
IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Augusta Division

IN RE:)	Chapter 7 case
)	Number <u>88-11590</u>
DR. ALAN DALE CLARK)	
)	
Debtor)	Filed at
_____))	5 O'Clock & 10 P.M.
)	Date: 4-26-91
DR. ALAN DALE CLARK)	
)	
Plaintiff)	
)	
vs.)	Adversary Proceeding
)	Number <u>89-1002</u>
MARY CAROLE BRAY CLARK)	
)	
Defendant)	

TEMPORARY RESTRAINING ORDER

Dr. Alan Dale Clark, plaintiff in this adversary proceeding and debtor in the underlying Chapter 7 bankruptcy case (hereinafter "Dr. Clark") by motion seeks a temporary restraining order to prevent Mary Carole Bray Clark, defendant, (hereinafter "Ms. Clark") from proceeding with a hearing seeking a determination of contempt against Dr. Clark in the Superior Court of Cobb County, Georgia. This adversary proceeding is currently on appeal and rests

in the United States Court for the Southern District of Georgia.¹

¹By order of the United States Court of Appeals for the Eleventh Circuit entered February 7, 1991 the judgment of the United States District Court for the Southern District of Georgia affirming the judgment of this court was vacated and remanded to the District Court "with directions to the district court to make

Bankruptcy Rule 8005² applies in that Dr. Clark is seeking "other

relief pending appeal".

In order to obtain . . . injunctive relief pursuant to Rule 8005, the movant must clearly establish

a more in-depth inquiry into the nature of the support obligations as required by In re: Harrell, 754 F.2d 902 (11th Cir. 1985)."

²Bankruptcy Rule 8005 provides:

A motion for a stay of the judgment, order, or decree of a bankruptcy judge, for approval of a supersedeas bond, or for other relief pending appeal must ordinarily be presented to the bankruptcy judge in the first instance. Notwithstanding Rule 7062 but subject to the power of the district court and the bankruptcy appellate panel reserved hereinafter, the bankruptcy judge may suspend or order the continuation of other proceedings in the case under the Code or make any other appropriate order during the pendency of an appeal on such terms as will protect the rights of all parties in interest. A motion for such relief, or for modification or termination of relief granted by a bankruptcy judge, may be made to the district court or the bankruptcy appellate panel, but the motion shall show why the relief, modification, or termination was not obtained from the bankruptcy judge. The district court or the bankruptcy appellate panel may condition the relief it grants under this rule on the filing of a bond or other appropriate security with the bankruptcy court. When an appeal is taken by a trustee, a bond or other appropriate security may be required, but when an appeal is taken by the United States or an officer or agency thereof or by direction of any department of the Government of the United States a bond or other security shall not be required.

(i) that the movant is likely to prevail on the merits of its appeal,

(ii) that movant will suffer irreparable injury if a stay or other injunctive relief is not granted,

(iii) that other parties will suffer no substantial harm if a stay or other injunctive relief is granted, and

(iv) in circumstances where the public interest is implicated, that issuance of a stay or other injunctive relief will serve, rather than disserve, such public interest. [citations omitted]

In re: The Charter Company, 72 B.R. 70, 71-72 (Bankr. M.D. Fla. 1987). After having reviewed the motion for temporary restraining order and having heard via telephonic conference argument of attorneys for the parties, this court makes the following findings.

The order and judgment of this court that is the subject of the pending appeal provides:

From the evidence presented, Ms. Clark has established by clear and convincing evidence that at the time the settlement agreement at issue was executed by the parties, it was their mutual intent that the following obligations be in the nature of maintenance or support as contemplated under 11 U.S.C. § 523(a)(5). The following obligations legitimately can be construed as such maintenance or support, and therefore, are excepted from Dr. Clark's discharge:

1. The obligation of Dr. Clark to make

periodic payments to Ms. Clark in the sum of \$500.00 per month per child as set forth in § 3 Child Support at page 7 of the settlement agreement,

2. The obligation of Dr. Clark to pay onehalf the cost of camp for each of the minor children, up to a maximum of \$350.00 per child per year as set forth § 3(d) Child Support at page 9 of the settlement agreement;

3. The obligation of Dr. Clark to pay \$50.00 per week for day care from the time the wife obtains employment and up until the minor child, Ivy, is enrolled in public school as set forth in § 3(e) Child Support at page 9 of the settlement agreement;

4. The obligation of Dr. Clark to pay 50% of the costs incurred by the minor children in participating in extracurricular activities, not to exceed \$350.00 per year per child as set forth in § 3(f) Child Support, at page 9 of the settlement agreement;

5. The obligation of Dr. Clark to pay for and maintain a major medical and hospitalization insurance policy as set forth in § 4 Health and Hospitalization Insurance at

page 9 of the settlement agreement;

6. The obligation of Dr. Clark to provide a term life insurance policy in the principal amount of \$200,000.00 as set forth in § 5 Life Insurance page 10-11 of the settlement agreement;

7. The obligation of Dr. Clark to pay tuition, books and matriculation fees for each one of the minor children to attend a four-year college as set forth in § 6 College Education at page 11 of the settlement agreement.

8. The obligation of Dr. Clark to pay to Ms. Clark the sum of \$50,000.00 at the rate of \$10,000.00 per year for five years as set forth in § 7 Disposition of Family Home at page 14 of the settlement agreement.

9. The obligation of Dr. Clark to pay medical and dental expenses in the amount of \$6,525.00 under § 8 Payment of Medical Expenses at page 15-16.

Regarding the issue of whether Dr. Clark's obligation to pay the debt due Fidelity National as an agreement to indemnify and hold Ms. Clark

harmless from any loss she may incur as a result of the Fidelity National claim, Ms. Clark has failed to meet the burden required for the establishment of nondischargeability of this aspect of the settlement agreement. Unlike the other provisions of the settlement agreement which are in dispute, this aspect of the agreement did not specifically provide that this obligation of Dr. Clark was in the nature of maintenance or support. As to this provision, Ms. Clark relies upon the legislative history of §523(a)(5) which establishes that debts resulting from an agreement by a debtor to hold the debtor's spouse harmless on joint debts are nondischargeable to the extent that the agreement is in payment of alimony, maintenance, or support of the spouse. See Hearings, pt 3, at 1287 - 1290 (HR Rep. No. 95-595, 95th Cong., 1st Sess. 364 (1977)), (S.Rep. No. 95-989, 95th Cong., 2nd Sess. 79 (1978), U.S. Code Cong. & Admin.News p. 5787). This determination is made under bankruptcy law considerations that are similar to considerations of whether a particular agreement to pay money to a spouse is actually alimony or a property settlement.

While the legislative history of §523(a)(5) is helpful, the plain language of the agreement is controlling. Section 12 alimony at page 19 of the settlement agreement provides:

"There is no alimony being paid by either party, and both parties specifically are relinquishing and forever releasing any claim to alimony in the future." This is a clear expression of the present intent of the parties at the time the settlement agreement was entered that Ms. Clark would receive no direct alimony, maintenance or support from Dr. Clark. All aspects of the settlement agreement dealing with maintenance or support obligations from Dr. Clark were for the benefit of the minor children. This court is cognizant of the realities of the situation that by determining the obligation dischargeable, the creditors of both Dr. Clark and Ms. Clark will pursue

Ms. Clark for collection, and if successful, this will result in a diminution in her property which may impact upon her ability to provide maintenance and support for the minor children. However, what

is at issue is Dr. Clark's agreed to obligation to provide maintenance and support for his minor children, not Ms. Clark's ability to provide such support.

Judgment is entered accordingly in favor of Mary Carole Bray Clark on her counterclaim and against Dr. Alan Dale Clark on his complaint in the amount of Twenty-Six Thousand Five Hundred Twenty-Five and No/100 (\$26,525.00) Dollars plus future interest at such rate as established by law. Entry of judgment in this matter in no way precludes Mary Carole Bray Clark from collecting in addition to the sum set forth in this judgment any sum which may become due subsequent to the entry of this judgment in accordance with the terms of the settlement agreement incorporated by reference into the final judgment and decree of total divorce between Dr. Clark and Ms. Clark, parties in this proceeding, and determined as nondischargeable under 11 U.S.C. §523(a)(5) in this judgment.³

Clark v. Clark (In re: Clark) 105 B.R. 753, 759-760 (Bankr. S.D. Ga. September 22, 1989). Dr. Clark initially appealed from the order and judgment in this adversary proceeding. Mrs. Clark crossappealed. On the appeal at the District Court level, the District Court concluded "[a]lthough the clerk of court gave the parties notice, on January 2, 1990, that this appeal had been docketed, appellant has failed to file any brief with the Court and had apparently abandoned his appeal. [footnote omitted] Consequently, appellant's appeal is dismissed for failure to comply with

Bankruptcy Rule 8009(a)(1) and for want of prosecution pursuant to Local Rule 15.1."

Clark v. Clark (In re: Clark) 113 B.R. 797, 798 (S.D. Ga. April 20, 1990).

Dr. Clark, having abandoned his appeal, the only matter addressed in the Court of Appeals and outstanding for resolution in the remand to the District Court is

³Through error the order referenced creditor as Liberty National. The correct name of the creditor is Fidelity National. The balance of this order references the "Liberty [Fidelity] National debt."

whether Dr. Clark's obligation to pay the debt due Liberty [Fidelity] National as an agreement to indemnify and hold Ms. Clark harmless from any loss she may incur as a result of the Liberty [Fidelity] National claim, was in the nature of maintenance or support. All other aspects of the judgment entered by this court and affirmed by the District Court are final and conclusive. Hook. et al v. Hook & Ackerman Inc. 233 F.2d 180 (3rd Cir. 1956). This court having determined that the enumerated provisions 1 through 9 referenced above in this court's order and judgment (In re: Clark 105 supra at 759) are nondischargeable in Dr. Clark's Chapter 7 bankruptcy proceeding and that determination being final and conclusive, Dr. Clark has failed to establish that he will likely prevail on the merits to prevent Ms. Clark from enforcing those nondischargeable obligation. A temporary restraining order, therefore, is not appropriate.

Regarding the dischargeability of obligation to pay the debt due Liberty [Fidelity] National, that matter is now before the District Court on remand from the Court of Appeals and preservation of the status quo pending entry of a final nonappealable order is

appropriate. This court has previously determined that this obligation was dischargeable in Dr. Clark's bankruptcy case which determination was affirmed by the District Court. The reversal by the Court of Appeals requires "a more in-depth inquiry into the nature of the support obligation," but did not determine the debt to be nondischargeable. This court and the District Court have previously decided in favor dischargeability. It appears likely that Dr. Clark will prevail on the merits as to the dischargeability of the Liberty [Fidelity] National debt on reconsideration. Additionally, should Dr. Clark be subjected to a contempt action for nonpayment of this obligation, he would clearly suffer irreparable injury. The maintenance of the status quo pending final order will not harm Ms. Clark. There does not appear to be a substantial public interest at stake in this case.

As it pertains only to the enforcement of Dr. Clark's obligation to pay the debt due Liberty [Fidelity] National Dr. Clark has established a basis for the entry of a temporary restraining order. Dr. Clark has failed to establish a basis

for the entry of a temporary restraining order as to the enforcement of the balance of the order and judgment of this court referenced above. Mary Carole Bray Clark, defendant in this adversary as well as her agents, attorneys and employees are ORDERED temporarily restrained from proceeding in any manner to collect or to compel Dr. Alan Dale Clark, plaintiff in this adversary proceeding, to pay any sums

contended by Ms. Clark to be due Liberty [Fidelity] National referenced in the order of this court entered September 22, 1989 and referenced herein pending the entry of a final nonappealable order in this adversary proceeding as to the dischargeability of that obligation. The temporary restraining order shall become a permanent injunction pending final determination of dischargeability without further hearing unless within ten (10) days of the date of this order, Ms. Clark through counsel request hearing.

The balance of the motion for temporary restraining order to prevent Ms. Clark from enforcing the judgment of nondischargeability as set forth herein from the order of this court of September 22, 1989 is ORDERED denied. Notice of the entry of this order was given to L.E. Mairiello attorney for Dr. Clark and Timothy C. Batten attorney for Ms. Clark by telephone at the time stated below.

JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia
this 26th day of April, 1991 at
5:04 p.m.