

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION**

In re:

WILLIAM LARRY CROSS,

Debtor.

_____ /

Case No.: 3:04-bk-8662-JAF

Chapter 7

WILLIAM LARRY CROSS,

Plaintiff,

vs.

Adv. No.: 3:11-ap-821-JAF

DOLORES CROSS and
DONALD M. CUMMINGS,

Defendants.

_____ /

DOLORES CROSS,

Counterclaim Plaintiff,

vs.

WILLIAM LARRY CROSS,

Counterclaim Defendant.

_____ /

**ORDER DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT
AND GRANTING DEFENDANTS' AND COUNTERCLAIM PLAINTIFF'S CROSS-
MOTION FOR SUMMARY JUDGMENT**

This proceeding is before the Court on: (1) Plaintiff William Larry Cross' ("Debtor") Motion for Partial Summary Judgment (Doc. 14); and (2) Defendants Donald E. Cummings and Dolores Cross' (collectively, "Defendants") Response in Opposition and Defendants' and Counterclaim Plaintiff Dolores Cross' ("Counterclaim Plaintiff") Cross-Motion for Summary

Judgment (Doc. 26). No response to the Cross-Motion for Summary Judgment has been filed. For the reasons stated herein, Debtor's Motion for Partial Summary Judgment (Doc. 14) is denied and the Cross-Motion for Summary Judgment (Doc. 26) is granted.

I. BACKGROUND

Debtor and Counterclaim Plaintiff were married for more than thirty (30) years. They divorced in 2003. Pursuant to the dissolution order, a marital obligation existed between them requiring the Debtor to pay money to his former spouse, Counterclaim Plaintiff. On June 18, 2003, a judgment for \$50,000.00 ("Judgment") was entered by the State of Connecticut Superior Court, Judicial District of Fairfield, against the Debtor in favor of Counterclaim Plaintiff. On the face of the Judgment, the \$50,000.00 obligation is described as a "property settlement" (Doc. 14-2 at 7).

On August 23, 2004, the Debtor filed a voluntary petition for Chapter 7 relief in the above-captioned case. At the time of filing, the Debtor had failed to pay any amount of the \$50,000.00 obligation. On July 22, 2011, Counterclaim Plaintiff domesticated the Judgment in Florida, and recorded the Judgment in Marion County, Florida, in an effort to collect the subject amount from the Debtor. Defendant Cummings is the Florida attorney used by Counterclaim Plaintiff to domesticate and record the Judgment in Florida. On October 19, 2011, the Plaintiff filed the instant adversary proceeding (Doc. 1, "Complaint"), seeking damages for violation of the discharge injunction against Defendants Cross and Cummings, individually. The Defendants responded by asserting an affirmative defense and a counterclaim (Doc. 24) that, in spite of the form of the \$50,000.00 Judgment, the obligation is in the nature of support, and not in fact due to any property settlement between the parties.

II. SUMMARY JUDGMENT STANDARD

Federal Rule of Civil Procedure 56 is applicable to bankruptcy proceedings pursuant to Federal Rule of Bankruptcy Procedure 7056. Granting summary judgment is appropriate if, based upon the materials in the record, “the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” FED. R. CIV. P. 56(a) and (c). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

The non-moving party, after a movant makes a properly supported summary judgment motion, must establish specific facts showing the existence of a genuine issue of fact for trial. FED. R. CIV. P. 56(c). The non-moving party may not rely on the allegations or denials in its pleadings to establish a genuine issue of fact, but must come forward with an affirmative showing of evidence. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). A court determining entitlement to summary judgment must view all evidence and make reasonable inferences in favor of the party opposing the motion. *Haves v. City of Miami*, 52 F.3d 918, 921 (11th Cir. 1995). “When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts.” *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

III. UNDISPUTED FACTS¹

The Debtor and Counterclaim Plaintiff were married in Connecticut in 1966 (Tr. 7). Approximately six years after being married, the Debtor and Counterclaim Plaintiff had a daughter (Tr. 8). Around this same time Counterclaim Plaintiff was found to be disabled by the Social Security Administration due to her having a defective heart valve (Tr. 12). Early in the marriage, the Debtor and Counterclaim Plaintiff decided they would have a “traditional marriage” where the Counterclaim Plaintiff would raise their daughter and the Debtor would support the family (Tr. 11). During this time, the Debtor was a self-employed accountant and consultant (Tr. 10).

In 1996, the parties’ daughter passed away from complications stemming from sickle cell anemia (Tr. 8, 20). Subsequent to his daughter’s passing, the Debtor “was not himself anymore” and decided to live and work in Florida (Tr. 18). Reluctantly, the Counterclaim Plaintiff joined her husband in Florida (Tr. 20-21). To this end, they sold their home in Connecticut and bought a home in Florida (Tr. 21-22).

On or about January 2000, however, the Debtor was caught embezzling approximately \$250,000.00 from his employer in Florida (Tr. 25, 28). The Debtor’s Florida employer apparently did not want the Debtor’s embezzlement to become a criminal matter, so a deal was entered into whereupon the Debtor was to immediately pay back \$100,000.00 and place a lien on the parties’ marital home for the remainder due and owing (Tr. 28-29).² The agreement was that,

¹ The parties have not come forward with evidence to dispute the facts contained within the trial transcript of the State of Connecticut Superior Court divorce proceeding (Docs. 14-3 through 14-10, hereinafter referred to a “Tr” followed by the appropriate transcript page number).

² The Debtor apparently lost a majority of the embezzled funds in a failed business venture (Tr. 90-109). Therefore, in order to pay the \$100,000.00, the Debtor borrowed this amount from his aunt (Tr. 29).

if the marital home was ever foreclosed upon, the Florida employer would turn the matter over to the state prosecutor (Tr. 29).

Subsequently, the marital home went into foreclosure and the Debtor was arrested in October 2000 on charges of embezzlement (Tr. 33). After the Debtor's arrest and the foreclosure on the marital home, the Debtor did not provide the Counterclaim Plaintiff with any support (Tr. 34). Consequently, the Counterclaim Plaintiff moved back to Connecticut, relying solely on assistance from her elderly parents and Social Security benefits (Tr. 34-35, 39-44).³ In addition, Counterclaim Plaintiff "was required to pay Medicare Part B premiums, prescription drugs, and out of pocket medical expenses not otherwise covered by Medicare" (Doc. 26-1 at 3).⁴

Around this same time, the Debtor's father was killed by an automobile (Tr. 35). A wrongful death suit was brought and the Debtor was eventually provided \$128,219.74 from his father's estate (Tr. 37). The Debtor apparently did not inform the Counterclaim Plaintiff of this distribution (Tr. 37, 46). The Debtor used \$115,000.00 of these funds to pay back his aunt (Tr. 118).

In relation to his arrest for embezzlement, the Debtor was placed on probation and ordered to pay restitution (Tr. 130). The Debtor pays approximately between \$100.00 and \$400.00 per month towards his restitution balance (Tr. 130). As a condition of the Debtor's probation, he is not permitted to work in a job that involves finance or accounting (Tr. 128). At

³ In 2002, Counterclaim Plaintiff received \$8,208.00 in Social Security benefits (Tr. 39). She remains disabled (Doc. 26 at 9).

⁴ The Debtor has come forward with no evidence to dispute these facts.

the time of the divorce proceeding in 2003, the Debtor worked as a salesman (Tr. 124, 136). His 2002 tax return reflected approximately \$28,000.00 in total earnings (Tr. 124, 136).⁵

During the divorce proceedings, the Counterclaim Plaintiff requested \$90.00 per week in permanent alimony, \$66,000.00 as a property settlement, and that the parties keep their respective used vehicles, and pay their own debts (Tr. 132; *see* Tr. 42, 137). At the time of the divorce proceeding, the Debtor had not paid any support to his spouse for a period of approximately 30 months (Tr. 44; Doc. 26-1 at 3, Affidavit of Counterclaim Plaintiff).⁶ When the Connecticut judge asked Counterclaim Plaintiff's divorce attorney where \$66,000.00 for a property settlement would come from, counsel responded that he believed there may be money hidden somewhere from the \$250,000.00 in embezzled funds (Tr. 142-44). In addition, counsel for Counterclaim Plaintiff believed the Debtor could possibly inherit from his aunt since he is her only surviving relative (Tr. 148-49).

The Connecticut judge, however, was concerned that there was no evidence of any hidden funds and that a possible inheritance was speculative (Tr. 143). The judge also pointed out that the money the Debtor received from his father's estate, while it was likely marital property, was spent on reimbursement related to the embezzled funds matter (Tr. 143, 147). The judge commented that Counterclaim Plaintiff's counsel was asking that the judge "conjure up a picture that somewhere, somehow there's a bank account, or there's a piece of property [to divide] and to order this man [the Debtor] to transfer it, or to pay an amount" (Tr. 143). The judge continued: "You're asking me to paint a picture of nothing. I have no evidence." (*id.*).

⁵ The Debtor's 2001 tax return reflected total earnings of \$9,220.00 (Tr. 126).

⁶ The Debtor has come forward with no evidence to dispute this fact.

The judge expressed to counsel for Counterclaim Plaintiff that lump sum alimony was likely a more appropriate remedy; however, counsel insisted that Counterclaim Plaintiff “is essentially destitute” and that she should be awarded a property settlement (Tr. 148-49). The judge ultimately acquiesced and awarded Counterclaim Plaintiff \$50,000.00 as a property settlement (Tr. 154; Doc. 14-2 at 7). In addition, the judge awarded Counterclaim Plaintiff \$175.00 per week in permanent alimony, payable until her death or remarriage whichever occurs first (Tr. 154; Doc. 14-2 at 7).

IV. ANALYSIS

As discussed more comprehensively below, the Court finds there are no genuine issues of material fact in dispute and that Defendants and Counterclaim Plaintiff are entitled to judgment as a matter of law.

The primary issue before the Court is whether the \$50,000.00 Judgment is nondischargeable as being in the nature of alimony, maintenance, or support. 11 U.S.C. § 523(a)(5).⁷ The party seeking to declare a debt nondischargeable has the burden of proof and the standard of proof is preponderance of the evidence. FED. R. BANKR. P. 4005; *Grogan v. Garner*, 498 U.S. 279, 287 (1991). The bankruptcy court must make a determination as to whether the debt is in the nature of alimony or support, or part of a property settlement, in deciding whether to declare the debt nondischargeable. *Cummings v. Cummings*, 244 F.3d 1263, 1266 (11th Cir. 2001); *Castillo v. Prater (In re Prater)*, 231 B.R. 819, 821 (Bankr. M.D. Fla. 1999). If the debt is in the nature of support, the debt is not dischargeable pursuant to 11 U.S.C. § 523(a)(5). In

⁷ Congress amended the applicable statute to remove subsections (A) and (B) from Section 523(a)(5), but the amendment is inapplicable to cases filed before the effective date of the amendment, and the Debtor’s petition was filed before this date. See Pub.L. 109-8 §§ 215(c), 1501(a).

addition, there is no deadline for filing an adversary proceeding in the bankruptcy court for a determination under Section 523(a)(5). A bankruptcy case may be reopened to litigate dischargeability of debt under Section 523(a)(5). FED. R. BANKR. P. 4007(b).

Federal bankruptcy law, not state law, determines whether a debt is in the nature of support or is a property settlement. *Castillo*, 231 B.R. at 821. Therefore, the terms or labels used in the state court's judgment are not controlling on the issue. *In re Throgmartin*, 426 B.R. 836, 841 (Bankr. M.D. Fla. 2012). Courts must make an independent evaluation of whether the debt is in the nature of alimony or support and, thus, is nondischargeable. *Cummings*, 244 F.3d at 1265.

This Court has used the following six factors in evaluating the nature of a separation obligation:

1. Whether the obligation under consideration is subject to contingencies, such as death or remarriage;
2. Whether the payment was fashioned in order to balance disparate incomes of the parties;
3. Whether the obligation is payable in installments or in a lump sum;
4. Whether there are minor children involved in a marriage requiring support;
5. The respective physical health of the spouse and the level of education;
6. Whether, in fact, there was need for support at the time of the circumstances of the particular case.

Castillo, 231 B.R. at 821; *Gardner v. Edwards (In re Edwards)*, 261 B.R. 523, 525-26 (Bankr. M.D. Fla. 2001).

In considering these six factors, *supra*, the Court finds the majority of the factors weigh in favor of treating the \$50,000.00 property settlement as nondischargeable. Specifically, as to the first factor, the Court would note that it neither weighs in favor of nor against

nondischargeability because an award of lump sum alimony would, like a property settlement, not have contingencies such as death or remarriage.

With respect to the second factor, the Court finds it weighs in favor of nondischargeability because it appears to have been entered in an effort to balance the disparate incomes of the parties. To illustrate, the most recent tax return of the Debtor at the time of the divorce proceeding revealed total earnings of approximately \$28,000.00 (Tr. 124, 136). At the time of the award, the Debtor had not paid any support to his spouse for a period of approximately 30 months (Tr. 44; Doc. 26-1 at 3). Counterclaim Plaintiff relied solely on assistance from her elderly parents and Social Security benefits in the amount of \$8,208.00 annually (Tr. 34-35, 39-44). Counterclaim Plaintiff was, and remains, disabled and had little to no earning potential; thus, the Debtor's financial circumstances were better than his spouse's. Finally, as noted by the Connecticut judge, there was no property, *per se*, to divide.⁸ Thus, the \$50,000.00 appears to have been entered in an effort to balance the disparate incomes of the parties.

Regarding the third factor, whether the obligation is payable in installments or in a lump sum, the Court finds this factor neither weighs in favor of the Debtor nor the Counterclaim Plaintiff. More particularly, while the award is lump sum, the Connecticut judge on several occasions throughout the hearing referred to the requested property settlement as being more appropriately couched as a lump sum alimony award (*see* Tr. 146, 149, 150). This is significant since the judge was concerned about not having any evidence before him regarding property to

⁸ As noted previously, the parties did keep their respective used automobiles and retained responsibility for their own debts.

divide (*see* Tr. 143-50).⁹ Consequently, the Court finds the fact the award is lump sum does not favor either party.

Likewise, the fourth factor, whether there are minor children involved, weighs in favor of neither party as there were no minor children at the time of the award.

Regarding the fifth factor, the respective physical health of the spouse and the level of education, the Court finds this factor weighs in favor of Counterclaim Plaintiff. Specifically, the Debtor's spouse was determined to be disabled by the Social Security Administration since approximately 1972 (*see* Tr. 7-12). The Debtor was healthy and had future earning potential, while Counterclaim Plaintiff "was required to pay Medicare Part B premiums, prescription drugs, and out of pocket medical expenses not otherwise covered by Medicare" (Doc. 26-1 at 3). The poor health of Counterclaim Plaintiff weighs in favor of nondischargeability of the award.

With respect to the sixth and final factor, whether there was need for support at the time of the award, the Court finds this factor weighs in favor of nondischargeability. Again, Counterclaim Plaintiff was, and remains, disabled. At the time of the award, the Debtor had not paid any support to his spouse for a period of approximately 30 months (Tr. 44; Doc. 26-1 at 3). Counterclaim Plaintiff relied solely on assistance from her elderly parents and Social Security benefits in the amount of \$8,208.00 annually (Tr. 34-35, 39-44). In addition, Counterclaim Plaintiff was required to pay for her medical expenses (Doc. 26-1 at 3). Moreover, as noted by the Connecticut judge, there was no property, *per se*, to divide.

In sum, each of the six factors, *supra*, when viewed in the context of the totality of the circumstances, support the conclusion that the entire \$50,000.00 property settlement was meant

⁹ It is unlikely counsel for Counterclaim Plaintiff or the divorce court contemplated the implications of dischargeability at the time. *See Cummings*, 244 F.3d at 1265.

to be in the nature of maintenance and support. Counterclaim Plaintiff has met her burden of proving the subject debt is not dischargeable pursuant to 11 U.S.C. § 523(a)(5).

V. CONCLUSION

Based on the foregoing, and there being no genuine issues of material fact, it is **ORDERED:**

1. The \$50,000.00 property settlement debt is not dischargeable pursuant to 11 U.S.C. § 523(a)(5). Consequently, there was no violation of the discharge injunction by Defendants Cross and Cummings.

2. A separate judgment will be entered.

DATED this 1st day of August, 2012 in Jacksonville, Florida.

/s/ Jerry A. Funk
JERRY A. FUNK
United States Bankruptcy Judge

Copies to:

Richard A. Perry, attorney for Plaintiff
Seldon J. Childers, attorney for Defendants and Counterclaim Plaintiff