



ORDERED in the Southern District of Florida on March 22, 2012.

A handwritten signature in black ink, appearing to read "Erik P. Kimball".

Erik P. Kimball, Judge
United States Bankruptcy Court

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION**

In re:

Case No. 11-38947-EPK

GIA FREER,

Chapter 7

Debtor.
_____ /

ORDER ON MOTION FOR RELIEF FROM STAY

THIS MATTER came before the Court upon *Creditor, Former Husband, Alvaro I. Martinez, Jr.'s Motion for Relief from the Automatic Stay* [ECF No. 18] (the "Motion") filed by Alvaro I. Martinez, Jr. ("Mr. Martinez"). In the Motion, among other things, Mr. Martinez seeks relief from the automatic stay under sections¹ 362(b) and 362(d) to pursue collection of attorneys' fees awarded by a state court in favor of Mr. Martinez and against Gia Freer (the "Debtor"). At the December 14, 2012 hearing on the Motion the Debtor

¹ Unless otherwise indicated, the terms "section" and "sections" used in this Order refer to sections of the United States Bankruptcy Code, 11 U.S.C. §§ 101 *et seq.*

objected to this component of the Motion.² The Court subsequently entered its *Order Setting Briefing Deadline* [ECF No. 29] allowing the parties to file briefs addressing whether or not the debts alleged in the Motion are non-dischargeable pursuant to sections 523(a)(5) or (15).

The Court considered the Motion, the *Debtor's Memorandum of Law in Support of Objection to Motion for Relief Filed on Behalf of Creditor, Alvaro I. Martinez, Jr.* [ECF No. 30], *Creditor, Former Husband, Alvaro I. Martinez, Jr.'s Memorandum of Law on the Nondischargeability of Debts Arising from Post-Dissolution Proceedings* [ECF No. 31]³, and the arguments advanced by the parties at the hearing.

On April 21, 2010, the Circuit Court of the Eleventh Judicial Circuit of Florida in and for Miami-Dade County – Family Division (the “Family Court”) entered its *Order Awarding Post Judgment Attorney's Fees* (the “April 21st Order”) in Case No. 1999-15258 FC 04. The Family Court awarded \$37,081.00 in attorneys’ fees in favor of Mr. Martinez and against the Debtor. The attorneys’ fees award resulted from the Debtor’s conduct in post-judgment discovery litigation between the parties, who are divorced, in connection with the Family Court’s ruling concerning the issue of school registration of the parties’ minor child. On May 11, 2011, the Family Court entered its *Final Order on Pending Motions* (the “May 11th Order”), determining issues of parental decision-making authority over school registration, parental time sharing, and child support. In the May 11th Order,

² The Debtor did not object to other relief requested by Mr. Martinez. This Court entered its *Partial Agreed Order Granting Creditor, Former Husband, Alvaro I. Martinez' Motion for Relief from the Automatic Stay on Issues of Child Custody, Visitation, Modification of Child Support and Enforcement of Child Support [DE # 18]* [ECF No. 39] (“the Partial Agreed Order”) lifting the automatic stay to allow Mr. Martinez to commence or continue the following actions in state court: (a) actions for establishment or modification of an order for domestic support obligations; (b) actions concerning child custody or visitation; and (c) actions for the collection of domestic support obligations from property that is not property of the estate.

³ The exhibits referenced in the brief filed by Mr. Martinez were omitted from the document as originally filed but were later filed at ECF No. 48 and were considered by the Court.

again based on the Debtor's conduct, the Family Court awarded Mr. Martinez additional attorneys' fees in an amount to be determined at a subsequent hearing.

In his Motion, Mr. Martinez argues that the \$37,081.00 debt arising from the April 21st Order is non-dischargeable pursuant to sections 523(a)(5) or (15). Mr. Martinez seeks relief from the automatic stay to collect under the April 21st Order and to pursue liquidation and collection of additional attorneys' fees consistent with the May 11th Order.

Section 362(b)(2)(B) provides that the filing of a bankruptcy petition does not stay "the collection of a domestic support obligation from property that is not property of the estate" In his brief, Mr. Martinez concedes that the attorneys' fee obligations under the April 21st Order and the May 11th Order are not domestic support obligations and thus are not excepted from the automatic stay under section 362(b)(2)(B). Mr. Martinez must seek relief from the automatic stay under section 362(d) to pursue collection of the existing attorneys' fee award and liquidation and collection of additional attorneys' fees consistent with prior orders of the Family Court.

If the Debtor's obligations to Mr. Martinez for attorneys' fees awarded by the Family Court will be discharged in this chapter 7 case, it would not be appropriate under any circumstances to grant Mr. Martinez relief from stay to pursue collection. Mr. Martinez would be limited to a distribution in this case. The opposite is not necessarily true. The fact that a debt will not be discharged, by itself, is not sufficient cause to grant relief from stay under section 362(d). In this case, the sole objection raised by the Debtor to the relief requested is that her obligations to Mr. Martinez will be discharged in this case. In her brief, the Debtor specifically requests "that the Court enter an Order finding that the debt owed to the Creditor, Alvaro I. Martinez, Jr., is not excepted from discharge under . . . 11

U.S.C. § 523(a)(15).”⁴ For purposes of the Motion, the parties agree that if the attorneys’ fee debts at issue are found to be non-dischargeable pursuant to section 523(a)(15), then Mr. Martinez is entitled to relief from stay to collect the amount that has been ordered by the Family Court and to liquidate and collect additional legal fees consistent with the May 11th Order. Mr. Martinez seeks to collect only from property of the Debtor that is not property of the estate.

The debts for legal fees awarded by the Family Court in the April 21st Order and the May 11th Order are non-dischargeable pursuant to section 523(a)(15).

[A] debt will be excepted from discharge under § 523(a)(15) when these three elements are met: (1) the debt in question is to a spouse, former spouse or child of the debtor; (2) the debt is not a support obligation of the type described in § 523(a)(5); and (3) the obligation was incurred during the course or in connection with a separation agreement, divorce decree or other order of a court of record.

In re Gruber, 436 B.R. 39, 44 (Bankr. N.D. Ohio 2010) (internal citations omitted).

The debts at issue are owed by the Debtor to her former husband, Mr. Martinez. The debts are not domestic support obligations. Attorneys’ fees awarded by the Family Court in this case – in connection with post-divorce litigation concerning child support, parental time-sharing, and parental decision-making authority over school registration – are obligations incurred during the course of or in connection with a separation agreement, divorce decree or other order of a court of record. *See In re Gruber*, 436 B.R. 39; *see also In re Eckstrom*, 2011 WL 5591648, at *2 (Bankr. N.D. Cal. Nov. 16, 2011). The Debtor’s

⁴ Fed. R. Bankr. P. 7001(6) requires that an action to determine the dischargeability of a debt must be brought by complaint. In his Motion, Mr. Martinez specifically requested a ruling from the Court on this issue. In her brief the Debtor requested that the Court make a determination under section 523(a)(15). The issue has been fully addressed by the parties. Based on the agreed facts and the narrow issue of law presented, neither party is prejudiced by the fact that the matter is not presented under Bankruptcy Rule 7001. The parties waived the right to require that this matter be addressed through an adversary proceeding. *See In re Copper King Inn, Inc.*, 918 F.2d 1404 (9th Cir. 1990); *see also Matter of Village Mobile Homes, Inc.*, 947 F.2d 1282, 1283 (5th Cir. 1991).

obligations for legal fees under the Family Court's orders are non-dischargeable pursuant to section 523(a)(15).

Accordingly, the Court finds that cause exists pursuant to section 362(d)(1) to lift the automatic stay to allow Mr. Martinez to pursue collection of the \$37,081.00 in attorneys' fees awarded by the Family Court in the April 21st Order and to pursue liquidation and collection of additional attorneys' fees awarded by the Family Court consistent with the May 11th Order.

For the foregoing reasons, and being otherwise fully advised in the premises, it is **ORDERED AND ADJUDGED** that:

1. The Motion [ECF No. 18] is GRANTED.
2. The automatic stay imposed by 11 U.S.C. § 362 is MODIFIED to permit Alvaro I. Martinez, Jr. to: (1) pursue collection of \$37,081.00 in attorneys' fees awarded by the Circuit Court of the Eleventh Judicial Circuit of Florida in and for Miami-Dade County – Family Division on April 21, 2010, in Case No. 1999-15258 FC 04, in that court's *Order Awarding Post Judgment Attorney's Fees*; and (2) pursue liquidation and collection of attorneys' fees imposed by the same court on May 11, 2011 in that court's *Final Order on Pending Motions*. Collection shall be limited to property of the Debtor that is not part of the estate in the above-captioned chapter 7 case.

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Copies furnished to:

Alan R. Crane, Esq.

Alan R. Crane, Esq. is directed to serve a copy of this order on all interested parties and to file a certificate of service with the Court.