

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

In the matter of:

ARTHUR MITCHELL HARDY  
(Chapter 13 Case 95-42178)

*Debtor*

ARTHUR MITCHELL HARDY

*Plaintiff*

v.

DORIS HARDY

*Defendant*

Adversary Proceeding

Number 96-4004

FILED

at 11 O'clock & 51 min. A.M

Date 7-17-96

MARY C. BECTON, CLERK  
United States Bankruptcy Court  
Savannah, Georgia

MEMORANDUM AND ORDER ON MOTION FOR SUMMARY JUDGMENT

Defendant, Doris Hardy, comes before this Court requesting summary judgment in the above-captioned matter. In her Motion for Summary Judgment, Ms. Hardy asserts that Debtor's claimed exemption of alimony on his 1994 and 1995 tax returns estop him from contending in a dischargeability proceeding that the debt to

his ex-wife, Defendant/Doris Hardy, is a property settlement. This is a core proceeding under 28 U.S.C. § 157(b)(2)(I). Based upon the parties' briefs, the record in the file, and applicable authorities, I make the following Findings of Fact and Conclusions of Law.

### FINDINGS OF FACT

The following facts are not in dispute. On August 13, 1958, the parties were married. They lived together as husband and wife until approximately 1988, during which time Debtor, Arthur Hardy (hereinafter "Debtor"), was on active duty in the United States Army stationed abroad. In 1990, Ms. Hardy instituted divorce proceedings and on January 10, 1991, the Circuit Court of Calhoun County, State of Alabama entered a final judgment and decree of divorce.

Although the Alabama judgment of divorce was entered without an appearance by Debtor, he subsequently asserted the Alabama judgment as a defense to a second divorce proceeding filed by Ms. Hardy in Liberty County Georgia upon Debtor's return to the United States in 1991. As a result, the Circuit Court of Calhoun County later denied a Motion to Set Aside the original divorce judgment on the grounds of estoppel and Debtor has been held to be bound to the terms of the judgment. Essentially, the Alabama Court awarded Ms. Hardy a sum of approximately

\$825.00 per month commencing on February 1, 1991, and continuing until April 1, 2016.

Debtor filed for Chapter 7 bankruptcy relief on October 13, 1995. He subsequently filed this adversary proceeding in order to determine the dischargeability of this debt pursuant to Sections 523(a)(5) and (15) of the Bankruptcy Code. In this adversary proceeding, Debtor/Plaintiff claims that the award of "alimony-in-gross" by the Circuit Court of Calhoun County Alabama is a term of art and, in actuality, a property settlement under Alabama law. Therefore, Debtor/Plaintiff claims that the debt should be discharged pursuant to 11 U.S.C. § 523(a)(15). Defendant, Doris Hardy, denies this legal contention. Ms. Hardy, proceeding *pro se*, claims that the debt owed to her by her ex-husband is alimony. Thus, she contends that the debt should be declared non-dischargeable pursuant to 11 U.S.C. § 523(a)(5).

Defendant, Doris Hardy, has filed this Motion for Summary Judgment.<sup>1</sup>

In her motion, Ms. Hardy asserts that her ex-husband filed tax returns for the years

---

<sup>1</sup> Ms. Hardy filed her original Motion for Summary Judgment of March 13, 1996. This Court held a hearing on April 11, 1996 and denied the motion for failure to prosecute, directing Plaintiff's counsel to prepare an order. On April 16, 1996, Ms. Hardy, who resides in the State of Alabama, instituted a second Motion for Summary Judgment although without a hearing. On April 17, 1996, this Court signed the order dismissing Ms. Hardy's initial motion. Plaintiff, Arthur Hardy, responded to the first motion although failed to re-issue a second response. Because of confusion to all parties, including this Court, Mr. Hardy's defense to the first Motion for Summary Judgment will also be considered as a response to the second motion.

1994 and 1995 on which he claimed an alimony deduction for an amount of \$9900 and \$5775 respectively. Ms. Hardy claims that Debtor may not now contend in this Court that the payments are a property settlement after he already has received favorable tax benefits by declaring the payments as alimony for income tax purposes. Ms. Hardy cites In re Robb, 23 F.3d 895 (4th Cir.1994), in support of her motion. Debtor does not deny that he listed the payments to his ex-wife as alimony on his tax returns. However, Debtor contends that In re Robb, 23 F.3d at 895, is only persuasive and not binding authority. For the following reasons, this Court will deny Defendant's Motion for Summary Judgment.

#### CONCLUSIONS OF LAW

In accordance with Federal Rule of Civil Procedure (applicable to bankruptcy under Fed.R.Bankr.P. 7056), this Court will grant summary judgment only if "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). A fact is material if it might affect the outcome of a proceeding under the governing substantive law. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). The moving party has the burden of establishing its right to summary judgment, See Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11th Cir.1991); See Clark v. Union Mut. Life Ins. Co., 692 F.2d 1370, 1372 (11th Cir.1982), and the court will read the

opposing party's pleadings liberally. See Anderson, 477 U.S. at 249, 106 S.Ct. at 2510-11.

In determining whether there is a genuine issue of material fact, the Court must view the evidence in the light most favorable to the party opposing the motion. See Addickes v. S.H. Kress & Co., 398 U.S. 144, 157, 90 S.Ct. 1598, 1608, 26 L.Ed.2d 142 (1970); See Rosen v. Biscayne Yacht and Country Club, Inc., 766 F.2d 482, 484 (11 Cir.1985). Once a motion is supported by a *prima facie* showing that the moving party is entitled to judgment as a matter of law, the party opposing the motion must go beyond the pleadings and demonstrate that there is a material issue of fact which precludes summary judgment. See Martin v. Commercial Union Ins. Co., 935 F.2d 235, 238 (11th Cir.1991).

The sole issue before this Court on the Motion for Summary Judgment is whether Debtor is bound by the doctrine of quasi-estoppel. Essentially, "quasi-estoppel forbids a party from accepting the benefits of a transaction or statute and then subsequently taking an inconsistent position to avoid the corresponding obligations or effects." Matter of Davidson, 947 F.2d 1294, 1297 (5th Cir.1991). This Court must consider Defendant's motion in light of the underlying action: a discharge proceeding pursuant to 11 U.S.C. §§ 523(a)(5) and (15). Those sections provide that

a Debtor may not discharge an obligation for alimony or support, although debts arising from a property settlement may be discharged if the requirements of Section 523(a)(15) are satisfied. As the Robb Court properly held, "[i]n undertaking this analysis, a court must examine the mutual intent of both parties when the parties executed the agreement." In re Robb, 23 F.3d at 897. The issue, therefore, is whether the listing of disputed payments as alimony on income tax returns per se prohibits a debtor from presenting further evidence to support a contrary intent or is it only probative of the parties' mutual intent. The courts are split. Some courts favor the per se rule; *See* Matter of Davidson, 947 F.2d at 1294; In re Robb, 23 F.3d at 895; other consider the evidence only to be probative. *See* In re Sampson, 997 F.2d 717 (10th Cir.1993); In re Kritt, 190 B.R. 382 (9th Cir.B.A.P.1995). The Eleventh Circuit Court of Appeals has not ruled on this issue. This Court is inclined to follow the line of cases which hold this evidence as only probative of the Debtor's intent.

Section 523(a)(5) excepts from discharge debts which are in the nature of alimony and support. Specifically, Section 523(a)(5) states that a debt for alimony is excepted from discharge unless,

such debt includes a liability designated as alimony . .  
. unless such liability is actually in the nature of  
alimony.

11 U.S.C. § 523(a)(5)(B). By its very terms, Section 523(a)(5) will not except from discharge any obligation labeled as alimony unless it actually is in the nature of alimony. It is the language of this section that persuades this Court to follow the probative rule. Section 523(a)(5) requires courts to consider the intent of the parties and not the labels which the parties attach. Thus, to adopt a per se rule allowing the labels which the parties use to dictate their intent for the purpose of Section 523(a)(5) would be contrary to the mandate of the statute. See In re Kritt, 190 B.R. at 388 ("quasi estoppel is inconsistent with the court's obligation to examine the substance, rather than the form, of the transaction"). Taken to the extreme quasi estoppel would bind all labels that the parties attach whether on a tax return or in the original divorce proceedings. Clearly, this is contrary to the requirements of Section 523(a)(5). Of course, this Court will consider the tax return as probative evidence in defining the intent of the Debtor.

In order for this Court to grant a motion for summary judgment, there must be no genuine issue as to any material fact and the moving party must be entitled to judgment as a matter of law. Rule 56 F.R.Civ.P. For the above reasons, I find for Debtor/Plaintiff and deny Defendant's Motion for Summary Judgment. Debtor's tax return only represents probative evidence that this obligation should be excepted from

discharge. Summary judgment should only be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Viewing the evidence in a light most favorable to the opposing party, I hold that the Defendant, Doris Hardy, has not carried her burden. The issue of the parties' intent remains in issue and shall require a full hearing for a final determination.

ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that the Motion for Summary Judgment filed by Defendant, Doris Hardy, is hereby DENIED.

IT IS FURTHER ORDERED that the clerk is instructed to set this adversary proceeding for trial.



---

Lamar W. Davis, Jr.  
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 16<sup>th</sup> day of July, 1996.