that there was no nonexempt equity in the property for the lien to attach. Dkt. No. 78. A status conference on the motion to lift stay is set on August 18, 2016 (Dkt No. 83), and the motion to avoid lien is not yet set for hearing.

III. Conclusions of Law

A. Summary Judgment Standard

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also* Fed. R. Bankr. P. 7056 (applying Rule 56[7] to adversary proceedings). "A fact is 'material' if its resolution in favor of one party might affect the outcome of the lawsuit under governing law. An issue is 'genuine' if the evidence is sufficient for a reasonable [fact-finder] to return a verdict for the non-moving party." *Ginsberg 1985 Real Estate P'ship v. Cadle Co.*, 39 F.3d 528, 531 (5th Cir. 1994) (citations omitted). The moving party bears the initial

[7] For convenience, references to the Federal Rules of Civil Procedure are shortened to "Rule ___".

responsibility of apprising the court of the basis for its motion and the parts of the record which indicate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

"Once the moving party presents the . . . court with a properly supported summary judgment motion, the burden shifts to the nonmoving party to show that summary judgment is inappropriate." *Morris v. Covan World Wide Moving, Inc.*, 144 F.3d 377, 380 (5th Cir. 1998). "The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). But the nonmovant must meet his burden with more than metaphysical doubt, conclusory allegations, unsubstantiated assertions, or a mere scintilla of evidence. *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994). A party asserting a fact is "genuinely disputed must support the assertion by: (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations . . . , admissions, interrogatory answers, or other materials. . . ." Fed. R. Civ. P. 56(c)(1)(A).

Summary judgment must be rendered when the nonmovant "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322.

The court may also "[a]fter giving notice and a reasonable time to respond . . . grant summary judgment for a nonmovant. . . ." Fed. R. Civ. P. 56(f)(1). "If one party moves for summary judgment, the court *sua sponte* may grant summary judgment for the nonmoving party provided all of the procedural safeguards of Rule 56 are followed." *McCarty v. United States*, 929 F.2d 1085, 1088 (5th Cir. 1991) (citing *British Caledonian Airways Ltd. v. First State Bank of Bedford, Tex.*, 819 F.2d 593, 595 (5th Cir. 1987)). The Court finds that the procedural

safeguards of Rule 56 have been met and that no issues of material fact remain to preclude an award of summary judgment to either party.

B. Nondischargeability

At issue in this case is whether the debt owed by Jerry to Karen is a DSO under the Bankruptcy Code. Jerry has already conceded that $12,000.00 of the debt is a DSO because the chancery court specifically refers to it as alimony. So, it is left for the Court to decide whether the remainder of the judgment entered by the chancery court, $60,876.00 related to the mortgage on the marital home, qualifies as a DSO or some other post-marital obligation.

> In cases under Chapters 7, 11, and 12 of the Bankruptcy Code, the distinctions between DSOs, governed by Section 523(a)(5),[8] and other types of post-marital obligations, governed by Section 523(a)(15),[9] are immaterial because both types of debts are nondischargeable and must be paid in full. *In re Douglas*, 369 B.R. 462, 465 (Bankr. E.D. Ark. 2007); *see* 4 *Collier on Bankruptcy* ¶ 523.02 at 523–15–16. But in Chapter 13 cases, an important distinction is drawn. DSOs may not be discharged in a Chapter 13 plan. 11 U.S.C. § 1328(a)(2); 11 U.S.C. § 523(a)(5). However, other post-marital obligations, including property settlements, are dischargeable in Chapter 13. 11 U.S.C. § 1328(a)(2); 11 U.S.C. § 523(a)(15); *Douglas*, 369 B.R. at 465.

In re Johnson, 397 B.R. 289, 295 (Bankr. M.D.N.C. 2008).

The Court notes that it is not bound by what the parties called the obligation to pay the mortgage on the marital home. *See Joseph v. J. Huey O'Toole, P.C. (In re Joseph)*, 16 F.3d 86, 88 (5th Cir. 1994) ("Thus, we must place substance over form to determine the true nature and purpose of the award, regardless of the label used."). "Whether a particular obligation constitutes alimony, maintenance, or support within the meaning of [Section 523(a)(5)] is a matter of federal bankruptcy law, not state law." *Biggs v. Biggs (In re Biggs)*, 907 F.2d 503, 504 (5th Cir. 1990).

[8] A debt "for a domestic support obligation" is excepted from discharge. 11 U.S.C. § 523(a)(5) (2010).

[9] A debt "to a spouse, former spouse, or child of the debtor and not" a DSO "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" is excepted from discharge. § 523(a)(15).

> Under bankruptcy law, the intent of the parties at the time a separation agreement is executed determines whether a payment pursuant to the agreement is alimony, support or maintenance within the meaning of section 523(a)(5). *See generally In re Davidson*, 947 F.2d 1294, 1296-97 (5th Cir. 1991); *In re Gianakas*, 917 F.2d 759, 762 (3d Cir. 1990). A written agreement between the parties is persuasive evidence of their intent. *Tilley v. Jessee*, 789 F.2d 1074, 1077 (4th Cir. 1986). Thus, if the agreement between the parties clearly shows that the parties intended the particular debt in question to reflect either support or a property settlement, then that characterization will normally control. *In re Yeates*, 807 F.2d 874 (10th Cir. 1986). On the other hand, if the agreement is ambiguous, then the court must determine the parties' intentions by looking to extrinsic evidence. *Id.* If an agreement fails to provide explicitly for spousal support, a court may presume that a so-called "property settlement" is intended for support when the circumstances of the case indicate that the recipient spouse needs support. *Stout v. Prussel*, 691 F.2d 859, 861 (9th Cir. 1982); *Shaver v. Shaver*, 736 F.2d 1314, 1316 (9th Cir. 1984) (J.M. Wisdom, J., sitting by designation).

Milligan v. Evert (In re Evert), 342 F.3d 358, 368 (5th Cir. 2003). Bankruptcy courts look to state law when considering extrinsic evidence. *See, e.g., Nunnally v. Nunnally (In re Nunnally)*, 506 F.2d 1024, 1026-27 (5th Cir. 1975) (discussing Texas law factors); *see* Collier Family Law and the Bankruptcy Code ¶ 6.03[2] (2015) ("[A]lthough state law is not dispositive, a court making a dischargeability determination can and should look to state law for guidance in making its decision."). But the Court need not consider extrinsic evidence if it finds no ambiguity in the settlement agreement. *Littleton v. Littleton (In re Littleton)*, 189 F. App'x 294, 296 (5th Cir. 2006) (citing *In re Evert*, 342 F.3d at 368-69).

Thus, the Court looks first to the agreement itself to see whether there exist indicia of Jerry and Karen's intent that this obligation be either support or property settlement. That Jerry would pay the indebtedness on the marital home is stated twice in the settlement agreement. First, it is included in a section titled "Division of Property:"

> A. Real Property
>
> 1. Wife shall have exclusive use, possession and title to the parties' marital home and the land upon which it is situated . . .

> 2. Husband shall pay the indebtedness due on the marital home and property upon which it is situated, and he shall hold Wife harmless from same. . . .

Adv. Dkt. No. 39 at 4-5. The obligation is again listed in a section titled "Covenants as to All Debts:"

> A. Specific Debts
>
> 1. Husband shall pay any indebtedness on the parties' marital home and the land upon which it is situated and all other mortgages on said property, if any.

Adv. Dkt. No. 39 at 7. Finally, in the same section, the settlement agreement also states

> D. Bankruptcy and Hold Harmless Agreement
>
> With respect to the parties' responsibility for the payment of those certain debts and liabilities and their obligations to hold each other harmless for payment thereof, as any such liabilities and obligations described herein, *the parties understand and agree that any such obligations are in the form of spousal support and are non-dischargeable debts under the Bankruptcy Code and are spousal support* and in the event that either shall hereafter file for bankruptcy under any chapter of the code, they shall reaffirm any debt they have agreed to pay by the terms and conditions of this document, this obligation being part of the financial support settlement between the parties.

Adv. Dkt. No. 39 at 8 (emphasis added).

The question is whether listing the obligation to repay the mortgage under the real property section of the settlement agreement and under the covenants as to debts section creates an ambiguity. The Court finds that it does not. The obligation to repay the mortgage does not convey an interest in real property between the parties in and of itself but merely relates to it, and its inclusion in that section does not contradict its inclusion in the later section. It is the same obligation, merely repeated. The bankruptcy and hold harmless agreement provides clear evidence of Jerry and Karen's intent to treat this obligation as support. *See Wade v. Cunningham (In re Wade)*, No. 13-67411, 2014 WL 3672137, at *4 (Bankr. N.D. Ga. Apr. 30, 2014) (citing *Engram v. MacDonald (In re MacDonald)*, 194 B.R. 263, 287 (Bankr. N.D. Ga. 1996))

("[P]rovisions precluding discharge in an agreement are against public policy, but do provide some evidence of the intentions of the parties."). This provision states that the debts Jerry has undertaken to pay on behalf of Karen are considered spousal support. According to the settlement agreement, the *only* debt that Jerry is obligated to pay on behalf of Karen is the mortgage on the marital home.

The Court finds that these provisions are an unambiguous expression of Jerry and Karen's intent to treat Jerry's obligation to repay the mortgage on the marital home as spousal support[10] which is nondischargeable in bankruptcy under Section 523(a)(5). Because the Court finds the settlement agreement language to be unambiguous, it does not consider any extrinsic evidence. *See In re Littleton*, 189 F. App'x at 296. The Court's decision today is in line with precedent in the Fifth Circuit where other bankruptcy courts "have found that a debtor's obligation to make mortgage payments on a home awarded to his or her former spouse is a domestic support obligation." *Cowan v. Cowan (In re Cowan)*, Adv. No. 14-03110, Bankr. No. 14-30389, 2014 WL 4418261, at *3 (Bankr. S.D. Tex. Sept. 5, 2014) (listing cases).[11]

IT IS HEREBY ORDERED THAT the Amended Motion for Summary Judgment (Adv. Dkt. No. 35) is DENIED.

FURTHER ORDERED THAT summary judgment is GRANTED in favor of Karen Robinson on the issue of dischargeability. The entirety of the contested debt owed by Jerry

[10] There are potential tax benefits to be gained by characterizing post-marital obligations as spousal support. *See* 26 U.S.C. § 215 (1984) (deduction for payment of alimony or separate maintenance).

[11] The Court also notes that while the absence of a specific award for alimony creates a presumption that a property related award was intended as an alimony-substitute, the presence of an alimony award does not create an opposite presumption, especially where the award is trivial. *See In re Evert*, 342 F.3d at 368-69. $1,200.00 in alimony per month provides Karen $14,400.00 per year. In 2007, one-person households earning $10,210.00 or less fell below the federal poverty line. Annual Update of the HHS Poverty Guidelines, 72 Fed. Reg. 3147 (Jan. 24, 2007). Today, the line is $11,880.00. Annual Update of the HHS Poverty Guidelines, 81 Fed. Reg. 4036 (Jan. 25, 2016). Without payment of the mortgage, Karen's alimony payment would barely allow her to live above the poverty line at the time of the divorce.

Robinson to Karen Robinson awarded in the Smith Country Chancery Court is nondischargeable as a debt in the nature of support under 11 U.S.C. § 523(a)(5).

##END OF ORDER##