

ORDERED in the Southern District of Florida on

September 21, 2006.



Steven H. Friedman

Steven H. Friedman, Judge
United States Bankruptcy Court

U.S. BANKRUPTCY COURT
SO. DISTRICT OF FLORIDA

SEP 21 2006

FILED _____ RECEIVED _____

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
West Palm Beach Division

IN RE:

Case No.: 96-33413-BKC-SHF
Chapter 7 Proceeding

LAWRENCE B. CUMMINGS,

Debtor. /

SUSAN CUMMINGS,

Plaintiff,

vs.

Adv. Pro. No.: 97-1128-BKC-SHF-A

LAWRENCE B. CUMMINGS,

Defendant. /

**MEMORANDUM OPINION DETERMINING OBLIGATION ARISING FROM
FINAL JUDGMENT OF DISSOLUTION OF MARRIAGE TO BE PARTIALLY
DISCHARGEABLE AND PARTIALLY NON-DISCHARGEABLE**

The trial of this adversary proceeding was conducted on January 17th, 18th and 19th, 2006, upon plaintiff's Complaint to Determine Dischargeability of a Debt and for Declaratory Judgment ("Complaint"). By way of the Complaint, Susan Cummings ("plaintiff") seeks a determination that the indebtedness of \$6,324,148 awarded to plaintiff by way of the May 23, 1996 Final Judgment of Dissolution of Marriage, entered by the Honorable John L. Phillips, Circuit Court Judge for the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida, Case No. CD 95-2684 FC, is non-dischargeable in its entirety pursuant to 11 U.S.C. §§ 523(a)(5) and (a)(15). In his Answer to Adversary Complaint and Affirmative Defenses (C.P. 5), Lawrence Cummings ("defendant")

acknowledges that a Final Judgment of Dissolution of Marriage was entered but asserts that, since the monetary award rendered in favor of plaintiff in the divorce proceeding encompassed an equitable distribution, and since the granting of a discharge of such obligation would result in a benefit to defendant which would outweigh the detrimental consequences to be suffered by plaintiff if the equitable distribution was deemed non-dischargeable, the entire amount awarded to plaintiff in the divorce proceeding should be deemed dischargeable. The Court, having heard the testimony of witnesses and having considered their credibility and demeanor, and also having considered the exhibits introduced at trial, and being otherwise fully advised in the premises, makes the following findings and conclusions pursuant to Rule 52 of the Federal Rules of Civil Procedure, which is incorporated by Bankruptcy Rules 9014 and 7052. Consistent with this Court's Final Judgment entered contemporaneously with the entry of this Memorandum Opinion, the Court determines that the monetary award in plaintiff's favor, contained in the May 23, 1996 Final Judgment of Dissolution of Marriage, is **non-dischargeable to the extent of \$7,567,202.38.**

JURISDICTION

This Court has jurisdiction as to the subject matter of the instant adversary proceeding pursuant to Title 28 U.S.C. §§ 157 and 1334(b). This is a core proceeding in accordance with 28 U.S.C. § 157(b)(2)(I).

BACKGROUND

This adversary proceeding emanates from the bankruptcy case of Lawrence B. Cummings, debtor, which case was commenced on August 20, 1996 with defendant's filing of his voluntary chapter 11 petition. Ultimately, confirmation of defendant's chapter 11 plan was denied, and on July 3, 1997, defendant's case was converted to a chapter 7 proceeding (Case No. 96-33413-BKC-SHF - C. P. 158). Deborah C. Menotte was appointed as the chapter 7 trustee to administer

defendant's chapter 7 bankruptcy estate (Case No. 96-33413-BKC-SHF - C. P. 163), which estate remains open pending a final disposition of assets by the chapter 7 trustee.

Dissolution of Marriage Proceeding

The afore-referenced dissolution of marriage proceeding was commenced on April 6, 1995 with the filing of a Petition for Dissolution of Marriage by Plaintiff. Following trial, Judge Phillips entered the Final Judgment of Dissolution of Marriage (Plf's Tr. Ex. 13). By way of the referenced Final Judgment, Judge Phillips determined that defendant was obligated to pay plaintiff \$6,324,148 to effectuate an equitable distribution, with defendant to make three equal payments of \$2,108,049, on July 15, 1996, July 15, 1997, and July 15, 1998. The Final Judgment further provides that, should defendant fail to make any of the payments as required, plaintiff would be entitled to a judgment for the unpaid balance, plus interest at the rate of 10% per annum.

An appeal of the Final Judgment was filed with the Fourth District Court of Appeal for the State of Florida. On October 7, 1998, the State Appellate Court affirmed in part and reversed and remanded in part the Final Judgment of Dissolution of Marriage, determining that the trial court had overstated plaintiff's share of equitable distribution to the extent of \$362,987, but otherwise ratifying the Final Judgment of Dissolution of Marriage. *Cummings v. Cummings* 719 So. 2d 948 (Fla. 4th DCA 1998). Based upon Plaintiff's uncontroverted trial testimony, no portion of the amount due under the Final Judgment of Dissolution of Marriage has been paid.

INITIAL ADJUDICATION OF INSTANT ADVERSARY PROCEEDING

The instant adversary proceeding was commenced on October 27, 1997, with plaintiff's filing of her Complaint to Determine Dischargeability of a Debt and for Declaratory Judgment. Following pretrial discovery, trial was conducted before the Honorable Barry S. Schermer, Visiting United States Bankruptcy Judge, on April 13 and April 14, 1999. Upon the conclusion of trial, Judge Schermer entered his Findings of Fact and Conclusions of Law determining the entirety of

the net equitable distribution awarded to plaintiff by way of Judge Phillips' May 23, 1996 Final Judgment of Dissolution of Marriage was dischargeable, pursuant to 11 U.S.C. §§ 523(a)(5) and 523(a)(15) (C.P. 88 and C.P. 89). Plaintiff appealed this Court's rulings and on October 6, 1999, the United States District Court for the Southern District of Florida affirmed the rulings issued by Visiting Judge Schermer (C.P. 102).

Thereafter, plaintiff pursued a further appeal to the United States Court of Appeals for the Eleventh Circuit. On March 20, 2001, the Eleventh Circuit issued its opinion reversing and remanding this Court's earlier adjudication. *Cummings v. Cummings*, 244 F.3d 1263 (11th Cir. 2001). In its decision, the Eleventh Circuit opined that ". . . on remand the bankruptcy court may choose to await clarification by the divorce court regarding what portion - if any - of the equitable distribution is in the nature of support." *Id.* at 1267.

Subsequent to the issuance of the Eleventh Circuit's March 20, 2001 decision, this Court, with Visiting Judge Schermer presiding, conducted a hearing upon plaintiff's Motion for Relief from Judgment (C.P. 103), relating to the Findings of Fact, Conclusions of Law and Judgments entered by Visiting Judge Schermer on May 4, 1999. Pursuant to the Order Re-Setting Trial, Pretrial Conference and Related Deadlines (C.P. 114), Judge Schermer denied plaintiff's Motion for Relief from Stay, and scheduled trial of this adversary proceeding on remand during the week of August 6, 2001. Immediately prior to the August 6, 2001 trial date, defendant filed his Emergency Motion (A) to Enforce Prior Order of this Court Invoking Exclusive Jurisdiction to Adjudicate this Adversary Proceeding, and (B) to Enjoin Plaintiff and the Divorce Court, pursuant to 11 U.S.C. § 105, from Proceeding in on any Issue Raised in this Adversary Proceeding ("Motion to Enforce Prior Order" - C.P. 120). The Motion to Enforce Prior Order sought to enforce the terms of the December 16, 1997 Order on Remand Providing for Independent Factual Findings to be Rendered in Connection With a Certain Adversary Action Commenced by Susan Cummings Seeking a Determination of

Dischargeability under Both 11 U.S.C. §§ 523(a)(5) and (a)(15), entered in the bankruptcy case of Lawrence B. Cummings (C.P. 228). Following a hearing upon the Motion to Enforce Prior Order, Visiting Judge Schermer entered his July 25, 2001 Order Granting, as Provided Herein, Emergency Motion (A) to Enforce Prior Order of this Court Invoking Exclusive Jurisdiction to Adjudicate this Adversary Proceeding, and (B) to Enjoin Plaintiff and the Divorce Court, Pursuant to 11 U.S.C. § 105, from Proceeding in on Any Issue Raised in this Adversary Proceeding (“Order Granting Motion to Enforce Prior Order” - C. P. 122). On August 3, 2001, plaintiff filed, with the Eleventh Circuit Court of Appeals, her Emergency Motion for Stay Pending Appeal (C.P. 127), contending that the July 25, 2001 Order Granting Motion to Enforce Prior Order was improvidently entered. On August 3, 2001 United States Circuit Court Judge Charles A. Wilson temporarily granted plaintiff’s Petition for Writ of Mandamus (C.P. 131), granting a temporary stay of this adversary proceeding pending further order by the Eleventh Circuit. Plaintiff’s initial Petition for Writ of Mandamus was denied by order of the Eleventh Circuit dated August 3, 2001(C.P. 135), but upon the subsequent filing by plaintiff of an Emergency Petition for Writ of Mandamus, the Eleventh Circuit granted a Writ of Mandamus on December 14, 2001, directing this Court “. . . to take no further action to enjoin or prohibit [plaintiff] from obtaining clarification from the state divorce court as to what portion, if any, of the equitable distribution was intended as support.” (Eleventh Circuit Court of Appeals Case Number 01-16263-C).

Subsequent to the issuance of the Writ of Mandamus, State Circuit Court Judge Phillips considered plaintiff’s Amended Motion for Clarification of Support Award. On January 14, 2002, Judge Phillips entered his Order Granting Amended Motion for Clarification (*Cummings v. Cummings*, Case No. CD 95-2684 FA - C.P. 1398), whereby he clarified his May 23, 1996 Final Judgment of Dissolution of Marriage. Paragraph 2.C. of the January 14, 2002 Order Granting Amended Motion for Clarification provides:

Without question, the undersigned intended the first two lump sum equitable [sic] distribution payments required by paragraph 10 of the Final Judgment of Dissolution of Marriage (Docket Entry #659) to be considered as, and used for, post-dissolution support of the Former Wife and children. The total lump sum the Former Husband was to pay the Former Wife as equitable distribution was \$6,324,148, payable in three equal payments. The first payment was due July 15, 1996, and the second was due July 15, 1997. Each payment was to be in the amount of \$2,108,049. Each of those payments constitutes support. The third payment of \$2,108,049 due July 15, 1998 was not necessary for support of the Former Wife and children.

ANALYSIS

It is plaintiff's position that the full measure of the award contained in the May 23, 1996 Final Judgment of Dissolution of Marriage is non-dischargeable. Defendant's position is wholly to the contrary - that the entirety of the referenced award is dischargeable. The statutory provisions applicable *sub judice* are 11 U.S.C. §§ 523(a)(5) and (a)(15).¹ The pertinent portion of 11 U.S.C. § 523(a)(5) provides that a discharge issued under 11 U.S.C. § 727 does not discharge an individual debtor from any debt " . . . to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree, or other order of a court of record"

Section 523(a)(15) provides that a discharge issued pursuant to 11 U.S.C. § 727 does not discharge an individual debtor from any debt:

not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation

¹The language contained within §§ 523(a)(5) and (a)(15) was modified with the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. However, since this bankruptcy case was commenced prior to the passage of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, the changes to the Bankruptcy Code do not apply with regard to the adjudication of this adversary proceeding.

agreement, divorce decree or other order of a court of record, a determination made in accordance with State or territorial law by a government unit unless -
(A) the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor and, if the debtor is engaged in a business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business; or
(B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor

Upon review by this Court of the trial record, a large portion of the evidence is extraneous to the issues to be adjudicated. Many of the exhibits relate to contempt proceedings against defendant emanating from the parties' divorce. Such exhibits were admitted, subject to the parties' establishing the relevance of such exhibits. The Court concludes that the adjudication of this adversary proceeding rests principally upon an interpretation of the various opinions and orders entered by other courts, at least as to the dischargeability of defendant's marital obligation under 11 U.S.C. § 523(a)(5). As to the dischargeability of domestic obligations, the Eleventh Circuit Court of Appeals has posited that state law does not determine whether a domestic obligation is dischargeable in bankruptcy. *In re Harrell*, 754 F.2d 902 (11th Cir. 1985); *In re Strickland*, 90 F.3d 444, 446 (11th Cir. 1996). However, as to the instant dispute, the Eleventh Circuit, upon plaintiff's Petition for Writ of Mandamus, directed this Court to take no further action in this adversary proceeding on the issue of dischargeability of defendant's obligation until plaintiff " . . . had a reasonable opportunity to obtain such clarification from the divorce court." (Pl.'s Tr. Ex. 53). As noted above, plaintiff obtained such clarification with the entry of the January 14, 2002 Order Granting Amended Motion for Clarification, entered by Circuit Court Judge Phillips.

Defendant questions the effect of the March 20, 2001 opinion of the Eleventh Circuit Court of Appeals and State Circuit Court Judge Phillips' January 18, 2002 Order Granting Amended Motion for Clarification with regard to the determination of the dischargeability of the July 15, 1996 and July 15, 1997 instalments due plaintiff under the Final Judgment of Dissolution of Marriage. Defendant presented the expert testimony of Barry E. Mukamal, a certified public accountant. Mr. Mukamal presented his Expert Report (Ex. 00) which ostensibly establishes that the \$6,324,148 award contained in Judge Phillips' May 23, 1996 Final Judgment of Dissolution of Marriage overstates the amount necessary for plaintiff to have maintained the lifestyle which she enjoyed as of the date of her divorce from defendant. Mr. Mukamal devised two sets of computations, representing the amounts which should have been awarded to plaintiff in order to maintain her standard of living, dependent upon whether the computations were predicated upon plaintiff's life expectancy (Mukamal Ex. 3, pg. 3), or upon the presumption that Lawrence Cummings was to reach age 65 (Mukamal Ex. 3, pg. 39). In effect, defendant seeks to recompute the amount of the equitable distribution awarded by Judge Phillips in the Final Judgment of Dissolution of Marriage. Such a recomputation by this Court is impermissible under the "law of the case" doctrine. "[T]he doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 815 - 16, 108 S. Ct. 2166, 2177, 100 L. Ed. 2d 811 (1988) (quoting *Arizona v. California*, 460 U.S. 605, 618, 103 S. Ct. 1382, 1391, 75 L. Ed. 2d 318 (1983)); *In re PCH Associates*, 949 F.2d 585 (2d Cir. 1991). This Court thus rejects the computations contained in Mr. Mukamal's Expert Report.

As to the dischargeability of the third payment of \$2,108.049 due under the Final Judgment of Dissolution of Marriage, Judge Phillips' January 14, 2002 Order Granting Amended Motion for Clarification provided that the third instalment "... was not necessary for support of the Former

Wife and children.” Thus, following the entry of Judge Phillips’ January 14, 2002 Order, the determination as to the dischargeability of the third instalment rested with this Court. In addition, it is clearly delineated in this Court’s February 1, 2005 Order Granting Debtor’s Motion to Amend Court Order Determining Relevant Time Period for the “Ability to Pay” Analysis under 11 U.S.C. § 523(a)(15) (C. P. 189) that the dischargeability of the third instalment due plaintiff under the May 23, 1996 Final Judgment of Dissolution of Marriage would be determined at the trial of this adversary proceeding. With regard to an action to determine the non-dischargeability of a marital obligation under 11 U.S.C. § 523(a)(15), “. . . [p]laintiff initially bears the burden of proving by a preponderance of the evidence that this debt should be excepted from discharge.” *In re Nouri*, 304 B.R. 155 (Bankr. M.D. Pa. 2003); accord *In re Busch*, 226 B.R. 710 (Bankr. M.D. Fla. 1998); *In re Phillips*, 187 B.R. 363 (Bankr. M.D. Fla. 1995). Plaintiff presented no evidence to establish the detriment which she would suffer if the third instalment payment under the Final Judgment of Dissolution of Marriage was discharged. Additionally, plaintiff presented no evidence to establish that the detriment which she would suffer outweighs the detriment that the defendant would suffer as a result of being required to pay the third instalment payment. Thus, based upon the lack of evidence presented by plaintiff, the third instalment, in the amount of \$2,108,049, is dischargeable.

COMPUTATION OF INTEREST DUE UPON JUDGMENT

The aggregate principal portion of the \$6,324,148 awarded to plaintiff by way of Judge Phillips which this Court determines to be non-dischargeable is \$3,853,111. The May 23, 1996 Final Judgment of Dissolution of Marriage provides that plaintiff is entitled to interest on the unpaid balance at the rate of 10% per annum. “To the extent that such interest related to the damage awards found to be nondischargeable, the interest which has accrued on such awards is also to be nondischargeable.” *Matter of Touchstone*, 149 B.R. 728-729 (Bankr. S. D. Fla. 1993), citing *In re Lacy*, 947 F.2d 1276 (5th Cir. 1992). The Eleventh Circuit has held that post-petition interest

on a non-dischargeable tax debt is also non-dischargeable. *In re Burns*, 887 F.2d 1541 (1989); *see also, In re Palladino*, 1995 WL 723107 (Bankr. S. D. Fla. 1995). “[I]f a tax liability is deemed nondischargeable under the Bankruptcy Code, then postpetition interest assessed on those nondischargeable liabilities is also a nondischargeable tax liability” *Palladino, supra.* at 723110. *See also, International Asset Recovery Corp. v. Thomson McKinnon Securities, Inc.*, 335 B.R. 520, 527 (S.D.N.Y. 2005).

Based upon the Court’s computations, at simple interest of ten (10%) percent on the unpaid principal balance(s) due to plaintiff, the Court determines that the aggregate amount of interest which has accrued between July 15, 1996 and September 21, 2006 equals \$3,714,090.72. The Court’s computation of interest is reflected upon the Appendix to this opinion. Accordingly, the Court determines that the indebtedness due to Susan Cummings by Lawrence B. Cummings is **non-dischargeable to the extent of \$7,567,201.72**. In accordance with Bankruptcy Rule 9021, a separate Judgment shall be entered consistent with this Memorandum Opinion.

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Susan Cummings v. Lawrence Cummings

Compound Period : Annual

Nominal Annual Rate : 10.000 %
 Effective Annual Rate : Undefined
 Periodic Rate : 10.0000 %
 Daily Rate : 0.02740 %

CASH FLOW DATA

Event	Start Date	Amount	Number Period	End Date
1 Loan	07/15/1996	2,108,049.33	1	
2 Payment	07/15/1996	362,987.00	1	
3 Loan	07/15/1997	2,108,049.33	1	
4 Payment	09/21/2006	7,567,202.38	1	

AMORTIZATION SCHEDULE - US Rule

Date	Loan	Payment	Interest Accrued	Interest Paid	Principal Paid	Interest	Balance Due Principal	Total
Loan 07/15/1996	2,108,049.33		0.00	0.00	0.00		2,108,049.33	
1 07/15/1996		362,987.00	0.00	0.00	362,987.00	0.00	1,745,062.33	2,108,049.33
1996 Totals	2,108,049.33	362,987.00	0.00	0.00	362,987.00			1,745,062.33
Loan 07/15/1997	2,108,049.33		174,506.23	0.00	0.00		3,853,111.66	
1997 Totals	2,108,049.33	0.00	174,506.23	0.00	0.00	174,506.23	3,853,111.66	4,027,617.89
2 09/21/2006		7,567,202.38	3,539,584.49	3,714,090.72	3,853,111.66	0.00	0.00	0.00
2006 Totals	0.00	7,567,202.38	3,539,584.49	3,714,090.72	3,853,111.66			
Grand Totals	4,216,098.66	7,930,189.38	3,714,090.72	3,714,090.72	4,216,098.66			