

SO ORDERED,



*Jason D. Woodard*  
Judge Jason D. Woodard  
United States Bankruptcy Judge

The Order of the Court is set forth below. The case docket reflects the date entered.

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF MISSISSIPPI

In re:	)	
	)	
DELYNN W.	)	
BURKHALTER,	)	Case No.: 21-10444-JDW
	)	
Debtor.	)	Chapter 7

	)	
MARTHA SUE	)	
BURKHALTER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	A.P. No.: 21-01011-JDW
	)	
DELYNN W.	)	
BURKHALTER,	)	
	)	
Defendant.	)	

## MEMORANDUM OPINION

This matter comes before the Court on the *Motion for Summary Judgment* filed by the plaintiff, Martha Sue Burkhalter.<sup>1</sup> The plaintiff filed her complaint to determine the dischargeability of obligations owed to her by her ex-husband arising from their divorce.<sup>2</sup> The debtor, Delynn Burkhalter, answered the complaint<sup>3</sup> but failed to respond to the summary judgment motion. The Court concludes that the plaintiff's motion is due to be granted in part and denied in part.

### I. JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. §§ 151, 157(a) and 1334, and the *United States District Court for the Northern District of Mississippi's Order of Reference of Bankruptcy Cases and Proceedings Nunc Pro Tunc* dated August 6, 1984. This is a core proceeding as set forth in 28 U.S.C. § 157(b)(2)(A), (B), (I), and (O).

### II. SUMMARY JUDGMENT STANDARD

Rule 56 permits a court to grant summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."<sup>4</sup> The court must view the pleadings

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<sup>1</sup> (A.P. Dkt. # 15).

<sup>2</sup> (A.P. Dkt. # 1).

<sup>3</sup> (A.P. Dkt. # 7).

<sup>4</sup> Fed. R. Civ. P. 56(a); Fed. R. Bankr. P. 7056 applies Fed. R. Civ. P. 56 to all bankruptcy proceedings.

and the facts in the light most favorable to the non-moving party.<sup>5</sup> The moving party bears the initial burden of “identifying parts of the record that [she] believes demonstrates the absence of a genuine issue of material fact”.<sup>6</sup> Alternatively, the moving party may also show “an absence of evidence to support the nonmoving party’s case” to succeed at the summary judgment phase.<sup>7</sup> “If the moving party satisfies this burden, ‘the burden then shifts to the nonmoving party to go beyond the pleadings and by [his] own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial.’”<sup>8</sup> Here, the plaintiff bears the initial burden as the moving party.

The debtor’s failure to respond to the motion does not necessarily entitle the plaintiff to summary judgment.<sup>9</sup> The court must still determine whether the evidence at this stage establishes a prima facie showing to satisfy the summary judgment standard.<sup>10</sup>

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<sup>5</sup> *Green v. Life Ins. Co. of N. Am.*, 754 F.3d 324, 329 (5th Cir. 2014) (citing *Duval v. N. Assur. Co. of Am.*, 722 F.3d 300, 303 (5th Cir. 2013)).

<sup>6</sup> *Rice v. Cornerstone Hosp. of W. Monroe, L.L.C.*, 674 F. App’x 391, 392 (5th Cir. 2017) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–323 (1986)).

<sup>7</sup> *Celotex*, 477 U.S. at 325.

<sup>8</sup> *Rice*, 674 F. App’x at 392 (quoting *Davis v. Fort Bend Cty.*, 765 F. 3d 480, 484 (5th Cir. 2014)).

<sup>9</sup> *Retzlaff v. de la Vina*, 606 F. Supp. 2d 654, 656 (W.D. Tex. 2009) (citing *Eversley v. MBank Dallas*, 843 F.2d 172, 174 (5th Cir. 1988)).

<sup>10</sup> *Id.*

### III. FINDINGS OF FACT<sup>11</sup>

The plaintiff and the debtor were divorced in August of 2016.<sup>12</sup> As part of their divorce, the parties entered into an agreement that provided for a multitude of payments to be made by the debtor to, or on behalf of, the plaintiff.<sup>13</sup> That agreement was approved by the Chancery Court for Lowndes County, Mississippi, in the divorce decree entered on August 12, 2016.<sup>14</sup> The plaintiff contends that all of her claims in this adversary proceeding are covered by that divorce agreement and are nondischargeable pursuant to subsections 523(a)(5) or (15) of the Bankruptcy Code.<sup>15</sup> The plaintiff's claims are reproduced below verbatim:

- a. \$1,647,500.00 in lump sum installment alimony arising under Paragraph 8 of the Property Settlement Agreement;
- b. \$140,000.00 in employment severance benefits arising under Paragraph 10 of the Property Settlement Agreement;
- c. \$9,446.10 in cell phone charges arising under Paragraph 10 of the Property Settlement Agreement;
- d. \$3,134.74 in health insurance charges arising under Paragraph 10 of the Property Settlement Agreement;
- e. \$9,300.00 in indemnity sought regarding a claim of Travelers and \$118,354.74 in another indemnity claim pending in the Burkhalter Rigging, Inc. Adversary cases, both arising under

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<sup>11</sup> To the extent any of the findings of fact are considered conclusions of law, they are adopted as such, and vice versa.

<sup>12</sup> (A.P. Dkt. # 1, ¶ 3); (A.P. Dkt. # 7, ¶ 1).

<sup>13</sup> (A.P. Dkt. # 1, ¶ 4); (A. P. Dkt. # 1, Ex. B); (A.P. Dkt. # 7, ¶ 1).

<sup>14</sup> (A.P. Dkt. # 1, Ex. A); (A.P. Dkt. # 1, ¶ 3); (A.P. Dkt. # 7, ¶ 1).

<sup>15</sup> Use of the terms "Section" or "Code" refer to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, unless noted otherwise.

- the indemnification requirement of Paragraph 13 of the Property Settlement Agreement;
- f. Attorney's fees in the amount of \$15,628.00 incurred in the Chancery Court of Lowndes County in prosecution of the case that includes the Property Settlement Agreement because Debtor was held in contempt by virtue of that certain Agreed Order entered in that matter dated February 11, 2020; and
  - g. Attorney's fees in the Texas Adversary Case in the amount of \$5,000.00, by virtue of the fact that Defendant was held in contempt in the Agreed Order entered the underlying Chancery Court case dated February 11, 2020.<sup>16</sup>

The court makes the following factual findings regarding each claim.

Paragraph 8 of the agreement provides that the debtor agreed to pay the plaintiff "lump sum installment alimony" of \$2,280,000 in installments of \$18,000 per month for 60 months and then \$20,000 for an additional 60 months until paid in full.<sup>17</sup> The debtor has admitted that the agreement obligates him to pay the installments and that the payments are a domestic support obligation.<sup>18</sup> The plaintiff submitted an affidavit with her motion that avers the debtor still owes her \$1,647,500.00 on this claim.<sup>19</sup> The debtor admitted that he owes her that amount.<sup>20</sup> The Court finds that the debtor owes the

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<sup>16</sup> (A.P. Dkt. # 15). The divorce decree and the parties refer to the agreement as the "Property Settlement Agreement" and use the term "alimony." The terms "property settlement" and "alimony" are terms of art in bankruptcy that may result in different treatment in some bankruptcy cases. *In re Hunsucker*, 631 B.R. 610, 613 (Bankr. N.D. Miss. 2021). The "Property Settlement Agreement" is referred to as "the agreement" herein to avoid confusion and to avoid the implication that the Court has made a finding on this issue.

<sup>17</sup> (A.P. Dkt. # 1, ¶ 5); (A.P. Dkt. # 1, Ex. B); (A.P. Dkt. # 7, ¶ 1).

<sup>18</sup> (A.P. Dkt. # 7, ¶ 1); (A.P. Dkt. # 15, Ex. C, No. 3).

<sup>19</sup> (A.P. Dkt. # 15, Ex. D).

<sup>20</sup> (A.P. Dkt. # 15, Ex. C, No. 16).

plaintiff \$1,647,500 in what the parties referred to as “lump sum installment alimony.”

Paragraph 10 of the agreement provides that the debtor’s business, Burkhalter Rigging, Inc., will pay the plaintiff \$5,000 per month for 60 months under a separate employee severance agreement.<sup>21</sup> The debtor has admitted that should the business default, (which it has), he is required to make the payments.<sup>22</sup> The plaintiff’s affidavit provides that the debtor has paid a total of \$160,000 toward the obligation listed in paragraph 10, but he is in arrears \$120,000 and owes a total of \$140,000.<sup>23</sup> The debtor denied those figures, but when asked in an interrogatory what amount he owed under paragraph 10, he merely referenced the agreement generally.<sup>24</sup> He offered no evidentiary response to dispute the plaintiff’s claim that he still owes her \$140,000.<sup>25</sup> The Court finds that the debtor owes the plaintiff \$140,000 for this obligation.

Paragraph 10 of the agreement also provides that Burkhalter Rigging is required to pay both the plaintiff’s monthly cell phone bill for 60 months and her health insurance premiums.<sup>26</sup> The debtor again admitted that the

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<sup>21</sup> (A.P. Dkt. # 1, ¶ 6); (A.P. Dkt # 1, Ex. B); (A.P. Dkt. # 7, ¶ 1).

<sup>22</sup> (A.P. Dkt. # 7, ¶ 1).

<sup>23</sup> (A.P. Dkt. # 15, Ex. D).

<sup>24</sup> (A.P. Dkt. # 15, Ex. E).

<sup>25</sup> (A.P. Dkt. # 15, Ex. E). *TIG Ins. Co. v. Sedgwick James of Washington*, 276 F.3d 754, 759 (5th Cir. 2002) (“Conclusional allegations and denials, speculation, improbable inferences, unsubstantiated assertions, and legalistic argumentation do not adequately substitute for specific facts showing a genuine issue for trial”) (citing *SEC v. Recile*, 10 F.3d 1093, 1097 (5th Cir. 1993)).

<sup>26</sup> (A.P. Dkt. # 1, ¶ 6); (A.P. Dkt # 1, Ex. B); (A.P. Dkt. # 7, ¶ 1).

agreement requires him to make those payments should the business default.<sup>27</sup> He further admitted that he and Burkhalter Rigging stopped paying both obligations but stated that he was unaware of the amount owed on each claim.<sup>28</sup> The plaintiff's affidavit provides that the debtor owes \$9,446.10 in cell phone charges and \$3,134.74 in health insurance premiums.<sup>29</sup> The debtor offered no evidentiary response to rebut those figures. The Court finds that the debtor owes the plaintiff \$9,446.10 for her cell phone charges and \$3,134.74 in health insurance premiums.

The debtor admitted that Paragraph 13 of the agreement provides that “[the debtor] shall defend [the plaintiff] to fullest and hold her harmless from any litigation and/or liability that arises from his businesses.”<sup>30</sup> The plaintiff states in her affidavit that she may be found liable to Travelers Insurance for a demand of \$9,300 arising from an obligation of Burkhalter Rigging.<sup>31</sup> She also states that she may face liability for at least \$118,354.72 arising from an adversary proceeding in Burkhalter Rigging's separate chapter 11 bankruptcy case pending in Texas.<sup>32</sup> While the plaintiff asserts she “may be found liable” for those claims, there is no evidence that those claims have been liquidated

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<sup>27</sup> (A.P. Dkt. # 7, ¶ 1).

<sup>28</sup> *Id.*

<sup>29</sup> (A.P. Dkt. # 15, Ex. D).

<sup>30</sup> (A.P. Dkt. # 1, ¶ 7); (A.P. Dkt. # 1, Ex. B); (A.P. Dkt. # 7, ¶ 1).

<sup>31</sup> (A.P. Dkt. # 15, Ex. D, ¶ 15).

<sup>32</sup> *Id.* at ¶ 16.

by entry of a judgment or otherwise.<sup>33</sup> Ultimately, the plaintiff may owe nothing on these claims and, as such, neither would the debtor. The Court makes no finding at this time as to the amounts owed on those unliquidated claims pending in other courts.

The plaintiff also asserts two claims for attorney's fees. The first is a claim for \$15,628 incurred in enforcing the agreement in chancery court.<sup>34</sup> The second is a claim in the amount of \$5,000 "in defending against the above captioned adversary proceeding pending in the United States Bankruptcy Court in Texas."<sup>35</sup> The debtor denied the allegations of those two claims for attorney's fees in his answer.<sup>36</sup> The plaintiff's affidavit states that she "incurred attorney's fees," but she provided no evidence that she was awarded fees by either court or that the debtor is otherwise obligated to pay those attorney's fees.<sup>37</sup> The Court makes no finding regarding the attorney's fees at this stage of the adversary proceeding.

#### IV. CONCLUSIONS OF LAW

The determination of nondischargeability is a two-step process. The plaintiff must first show that she holds a valid claim against the debtor. If successful, the plaintiff must then demonstrate how and why that claim is

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<sup>33</sup> (A.P. Dkt. # 15, Ex. D, ¶ 14).

<sup>34</sup> (A.P. Dkt. # 1, ¶ 20).

<sup>35</sup> (A.P. Dkt. # 1, ¶ 21).

<sup>36</sup> (A.P. Dkt. # 7, ¶ 2).

<sup>37</sup> (A.P. Dkt. # 15, Ex. D).



nondischargeable under the Bankruptcy Code.<sup>38</sup> Here, the Court has found that the plaintiff holds liquidated claims against the debtor for the “lump sum installment alimony,” the employee severance benefits, the cell phone charges, and the health insurance coverage. The Court now turns to the dischargeability of those debts.

Section 523 of the Bankruptcy Code includes two subsections pertaining to the dischargeability of claims arising from domestic relations. Section 523(a)(5) provides that a debtor may not discharge a “domestic support obligation,” which is a debt “in the nature of alimony, maintenance, or support.”<sup>39</sup> Section 523(a)(15) expands the category to include all other debts:

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. . . .

As this Court has explained, “subsection (a)(5) debts are generally alimony and child support while subsection (a)(15) debts are all other debts owed to a former spouse or child arising from domestic proceedings.”<sup>40</sup> While the Court recently established a revised set of factors to differentiate between a domestic support obligation and a property settlement,<sup>41</sup> the Court need not address those

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<sup>38</sup> *In re Blankenship*, 525 B.R. 629, 638 (Bankr. N.D. Miss. 2015).

<sup>39</sup> 11 U.S.C. § 101(14A)(B).

<sup>40</sup> *Hunsucker*, 631 B.R. at 615.

<sup>41</sup> *Id.* at 619.

factors here because both types of claims are nondischargeable in chapter 7 cases.<sup>42</sup> In a chapter 7 case, it is sufficient to determine that a claim falls within either subsection.

The debtor has admitted that he agreed to pay the plaintiff \$2,280,000 as lump sum installment alimony.<sup>43</sup> The Court has found that he still owes her \$1,647,500 on that claim. The debtor has further admitted that the lump sum installment alimony is a domestic support obligation incurred in a divorce proceeding, which is exempted from discharge.<sup>44</sup> There is no dispute that the claim for \$1,647,500 in lump sum installment alimony is nondischargeable.

The debtor has admitted, and the Court has found, that he owes \$140,000 in employee severance to the plaintiff.<sup>45</sup> At first glance, employment severance does not seem to fall within either domestic relations category. But the Fifth Circuit Court of Appeals has noted that “[s]ection 523(a)(15) purports to apply to ‘any debt ... [not in the nature of alimony or child support] that is incurred in the course of a divorce or separation.’”<sup>46</sup> For section 523(a)(15) to

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<sup>42</sup> *Humphries v. Rogers (In re Humphries)*, 516 B.R. 856, 864-65 (Bankr. N.D. Miss. 2014) (noting that § 523(a)(15) debts are dischargeable in chapter 13 but not in other chapters); *See also Hunsucker*, 631 B.R. at 613 (“In a chapter 13 case, § 523(a)(15) debts are dischargeable, while § 523(a)(5) domestic support obligations are not.”).

<sup>43</sup> (A.P. Dkt. # 7, ¶ 1).

<sup>44</sup> (A.P. Dkt. # 15, Ex. C); 11 U.S.C. § 523(a)(5); 11 U.S.C. § 101(14A)(B).

<sup>45</sup> (A.P. Dkt. # 7, ¶ 1).

<sup>46</sup> *Matter of Gamble*, 143 F.3d 223, 225 (5th Cir. 1998) (quoting 11 U.S.C. § 523(a)(15)) (citing *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 566 (in interpreting the Bankruptcy Code, “as long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute”)).

apply, “the critical issues are the nature of the debt, not the payee, and whether under state law the debt was incurred in the course of a divorce or separation.”<sup>47</sup> Some courts hold that “a debt is nondischargeable when the debtor undertakes new obligations to pay on a debt for the former spouse's benefit and the former spouse can enforce those new obligations.”<sup>48</sup> Essentially, the question is whether the debt was incurred through the divorce. Here, the primary obligor is the company, but the debtor would not otherwise be obligated to pay the severance but for the agreement. Further, the plaintiff's employment with the company (owned by the debtor) was terminated due to the divorce and the debtor's personal liability to pay this debt to his former spouse arises directly from the divorce. At a minimum, it falls within section 523(a)(15) and is therefore nondischargeable.<sup>49</sup>

The Court has also found that the debtor owes \$9,446.10 in cell phone charges and \$3,134.74 in health insurance premiums. Again, both obligations were incurred in connection with the divorce and the parties' agreement.<sup>50</sup> The Court finds the claims for the plaintiff's health insurance coverage and her cell phone bill are nondischargeable under §523(a)(5) or (15).

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<sup>47</sup> *In re Montgomery*, 310 B.R. 169, 177 (Bankr. C.D. Cal. 2004).

<sup>48</sup> *In re Proyect*, 503 B.R. 765, 775 (Bankr. N.D. Ga. 2013).

<sup>49</sup> 11 U.S.C. § 523(a)(15).

<sup>50</sup> (A. P. Dkt. # 1, Ex. B).

Because the summary judgment evidence fails to establish a prima facie showing as to the existence or amount of the claims for indemnity and/or attorney's fees, the Court cannot make a determination as to the amount or dischargeability of those claims at this stage.

Accordingly, it is hereby **ORDERED, ADJUDGED, and DECREED** that the plaintiff's *Motion for Summary Judgment* is **GRANTED IN PART and DENIED IN PART**. The claims for \$1,647,500 in lump sum installment alimony, \$140,000 in employment severance benefits, \$9,446.10 in cell phone charges, and \$3,134.74 in health insurance premiums are nondischargeable pursuant to 11 U.S.C. § 523(a)(5) and/or (15). The Court makes no finding as to the remaining claims, which shall proceed to trial. A pretrial hearing will be scheduled by separate order as to the remaining claims.

**##END OF OPINION##**