

ENTERED
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U.S. BANKRUPTCY COURT
MDNC - TD

Defendant.

The Plaintiff and Defendant were married on August 24, 1974. Over the next few years,

the Defendant established a grading business, Bristow Grading. The couple's two children, Christopher Wilson Bristow and Charles Warren Bristow, were born in 1979. After the children were born, the Defendant was able to earn sufficient income to support the family, while the Plaintiff remained at home to care for the children. During this time, the Plaintiff also assisted in the Defendant's business by managing the company books and providing other office support. As Bristow Grading continued to grow throughout the 1980's and 1990's, the Defendant purchased additional equipment and eventually was able to hire several employees. The Plaintiff remained out of the public work force until 1992, when she obtained a job at Capital Metals, Inc., as a metal engraving machine operator. After the Plaintiff reentered the workforce, the household expenses continued to be paid through income generated by Bristow Grading. The Defendant testified that the Plaintiff's income was not needed to support the household, and that the Plaintiff's income was simply used to supplement the household budget.

The Plaintiff and Defendant separated in 1998 and were divorced on January 3, 2000. A Judgment of Equitable Distribution of Marital Property (the "Equitable Distribution Judgment") was entered by the Davidson County District Court on July 25, 2002. The Equitable Distribution Judgment awarded the Defendant the assets of Bristow Grading and awarded the Plaintiff the marital home. Because the Defendant was awarded the assets of Bristow Grading, his share of the marital assets was substantially greater than the Plaintiff's. Additionally, the Defendant was ordered to pay in full the balance owed to First Citizens Bank on the equity line account secured by the marital home ("First Citizens equity line").¹ After deducting the debt to First Citizens, the

¹ The Equitable Distribution Judgment found that the balance due to First Citizens was \$62,341.90.

Defendant received and assets totaling \$271,582.52, and the Plaintiff received assets totaling \$145,390.29. The Defendant was ordered to pay a distributive award in the amount of \$63,096.62 (the "Distributive Award"), plus interest at the legal rate until paid in full.

The judgment for alimony (the "Alimony Judgment") was entered on September 19, 2002. Upon consideration of the facts, the state court found that the Plaintiff was entitled to an alimony award. The state court found that the Defendant had a much greater earning capacity than the Plaintiff. The court found that the Plaintiff was the dependant spouse; that she was actually and substantially dependant upon the Defendant; and that she was substantially in need of maintenance and support. The court found that the Plaintiff's reasonable expenses were \$3,179.00 per month and that her net monthly earnings were \$1,656.83 per month. The court included no money in the Plaintiff's budget for the First Citizens equity line payment, but rather, included this payment in the Defendant's budget. Given the Plaintiff's reasonable expenses of \$3,179.00, the court found that the Plaintiff needed additional disposable income of \$1,500.00 per month, not including the amount of the payment of the equity line on her home, to maintain herself at the minimum standard of living that she had during her marriage.

The court also considered the Defendant's income and reasonable expenses. The court found that the Defendant had net disposable income of approximately \$5,500.00 per month. The court found that the Defendant would be paying the \$63,096.62 Distributive Award to the Plaintiff at a rate of \$1,000.00 to \$1,200.00 per month. The court found that even though the Defendant's income varied somewhat from year to year, the Defendant had sufficient income to pay alimony to the Plaintiff in the amount of \$500.00 per month, in addition to paying the First Citizens equity line at a rate of approximately \$700.00 per month and paying the \$63,096.62

Distributive Award at a rate of \$1,000.00 to \$1,200.00 per month. Therefore, the court ordered that the Defendant pay the sum of \$500.00 per month to the Plaintiff until the Defendant's death, the Plaintiff's remarriage, or the Plaintiff's cohabitation as defined in N.C. Gen. Stat. § 50-16.9.

Finally, the court found that the Plaintiff did not have sufficient means by which to defray the expense of the prosecution of the state court proceedings, and ordered that the Defendant pay \$5,134.00 in attorney's fees to the Plaintiff's counsel, Kathleen E. Nix.

On January 20, 2004, the Defendant filed a voluntary petition for relief under Chapter 7 of the United States Bankruptcy Code. As of the Petition Date, the Defendant had paid only a portion of the attorney fee's to Plaintiff's counsel, a portion of the First Citizens equity line, and had not paid the Distributive Award. The Plaintiff timely filed an adversary proceeding in the Bankruptcy Case, contending that the debt should not be discharged pursuant to 11 U.S.C. § 523 (a)(5) and (a)(15).

DISCUSSION

The Plaintiff contends that the Defendant's obligations as set forth in the Equitable Distribution Judgment and Alimony Judgment (collectively referred to as "State Court Judgments") including (1) the \$63,096.62 Distributive Award; (2) the First Citizens equity line; (3) the \$500.00 per month alimony payment; and (4) the attorney's fees in the amount of \$5,134.00 are nondischargeable pursuant to § 523(a)(5) because they are in the nature of alimony or support. In the alternative, the Plaintiff contends that they are nondischargeable debts pursuant to § 523(a)(15).

A. 11 U.S.C. § 523(a)(5)

Section 523(a)(5) provides, in relevant part:

(a) A discharge under [certain enumerated sections] of this title does not discharge an individual debtor from any debt--

(5) 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, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that--

(B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support;

11 U.S.C. § 523(a)(5). Therefore, if the court makes the determination that (1) the obligation is a debt to a spouse, former spouse, or child of the debtor; (2) the obligation is truly in the nature of alimony, support or maintenance; and (3) the obligation did arise or was connected with a separation agreement, divorce decree or other order of a court of record; then the obligation will not be dischargeable. When addressing exceptions to discharge, the court must be mindful to interpret the exceptions to discharge narrowly to protect the purpose of providing debtors a fresh start. In re Biondo, 180 F.3d 126, 130 (4th Cir. 1999). The party seeking to except a debt from discharge pursuant to § 523(a)(5) has the burden of proving, by a preponderance of the evidence, that the debt is for alimony, maintenance, or support.

In this case, there is no dispute that the obligations created by the Equitable Distribution Judgment and Alimony Judgment are debts to a spouse or former spouse that are connected to a divorce decree. Therefore, the only issue as to each obligation is whether the obligation is truly in the nature of alimony, support or maintenance. It does not appear that the parties dispute that the \$500.00 per month alimony payment is, in fact, an obligation that is truly in the nature of

alimony, support or maintenance. Nevertheless, for the sake of clarity, the court will find for the record that the \$500.00 per month alimony payment is an obligation that is truly in the nature of alimony, support or maintenance and is nondischargeable pursuant to § 523(a)(5).

Consequently, the court must only determine whether the \$63,096.62 Distributive Award, the First Citizens equity line, and the attorney's fees in the amount of \$5,134.00 are obligations in the nature of alimony, support or maintenance.

A determination under § 523(a)(5) as to whether an obligation is in the nature of alimony or support is a fact specific analysis which allows courts to examine numerous factors on a case-by-case basis. In re Austin, 271 B.R. 97, 106 (Bankr. E.D. Va. 2001); In re Baker, 274 B.R. 176, 188 (Bankr. D.S.C. 2000); In re Catron, 164 B.R. 912, 918-19 (E.D. Va.1994). Some of the factors may include the language and substance of the agreement or judgment, the intent of the state court as to the purpose of the obligation, the parties' financial circumstances at the time of the agreement, the length of the marriage, and the role of the obligation at the time of the agreement. The court must not rely simply on the label used by the parties or state court, but must look beyond the label to examine whether the debt actually is in the nature of support or alimony. Cummings v. Cummings, 244 F.3d 1263, 1265 (11th Cir. 2001); In re Brody, 3 F.3d 35, 38 (2d Cir.1993); In re Genovese, 96 F.3d 1438, 1996 WL 516160, at *2 (4th Cir.1996) (unpublished opinion); see also In re Cribb, 34 B.R. 862 (Bankr. S.C. 1983) (court may look beyond the four corners of a divorce decree or an agreement of the parties in order to determine the nature of the payments constituting the debts sought to be discharged). Federal bankruptcy law, not state law, ultimately determines whether a particular obligation is alimony, maintenance or support under as defined by § 523(a)(5). Matter of Long, 794 F.2d 928 (4th Cir. 1986); In re

Adams, 254 B.R. 857 (D. Md. 2000).

Turning to the facts in the present case, the court first recognizes that the parties were married for 24 years. Thus, the length of the marriage was significant. For an appreciable portion of the marriage, the Plaintiff remained out of the public work force to provide care for the couple's children and support to her husband and his work with Bristow Grading. These facts weigh in favor of a finding that the disputed obligations were intended to be in the nature of alimony, support or maintenance. The parties' financial circumstances at the time of the entry of the Equitable Distribution Judgment and the Alimony Judgment also weigh in favor of finding that the Distributive Award is in the nature of alimony or support. The Defendant was employed by his own successful grading business with profits of \$81,814.00 in 2001, while the Plaintiff earned \$25,406.00 in 2001. Because the Defendant gained experience and established himself in the grading industry during the course of the marriage, while the Plaintiff remained at home to care for the couple's children, the Defendant's earning capacity was much greater than the Plaintiff's at the time of the divorce. Bearing in mind these general circumstances, the court will examine the facts and circumstances specific to each of the disputed obligations below.

1. The Distributive Award

The state court addressed the Distributive Award in both the Equitable Distribution Judgment and the Alimony Judgment. In the Equitable Distribution Judgment, the state court ordered that the Defendant pay the Distributive Award within 30 days. The court found that the Defendant had greater income and earning capacity than the Plaintiff, and that the Defendant had the means and ability to pay the Distributive Award. In the Alimony Judgment, entered several months later, the state court appears to contemplate some modifications to its prior order. The

Alimony Judgment states that the Distributive Award will be paid over time at a rate of approximately \$1,000.00 per month rather than making a lump sum payment. The state court further found that the Plaintiff was in need of \$1,500.00 in support. Having found that the Defendant was already paying approximately \$1,000.00 per month, the court then calculated the alimony payment of \$500.00 per month. In making these calculations, the state court treats the Distributive Award as a *portion* of the total funds that the Defendant must pay to enable the Plaintiff to maintain herself at the minimum standard of living that she had during her marriage (\$1,000.00 Distribute Award + \$500.00 alimony payment = \$1,500.00). Thus, the language of the State Court Judgments reflect the state court's intent that the Distributive Award serve as support for the Plaintiff.

Similarly, this court finds that, for all practical purposes, the intended role of the Distributive Award at the time of the State Court Judgments was to provide support to the Plaintiff. The evidence presented establishes that the Plaintiff's reasonable expenses at the time of the State Court Judgments totaled \$3,179.00 per month, not including the First Citizens equity line payment. The Plaintiff's income was \$1,656.83 per month, leaving the Plaintiff with a monthly deficit in the amount of \$1,522.17 plus the amount of the First Citizens equity line payment. As a result, the \$500.00 per month alimony payment together with the Distributive Award paid at a rate of \$1,000.00 per month, for a total of \$1,500.00, were necessary for the Plaintiff's maintenance and support.

The type of property that each party was awarded by the state court is further evidence that Plaintiff was in need of the Distributive Award for her support. When the marital property was distributed, the Defendant retained the assets Bristow Grading, and therefore, the bulk of the

marital property. The Defendant clearly testified that, during the marriage, the household expenses were paid out of Bristow Grading. Therefore, by receiving the assets of Bristow Grading, the Defendant was not only awarded the bulk of the marital assets, but also awarded the stream of income that flowed from those assets and had formerly supported the marital household. Subsequent to the divorce, the Plaintiff no longer had that source of income and was in need of support. See In re Bourassa, 168 B.R. 8 (Bankr. D.N.H. 1994) (the fact that virtually all income-producing assets were transferred to debtor in property settlement is evidence of plaintiff's need for support). Essentially, upon her divorce, the Plaintiff lost the income producing assets of Bristow Grading, from which her household expenses were paid, and in exchange, she received an award of \$63,096.62. Just as the role of Bristow Grading was to support the household, so too was the award of \$63,096.62.

The Defendant relies upon the label assigned by the state court to support his position that Distributive Award was nothing more than a property settlement. This argument is simply no persuasive, as courts have consistently held that an obligation that is essential to enable a party to maintain basic necessities is a nondischargeable support obligation, even if that obligation was labeled as a property settlement. See, e.g., In re Herbert, 304 B.R. 67 (Bankr. E.D.N.Y. 2004) (\$105,000 payment related to the division of assets was nondischargeable support where the funds were necessary for plaintiff's basic needs); In re Mendez, 275 B.R. 482 (Bankr. W.D. Pa. 2001) (debtor's obligations to pay the plaintiff the sum of \$154,921.96 and to pay all of the marital debts that were imposed in a section of the state court judgment captioned "DIVISION OF MARITAL PROPERTY" fell within the discharge exception for maintenance or support); In re Rosenblatt, 176 B.R. 76 (Bankr. S.D. Fla. 1994) (debtor's obligation to make a

net distributive payment of \$533,000 to his former wife was a nondischargeable support obligation); In re Brody, 154 B.R. 408 (E.D.N.Y. 1993) (\$600,000 obligation designated as a “distributive award” in separation agreement was a nondischargeable support obligation); In re Azia, 159 B.R. 71 (Bankr. D. Mass 1993) (\$55,000 payment labeled as “Division of Property” was nondischargeable support based upon the needs of the parties at the time of the agreement and their relative financial situation); In re Bonheur, 148 B.R. 379 (Bankr. E.D.N.Y. 1992) (equitable distribution award was a support obligation under circumstances of a long term marriage, a disparity of spousal incomes and a property award, in lieu of maintenance, to provide support for the plaintiff); In re Grasmann, 156 B.R. 903 (Bankr. E.D.N.Y. 1992) (divorce decree award was nondischargeable maintenance and support despite the fact that the payment was labeled a distributive award and that the state court addressed maintenance separately from the distributive award); In re Cacolici, 108 B.R. 578 (Bankr. N.D. Ohio 1989) (debtor's divorce decree obligation to plaintiff was nondischargeable support, though termed “property settlement,” where assets awarded to former spouse were necessary for her support).

Based upon the foregoing, the court finds that the Distributive Award in the amount of \$63,096.62, plus interest at the legal rate from the July 25, 2002, is an obligation in the nature of support for the purposes of § 523(a)(5).

2. The First Citizens equity line

The Debtor's obligation to pay the First Citizens equity line is referenced in both the Equitable Distribution Judgment and the Alimony Judgment. The Equitable Distribution Judgment distributes the equity line to the Defendant, while the Alimony Judgment describes the role of that obligation in relation to all of the needs and obligations of the parties. In the

Alimony Judgment, the state court considered the fact that the Defendant was required to pay the First Citizens equity line when it determined the amount of alimony to be paid directly to the Plaintiff. In calculating the amount of support that the Plaintiff required, the state court did not include payment of the equity line in the Plaintiff's budget. The state court's finding that the Plaintiff was in need of \$1,500.00 per month was based upon a budget that did not include any amount for housing, either payment of the equity line or any other housing. Therefore, the language of the state court judgments treats the First Citizens equity line obligation as an obligation that is necessary for the Plaintiff's support.

In addition, evidence presented clearly supports a finding that the Plaintiff was unable to meet her basic household needs when the Defendant did not pay the First Citizens equity line. After the Defendant ceased payments on the equity line, the Plaintiff was unable to maintain payments and First Citizens commenced foreclosure proceedings. The Plaintiff's daughter and son-in-law eventually cured the default and brought the Plaintiff's home out of foreclosure. They have continued to make the payments on the equity line, as the Plaintiff lacked the ability to do so. Based upon the foregoing, the court finds that the role of the Defendant's obligation to pay the First Citizens equity line was to provide shelter for the Plaintiff.

Numerous courts have found that payments to protect a residence constitute a nondischargeable support obligation. See, e.g., In re Trump, 309 B.R. 585 (Bankr. D. Kan. 2004) (obligation to make payments on second mortgage note, and ultimately to satisfy that note, was in the nature of support and thus fell within discharge exception for alimony, maintenance, or support, notwithstanding debtor's contention that obligation was actually division of debt, inasmuch as function of obligation was to allow former wife and children to remain in marital

residence as their shelter); In re Batzek, 314 B.R. 464 (Bankr. M.D. Fla. 2004) (debtor's obligation to pay second mortgage was nondischargeable as being in the nature of support); In re Tatge, 212 B.R. 605 (8th Cir. B.A.P 1997) (agreement to make the mortgage payments was intended to serve the most basic of support functions, to provide a home which plaintiff otherwise would not have been able to afford); In re Leslie, 181 B.R. 317 (Bankr. N.D. Ohio 1995) (debtor's obligation to pay credit line was a nondischargeable support obligation where credit line was secured by open-end mortgage encumbering marital home, decree contemplated that former wife would continue to reside in home, marriage was of long duration, former wife was charged with providing for minor child of marriage, and former wife would have been unable to meet her living expenses absent debtor's payments on credit line); In re Burns, 186 B.R. 637 (Bankr. D.S.C. 1992) (debts related to household obligations which, if not paid by the debtor, would result in diminution of wife's and child's standard of living were nondischargeable spousal support); In re Gianakas, 100 B.R. 787 (Bankr. W.D. Pa 1989) (debtor's obligation to pay second mortgage on house in which his ex-wife and their children resided constituted nondischargeable support obligation even though the term of the mortgage payments continued after children reached majority age). All of the circumstances taken together, including the financial circumstances of the parties, the function served by the obligation, the length of the marriage, and the language of the state court judgments, justify a finding that the Defendant's obligation to pay the equity line was intended to serve as support.

The Plaintiff presented evidence that the balance due on the equity line was \$35,000.83 as of January 28, 2005. Based upon the evidence presented, the court finds that the amount of \$35,000.83, plus the amount of any interest charged by First Citizens on that equity line account

from January 28, 2005 until the balance owed to First Citizens on the equity line has been paid in full is a nondischargeable support obligation pursuant to § 523(a)(5).

3. Attorney's Fees

Lastly, the state court awarded attorney fees in the amount of \$5,134.00 in the Alimony Judgment. The Plaintiff contends that outstanding legal fees owed by the Plaintiff to her domestic counsel in excess of \$20,000.00 constitutes a nondischargeable debt, however, the Plaintiff cites no authority to support its position that this court may alter the amount of attorney's fees awarded by the state court. The Alimony Judgment made no reference to additional attorney fees to which the Plaintiff might be entitled in the future; therefore, the court will only consider the whether the original obligation in the amount of \$5,134.00 is an obligation in the nature of alimony, support or maintenance.

The language of the Alimony Judgment clearly reflects the state court's intent to balance the financial needs of the parties. The state court specifically found that the Plaintiff did not have sufficient means by which to pay for the full costs of the domestic litigation. The majority of courts, including the Fourth Circuit, have classified an award of attorney's fees in a divorce judgment as a nondischargeable debt in the nature of alimony, maintenance, and support under § 523(a)(5). In re Silansky, 897 F.2d 743, 744 (4th Cir.1990); In re Adams, 254 B.R. at 861.

Based upon the circumstances in this case, the court finds that the attorney's fees awarded to the Plaintiff in the Alimony Judgment are in the nature of alimony.

Having determined that the Defendant's obligation to pay attorney's fees in the amount of \$5,134.00 to Ms. Nix is nondischargeable, the court must now determine the amount remaining due on this obligation. The Defendant presented copies of two receipts from the

Plaintiff's attorney: one in the amount of \$3,000.00 with the notation "alimony" and another in the amount of \$2,634.00 with the notation "attorney fees" as evidence that a portion of the amount due to Ms. Nix has already been paid. At the trial on this matter, the Defendant appeared unsure as to whether \$2,634.00 or \$5,134.00 was for payment of attorney fees. The Plaintiff contends that the Defendant has not paid the amount of \$5,134.00 to Ms. Nix in full. The court finds that the notations written on the face of the receipts is the most reliable evidence as to the amounts paid. Therefore, the court finds that the Defendant paid \$2,634.00 to Ms. Nix and that \$2,500.00 remains due and owing.

B. 11 U.S.C. § 523(a)(15)

In light of this court's finding that all of the obligations arising from the State Court Judgments are excepted from discharge by § 523(a)(5), it is not necessary to consider whether or not any of the obligations are excluded from discharge by § 523(a)(15). By its express terms, § 523(a)(15) applies to obligations that are not of the kind described in § 523(a)(5). See 11 U.S.C. § 523(a)(15). The court has determined that all of the obligations in question are of the kind described in paragraph § 523(a)(5) and need look no further.

Nevertheless, were it necessary to consider § 523(a)(15) to fully resolve this matter, the court would conclude that neither of the exceptions, set forth at § 523(a)(15)(A) and (B), to the exception to discharge found in § 523(a)(15) applies here. The Defendant has painted an extremely grim picture of his present financial condition and relies heavily on § 523(a)(15)(A) as support for his position that the disputed obligations are dischargeable. The Defendant points to the fact that he no longer owns a grading business because he transferred the business operations and all accompanying assets to a corporation owned by his sons. He contends that this transfer

was in satisfaction of a previous debt, though he presented no evidence of any such debt. The Defendant also asserts that his income has dropped precipitously, since he is now simply an employee of his sons' business. Despite his present circumstances, the court finds that the evidence presented reflects that the Defendant's income-earning capacity is many times greater than Plaintiff's. He is several years younger than the Plaintiff, and has demonstrated the ability to earn in excess of \$80,000.00 per year, while the Plaintiff has never earned more than \$30,000.00 per year.

Finally, the Defendant contends that he has fewer assets than the Plaintiff, yet less than three years ago he was awarded 65% of marital assets. The court finds the Defendant's testimony regarding the rapid dissipation of his business assets was not credible and would not weigh the Defendant's lack of assets in his favor. Therefore, the court would find that the obligations were nondischargeable under § 523(a)(15) because the Defendant remained able to satisfy his obligations to Plaintiff and the detriment that the Plaintiff would suffer as a result of a discharge would far outweigh any benefit Defendant.

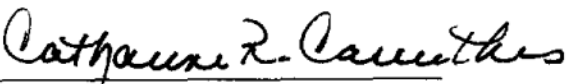
CONCLUSION

In summary, the Alimony Judgment reflects the state court's intent that the aggregate of the Distributive Award, the First Citizens equity line, and the \$500.00 per month alimony award would be utilized for the Plaintiff's support. Without each of those sources of income, the Plaintiff's budget, as set forth by the state court, would not be feasible. Therefore, all of the obligations in question are in the nature of support, alimony, or maintenance as described in paragraph § 523(a)(5).

Based upon the foregoing, the court finds that the Plaintiff is entitled to recover of the

Defendant (1) the Distributive Award in the amount of \$63,096.62; (2) the First Citizens equity line in the amount of \$35,000.83, plus the amount of any interest charged by First Citizens on the equity line account from January 28, 2005 until the balance owed to First Citizens on the equity line has been paid in full; and (3) the attorney fees of Plaintiff's domestic counsel, Kathleen E. Nix, in the amount of \$2,500.00. The foregoing claims are nondischargeable debts pursuant to § 523(a)(5) of the Bankruptcy Code and therefore have priority status under § 507(a)(7).

This the 22 day of April 2005.


Catharine R. Carruthers
United States Bankruptcy Judge