UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In Re	:	**Case No. 98-4868-DH**
BRIAN KEITH QUICK,	:	**Chapter 7**
Debtor.	:	
LAURA QUICK, and M. LEANNE TYLER,	:	**Adv. No. 99-99022**
Plaintiffs,	:	
v.	:	
BRIAN KEITH QUICK,	:	
Defendant.	:	

ORDER—MOTION FOR SUMMARY JUDGMENT AND OBJECTION THERETO

On December 9, 1999, a telephone hearing was held on the Plaintiff's Motion for Summary Judgment and Objection Thereto. Plaintiffs, Laura Quick and M. Leanne Tyler, were represented by attorney James C. Wherry; Defendant, Brian K. Quick, was represented by attorney Tonya S. Tappa for James L. Tappa. At the conclusion of the hearing, the court took the matter under advisement. The court considers the matter fully submitted.

The court has jurisdiction of this matter pursuant to 28 U.S.C. § 157(b)(1) and § 1334 and order of the United States District Court for the Southern District of Iowa. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I). The court, upon review of the briefs, pleadings, evidence, and arguments of counsel, now enters its findings and conclusions pursuant to Fed. R. Bankr. P. 7052.

FINDINGS OF FACT

The court finds the following facts to be undisputed:

1. On November 4, 1998, the defendant, Brian Keith Quick (the debtor), filed a petition for Chapter 7 relief with the United States Bankruptcy Court, Southern District of Iowa.

2. The plaintiff, Lori Quick, is the former spouse of the debtor. The plaintiff, M. Leanne Tyler represented Lori Quick in her dissolution of marriage proceeding.

3. Brian and Lori were married on June 5, 1982. The marriage was dissolved by order of the Iowa District Court for Scott County on September 15, 1998.

4. Debtor's Schedule I shows gross income of $4,600.00 per month from Browning Ferris Industries (BFI) where he worked in sales. In 1998, he made $62,193,88 from BFI. As of September 3, 1999, his employment was terminated due to the merger of BFI and Allied Waste Industries. He currently works for Lohman Brothers on a commission basis.

5. Prior to the dissolution of marriage, Brian and Lori occupied a residence at 27217 208th Avenue, Eldridge, Scott County, Iowa (the Eldridge Home). The Eldridge Home sold for $237,500.00 on August 17, 1998. By order of the Iowa District Court for Scott County dated August 17, 1998, the proceeds from the sale were to be deposited into an interest-bearing, restricted account. No withdrawals were allowed without an order from the court, or mutual written consent of the parties. The net proceeds, $70,210.89, were deposited into the trust account of M. Leanne Tyler.

6. On September 15, 1998, the district court judge filed Findings of Fact, Conclusions of Law, and Decree (the Decree) in the dissolution of marriage case of Lori Quick and Brian Quick. The Decree provides that Brian Quick pay $75.00 per child per week or

$1200.00 per month in child support. At the time of the filing of the motion for summary judgment in this proceeding, the debtor had paid a total of $15,374.69. He was behind $199.71 in child support payments.

7. Brian Quick was ordered to pay Lori Quick rehabilitative alimony of $400.00 per month for a period of three years beginning on September 25, 1998. Up to August 31, 1997, he has paid $3,498.47 in alimony.

8. The Decree provided that the proceeds from the sale of the Eldridge Home were to be used to pay certain enumerated debts to creditors. Additional debts were listed for which the sale proceeds were insufficient to pay. The parties agree to the enumeration, but are in dispute as to the nature and the validity of certain of these debts. The debtor scheduled some of these debts on Schedule F, Creditors Holding Unsecured Nonpriority Claims, of his bankruptcy petition.

9. The district court awarded Lori Quick $5,000.00 from the proceeds of the sale of the Eldrige Home.

10. Pursuant to the Decree, Brian Quick and Laurie Quick were awarded joint custody of their three minor children, Andrew, Amanda, and Michael. Lori Quick was awarded sole physical care of the children.

11. Pursuant to the Decree, Brian Quick was awarded his interest in the BFI 401(k) and the BFI pension plans, and in return, Lori Quick received all the parties' interest in the real estate at 2412 N. Howell Street in Davenport, Iowa.

12. The district court entered judgment against Brian Quick for attorney fees and psychiatric expenses incurred by Lori Quick in the amount of $11,243.60.

13. Lori Quick employed attorney Doug Wells prior to hiring Ms. Tyler. The court ordered Brian Quick to pay Doug Well's attorney fees. The Decree provides that Mr. Wells will receive $1000 from the proceeds of the Eldridge Home. The debt of $3,047.50 to Mr. Wells is scheduled on the debtor's bankruptcy petition as an unsecured claim.

14. The parties have resolved the 1997 tax refund issue.

The court finds the following facts to be disputed:

1. Whether the debtor intended to use his share of the proceeds from the Eldridge home to purchase a new homestead.

2. Whether there was any intention by the parties or by the district court that debt payments to third persons serve as alimony, maintenance, or support to Lori Quick or the Quick children.

3. Whether there was any intention by the parties or by the district court that the $5,000.00 payment to Lori Quick serves as alimony, maintenance, or support.

4. Whether the debtor has the ability to pay any debt incurred by the debtor in the course of dissolution from income or property not necessary for his or his dependants' support or maintenance.

5. Whether the benefit of discharging the debt that was incurred in the course of the dissolution outweighs the detriment to the plaintiff.

6. Whether attorneys Tyler and Wells have filed the required itemizations of fees with the district court.

7. Whether the parties and the district court intended that the attorney's fees serve as alimony, maintenance, or support.

DISCUSSION

In their motion for summary judgment, the plaintiffs ask the court to determine that various debts listed in the dissolution decree and ordered to be paid by the defendant or from proceeds of the sale of the Eldridge home are not dischargeable pursuant to 11 U.S.C. § 523 (a)(5) & (15). The plaintiffs argue that the debts comprise alimony, maintenance, and support to Lori Quick and her children or are otherwise nondischargeable as debts incurred in the course of dissolution proceedings. The plaintiffs additionally ask that the court determine that the plaintiff has no homestead interest in his share of the proceeds from the Eldridge Home and that M. Leanne Tyler has an attorney lien on those funds. For the following reasons, the court will grant the motion in part and deny it in part.

Federal Rule of Bankruptcy Procedure 7056 applies Federal Rule of Civil Procedure 56, governing summary judgment, to adversary proceedings. Summary judgment shall be granted if the court determines that "there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56; Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). There is no genuine issue of material fact unless there is sufficient evidence favoring the non-moving party for the finder of fact to return a verdict for that party, if the non-moving party is the party with the burden of proof. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). A court considering a motion for summary judgment must view all the facts in the light most favorable to the non-moving party, and give the non-moving party the benefit of all reasonable inferences that can be drawn from the facts. Matsushita Electric Industries, Co., v. Zenith Radio Corp., 475 U.S. 574, 587 (1986)(quoting United States v. Diebold, Inc., 369 U.S.

574 (1962)); Rifkin v. McDonnell Douglas Corporation, 78 F.3d 1277, 1280 (8th Cir. 1996). The court is not to weigh the evidence, but determine whether there is a genuine issue of fact for trial. Johnson v. Enron Corporation, 906 F.2d 1234, 1237 (8th Cir. 1990); see also Anderson, 477 U.S. at 249; Celotex, 477 U.S. at 323-24; Matsushita, 475 U.S. at 586-87.

Procedurally, the moving party "bears the initial responsibility of informing the district court of the basis for its motion and identifying those portions of [the record which show lack] of a genuine issue of material fact." Celotex, 477 U.S. at 323; see also Reed v. Woodruff County, 7 F.3d 808, 810 (8th Cir. 1993). Rule 56 does not require the moving party to support its motion with affidavits or other similar materials negating the opponent's claim. "When a moving party has carried its burden under Rule 56(c), its opponent must do more than simply show there is some metaphysical doubt as to the material facts." Matsushita, 475 U.S. at 586. The non-moving party is required by Rule 56(e) to go beyond the pleadings, and by affidavits, or by the "depositions, answers to interrogatories, and admissions on file," to designate "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); Celotex, 477 U.S. at 324; Mclaughlin v. Esselte Pendaflex Corp., 50 F.3d 507, 511 (8th Cir. 1995).

However, "as a general principle, questions of motive and intent are particularly inappropriate for summary adjudication." P.H. Glatfelter Co. v. Voith Inc., 784 F.2d 770, 774 (7th Cir. 1986), quoting Cedillo v. International Association of Bridge & Structural Iron Workers, Local Union No. 1, 603 F.2d 7, 11 (7th Cir. 1979). "A dispute over historical facts or inferences, if genuine and material within the meaning of Rule 56, precludes summary judgment." Schwarzer, Hirsch & Barrans, The Analysis and Decision of Summary Judgment Motions at 14 (Federal Judicial Center 1991); but see In re Chavin, 150 F.3d 726 (7th Cir. 1998)

(denial of knowledge may be so utterly implausible that no reasonable jury could find otherwise and, therefore, summary judgment is appropriate); Aubrey v. Thomas (In re Aubrey), 111 B.R. 268 (B.A.P. 9th Cir. 1989) (debtor provided insufficient proof to demonstrate genuine issue of material fact and summary judgment was appropriate to deny discharge). A matter is material to the bankruptcy if it relates to the debtor's business transactions or estate, or "concerns the discovery of assets, business dealings, or the existence and disposition of [the debtor's] property." Palantine National Bank of Palantine, Illinois, (In re Olson), 916 F.2d 481, 484 (8th Cir. 1990)(quoting and adopting the materiality standard set forth in In Re Chalik, 748 F.2d 616, 618 (11th Cir. 1984)).

The Bankruptcy Code provides that a debt to a spouse, former spouse, or child of the debtor for alimony, maintenance, or support in not dischargeable. 11 U.S.C. § 523(a)(5). Additionally, a debt incurred by the debtor in the course of a divorce or by divorce decree is generally nondischargeable. 11 U.S.C. § 523(a)(15). However, a debt under § 523(a)(15) may be discharged if the debtor proves the inability to pay the debt from income or property not reasonably necessary for the support of the debtor or the debtor's dependants. 11 U.S.C. § 523(a)(15)(A). Alternately, the debt may be discharged if the debtor proves that the benefit to the debtor outweighs the detrimental consequences to the spouse, former spouse, or child. 11 U.S.C. § 523(a)(15)(B); see Moeder v. Moeder (In re Moeder), 220 B.R. 52, 56 (B.A.P. 8th Cir. 1998)("[O]nce the objecting creditor proves that the debt constitutes a property settlement award incurred in course of a divorce proceeding, the burden shifts to the debtor to prove either of the exceptions to nondischargeability contained in subsections (A) or (B)").

"[T]he question of whether a particular debt constitutes alimony, maintenance, or support or rather constitutes a property settlement is a question of federal bankruptcy law not of state law." Id. at 55, citing Tatge v, Tatge (In re Tatge), 212 B.R. 604, 608 (B.A.P. 8th Cir. 1997) (citing Williams v. Williams (In re Williams), 703 F.2d 1055,1056 (8th Cir. 1983)(quoting H.R. REP. NO. 95-595, 95th Cong. 2nd Sess. At p. 364, 1978 U.S.Code Cong. & Ad.News at p. 6319 (1977))). The bankruptcy court is not bound by the state court definitions of alimony, maintenance, and support, nor is it bound by a dissolution decree's characterization of the awards. In re Williams, 703 F.2d at 1057. The label given to an award is unimportant, it is the actual nature of the debt that determines is dischargeability. Scholl v. McLain (In re McLain), 241 B.R. 415, 419 (B.A.P. 8th Cir. 1999).

"The crucial issue in making this determination is the intent of the parties and the function the award was intended to serve at the time of the divorce." In re Moeder, 220 B.R. 52 at 55. The court must discern not only the intent of the parties, but also the intent of the state court. In re McLain, 241 B.R. at 419-20.

In this case, the parties agree that the award to Lori Quick of rehabilitative alimony is nondischargeable. While the defendant expresses concern at the plaintiff's language stating "all alimony due and owing at this time is nondischargeable ($10,901.43)..." (Plain. Mot. For Sum. J. at p. 3), the court does not interpret the plaintiff's motion to indicate that the entire amount has been accelerated, only that the obligation is nondischargeable. The dissolution decree states that the defendant is to receive $400.00 per month commencing September 25, 1998, and continuing monthly for a period of three years. There is no provision in the decree for acceleration of the obligation, and the plaintiff cites no authority for such a conclusion. The court holds that the

defendant's obligation to pay $400.00 per month to the plaintiff under the terms of the dissolution decree, along with any arrearage, is nondischargeable alimony pursuant to § 523(a)(5), and the plaintiff's motion for summary judgment is granted on this issue.

The parties also are in agreement that the obligation to pay $75.00 per child per week or $1,200.00 per month to the plaintiff through the clerk of court for the use and support of the minor children is nondischargeable, as is any arrearage in the payments. The defendant scheduled $1,700.00 for alimony, maintenance, and support on Schedule J, Current Expenditures, and did not schedule the obligation or any arrearage as unsecured debt. The court holds that this obligation and any arrearage is nondischargeable support pursuant to § 523(a)(5), and the plaintiff's motion for summary judgment on this issue should be granted.

The parties agree that the 1997 tax refund issue has been resolved. Therefore, it is no longer before the court.

The parties vigorously dispute whether pursuant to the Iowa homestead statute, Iowa Code § 561, the debtor is entitled to exempt a share of the proceeds from the sale of the Eldridge Home. They additionally dispute whether various debts ordered paid from the proceeds are in the nature of alimony, support, or maintenance. They also dispute whether the debts are dischargeable or not pursuant to § 523(a)(15).

The Bankruptcy Code permits a debtor to exempt certain property from the bankruptcy estate. 11 U.S.C. § 522(b). Section 522(b)(1) permits the states to "opt out" of the federal exemption scheme and require the debtor to use the exemptions provided by state law. Iowa has chosen to opt out of the federal exemptions. Iowa Code § 627.10. Therefore, the claim of exemption for the homestead is made pursuant to Iowa law.

Iowa Code § 561.16 provides that a person's homestead is exempt from judicial sale where there is no special declaration of statute to the contrary. Section 598.21 dealing with orders for disposition and support in dissolution cases is a special declaration of statute to the contrary. In re Macke, 136 B.R. 209, 210 (Bankr. S.D. Iowa 1992) citing Kobriger v. Winter, 263 N.W.2nd 892, 894 (Iowa 1978); In re Knoll, 124 B.R. 548, 549 (Bankr. N. D. Iowa 1991). When a new homestead is acquired with the proceeds of a former homestead, the new homestead is exempt from execution to the same amount and to the same extent as the former was exempt. Iowa Code § 561.20. Proceeds from the sale of a homestead may maintain exempt status for a reasonable time if the debtor intends to use the proceeds to buy another homestead. Braunger v. Karrer, 563 N.W.2d 1, 3-4 (Iowa 1997).

It is clear in this case that the threshold issue that must be determined is whether the defendant had the requisite intent to use his share of the proceeds of the former homestead to purchase a new homestead. If such intent is not found, his share of the proceeds is not exempt. If not exempt, his share of the proceeds is property of the bankruptcy estate. 11 U.S.C. § 541(a)(1).

The defendant has presented an affidavit and other evidence to support his contention that he intended to use the proceeds for a new homestead. The plaintiff has presented an affidavit stating that plaintiff's intention was to pay bills with the proceeds. While it is true that intent may be inferred from circumstantial evidence, Caspers v. Van Horne (In re Van Horne), 823 F.2d 1285, 1287 (8th Cir. 1987), such an inference would require the court to weigh the evidence and make a finding of fact. The court, mindful of the Eighth Circuit's admonition in Johnson, will not make such a determination on this summary judgment motion.

As stated earlier, the determination of whether a specific obligation in a dissolution decree is in the nature of alimony, support, or maintenance, requires the court to determine the intention of the parties and the state court. Questions of intent are particularly not an appropriate issue for summary judgment in this case with its limited evidence and no possibility to weigh the credibility of the parties. The plaintiff's motion for summary judgment on the remaining issues of alimony maintenance and support must be denied.

Any issue concerning the defendant's ability to pay and any benefit to the debtor, detriment to the creditor analysis would turn on the amount of debt incurred in the course of the divorce other than alimony, maintenance, or support. In this case, determination of the § 523(a)(15) issue must await resolution of the § 523(a)(5) issue. Summary judgment on the (a)(15) issue is also denied.

Finally, the plaintiff requests that the court hold as a matter of law that M. Leanne Tyler has an attorney's lien on the defendant's share of the proceeds of the sale of the Eldridge home pursuant to Iowa Code § 602.10116(1), (3), or (4). (Plain. Br. in Sup. at 4). Because the plaintiff has not established its prima facie case, motion for summary judgment on this issue must be denied.

Iowa Code § 602.10116 provides:

> An attorney has a lien for a general balance of compensation upon:
> 1. Any papers belonging to a client which have come into the attorney's hands in the course of professional employment.
> 2. Money in the attorney's hands belonging to a client.
> 3. Money due a client in the hands of the adverse party, or attorney of such party, in an action or proceeding in which the attorney claiming the lien was employed, from the time of giving notice in writing to such adverse party, or attorney of such party, if the money is in the possession or under the control of such attorney, which notice shall state the amount claimed , and , in general terms, for what services.

> 4. After judgment in any court of record, such notice may be given, and the lien made effective against the judgment debtor, by entering the same in the judgment or combination docket, opposite the entry of the judgment.

The Iowa statute fixes the rights of the parties in interest as to the property. In the Matter of the Will of Lamm, 109 N.W. 2d 708, 712 (Iowa 1961); see generally Tri City Equipment Co. v. Modern Real Estate Investments, Ltd, 460 N.W.2d 464, 466 (Iowa 1990)(discussing attorney's retaining liens and charging liens). The statute stands in lieu of common law rights, and it is only through the statute that an attorney's lien may be asserted. Id.; Jennings v. Bacon, 51 N.W. 15, 16 (Iowa 1892). In order for the lien to exist, all the prerequisites and conditions precedent of the statute must be met. Hemingway v. Adrian State Bank, of Adrian, Minn., 221 N.W. 920, 921 (Iowa 1928).

In this case, subsection 1 is inapplicable because it pertains to papers belonging to the attorney's own client. Subsection 2 is not argued, however, it is inapplicable because it pertains to money belonging to the attorney's own client. Subsection 3 is inapplicable because it pertains to money in the adverse party's possession, or the adverse party's attorney's possession. Moreover, subsection 3 requires that the attorney give notice in writing to the adverse party that an attorney lien is asserted. The plaintiff has neither alleged such notice nor provided evidence that such notice was given. Finally, subsection 4 requires that notice may be given and the lien made effective by entering the lien in the judgment or combination docket opposite the entry of the judgment. The plaintiff has neither alleged nor provided evidence that such an entry was made. Plaintiff's motion for summary judgment on the attorney's lien issue must be denied.

The court concludes by noting that the pleadings, briefs, and evidence that are currently part of the record raise a number of questions concerning who is responsible for various debts.

Also, a number of debts listed in the dissolution decree are alleged paid. Finally, in their Statement of Uncontested Facts at p. 4, the plaintiff's list some debts of the defendant. These debts were to be paid from the proceeds of the sale of the Eldridge Home. The plaintiffs state that if these debts are the sole responsibility of the defendant, they do not want them paid, but if they are joint debts as indicated on Schedule H, they want them paid in the bankruptcy.

The record is currently unclear on the status of many of these debts and the parties' positions concerning the nature of and liability for the debts. A succinct enumeration and statement of position concerning the debts at issue would prove most beneficial to the court.

ORDER

IT IS THEREFORE ORDERED, as follows:

(1) The plaintiffs' Motion for Summary Judgment is GRANTED to the extent that the defendant's obligation to pay $400.00 per month commencing September 25, 1998, and continuing monthly for a period of three years along with any arrearage is nondischargeable.

(2) The plaintiffs' Motion for Summary Judgment is GRANTED to the extent that the defendant's obligation to pay $75.00 per week per child or $1200.00 per month pursuant to the terms of the dissolution decree along with any arrearage is nondischargeable.

(3) As to the remaining issues, the plaintiffs' Motion for Summary Judgment is DENIED.

(4) Pre-trial conferences will be set upon a separate order of the court.

Dated this _____ day of July, 2000.

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RUSSELL J. HILL, CHIEF JUDGE
U.S. BANKRUPTCY COURT