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JUDGE: M. A. Mahoney

PARTIES: Julian Gregory Harris, Reba Darlene Harris

CHAPTER: 13

ATTORNEYS: H. D. Padgett, N. G. Nelson

DATE: 9/22/98

KEY WORDS:

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

In Re

JULIAN GREGORY HARRIS

Case No. 98-12630-MAM-13

Debtor.

ORDER

Herman D. Padgett, Mobile, AL, Attorney for Julian Gregory Harris.
Narrissa G. Nelson, Foley, AL, Attorney for Reba Darlene Harris.

This matter is before the court on Reba Darlene Harris' objection to confirmation of Julian Gregory Harris' Chapter 13 plan. This court has jurisdiction to hear this matter pursuant to 28 U.S.C. §§ 1334 and 157 and the Order of Reference of the District Court. This is a core proceeding pursuant to 28 U.S.C. § 157(b) and the court has the authority to enter a final order. For the reasons indicated below, Gregory Julian Harris' Chapter 13 plan is confirmed.

FACTS

Gregory Julian Harris (debtor) filed this Chapter 13 case on July 28, 1998. Debtor does not dispute that he owes \$32,942.00 for numerous debts, including \$16,507 to his ex-wife Reba Darlene Harris (ex-wife) for child support. Debtor also owes his ex-wife \$951.00/month in alimony, maintenance and support (alimony). He has not paid any alimony since June of this year. Ex-wife contends that in addition to these debts, debtor owes her \$16,234.24 for a judgment obtained in the Circuit Court of Baldwin County (the debt). Apparently, the circuit court entered the \$16,234.24 judgment to enforce the parties' divorce decree.

Debtor received a Chapter 7 discharge on January 26, 1998. Debtor did not list the debt in his Chapter 7 Schedules. On April 4, 1997, ex-wife attended debtor's 341 meeting, accompanied by her attorney, and asked debtor whether he would pay the amount set forth in the

divorce decree. Debtor replied, “Whatever she wanted, I signed.” The deadline to file a complaint to determine dischargeability of the debt was June 27, 1997.

Debtor’s original Chapter 13 plan consisted of monthly payments of \$200 and \$56 Regions Bank and Sears respectively. Debtor orally amended this plan on September 10, 1998 to include a monthly payment of \$250 for delinquent child support. Debtor’s plan does not provide for any treatment of the debt. He plans to pay current alimony directly, not through his plan.

LAW

In deciding whether to confirm debtor’s Chapter 13 plan this court must determine, 1) whether the debt was discharged in debtor’s Chapter 7 case and, 2) whether debtor waived the discharge or reaffirmed his obligation to pay the debt.

A.

Ex-wife must establish nondischargeability of the debt by a preponderance of the evidence. *Grogan v. Garner*, 111 S.Ct. 654 (1991). A discharge under Chapter 7 does not discharge debts “neither listed nor scheduled . . . unless such creditor had notice or actual knowledge of the case in time” for the creditor to timely file a proof of claim. 11 U.S.C. § 523(a)(3). Ex-wife’s questions regarding the debt at debtor’s 341 meeting conclusively establish that she had actual knowledge of the case in time to file a claim before the June 27, 1997 deadline. Therefore, the judgment was not excepted from discharge under § 523(a)(3).

Debts incurred for alimony, maintenance, or support are nondischargeable under § 523(a)(5). Section 523(a)(5) does not cover property settlement agreements incurred in the course of a divorce proceeding, but instead, § 523(a)(15) deals with these debts. Neither party

presented sufficient evidence to definitively determine the nature of the debt. Based primarily on the fact that debtor owes ex-wife alimony and child support separate and apart from the debt, this court finds that the debt is probably a property settlement agreement. If the debt is in the nature of a property settlement, then it is covered under § 523(a)(15), rather than § 523(a)(5).

To establish the nondischargeability of a debt which is a § 523(a)(15) debt, ex-wife needed to file a complaint during the Chapter 7 case and she did not. 11 U.S.C. § 523(c)(1) and Fed.R.Bank.P. 4007(c). Therefore, if the debt is a property settlement debt under § 523(a)(15), the only way the debt survived debtor's discharge in his Chapter 7 case is if Harris waived discharge of the debt. That issue is discussed below.

It is possible that the debt is a debt for alimony or child support covered by 11 U.S.C. § 523(a)(5). If it is, its nondischargeability may be established at any time, even after debtor's discharge. 11 U.S.C. §523(c)(1) and Fed.R.Bank.P. 4007(b). Whether debtor waived or did not waive his discharge in regard to the debt is not relevant. If the debt is nondischargeable under § 523(a)(5), the discharge has no effect.

The court does not have enough facts at this time to rule on this issue. The divorce decree was not put into evidence nor was testimony about the nature of the debt elicited.

B.

Section 524(c) and (d) of the Bankruptcy Code which controls the validity of reaffirmation agreements also governs a waiver of the dischargeability of a particular debt. *In re Matter of Ethridge*, 80 B.R. 581, 585 (Bankr. M.D.Ga. 1987). The Bankruptcy Code provides detailed instructions on reaffirming a debt based in part on the purpose of bankruptcy to give a debtor a fresh start, "unhampered by pressure and discouragement of pre-existing debt" *Id.*

at 586 (cite omitted). Debtor's testimony during the 341 meeting does not satisfy the requirements of § 524(c). Furthermore, even assuming debtor could waive a discharge of a particular debt under a procedure other than that specified in § 524(c), it is unlikely that his testimony would qualify as a waiver. Debtor did not specifically reaffirm his obligation to pay the debt or specifically waive discharge of the debt.

THEREFORE, IT IS ORDERED that debtor's Chapter 13 plan is confirmed based upon the plan as filed, together with debtor's September 10, 1998 oral amendment to pay an additional \$250/month for child support. If Reba Darlene Harris can establish that the \$16,234.24 debt was not discharged in the debtor's previous Chapter 7 case and that the debt should be paid in full or in part in this Chapter 13 case, then the court will consider if the plan must be modified further.

Dated: September 22, 1998

MARGARET A. MAHONEY
CHIEF BANKRUPTCY JUDGE