

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA

Augusta Division

IN RE:)	Chapter 7 Case
)	Number <u>95-11415</u>
JACK ALLEN HORNER)	
)	
Debtor)	
_____)	
)	
JACK ALLEN HORNER)	
)	
Plaintiff)	
)	
vs.)	Adversary Proceeding
)	Number <u>95-01090A</u>
BARBARA HORNER)	
)	
Defendant)	

ORDER

By motion, the plaintiff Jack Allen Horner seeks reconsideration of the order filed September 17, 1997 pursuant to Federal Rule of Bankruptcy Procedure (FRBP) 9024 applying Federal Rule of Civil Procedure (FRCP) 60 asserting that the court's order of September 17 was based at least in part, upon the court's error in failing to consider the Brief of the Plaintiff Jack A. Horner on Remand submitted to the court in response to the scheduling order of February 24, 1997. In the September 17 order in footnote 6 I found

that the plaintiff had failed to submit a brief and found "Mr. Horner's failure to pursue his claim that the separation agreement was unconscionable and that Ms. Horner was guilty of actual fraud and concealment in the preparation of the agreement [was] taken as an abandonment of that assertion." Attached to plaintiff's motion for reconsideration is a filed stamped copy of the brief. Having read and considered the brief of the plaintiff Jack A. Horner on remand I find no basis to alter my ruling of September 17, 1997 finding "[t]he obligation under paragraph 9 of the separation agreement between the parties, incorporated in the divorce decree of the Superior Court of Columbia County, Georgia requiring Jack Allen Horner to pay to Barbara Horner \$1,100.00 every fourth week until January 31, 2005, . . . in the nature of support for Ms. Horner and . . . excepted from the discharge order in Mr. Horner's underlying Chapter 7 bankruptcy case."

Following the reversal and remand from the District Court, by order filed February 24, 1997, the parties were required to file a request for an evidentiary hearing within ten (10) days of the date of the order. Barring a request for an evidentiary hearing, the parties were afforded thirty (30) days in which to file any additional argument by letter brief. In response to the order, Mr. Horner filed a request for an evidentiary hearing which was withdrawn based upon the consent of the parties to the admission into evidence in Mr. Horner's 1992 through 1995 federal income tax

returns. Those returns were considered by me under § 11, the tax treatment of the payment, at page 18 of the September 17 order. Given an opportunity to present evidence in support of his contention that the separation agreement was unconscionable and that Ms. Horner was guilty of actual fraud and concealment in the preparation of the agreement, Mr. Horner failed to do so. The references to the transcript of the trial in his brief fails to establish any basis to strike or modify the agreement, and modification or striking the agreement in its entirety appears to be the only remedy available should I make a determination that the agreement was in fact unconscionable or that Ms. Horner committed fraud and concealment in its preparation. Such determination is best left for the State court whose judgment incorporated the agreement. Carver v. Carver, 954 F.2d 1573 (11th Cir. 1992) cert. denied 506 U.S. 986 (1992). (It is not the intent of the Bankruptcy Code to allow bankruptcy courts to modify divorce decrees of State courts where alimony and child support obligations are set); Carswell v. Lang, 757 F.2d 608 (4th Cir. 1985) (quoting In re McDonald, 755, F.2d 715, 717, 719 (9th Cir. 1985) (It is appropriate for bankruptcy courts to avoid incursion into family law matters out of consideration of court economy, judicial restraint in deference to our state court brethren and their established expertise in such

matters).¹

¹A challenge to the enforceability of a state court divorce decree based upon some wrongdoing on the part of one of the parties to the State court action appropriately should be brought to the attention of the State court judge rather than collaterally attack in this court. But for the admonition of the District Court on remand instructing me to determine the validity of

Finding nothing in the evidence presented at trial or in the briefs submitted by the plaintiff to suggest that the separation agreement

this assertion, I would have dismissed it out right.

incorporated in the final decree of divorce between the parties was unconscionable or that Ms. Horner committed actual fraud and concealment in the preparation of the agreement and having considered the brief submitted on behalf of the plaintiff, the motion for reconsideration is ORDERED denied.

JOHN S. DALIS
CHIEF UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia

this ____ day of November, 1997.