STATE OF MICHIGAN

COURT OF APPEALS

ARLENE M. BERRYMAN,

Plaintiff-Appellee,

v

DOUGLAS C. SUTPHIN,

Defendant-Appellant.

UNPUBLISHED
April 8, 2010

No. 289228
Oakland Circuit Court
LC No. 2002-667616-DM

Before: Jansen, P.J., and Murray and Gleicher, JJ.

PER CURIAM.

In this postdivorce effort by plaintiff Arlene M. Berryman to recover attorney fees from defendant Douglas C. Sutphin, her former spouse, defendant appeals as of right a portion of a November 2008 circuit court order requiring that he reimburse plaintiff for $23,468.73 in attorney fees by January 2009. We affirm.

The parties agreed to a consent judgment of divorce, which the circuit court entered in January 2003. Plaintiff initially sought an award of about $22,000 in attorney fees in May 2007, asserting that she had incurred this amount because of defendant's "failure . . . to pay the sums required under the Judgment of Divorce and" subsequent orders. Defendant responded by urging the circuit court to hold a hearing to address the propriety of plaintiff's attorney fee reimbursement claim, and characterizing as procedurally improper her submissions of an itemized list of attorney fees purportedly incurred. After holding an evidentiary hearing, the circuit court in September 2007 ordered that defendant "shall pay [plaintiff] the sum of $23,468.73 as the net attorney fees and costs that she incurred in enforcing the terms and provisions of the Judgment of Divorce through the July 7, 2007 billings which sum shall be paid in equal monthly installments beginning October 19, 2007." At some point in 2007, plaintiff sought Chapter 13 bankruptcy protection, but in July 2007 plaintiff converted her Chapter 13 filing into a Chapter 7 proceeding. On October 2, 2007, the bankruptcy court entered a Chapter 7 discharge of plaintiff's debts.

In March 2008, plaintiff filed a "motion to enforce order for payment of attorney fees," contending that defendant had made no payments in conformity with the circuit court's September 2007 order. In response, defendant did not dispute that he had neglected to pay any court-ordered attorney fees; he generally asserted that some unspecified attorney fees were improperly awarded and maintained that the court should extinguish the attorney fee award in light of various other expenses that defendant had paid for plaintiff. In May 2008, the circuit

court referred to a mediator the parties' attorney fee payment dispute. After mediation proved unsuccessful, plaintiff filed a renewed motion to enforce the circuit court's attorney fee award in August 2008. Defendant responded that "[a]ny outstanding fees Plaintiff owed her attorney . . . were automatically discharged in her voluntary petition to convert her Chapter 13 to a Chapter 7 bankruptcy," and that the circuit court thus could not order defendant to pay the previously awarded attorney fees and should set aside the September 2007 attorney fee order. On November 12, 2008, the circuit court entered an order that, in relevant part, instructed defendant to "comply with this court's order of September 27, 2007 ordering his [sic] to pay attorney fees of $23,468.73 by paying $7,822.91, which is one-third of that amount by November 26, 2008; $7,822.91 by December 26, 2008 . . . and the remaining $7,822.91 by January 25, 2009."

I. Dischargeability of Defendant's Attorney Fee Obligation

Defendant challenges on appeal the circuit court's November 2008 attorney fee order. According to defendant, "the $23,468.73 attorney fee Plaintiff owed her attorney . . . was discharged in Plaintiff's July 2, 2007 Chapter 7 Bankruptcy case," and "Defendant no longer owes . . . [plaintiff's counsel] $23,468.73 because said debt had been previously discharged and is no longer due." We generally review for an abuse of discretion a circuit court's award of divorce-related attorney fees. *Unthank v Wolfe*, 282 Mich App 40, 66; 763 NW2d 287 (2008), rev'd in part on other grounds 483 Mich 964 (2009). However, to the extent that defendant's appeal involves legal questions, including the applicability of bankruptcy law provisions, we consider de novo these questions of law. *Id*.

The statute authorizing a Chapter 7 bankruptcy discharge, 11 USC 727, reads, in pertinent part:

> (a) The court shall grant the debtor a discharge, . . .
>
> * * *
>
> (b) Except as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter, . . . whether or not a proof of claim based on any such debt or liability is filed under section 501 of this title . . . .

As relevant to this case, the discharge exceptions in 11 USC 523 include the following:

> (a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt—
>
> * * *
>
> (5) for a domestic support obligation;
>
> * * *
>
> (15) to a spouse, former spouse, or child of the debtor and 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 agreement, divorce decree or other order of a court of record, or a determination made in accordance with State or territorial law by a governmental unit . . . .

As defined in 11 USC 101(14a),

> The term "domestic support obligation" means a debt that accrues before, on, or after the date of the order for relief in a case under this title . . . that is—
>
> (A) owed to or recoverable by—
>
> (i) a spouse, former spouse, or child of the debtor or such child's parent, legal guardian, or responsible relative; or
>
> * * *
>
> (B) in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of such spouse, former spouse, or child of the debtor or such child's parent, without regard to whether such debt is expressly so designated;
>
> (C) established or subject to establishment before, on, or after the date of the order for relief in a case under this title, by reason of applicable provisions of—
>
> (i) a separation agreement, divorce decree, or property settlement agreement;
>
> (ii) an order of a court of record; or
>
> (iii) a determination made in accordance with applicable nonbankruptcy law by a governmental unit; and
>
> (D) not assigned to a nongovernmental entity, unless that obligation is assigned voluntarily by the spouse, former spouse, child of the debtor, or such child's parent, legal guardian, or responsible relative for the purpose of collecting the debt.

Plaintiff undisputedly obtained debt relief in the form of a discharge under 11 USC 727. Defendant insists that plaintiff's Chapter 7 discharge eliminated any debt plaintiff owed to her divorce attorney arising from the postdivorce proceedings. We note that the record supplied this Court remains unclear whether plaintiff's debt to her divorce attorney was discharged in her Chapter 7 proceeding. Billing statements of plaintiff's divorce attorney reflect that as of July 2007, the same month that plaintiff made her Chapter 7 filing, plaintiff owed her divorce attorney a balance of approximately $18,900. Defendant asserts that plaintiff's Chapter 7 discharge eliminated any debt she owed her divorce attorney, despite that she did not list the debt to her divorce attorney on her schedule of creditors. However, whether a Chapter 7 discharge of plaintiff's debt to her divorce attorney occurred depends on whether her divorce attorney had

notice of plaintiff's Chapter 7 proceeding. According to 11 USC 523(a)(3), a Chapter 7 discharge does not discharge a debt

> neither listed nor scheduled under section 521(1) of this title, with the name, if known to the debtor, of the creditor to whom such debt is owed, in time to permit—
>
> (A) . . . timely filing of a proof of claim, unless such creditor had notice or actual knowledge of the case in time for such timely filing . . . .

Defendant has presented no evidence substantiating (1) that plaintiff listed or scheduled her divorce attorney debt, or (2) the extent of plaintiff's divorce attorney's notice or knowledge of the right to assert a claim in plaintiff's Chapter 7 case.

But we need not ascertain the status of plaintiff's debt to her divorce attorney at the time plaintiff received her Chapter 7 discharge. Even were we to assume for the sake of argument that plaintiff's Chapter 7 discharge eliminated the debt she owed to her divorce attorney, defendant ignores that plaintiff's discharge has no legal impact on the distinct attorney fee debt that defendant owed to plaintiff, arising from the circuit court's September 2007 and November 2008 orders. See, e.g., *In re Perlin*, 30 F3d 39, 41-42 (CA 6, 1994) (distinguishing between obligations to a divorcing party and the divorcing party's counsel, the court noted, "The divorce decree affects only the relations between the debtor and his former spouse," and that "[t]he judgment ordering [the debtor] to pay his former spouse's attorney fees was rendered in her name, not [the former spouse's divorce counsel]."); *In re Calhoun*, 715 F2d 1103, 1006 n 4 (CA 6, 1983) ("There are two distinct obligations involved in an agreement to assume former joint marital debts—the underlying debt owed to the mutual creditor and the obligation owed directly to the former spouse to hold the spouse harmless on that underlying debt.").

In circumstances nearly identical to the circumstances of this case, in a case addressing a husband's argument about the effect of his former wife's bankruptcy filing identical to defendant's argument here, the Ohio Court of Appeals in *Mallin v Mallin*, 102 Ohio App 3d 717, 721; 657 NE2d 856 (1995), observed the following:

> The husband first argues that enforcement of the order requiring him to pay $15,000 for his wife's attorney fees constitutes an invalid contribution since the wife's bankruptcy removed any obligation to pay those fees. He maintains that the wife's discharge of attorney fees in bankruptcy also constitutes a discharge of his obligation to pay those fees under the divorce decree. The referee rejected this argument because the order to pay the wife's attorney fees was intended as support alimony. Since alimony is a nondischargeable debt under the Bankruptcy Code, the referee would not allow the husband to escape paying an obligation that he himself could not discharge had he been in the wife's position.
>
> The trial court made the following order in the divorce decree:

> "11. As further alimony, (husband) shall pay to (wife) the sum of $15,000.00 as and for his contribution to her attorney fees, for which judgment is rendered and execution may issue."
>
> * * *
>
> . . . The referee correctly stated that the judgment relating to attorney fees was intended as alimony. Hence, *the husband's debt to the wife is separate and distinct from the debt the wife owed to her attorney. The husband's obligation to pay alimony continues to exist regardless of whether the wife's debt to her attorney is discharged in bankruptcy*. Consequently, his debt to the wife has not been discharged . . . . [Emphasis added.]

Concerning the nature of the attorney fee obligation the circuit court imposed on defendant, the court in its September 2007 order for payment of attorney fees found that plaintiff had incurred "$23,468.73 . . . in enforcing the terms and provisions of the Judgment of Divorce," but the court took "under advisement the issue of whether the attorney fees incurred are in the nature of support and the determination of if they are non-dischargeable in bankruptcy."[1] The circuit court in neither the September 2007 nor November 2008 order specifically invoked MCL 552.13(1) or MCR 3.206(C)(2), but both the statute and court rule authorize an award of attorney fees "when a party needs financial assistance to prosecute or defend the suit. That is, a party should not be required to invade assets to satisfy attorney fees when the party is relying on the same assets for support." *Smith v Smith*, 278 Mich App 198, 207; 748 NW2d 258 (2008) (internal quotation omitted). Given the need-based focus of the Michigan rule and statute permitting awards of divorce-related attorney fees, the circuit court's order that defendant pay plaintiff $23,468.73 in attorney fees may amount to a "domestic support obligation" nondischargeable under 11 USC 523(a)(5).

Although some uncertainty exists with respect to whether the circuit court's attorney fee order amounts to a domestic support obligation "in the nature of alimony, assistance, or support," 11 USC 101(14a)(B), it remains beyond dispute that the current bankruptcy code prohibits the Chapter 7 discharge of a divorce-related attorney fee obligation. Depending on the underlying circumstances and the precise language of a divorce court's attorney fee award, federal courts deem a divorcing party's attorney fee debt as nondischargeable in a Chapter 7 bankruptcy under either 11 USC 523(a)(5) or (15). See *In re Goans*, 271 BR 528, 534 (ED Mich, 2001) (finding nondischargeable under § 523(a)(5), as "in the nature of support," a husband's obligation in a divorce judgment to pay $4,000 of his former wife's attorney fees); *In re LaCasse*, 1998 Bankr Lexis 1643, *6-8 (WD Mich, 1998) (finding nondischargeable pursuant to § 523(a)(15) the

[1] The parties point to no portion of the record where the circuit court made additional findings about the nature of defendant's attorney fee obligation, and our review of the record has uncovered no additional information related to this question.

husband's obligation in a divorce judgment to pay $30,000 of attorney fees incurred by his former wife to the wife's divorce counsel).[2]

We conclude that defendant's court-ordered attorney fee debt to plaintiff, his former spouse, would have constituted a nondischargeable obligation had defendant himself sought relief under the bankruptcy code. Moreover, irrespective whether plaintiff may have discharged her own debt to her divorce counsel in her Chapter 7 proceeding, defendant's distinct attorney fee obligation to plaintiff remains entirely intact notwithstanding her Chapter 7 discharge.

II. Interpretation of Consent Judgment of Divorce

We additionally reject defendant's insistence that plaintiff's pursuit of Chapter 7 relief violated the terms of the parties' consent judgment of divorce. Defendant invokes the following highlighted sentence of a paragraph that appears at the conclusion of the property settlement provisions in the January 2003 consent judgment:

---

[2] In this case, plaintiff commenced her Chapter 7 proceeding in 2007, after the October 17, 2005 enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub L No 109-8, 199 Stat 23 (BAPCA). The treatise Collier, Bankruptcy Manual (3d ed, 2009), p 523.10, summarizes the effect of the BAPCA on §§ 523(a)(5) and (15) as follows:

> Since its enactment, for purposes of dischargeability, the Code has drawn a distinction between an obligation that is in the nature of alimony, maintenance and support and other types of obligations arising out of a marital relationship, more specifically, a debt arising in the course of a divorce or separation or in connection with a separation agreement or divorce decree. The latter type of debt is commonly referred to as a property settlement obligation.
>
> It is not always simple to distinguish whether an obligation is alimony, maintenance or support as opposed to a property settlement. Nevertheless, before the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, the distinction between the two types of debts was critical in evaluating the dischargeability of a domestic relations related obligation under section 523(a). A debt in the nature of alimony, maintenance and support was nondischargeable under section 523(a)(5). A property settlement debt was subject to a dischargeability balancing test then set forth in section 523(a)(15).
>
> As part of the 2005 Act, the balancing test previously set forth in former subsections (A) and (B) of section 523(a)(15) was deleted. Rather, section 523(a)(15) now provides unqualifiedly that a debt encompassed by section 523(a)(15) is nondischargeable. *Thus, with respect to dischargeability in cases under chapters 7, 11 and 12, all of which base dischargeability on section 523(a), the distinction between a domestic support obligation and other types of obligations arising out of a marital relationship is of no practical consequence.* [Emphasis added, footnotes omitted.]

> Other than as specifically set forth above, Plaintiff shall assume responsibility for, and be liable for, any debt in her name alone and shall hold Defendant harmless thereon, and Defendant shall assume responsibility for, and be liable for any debt in his name alone, as well as for any *joint* debt, and shall hold Plaintiff harmless thereon. *These assumptions of debt are considered to be for the support and maintenance of both of the parties and as such, shall not be dischargeable in bankruptcy to the other party's detriment; however, this shall not prohibit the filing of a Chapter XIII Reorganization.* [Emphasis added.]

Contrary to defendant's interpretation, the highlighted language does not purport to forbid a party's filing for debt relief under Chapter 7. The highlighted sentence unambiguously proclaims only that the debts assumed by the parties in the consent judgment would amount to nondischargeable obligations in any future federal bankruptcy proceeding. *Gramer v Gramer*, 207 Mich App 123, 125; 523 NW2d 861 (1994) (instructing that consent judgments "are of the nature of a contract," and that "[i]nterpretation of unambiguous and unequivocal contracts is a question of law").

III. Merits of Circuit Court's Attorney Fee Award

In defendant's brief on appeal, he fails to explain how the circuit court erred in any respect in fashioning the award of attorney fees in September 2007 or the attorney fee payment schedule ordered in November 2008. MCL 552.13(1); MCR 3.206(C); *Unthank*, 282 Mich App at 66. Because defendant essentially has abandoned the propriety of the attorney fees awarded in this case and the payment schedule the circuit court entered in November 2008, we decline to consider this issue further, and we uphold the circuit court's November 2008 order. *Korth v Korth*, 256 Mich App 286, 294; 662 NW2d 111 (2003).

Affirmed.

/s/ Kathleen Jansen
/s/ Elizabeth L. Gleicher