

United States Bankruptcy Court
Northern District of Illinois
Eastern Division

Transmittal Sheet for Opinions for Posting

Will this opinion be published? No

Bankruptcy Caption: *In re Heather Kolaski*

Bankruptcy No.: 19-36229

Adversary Caption: *Kolaski v. Kolaski*

Adversary No.: 20-00110

Date of Issuance: August 10, 2020

Judge: Deborah L. Thorne

Appearance of Counsel:

Nathan E. Delman
Horwood Marcus & Berk Chartered
Attorney for Plaintiff

Robin C. Reizner
2720 S. River Road, #58
Des Plaines, IL 60018
Attorney for Defendant

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re:)	Chapter 7
)	
Heather Kolaski)	Case No. 19-36229
)	
Debtor.)	Judge Deborah L Thorne
)	
_____)	
Brandon Kolaski)	
)	Adversary No. 20-00110
Plaintiff,)	
)	
v.)	
)	
Heather Kolaski)	
)	
Defendant.)	

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT¹

This matter comes before the court on the Motion for Summary Judgment filed by Brandon Kolaski against the debtor, Heather Kolaski. Brandon seeks to have his claims for attorneys' fees, a contempt judgment and a smaller amount for child support determined to be nondischargeable. The court has reviewed the parties' pleadings and determines that Brandon is entitled to an order for summary judgment as his claims are nondischargeable under 11 U.S.C. § 523(a)(5) and (15) as explained below.

Relevant Background

Brandon is the ex-husband of Heather. The Parties were married in 1997 and filed for dissolution of marriage in the Circuit Court of Cook County in 2010. The judgment of divorce

¹ This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334(b), §157(b)(2)(I) and (J). Venue is proper in this district pursuant to 28 U.S.C. § 1409.

was entered on 2013. Heather and Brandon have four children together. Since the judgment of divorce, there have been multiple post-decree matters litigated in the Circuit Court. In the summer of 2019, Brandon filed a Motion to Modify Vacation and Child Related Expenses, Petition for Rule, Request for Fees related to his Emergency Motion to Enforce and Petition for College Contributions (the “Post-Decree Motion”). On September 26, 2019, the Circuit Court entered an order in response to the Post-Decree Motion. The Order granted several of Brandon’s requests, specifically, the Order compels Heather to pay: \$500.00 for a minor child’s laptop, \$5,731.00 to purge contempt, and \$6,636.00 for Brandon’s attorney fees.

Heather filed a chapter 7 bankruptcy petition on December 26, 2019. She scheduled two nonpriority general unsecured claims owed to Brandon, \$5,731.00 for “Reimbursement for Children’s expenses” and \$6,636.00 for “Reimbursement of Attorney’s Fees”. Brandon objects to the dischargeability of the claims under 11 USC § 523(a)(5) maintaining that the claims are domestic support obligations.

DISCUSSION

Applicable Standards for Summary Judgment

In order to prevail on a motion for summary judgment, the movant must meet the criteria set forth in Rule 56 of the Federal Rules of Civil Procedure, made applicable to adversary proceedings by Federal Rule of Bankruptcy Procedure 7056. Rule 56 states that “[t]he court shall grant summary judgment 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 Estate of Allen v. City of Rockford*, 349 F.3d 1015, 1019 (7th Cir. 2003).

The existence of a material factual dispute is sufficient to preclude summary judgment only if the disputed fact is determinative of the outcome under applicable law. *Anderson v.*

Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). “[S]ummary judgment is not an appropriate occasion for weighing the evidence; rather, the inquiry is limited to determining if there is a genuine issue for trial.” *Lohorn v. Michal*, 913 F.2d 327, 331 (7th Cir. 1990). All reasonable inferences drawn from the underlying facts must be viewed in a light most favorable to the party opposing the motion. *Roger Whitmore’s Auto Sers., Inc. v. Lake County, Ill.*, 424 F.3d 659, 666–67 (7th Cir. 2005).

The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party establishes the absence of a genuine issue of material fact, however, the burden shifts to the non-moving party to “do more than simply show that there is some metaphysical doubt as to the material facts.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

Heather has failed to properly plead a response as she has not filed a supporting memorandum of law or a concise response to Brandon’s statement of facts as required under Local Rule 7056-2(A)9(1). In fact, she has not furnished any affidavits or references to the record that she relies upon. There appear to be no disagreements as to material facts, however, except as to the underlying nature of a portion of the attorney’s fees in the second claim. Although her response in opposition to the motion for summary judgment could be stricken for failure to comply, the court will deem all material facts set forth in Brandon’s statement, except for the nature of the attorney’s fees, as admitted by Heather as they are not controverted by Heather.

Nondischargeability under § 523(a)(5)

Domestic support obligations are exempt from discharge in bankruptcy under Bankruptcy Code sections 1328(c)(2) and 523(a), and entitled to priority under 507(a)(1)(A). Every circuit,

including the Seventh Circuit, has recognized that attorney fee awards may constitute “support” under the Bankruptcy Code. *Eden v. Robert A. Chapski, Ltd.*, 405 F.3d 582, 588 (7th Cir. 2005); *In re Rugiero*, 502 Fed.Appx. 436, 439 (6th Cir. 2012) (collecting cases). In *In re Trentadue*, 837 F.3d 743, 747 (7th Cir. 2016), the Seventh Circuit held a claim must satisfy all four requirements under section 101(14A) to qualify as a domestic support obligation. Specifically, section 101(14A) defines a domestic support obligation as,

a debt that accrues before, on, or after the date of the order for relief in a case under this title, including interest that accrues on that debt as provided under applicable nonbankruptcy law notwithstanding any other provision of this title, that is—

(A) owed to or recoverable by—

(i) a spouse, former spouse, or child of the debtor or such child’s parent, legal guardian, or responsible relative; or

(ii) a governmental unit;

(B) in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of such spouse, former spouse, or child of the debtor or such child’s parent, without regard to whether such debt is expressly so designated;

(C) established or subject to establishment before, on, or after the date of the order for relief in a case under this title, by reason of applicable provisions of—

(i) a separation agreement, divorce decree, or property settlement agreement;

(ii) an order of a court of record; or

(iii) a determination made in accordance with applicable nonbankruptcy law by a governmental unit; and

(D) not assigned to a nongovernmental entity, unless that obligation is assigned voluntarily by the spouse, former spouse, child of the debtor, or such child’s parent, legal guardian, or responsible relative for the purpose of collecting the debt.

11 U.S.C. § 101(14A).

Brandon argues that his claims are nondischargeable under § 523(a)(5) and therefore Heather’s discharge under section 727 . . . does not discharge her for his claims. Brandon’s claims meet the requirements under section 101(14A) as he is Heather’s former spouse and seeks to recover an amount based upon a finding of contempt against Heather by the Circuit Court for

failure to pay child support. Thus, the contempt award meets the criteria for a domestic support obligation.

The determination of whether the \$6,636.00 claim for “Reimbursement of Attorney’s Fees” is “in the nature of support” is a question of federal bankruptcy law, not state law. *In re Reines*, 142 F.3d 970, 972 (7th Cir. 1998). As such, this court is “not bound by the labels attached to the obligation” under state law. *Id.* Rather, this court employs a functional approach that “look[s] beyond the language of a[n award] to the intent of the parties and to the substance of the obligation.” *In re Goin*, 808 F.2d 1391, 1392 (10th Cir. 1987). Since there is no settlement agreement between the parties at issue, this court must look to the intent of the state court in rendering its judgment and fee award. *See Cummings v. Cummings*, 244 F.3d 1263, 1266 (11th Cir. 2001) (“[T]he bankruptcy court should have examined the intent of the divorce court before making a determination that no portion of the equitable distribution was in the nature of support.”).

Three factors are considered to determine the intent of a state court imposing a judgment in a family-court setting: “(1) the language and substance of [a judgment] in the context of the surrounding circumstances, using extrinsic evidence if necessary; (2) the parties' financial circumstances at the time of [the judgment]; and (3) the function served by an obligation at the time of [the judgment].” *Trentadue*, 837 F.3d at 748; 9D Am. Jur. 2d Bankruptcy § 3646 (2016) (citing *In re Gianakas*, 917 F.2d 759 (3d Cir. 1990)). “[E]xceptions to discharge are to be [construed] strictly against a creditor and liberally in favor of the Heather.” *In re Morris*, 223 F.3d 548, 552 (7th Cir. 2000) (internal quotation marks omitted). The underlying policy of the provision exempting DSOs from discharge “favors enforcement of familial support obligations over a ‘fresh start’ for the debtor.” *In re Miller*, 55 F.3d 1487, 1489 (10th Cir. 1995).

The \$6,636 claim for attorney's fees was actually broken down into three different awards by the Circuit Court. Specifically, the Order reads as follows:

Paragraph 2 (b): HEATHER shall pay for BRANDON's attorney's fees, in the amount of \$ 2024.00, related to said contempt, as there was no cause or justification for her failure to contribute.

Paragraph 5: BRANDON shall be awarded his attorney's fees related to the Emergency Motion to Enforce in the amount of \$ 2612.00.

Paragraph 6. BRANDON is further awarded fees related to his Motion to Modify due to HEATHER'S failure to comply with discovery request which resulted in delays in this litigation. HEATHER shall pay BRANDON \$2000.00 toward his attorney fees.

Regarding the award provided in Paragraph 2(b), the language and substance of the judgment indicates that the attorney's fees were tied to the support of the parties' children. The Order states that Heather "shall pay for [debtor's] attorney's fees... related to said contempt, as there was no cause or justification for her failure to contribute." As explained above, Heather was held in contempt for failure to pay for the support of her children. In its order, the Circuit Court stated, that it "reviewed and considered all relevant motions, responses, replies, oral arguments, relevant legal authority and hearing exhibits and the Court being fully advised in the premises." This would seem to indicate that it considered the financial ability of the two parties to pay and only awarded the fees after a party capable of paying violated prior orders and agreements. The function of the order was to compensate Brandon for the attorney's fees he incurred to obtain Heather's compliance with her child support obligations. Accordingly, the second requirement of § 101(14A) is satisfied for the claim for the attorney's fees awarded in Paragraph 2(b).

Looking again to the claim to purge contempt and the award for attorney's fees provided in Paragraph 2, both of these debts stem from the divorce decree, as well as "an order of a court of record." The Circuit Court ordered Heather to make these payments to Brandon, thus

satisfying the third requirement of § 101(14A). Neither of the claims have been assigned to a nongovernmental entity and remain with Brandon. Thus, the final requirement of § 101(14A) is satisfied

Heather argues that she has similar countervailing claims for reimbursement against Brandon and thus this court should set off those claims against Brandon's claims. The existence of countervailing claims is not relevant for two reasons. First, Heather did not list any of these claims against Brandon as an asset on her bankruptcy schedules and thus no mutual debt exists for this court to set off against Brandon's claims. And second, the existence of countervailing reimbursement claims does not affect the nondischargeability of Brandon's claims especially as Heather raised this before the Circuit Court which apparently denied it.

Having satisfied all four requirements of section 101(14), Brandon has established that his claim to purge Heather's contempt for \$5,731 and his claim for attorney's fees provided for in Paragraph 2 of the Circuit Court's order for \$2,024 are for domestic support obligations and thus are nondischargeable under section 523(a)(5). Brandon's motion for summary judgment is granted regarding his \$5,731 claim for reimbursement and for the \$2,024 portion of his claim for attorney's fees.

There is still an issue of material fact regarding the award for attorney's fees under section 523(a)(5) provided in Paragraph 5 and 6 of the Circuit Court's order. Brandon's motion for summary judgment related to Paragraphs 5 and 6 is denied under section 523(a)(5) and will be considered under 523(a)(15).

Nondischargeability under § 523(a)(15)

Brandon also argues that his claims are nondischargeable under section 523(a)(15). This section provides that any debt "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” is excepted from discharge. 11 U.S.C. § 523(a)(15); *In re Williams*, 398 B.R. 464 (Bankr. N.D. Ohio 2008).

The record presented to this court does not describe paragraphs 5 and 6 of the Circuit Court Order as domestic support obligations. But, an examination of the Order makes it clear that they are nondischargeable under 523(a)(15) as they are debts owed to Brandon, Heather’s former spouse, they are not domestic support obligations under 523(a)(5), and were incurred in connection with an order of a court of record.² Specifically, the Circuit Court ordered Heather to compensate Brandon for attorney’s fees he incurred in the course of litigating various parental and marital issues arising from the parties’ divorce. Brandon has satisfied all three requirements for nondischargeability under § 523(a)(15) and his motion for summary judgment is granted regarding the \$2,612 and \$2,000 portions of his claim for attorney’s fees.

CONCLUSION

The claims of Brandon Kolaski against Heather Kolaski in the amount of \$5,731 and \$2,024 are nondischargeable under § 523(a)(5). The claims of Brandon Kolaski against Heather Kolaski in the amount of \$2,612 and \$2,000 are nondischargeable under § 523(a)(15).

ENTER:

Dated: August 10, 2020

Honorable Deborah L. Thorne
United States Bankruptcy Judge

² It is possible that the Circuit Court considered Paragraphs 5 and 6 as domestic support obligations and thus they would have been nondischargeable under 523(a)(5). This court, however, does not know how the Circuit Court viewed this portion of its order and neither party has explained this. In spite of that, this court finds that they are nondischargeable under (a)(15). If they are not domestic support obligations, they clearly are based in an order of a court of record and owed to Brandon.