

In the United States Bankruptcy Court
for the
Southern District of Georgia
Brunswick Division

In the matter of:

ALLEN EDWARD CARROLL
(Chapter 7 Case 92-20584)

Debtor

YVONNE E. CARROLL WILLIAMS

Plaintiff

v.

ALLEN EDWARD CARROLL

Defendant

Adversary Proceeding

Number 92-2098

FILED
at 11 O'clock & 12 min AM
Date 9/9/93
MARY C. BESTON, CLERK
United States Bankruptcy Court
Savannah, Georgia

MEMORANDUM AND ORDER

On June 15, 1993, a hearing was held upon a complaint to determine dischargeability of divorce related obligations pursuant to 11 U.S.C. Section 523(a)(5). The Plaintiff also alludes to a possible objection to discharge under Section 727 of the Code but, since that issue was not raised prior to the trial, that issue was not and will

not be considered. The Plaintiff contends that the Debtor "has allowed the value of the property to decrease as a result of his failure to care for and maintain said property," which contention is in the nature of a Section 523(a)(6) objection., i.e., for willful and malicious injury to property of another. See Complaint, paragraph 11.

FINDINGS OF FACT

Debtor/Defendant and his former wife, Plaintiff, were divorced on July 26, 1991, after a contested proceeding. Debtor filed his Chapter 7 petition on August 18, 1992. The parties had been married for approximately 35 years and had no minor children at the time of the divorce.

At the time of the divorce, Debtor's primary source of income was his Social Security disability entitlement. In addition to his disability income, there was some evidence that the Debtor earned additional income mowing lawns.

At the time of the divorce, Plaintiff was employed and earning approximately the same amount of money as did the Debtor.

The divorce decree provided that the Debtor would retain possession

of the former marital residence and that each party would retain a one-half individual ownership interest in said property. The decree further provided that the property would be marketed through a licensed realtor, at its fair market value. Upon the sale of the property, each party would receive fifty percent (50%) of the net proceeds as an equitable distribution of their marital property. See Separation Agreement, page 5, paragraph (h).

Until the property sold, the Debtor was required to make the first and second mortgage payments to Georgia Federal Savings Bank and Barnett Bank of Southeast Georgia, respectively.

As an alternative to that division of property, paragraph (i) of the Separation Agreement (page 6) provided that, as "alimony," either party may offer the other party \$10,000.00 to buy out the other's equity. Neither party ever exercised this option although at one time the Plaintiff herein demanded that payment from the Debtor.

The property was listed for sale with Sellers Realty under a standard Glynn County Board of Realtors Contract for Sale. The owners agreed to pay a 6% real estate commission. The original asking price was \$79,000.00, but that amount

included a \$4,000.00 remodeling/repair allowance so that the net listed price was \$75,000.00.

According to the testimony of Melissa Sellers, the listing agent, at the time of the listing the property had "deferred maintenance" problems with paint, carpet, cleaning and roofing. Within the industry the phrase "deferred maintenance" suggests that property is generally rundown and in need of attention.

On August 26, 1991, a formal offer was made through Mrs. Sellers for \$65,000.00. This offer was rejected by the owners.

In the year between that offer and the date of the Debtor's filing his petition in bankruptcy, there was additional deterioration in the property, apparently according to Mrs. Sellers, resulting from additional "deferred maintenance." Another offer was made, this one for \$60,000.00 which was transmitted post-petition. It was insufficient to satisfy the first and second debts secured by the property and it was rejected.

Federal income tax liens were placed against the property in the approximate amount of \$6,000.00. Glynn County and the City of Brunswick were

owed \$700.00 and \$300.00 respectively for 1991 property taxes. These claims also constitute liens against the property.

Barnett Bank of Southeast Georgia ("Barnett Bank"), second lienholder, obtained relief from the Section 362 stay, purchased the note of the first lienholder, Georgia Federal Savings Bank, ran newspaper advertisements and sold the property on the courthouse steps for \$66,687.51 on January 5, 1993. The bid price was equal to the payoff at Barnett Bank plus 15% statutory "attorney fees" which had been added (but not actually paid to Barnett's attorneys). More than 120 days have elapsed since the foreclosure potentially rendering the Internal Revenue Service lien void as a matter of law. More than 30 days have passed since the foreclosure and no confirmation proceeding has been filed in any court, which has the probable effect of waiver of any potential deficiency claim against the non-debtor spouse by Barnett Bank.

Of the \$66,687.51 paid at foreclosure, \$6,622.94 represented the statutory and contractual attorney's fees and costs of foreclosure. The actual payoff on the first and second mortgage was \$60,064.57.

After the divorce, the Debtor made regular monthly payments to

Georgia Federal Savings Bank in the amount of \$339.38 up to and including April of 1992. The Debtor made regular monthly payments to Barnett Bank in the amount of \$316.53 up to and including May of 1992. See stay relief motions filed by each mortgage lender. Thus between the dates of the offer of the \$65,000.00 on August 26, 1991, and the date of the foreclosure by Barnett Bank, the Debtor paid \$5,563.81 to the mortgage lenders of which amount some was attributable to the principal.

Had the parties accepted the \$65,000.00 offer, which was the best offer received and the best indicator of true market value, the distribution would have been as follows (assuming a closing within thirty days):

Contract Price (8/26/91)	\$65,000.00
Less Real Estate Commission	3,900.00
Less Transfer Tax	65.00
Less Pro-Rata Property Taxes (through 8/31/93)	750.00
Less Payoffs (as of 1/5/93)	\$60,064.57
Balance	\$220.43

Because Debtor had made payments between August 26, 1991, and January 5, 1993, of which some amount was attributed to principal, the payoffs would in fact have been greater in August of 1991. As a result, at the time of the offer, in order to close, the parties herein would have been required to pay out money instead

of receiving money.

Although it is true that tax liens were placed against this property in apparent violation of the divorce decree, it is also true that those liens had no bearing whatsoever on the sale of the property or on the net proceeds as they would have appeared in August of 1991. Thus there is not now nor was there at any time any evidence of equity in the residence.

CONCLUSIONS OF LAW

Section 523(a)(5) of the Bankruptcy Code creates an exception to discharge of any debt

... to a spouse, former spouse, or child of the debtor, form alimony to, maintenance for, or support of such spouse or child in connection with a separation agreement, divorce decree or of the order of a court of record . . .

But the exception does not apply unless "such liability is actually in the nature of alimony, maintenance, or support." 11 U.S.C. §523(a)(5). The Eleventh Circuit mandates that "what constitutes alimony, maintenance, or support will be determined under the bankruptcy laws, not state law." In re Harrell, 754 F.2d 902, 905 (11th Cir.

1985) (quoting H.H.Rep.No. 595, 95th Cong., 1st Sess. 364 (1977) reprinted in 1978, U.S. Code Cong. & Admin. News 5787, 6319). To be declared non-dischargeable, the debt must have been actually in the nature of alimony, maintenance, or support. Harrell, 754 F.2d at 904.

The non-debtor spouse has the burden of proving that the debt is within the exception to discharge. Long v. Calhoun, 715 F.2d 1103 (6th Cir. 1983). The exceptions to discharge in Section 523 must be proved by a preponderance of the evidence. Grogan v. Garner, 111 S.Ct. 654, 112 L.Ed.2d 775 (1991).

A determination as to whether or not a debt is in the nature of support requires an examination of the facts and circumstances existing at the time the obligation was created, not at the time of the bankruptcy petition. Harrell, 754 F.2d at 906. Accord Sylvester v. Sylvester, 865 F.2d 1164 (10th Cir. 1989); Forsdick v. Turgeon, 812 F.2d 801 (2nd Cir. 1987); Draper v. Draper, 790 F.2d 52 (8th Cir. 1986). It is the substance of the obligation which is dispositive, not the form, characterization, or designation of the obligation under state law. In re Bedingfield, 42 B.R. at 645-46. Accord Shaver v. Shaver, 736 F.2d 1314, 1316 (9th Cir. 1984); Williams v. Williams, 703 F.2d 1055, 1057 (8th Cir. 1983). According to the Eleventh Circuit in Harrell:

The language used by Congress in Section 523(a)(5) requires bankruptcy courts to determine nothing more than whether the support label accurately reflects that the obligation at issue is "actually in the nature of alimony, maintenance, or support." The statutory language suggests a simple inquiry as to whether the obligation can legitimately be characterized as support, that is, whether it is in the nature of support.

Harrell, 754 F.2d at 906 (emphasis original). Although the Harrell court determined that only a "simple inquiry" was needed, the court did not set forth guidelines or factors to be considered. The bankruptcy court may consider state law labels and designations although bankruptcy laws control. See In re Holt, 40 B.R. 1009.1011 ("There is no federal bankruptcy law of alimony or support. Such obligations and the rights of the parties must be devined [sic] by reference to the reasoning of the well established law of states.")

The bankruptcy court must determine if the obligation at issue was intended to provide support. Calhoun, 715 F.2d at 1109. In making its decision, the court should "consider any relevant evidence including those facts utilized by state courts to make a factual determination of intent to create support." Id. If a divorce decree incorporates a divorce settlement agreement, the court should consider the intent of the parties in entering the agreement; if a divorce is rendered following actual litigation, the court should focus upon the intent of the trier of fact. In re

West, 95 B.R. 395 (Bankr. E.D.Va. 1989). See generally In re Mall, 40 B.R. 204 (Bankr. M.D.Fla. 1984) (Characterization of an award in state court is entitled to greater deference when based on findings of fact and conclusions of law of a judge as opposed to a rubber stamped agreement incorporated into a divorce decree); In re Helms, 48 B.R. 215, 225 (Bankr. W.D.Ky. 1985) (It is not those questions of support which have been fully litigated and adjudicated in the state court system which are now subject to second guessing by bankruptcy judges, sitting as "super divorce courts." It is only those cases . . . in which former spouses settle their support differences by agreement albeit with resulting state court approval, that bankruptcy courts may later reopen and examine.")

In order to except a debt from discharge under Section 523(a)(6), the creditor must prove three elements by a preponderance of the evidence:

1. That the debtor injured another entity or the property of another entity;
2. That the debtor's actions were deliberate and intentional; and
3. That the debtor's actions were malicious.

The Eleventh Circuit in Chrysler Credit Corp. v. Rebhan, 842 F.2d 1257 (11th Cir. 1988), approved and adopted the approach set forth in the United

Bank of Southgate v. Nelson, 35 B.R. 766 (N.D.Ill. 1983), in construing the "willful and malicious" elements of 11 U.S.C. Section 523(a)(6). Under Southgate, "willful means deliberate or intentional" and "malice for purposes of section 523(a)(6) can be established by a finding of implied or constructive malice." Rebhan, 842 F.2d at 1263. "No showing of personal hatred, spite or ill-will is required to prove an injury malicious; it is enough that it was 'wrongful and without just cause or excuse'." In re Lindberg, 49 B.R. 228, 230 (Bankr. D.Mass. 1985) (quoting In re Askew, 22 B.R. 641, 643 (Bankr. M.D.Ga. 1982), aff'd 705 F.2d 469 (11th Cir. 1983). Hence, an injury is considered "willful" if it is intentional and "malicious" if it results from an intentional or conscious disregard of one's duties. Id.

Once it is determined that a debtor has willfully injured the property of another, the determination of whether such debt will be held non-dischargeable under Section 523(a)(6) turns on the intent of the debtor.

Based on the foregoing authorities, the Debtor's duty to maintain the two mortgages on the property is properly characterized as in the nature of support to the Plaintiff. Obviously this support prevented the Plaintiff from having to service these debts, and thereby from reducing the disposable income that she would have available to maintain her own household. When Debtor failed to maintain these

payments it led to a foreclosure of the parties' residence and a potential claim for damages measure by the unpaid monthly payments or the loss of the residence or some combination thereof.

Moreover, had the Debtor deliberately and willfully allowed the value of the home to erode by "deferred maintenance" or otherwise, then, in accordance with Section 523(a)(6), I would conclude that such erosion was caused by the deliberate and willful actions of the Debtor, as opposed to being caused by mere economic inability to service the debt, and that the lost equity would be a non-dischargeable obligation.

However, based on the realities of this case, at no time after the divorce was there any equity in this property. Thus, Debtor's non-payment of monthly debt service caused Plaintiff no economic loss. The foreclosure of the home in which Plaintiff had no equity did not harm her, so long as no deficiency claim is asserted. Likewise, no willful injury to the property harmed Plaintiff. A contract for sale was obtained almost immediately after the divorce decree which yielded no net proceeds to the parties. Plaintiff has not shown that any conduct of Debtor had the effect of destroying the parties' equity in the property.

ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that judgment is entered in favor of the Debtor as to the Section 523(a)(6) liability and any alleged debt to Plaintiff arising out of the divorce decree is discharged unless Barnett Bank obtains a deficiency judgment against Plaintiff which will be non-dischargeable under 11 U.S.C. Section 523(a)(5).



Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 7th day of September, 1993.