IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

IN RE: JESSIE WAYNE CHESTNUT, Debtor **No. 5:09-bk-73078**

UNITED STATES OF AMERICA **PLAINTIFF**
v. **5:16-ap-7048**
JESSIE WAYNE CHESTNUT **DEFENDANT**

ORDER GRANTING SUMMARY JUDGMENT

Before the Court is the *United States' Motion For Summary Judgment* filed on May 12, 2017. The debtor, Jessie Wayne Chestnut, filed his *Response to Motion For Summary Judgment (Docket Entry #37)* on July 10, 2017, to which the United States replied on July 12, 2017. For the reasons stated below, the Court grants the United States's motion for summary judgment.

Case History

The debtor filed his chapter 13 bankruptcy petition on June 23, 2009. At the time of filing, according to the United States's Proof of Claim, the debtor owed taxes and fines to the Internal Revenue Service (IRS) from seven prior tax years: 2001, 2002, 2003, 2004, 2006, 2007, and 2008. The IRS filed its proof of claim for $13,071.54 as an unsecured priority claim for the debt relating to tax years 2006, 2007, and 2008, and for $45,905.66 as an unsecured general claim for the remaining debt relating to tax years 2001, 2002, 2003, 2004, and 2006. The Court confirmed the debtor's plan on January 5, 2010. In the debtor's plan, the debtor proposed to pay his priority debt in the amount of $13,071.54 to the IRS. Unsecured creditors, including the IRS, were to be paid a pro rata amount from any funds remaining after payment of all other classes of claims. The debtor made monthly payments over the course of his bankruptcy, and each month approximately $218.00 of the debtor's plan payment was applied to his obligation to the IRS as provided in the confirmed plan. On June 18, 2014, the debtor received a general discharge under 11 U.S.C. § 1328(a). During the course of his bankruptcy, the debtor paid the IRS's

unsecured priority claim of $13,071.54, and a small portion of the IRS's unsecured general claim.

After the debtor received his discharge, the IRS sought to collect what it alleged were "non-discharged pre-petition tax liabilities and non-discharged post-petition interest" pursuant to the debtor's tax obligations for amounts that had not been repaid through the debtor's chapter 13 bankruptcy plan. In response, the debtor filed a motion for contempt against the United States on January 12, 2016, alleging that his chapter 13 discharge relieved him of any repayment obligation to the United States for the tax debt the IRS now sought to collect. The United States filed its first adversary proceeding on June, 23 2016, seeking to determine the dischargeability of the federal tax debt it claimed was still owed.

On July 22, 2106, the debtor filed a motion to dismiss the United States's adversary proceeding. In his motion, the debtor claimed that the United States was time-barred from bringing the adversary proceeding, that the Court's confirmation order and discharge of the debtor's debt obligation served as res judicata against the IRS from seeking a determination of dischargeability, and that the IRS's acceptance of the debtor's chapter 13 plan and the Court's discharge order pursuant to that plan relieved him of the remaining debt to the IRS under the holding of *United Student Aid Funds, Inc. v. Espinosa,* 559 U.S. 260 (2010).

The United States filed its *Opposition to Defendant's Motion to Dismiss* on August 10, 2016, relying on § 523(a)(1)(B) in support of its position that the United States is permitted to file a complaint at any time to determine the dischargeability of tax debts. The United States also argued that res judicata did not apply because the Court's discharge order did not apply to the debt the United States sought to determine. Finally, the United States argued that *Espinosa* did not control because the type of debt in *Espinosa* and the type of debt in question were subject to different treatments under the code, rendering the *Espinosa* holding moot as to dischargeability of tax debt in a chapter

13 bankruptcy. After a hearing, the Court denied the debtor's motion to dismiss.

On August 12, 2016, shortly after the debtor filed his motion to dismiss the adversary proceeding, the United States filed its first motion for summary judgment. The debtor responded on September 2, 2016. On October 11, 2016, the United States filed an amended complaint, to which the debtor responded on November 8, 2016. Based on the amended complaint and answer, the Court entered its order on December 19, 2016, denying the United States's motion for summary judgment as moot without prejudice to the United States filing another motion for summary judgment. On May 12, 2017, the United States filed the motion for summary judgment that is now before the Court.

Jurisdiction

This Court has jurisdiction over this matter under 28 U.S.C. § 1334 and 28 U.S.C. § 157, and it is a core proceeding under 28 U.S.C. § 157(b)(2)(I). The following opinion constitutes findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052.

Summary Judgment

Federal Rule of Bankruptcy Procedure 7056 provides that Federal Rule of Civil Procedure 56 applies in adversary proceedings. Rule 56 states that summary judgment shall be rendered "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(a). The burden is on the moving party to establish the absence of a genuine issue of material fact and that it is entitled to judgment as a matter of law. *Canal Ins. Co. v. ML & S Trucking, Inc.*, No. 2:10-CV-02041, 2011 WL 2666824, at *1 (W.D. Ark. July 6, 2011) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, (1986); *Nat'l Bank of Commerce of El Dorado, Ark. v. Dow Chem. Co.*, 165 F.3d 602 (8th Cir.1999)); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (citing to former Fed. R. Civ. P. 56(c)). The burden then shifts to the non-moving party, who must show "that the materials cited do not establish the absence or presence of a genuine dispute, or

that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1)(B). The non-moving party is not required to present a defense to an insufficient presentation of facts by the moving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 161 (1970) (quoting 6 J. Moore, Fed. Prac. 56.22(2), pp. 2824-25 (2d ed. 1966)). However, if the non-moving party fails to address the movant's assertion of fact, the court may consider the fact undisputed. Fed. R. Civ. P. 56(e)(2). When ruling on a summary judgment motion, the Court must view the facts in the light most favorable to the non-moving party and allow that party the benefit of all reasonable inferences to be drawn from the evidence. *Canada v. Union Electric Co.*, 135 F.3d 1211, 1212-13 (8th Cir. 1997); *Ferguson v. Cape Girardeau Cty.*, 88 F.3d 647, 650 (8th Cir. 1996).

Discussion

In its amended complaint, the United States is asking the Court to determine the dischargeability of the debtor's 2001, 2002, 2003, 2004, and 2006 tax debts pursuant to §§ 523(a)(1)(B) and 1328(a).[1] The issue before the Court is whether the debtor's discharge that was entered on June 18, 2014, included his unpaid tax debts from the tax years 2001, 2002, 2003, 2004, and 2006. The debtor argues that these obligations were discharged based on the holding in *Espinosa* and that contesting the dischargeability of the debt is now barred by the doctrine of res judicata. The United States argues that the debt is nondischargeable under § 523(a)(1)(B)(ii), that *Espinosa* is not relevant to a determination of the dischargeability of this type of debt, and that the United States's action to seek a determination of the dischargeability of the tax debt is not barred for any reason.

Within its motion for summary judgment, the United States submitted a statement of

[1] In its motion for summary judgment, the United States also included an argument relating to § 523(a)(1)(C). However, because that code provision was not raised or addressed in its amended complaint, the Court will not address it for the first time in the United States's motion for summary judgment.

undisputed material facts in accordance with this Court's General Order No. 37.[2] Although the debtor filed his response to the United States's motion on July 10, 2017, he did not dispute any of the United States's alleged material facts. Accordingly, the Court finds that the facts alleged in the United States's motion for summary judgment are true for purposes of its motion. The relevant material facts that support this Court's ruling follow:

> 2. On June 23, 2009, Chestnut filed a Chapter 13 bankruptcy petition with this Court.
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> . . .
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> 4. On August 25, 2009, Chestnut filed an amendment to the Chapter 13 plan, stating that "Debtor has a priority debt to the Internal Revenue Service in the amount of $13,071.54 which will be paid in full at $218.00 per month."
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> 5. Neither the amendment to the Chapter 13 plan described above in paragraph 4 nor the Chapter 13 bankruptcy plan provided for payment of post-petition interest on the federal income tax liabilities.
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> . . .
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> 9. Throughout Chestnut's Chapter 13 plan, Chestnut paid the IRS's priority claim of $13,071.54 described above in paragraph 3.
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> 10. Throughout Chestnut's Chapter 13 plan, Chestnut paid only $57.26 towards the IRS's general unsecured claim of $45,905.66 described above in paragraph 3.
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> 11. Throughout Chestnut's Chapter 13 plan, Chestnut failed to fully pay all of his federal income tax debts listed on the IRS's proof of claim. Although all pre-petition penalties assessed against Chestnut were discharged and abated by the IRS, a substantial portion of Chestnut's income tax debts that comprised the IRS's general unsecured claim remains due and owing to the United States.
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> 12. As of May 4, 2017, Chestnut owes the United States $38,387.19, plus statutory additions that have accrued and will continue to accrue thereon until fully paid, for unpaid federal income tax liabilities for tax years 2001, 2002, 2003, 2004, and 2006.
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[2] The Court's General Order No. 37(c) states:

> All material facts set forth in the statement filed by the moving party pursuant to paragraph (a) shall be deemed admitted solely for the purposes of the motion for summary judgment unless controverted by the statement filed by the non-moving party under paragraph (b). If no response is filed, any facts alleged to be undisputed in the moving party's motion and supporting affidavits may be taken as true.

23. Chestnut's federal income tax returns ("Form 1040s") for the following tax years were due on the following dates:

2001	April 15, 2002
2002	April 15, 2003
2003	April 15, 2004
2004	April 15, 2005
2006	April 17, 2007

24. Chestnut did not file Form 1040s for tax years 2001, 2002, 2003, 2004, and 2006 on or before their respective due dates.

25. Chestnut admits that he "*failed* to file *timely* federal income tax returns for tax years 2001, 2002, 2003, 2004, and 2006."

. . .

29. In 2008, Chestnut hired Wilson & Wilson, E.A. to prepare his 2000-2008 tax returns.

. . .

31. On March 20, 2008, Chestnut signed the Form 1040s for tax years 2001, 2002, 2003, 2004, and 2006.

32. In 2008, Chestnut submitted Form 1040s to the IRS for tax years 2001, 2002, 2003, 2004, and 2006.

33. For tax years 2001, 2002, 2003, 2004, and 2006, Chestnut signed and submitted Form 1040s between June 23, 2007 and June 23, 2009.

34. Chestnut admits that he "filed late returns for [tax years 2001, 2002, 2003, 2004, and 2006] within two years of filing his bankruptcy petition."

. . .

37. Chestnut has unpaid federal income tax liabilities for tax years 2001, 2002, 2003, 2004, and 2006 in the amounts listed below:

2001	$4,154.95
2002	$12,203.75
2003	$11,583.99
2004	$9,489.24
2006	$955.26
TOTAL	$38,387.19

Generally, under § 1328(a), any unsecured debt provided for in the debtor's plan that remains unpaid after the debtor completes his payments under a confirmed plan is discharged. However, that section also provides for certain exceptions to the general discharge and refers to § 523(a)(1)(B) specifically:

> § 1328 Discharge
>
> (a) [A]s soon as practicable after completion by the debtor of all payments under the plan . . . the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title, *except* any debt–

> . . .
> (2) of the kind specified in section 507(a)(8)(C) or in paragraph (1)(B), (1)(C), (2), (3), (4), (5), (8), or (9) of section 523(a);

11 U.S.C. § 1328(a) (emphasis added). Paragraph (1)(B) of § 523(a) references a tax–

> (B) with respect to which a return, or equivalent report or notice, if required—
> (i) was not filed or given; or
> (ii) was filed or given after the date on which such return, report, or notice was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition.

11 U.S.C. § 523(a)(1)(B). Without considering the debtor's *Espinosa* argument yet, when these two sections are read together with the material facts that are stated above, the debts that the debtor is now arguing were discharged in 2014 clearly were not. The debtor filed his petition on June 23, 2009. The due dates for the debtor's 2001, 2002, 2003, 2004, and 2006 returns were April 17, 2007, or earlier. The debtor submitted the Form 1040s for these years in 2008, well after the date on which the returns were last due and within two years of the date he filed his voluntary petition. Despite his *Espinosa* argument, which the Court will address next, the Court finds that the debtor's remaining obligation to the United States in the amount of $38,387.19 as of May 4, 2017, was not discharged in the debtor's bankruptcy case.

It appears to the Court that the debtor is arguing that the Supreme Court, in *Espinosa*, held that confirmation of a plan–any plan–is binding on a creditor who received notice but failed to appeal or object to confirmation and allows for the discharge of an otherwise nondischargeable debt. Because the debtor included payment of the IRS's priority claim in full in his plan and treated the balance owed as of the date of the debtor's petition as an unsecured debt, he believes that the balance that remained after the payments under his confirmed plan were made was discharged because the IRS did not object to its treatment under the plan. That argument does not reflect this Court's understanding of *Espinosa*.

Broadly speaking, there are three types of debts that are addressed in § 523(a). First are the debts that will be discharged unless a creditor takes certain action. These debts

appear in § 523(a)(2), (4), and (6). According to Rule 4007(c), a complaint to determine the dischargeability of a debt under these sections requires a complaint to be filed no later than 60 days after the first date set for the meeting of creditors. Second are the student loan debts under § 523(a)(8) that may be dischargeable if the debtor can prove that excepting the debt from discharge would impose an undue hardship on the debtor. This is the type of debt addressed in *Espinosa*. Third are the debts that are not dischargeable for any reason. In a chapter 13 case, these include the debts found in § 523(a)(1)(B), (1)(C), (2), (3), (4), (5), and (9). Section 523(a)(1)(B) is the section currently before the Court.

The issue presented to the Supreme Court in *Espinosa* related to the second category of debt. The issue was whether an order that confirms the discharge of a student loan debt without a prior finding of undue hardship or an adversary proceeding is a void order. In *Espinosa*, the debtor included language in his plan that specifically stated that the creditor's accrued interest on the debtor's student loan debt would be discharged upon completion of the plan. The creditor did not object to this treatment, an adversary proceeding to determine the dischargeability of the debt was not filed, and the bankruptcy court did not make a determination of undue hardship prior to confirming the debtor's plan. When the debtor completed his payments under the confirmed plan, he received his discharge. A short while later, the creditor began collection efforts for the accrued interest. The debtor then filed a motion to enforce the court's discharge order, to which the creditor filed a cross-motion asking the court to set aside its confirmation order as void for two reasons: first, § 523(a)(8) requires a finding by the court of undue hardship before a student loan can be discharged and, second, the creditor did not receive due process because an adversary proceeding and summons was not filed and served on the creditor.

In its ruling–which had the effect of denying the creditor's cross-motion–the Supreme Court stated that a void judgment is a legal nullity and can be set aside under Rule 60(b)(4) "only in the rare instance where a judgment is premised either on a certain type

of jurisdictional error or on a violation of due process that deprives a party of notice or the opportunity to be heard." *Espinosa*, 599 U.S. at 271. Because the bankruptcy court had jurisdiction over the student loan matter under § 523(a)(8) and because the creditor received actual notice of the filing and contents of the debtor's plan prior to confirmation, the Court held that the bankruptcy court's order of discharge was not a void judgment and Rule 60(b)(4) was not applicable. In addressing the lack of a finding by the bankruptcy court of an undue hardship, the Court stated that the bankruptcy court committed legal error but that the order would remain enforceable and binding on the creditor because the creditor "had notice of the error and failed to object or timely appeal." *Id.* at 275.

This Court finds that the debtor's reliance on *Espinosa* in this case is without merit. *Espinosa* dealt with a debt from the second category listed above–student loan debts under § 523(a)(8) that may be dischargeable if the debtor can prove that excepting the debt from discharge would impose an undue hardship on the debtor. A tax debt, such as the one before this Court is a debt from the third category listed above–a debt that is not dischargeable for any reason. In other words, as stated by the *Espinosa* Court, it is a debt that is "*not* dischargeable under *any* circumstances." *Id.* at 273 n.10

Section 1325(a) states that a court should confirm a plan if the plan complies with the provisions of chapter 13 and other applicable provisions. In this instance, the debtor's plan complied with the provisions of chapter 13: the debtor proposed to pay–and did pay–his priority obligation to the IRS in full during the life of the plan as required under § 1322(a)(2) and he classified the IRS's unsecured debt in the same class as other unsecured creditors as required under § 1322(a)(3) and paid $57.26 toward that debt. The Court confirmed the debtor's plan, the debtor made all of his proposed payments, and the Court entered its discharge of the debtor. Despite the debtor's understanding of his discharge, on the reverse side of the discharge order under *Explanation of Bankruptcy Discharge in a Chapter 13 Cases*, the order states that "[d]ebts for certain taxes to the extent not paid in full under the plan" are not discharged. The Court finds that the

remaining tax obligation owed by the debtor to the United States, including post-petition interest on those obligations,[3] is such a debt and that the remaining tax obligation–in the amount of $38,387.19 as of May 4, 2017–was not and is not discharged. Accordingly, the Court finds that the United States is entitled to summary judgment as a matter of law and grants its motion for summary judgment as to § 523(a)(1)(B).

IT IS SO ORDERED.

Ben Barry
United States Bankruptcy Judge
Dated: 07/21/2017

cc: Casey S. Smith
John M. Blair
Jessie Wayne Chestnut

[3] In *In re Burnett*, the Eighth Circuit found that "the Ninth Circuit's decision in *Foster v. Bradbury* (*In re Foster*) [319 F.3d 495, 497 (9th Cir. 2003)], on which the BAP principally relied, persuasive. The Ninth Circuit 'agree[d] with the weight of authority . . . that interest on nondischargeable child support obligations, like interest on nondischargeable tax debt, continues to accrue after a Chapter 13 petition is filed and is not dischargeable.'" *In re Burnett*, 646 F.3d 575, 582 (8th Cir. 2011).