

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE
SOUTHERN DISTRICT OF GEORGIA
Augusta Division

IN RE:)	Chapter 7 Case
)	Number <u>89-10798</u>
ROY GEORGE ROLLINS)	
)	FILED
Debtor)	at 9 O'clock & 16 min. P.M.
)	Date: 10-23-89
GLORIA W. ROLLINS)	
)	
Plaintiff)	
)	
vs.)	Adversary Proceeding
)	Number <u>89-1045</u>
ROY GEORGE ROLLINS)	
)	
Defendant)	

MEMORANDUM AND ORDER

Gloria W. Rollins (hereinafter "Ms. Rollins") has brought this adversary proceeding against Roy George Rollins (hereinafter "debtor"), debtor in the underlying Chapter 7 bankruptcy petition, pursuant to 11 U.S.C. §523(a)(5) seeking a determination that a portion of the debtor's obligations under a judgment and decree of total divorce between the parties to this litigation are nondischargeable in the debtor's Chapter 7 case. Based upon the evidence put forth at trial, this court makes the following findings of fact and conclusions of law

FINDINGS OF FACT

By agreement dated November 25, 1987 the debtor and Ms. Rollins entered into a final settlement agreement settling all questions of separation, alimony and property division between the parties which agreement was incorporated into the final

decree of total divorce. The terms of the settlement agreement are not at issue. The settlement agreement provides in pertinent part:

At page 2:

2. ACCEPTANCE AND MUTUAL RELEASE

Each of the parties accepts the undertakings hereto in full and complete settlement and release of all claims and demands of every kind, name or nature against the other party hereto, including all liability now or at any time hereafter existing or accruing on account of support, maintenance, alimony, (temporary or permanent), dower, curtesy, or other allowances, either statutory or arising at common law, incident to the marriage relation, except as herein specifically provided, and after this settlement, the Husband (debtor herein) and Wife (Ms. Rollins) shall require nothing of the other, except as herein specifically provided.

At page 3:

6. AUTOMOBILES

The Husband does hereby grant, bargain, convey and quit claim to the Wife any and all right, title and interest he may have in and to one (1) 1987 Nissan 300 ZX automobile subject to the outstanding indebtedness thereon owed to First Atlanta Bank with monthly payments in the sum of \$629.50 Dollars which the Husband does hereby agree to assume and satisfy as the same becomes due and payable until the outstanding indebtedness thereon has been paid in full. Therefore, the Husband does hereby agree to execute documents of title, tag registration, and any other documents necessary to transfer

title to said vehicle to the Wife at the execution of this agreement, or as soon as the lienholder for said vehicle consents to a transfer by the Husband to the Wife, but in no event later than satisfaction of the outstanding indebtedness presently existing upon said vehicle.

The Wife does hereby grant, bargain, convey and quit claim to the Husband any and all right, title and interest she may have in and to one (1) 1979 Buick automobile and one (1) 1984 Buick Century automobile subject to the outstanding indebtedness thereon which the Husband does hereby agree to assume and satisfy as the same becomes due and payable.

At page 5:

8. DIVISION OF REAL PROPERTY a) The parties hereto jointly own the property known and designated as 440 Aumond Road, Richmond County, Georgia. The Husband does hereby grant, bargain, convey and quit claim to the Wife an undivided 1/2 interest in and does agree to execute simultaneously herewith a quit claim deed transferring to the Wife an undivided 1/2 interest in and

to the following property:

Legal description of property at 440 Aumond Road,
Augusta, Richmond County, Georgia omitted]

The Husband shall assume and otherwise satisfy the first mortgage outstanding upon said property owed to Williamsburg Savings and Loan with monthly payments in the sum of \$185.00 and to pay the monthly indebtedness thereon as the same becomes due, and a second mortgage on said property owed to Banker's First with monthly payments in the sum of \$800.00, and agrees to pay the monthly indebtedness thereon as the same becomes due. The Husband shall hold the Wife harmless from the claims of both aforesaid creditors, including principal, interest, attorneys fees and costs of collection which may be incurred as a result of defending any action against the Wife by either of said creditors.

The Husband has heretofore vacated the marital property of the parties and the Husband agrees that the Wife shall be entitled to the continued, exclusive use and possession of said property and the Wife agrees to assume and otherwise satisfy all maintenance and utilities upon said property except that the Husband agrees to pay 60% of the costs of any major repair to the said property while the property is jointly owned by the parties as herein provided. A major repair to said property shall be defined as any repair the costs of which exceeds the sum of \$250.00. The Wife shall be responsible and agree to pay all other expenses and necessary living expenses incurred by her as a result of her use and possession of said property. The parties agree to sell said property upon the occurrence of any of the following events:

- a) In the event the Wife shall voluntarily vacate the marital residence;
- b) In the event of the death or remarriage of the Wife;
- c) In the event the Wife cohabits in a meretricious relationship with a person of the opposite sex.

Upon the event of sale, the parties hereto agree to place said property upon the open market for sale at a price mutually agreed upon between the parties. In the event the parties are unable to agree upon a sale price for said property, then in that event, each party shall choose a real estate appraiser of their own choice and the two real estate appraisers so chosen shall in turn choose a third appraiser who shall determine the sale price for said property, and the parties hereto agree to be bound by the sale price determined by the third appraiser as herein provided. The Husband agrees that the Wife shall be entitled to the continued, exclusive use and possession of said property until the sale of the same is consummated and the Husband shall continue to pay the monthly indebtedness due on said property, including taxes and insurance, prior to the consummation of any sale. Upon the sale of said property, the net proceeds shall be distributed equally

to the parties. The net proceeds shall mean the sum of money remaining after subtracting from the total sale price of said property all valid encumbrances against the property created on or before the date of the existence of this Agreement and all costs of sale including a reasonable broker's commission paid by the seller in the normal course, and in the event it is necessary for the services of real estate appraisers to be used as herein specified then the costs of said appraisers shall likewise be subtracted from the total sales price of said property.

If in the event a sale shall have not occurred prior to the Wife having reached the age of 65, then in that event, the Husband shall and does hereby agree, grant, bargain, convey and quit claim to the Wife all remaining interest that he may have in and to said property.

At page 8:

9. ALIMONY

The Husband agrees to pay the Wife as periodic alimony, for her support and maintenance, the sum of \$500.00 per month commencing January 1, 1988, and continuing on the first day of each and every month thereafter until the death of the Husband or Wife, or the remarriage of the Wife, whichever event first occurs.

The Husband agrees to maintain unencumbered life insurance upon his life in the minimum amount of \$50,000.00 for the benefit of the Wife and shall designate the Wife as irrevocable beneficiary thereof, and shall so maintain said insurance until the death of the Husband or Wife or the remarriage of the Wife or for a period of 10 years from the date hereof whichever event first occurs. Finally the Husband shall provide proof of such insurance to the Wife from time to time upon request.

The Husband agrees to maintain medical and hospital insurance for the benefit of the Wife equivalent to that presently maintained by the Husband until the death of the Husband or Wife or the remarriage of the Wife, whichever event first occurs . . .

The debtor does not deny that the obligations set forth under section 9. Alimony as referenced above are obligations in the nature of alimony, maintenance, or support and are nondischargeable in his bankruptcy proceeding pursuant to 11 U.S.C. §523(a)(5). The debtor contends that the remaining provisions pertaining to the automobile and the former marital residence are matters of property division which obligations are dischargeable in his bankruptcy proceeding.

Both parties were represented by counsel through the negotiations of the settlement agreement and divorce proceeding. Subsequent to the entry of the final judgment

of total divorce between the parties which incorporated the referenced final settlement agreement, correspondence was sent from then debtor's counsel to counsel then representing Ms. Rollins dated April 17, 1989 which correspondence provided in pertinent part:

This letter is written pursuant to your request . . . It is my understanding that you have requested that Mr. Rollins agree that all payments made in satisfaction of the debt on the automobile driven by Mrs. Rollins be declared property division and not alimony. Further, it is my understanding that you have requested that Mr. Rollins agree that all payments made in satisfaction of any outstanding indebtedness upon the real property likewise be deemed property division and not alimony.

The purpose of this letter is to acknowledge that the payments herein referenced are in fact in the nature of property division and not

alimony . . .

While not admitting that the inquiry was made by her counsel at her request, Ms. Rollins acknowledged that the recipient of the letter was her attorney acting on her behalf and that she was familiar with the contents of the correspondence. The debtor testified that the letter was written by his lawyer in response to an inquiry referenced in the letter from Ms. Rollins' attorney and did state the intent of the parties at the time the final settlement agreement was executed on November 25, 1987.

CONCLUSIONS OF LAW

In determining whether a particular debt falls within one of the exceptions of §523, the statute should be strictly construed against the objecting creditor and liberally in favor of the debtor. Any other construction would be inconsistent with the liberal spirit of the Bankruptcy Code favoring a discharge in order to effectuate a fresh start for the debtor. 3 Collier on Bankruptcy §523.05(A) (L. King 15th Ed. 1989); In re: Black, 787 F.2d 503 (10th Cir. 1986). In addition to this strict narrow construction given §523, the burden of proof rests with the party opposing dischargeability, and that burden requires proof by clear and convincing evidence. In re: Hunter, 780 F.2d 1577 (11th Cir. 1986); In re: Hyers, 70 B.R. 764 (Bankr. M.D. Fla. 1987). This burden of

proof remains with the party opposing dischargeability regardless of the procedural posture of the case. It is irrelevant whether the plaintiff is the debtor or creditor seeking a determination of dischargeability. The burden of proof does not depend upon which party brought the action, but which party opposes dischargeability. In the present action Ms. Rollins bears the burden of proving by clear and convincing evidence that the provisions of the settlement agreement that are at issue are obligations of the debtor which are "actually in the nature of alimony, maintenance or support." 11 U.S.C. §523(a)(5)(B).

The language of §523(a)(5) suggests a simple inquiry by this court as to whether the obligation can legitimately be characterized as being in the nature of support. In re: Harrell, 754 F.2d 902 (11th Cir. 1985). This section provides in pertinent part as follows:

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

(5) To a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a settlement agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit or property settlement agreement, but not to the extent that - . . .

(B) Such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support;

Under circumstances as in the present action, wherein the obligations at issue are contained in a voluntarily executed

settlement agreement between the spouses, a determination that those obligations are actually in the nature of alimony or support requires a determination that the parties had a mutual intent to have the obligations considered as such support at the time the agreement was made. In re: Long, 794 F.2d 928 (4th Cir. 1986), citing Melichar v. Ost, 661 F.2d 300, 302 (4th Cir. 1981), cert. denied, 456 U.S. 927, 102 S.Ct. 1974, 72 L. Ed. 2d. 442 (1982). Where the parties have reduced their agreement to writing, the writing in absence of ambiguity, mutual mistake or fraud is the sole expositor of the transaction and the intention of the parties.

Smith v. Crosrol, Inc., 498 F. Supp. 697 (M.D. Ala. 1980). This court has previously determined that in dischargeability disputes under §523(a)(5), where the obligations at issue are contained in a voluntarily executed settlement agreement between spouses, a determination that those obligations are actually in the nature of alimony, maintenance or support requires a determination that (1) the parties had a mutual intent to have the obligations considered as such support at the time the agreement was made with such intent, absent a showing of ambiguity, mutual mistake, or fraud, determined from the plain language of the agreement, and (2) the obligation at issue can legitimately be characterized as being in the nature of support. Clark v. Clark (In re: Clark), Ch. 7 case No. 88-11590, Adv. No. 89-1002 (Bankr. S.D. Ga. September 21, 1989). From the reading of the provisions of the settlement agreement at issue, this

court cannot determine whether the provisions of section dealing with the automobile or section 8 dealing with the marital residence are in the nature of alimony, maintenance or support or are property division. The settlement agreement does list a separate provision for alimony payments and as it pertains to the marital residence, this provision is designated DIVISION OF REAL PROPERTY. However, the terms calling for not only a transfer of a half interest in the marital residence of the debtor which occurred contemporaneously with the execution of the settlement agreement, but also the maintenance of future payments, carries language usually indicating a support obligation. The obligation to meet the payments on the mortgage continue so long as Ms. Rollins remains in the property and remains single. The settlement agreement read in its entirety is ambiguous as to the intent of the parties. Parole evidence is not only admissible, but in this case, necessary to determine the intent of the parties. The parole evidence rule is considered to be a rule of substantive law, not a rule of evidence. Merchants National Bank

& Trust Company v. Professional Men's Ass'n, 409 F.2d 600,602 (5th Cir., 1969) cert. denied 396 U.S. 1009, 90 S.Ct. 567, 24 L.Ed.2d 501 (1970); Freeman v. Continental Gin Co., 381 F.2d 459, 463 (5th Cir. 1967); Sperry Rand Corp. v. Industrial Supply Corp., 337 F.2d 363, 371 (5th Cir. 1964); Southern Stone Co. v. Singer, 665 F.2d 698 (5th Cir. 1982). Where, as here, a written agreement is ambiguous as to the intention of the parties, evidence otherwise competent, of acts

and transactions between them, tending to show the construction the parties themselves put upon the agreement when it was executed, whether occurring prior to or subsequently to the execution of the contract, is admissible. Armistead v. McGuire, 46 Ga. 232 (1872); Baker v. Jellibeans Inc., 252 Ga. 458, 314 S.E. 2d 874 (1984). See Official Code of Georgia Annotated (O.C.G.A.) §24-6-1 and §24-6-3(b).

This court believes that the letter dated April 17, 1989, between counsel then representing the parties is determinative as to the intent of the parties at the time the agreement was entered. It was the intent of the parties to treat the obligations referenced in sections 6 and 8 involving the transfer of the automobile and one-half interest in the marital residence with the debtor's obligation to maintain future mortgage payments as property settlement and not alimony, maintenance or support. Ms. Rollins has failed to establish by clear and convincing evidence the nondischargeability of these aspects of the settlement agreement. The debtor having admitted that the provisions of Section 9. ALIMONY of the settlement agreement dated November 25, 1987 are in the nature of alimony, maintenance and support for the benefit of Ms. Rollins and are nondischargeable in the debtor's underlying Chapter 7 bankruptcy proceeding, judgment is entered accordingly in favor of plaintiff, Gloria W. Rollins on her complaint against Roy George Rollins debtor and defendant in this adversary proceeding

establishing the nondischargeability of section 9. ALIMONY of the settlement agreement referenced above. Judgment is entered in favor of Roy George Rollins, debtor and defendant herein against Gloria W. Rollins plaintiff determining as dischargeable the obligations of sections 6 and 8 of the settlement agreement dated November 25 1987, between the parties. No monetary damages are awarded.

JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia

this 20th day of October, 1989.