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

IN RE: Michele June Taylor, Debtor **No. 5:09-bk-75615**
Ch. 7

Michele June Taylor **Plaintiff**

v. **5:10-ap-7192**

First Security Bank **Defendant**

ORDER

Before the Court is a Motion For Summary Judgment filed by the debtor, Michele Taylor [Michele], on February 14, 2011; a response and cross-motion for summary judgment filed by First Security Bank [FSB] on February 23, 2011; and a response to the cross-motion for summary judgment filed by Michele on March 7, 2011.

On April 8, 2011, the Court entered its order denying both motions for summary judgment because the parties provided insufficient facts to the Court from which the Court could make a determination.[1] The Court continued the trial on the adversary proceeding to September 2, 2011. On September 1, 2011, the parties filed their Joint Stipulations of Fact, purporting to provide the Court with the facts that were missing from the earlier filed motions for summary judgment. The Court took the matter under advisement and again postponed the trial. For the reasons more fully explained below, the Court grants the debtor's motion for summary judgment and denies FSB's motion for summary judgment. The discharge injunction under 11 U.S.C. § 524(a)(2) remains in effect rendering the debtor's request for an "injunction enjoining First Security Bank

[1] The Court did, however, address and dispose of FSB's collateral estoppel argument in its April 8 order. The Court stated that because a determination of whether the debt allegedly owed by Michele to FSB was dischargeable under 11 U.S.C. § 523(a)(15) was *not* a finding in the Court's June 11, 2010 order entered in adversary proceeding 5:10-ap-7017, it could not have been essential to the judgment as required for collateral estoppel.

from further attempts to collect the debt formerly owed to it by Michele Taylor" moot.

As stated in the Court's previous order of April 8, 2011, Michele's motion for summary judgment requests that the Court find that FSB has violated the discharge injunction under 11 U.S.C. § 524 by sending Michele a demand letter and suing Michele in state court after the Court's order of discharge was entered. In its cross-motion for summary judgment, FSB asserts that it may proceed with the enforcement of its liens despite the discharge injunction because the Court's June 11, 2010 order [June 11 Order] entered in adversary proceeding 5:10-ap-7017 provides that Michele's debt to FSB is non-dischargeable under § 523(a)(15).

Whether FSB has violated the discharge injunction depends on whether the discharge injunction enjoins FSB from its attempts to collect upon Michele's debt. Because FSB's actions fall within the actions prohibited by § 524(a)(2), the discharge injunction would prohibit FSB from its collection attempts of a personal obligation *if* Michele's obligation to FSB was discharged under § 727. 11 U.S.C. § 524(a). Therefore, to prevail on her motion for summary judgment, Michele must show that (1) there is no genuine dispute as to any material fact with regard to whether her debt to FSB was discharged under § 727, and (2) she is entitled to judgment as a matter of law. Fed. R. Bankr. P. 7056.

The parties' Joint Stipulations of Fact support Michele's motion for summary judgment. The parties stipulated that,

(1) Michele and her ex-spouse Darrall entered into a home equity line of credit with FSB on March 6, 2009;

(2) As security, Michele and Darrall granted FSB a "second priority mortgage on a home that she owned in Cave Springs, Arkansas";[2]

[2] Although Michele's and Darrall's Separation and Property Settlement Agreement contemplated the sale of the house within six months from the date of the agreement, which is dated July 6, 2009, the parties did not provide the Court with any information concerning the present status of the house or the existing status of FSB's

(3) Michele and Darrall were divorced in July 2009;

(4) Michele filed her voluntary chapter 7 petition on November 5, 2009;

(5) Michele did not reaffirm her debt to FSB;

(6) FSB did not file a complaint seeking to except its debt from discharge in Michele's case;

(7) Darrall filed a complaint to determine the dischargeability of Michele's obligations to Darrall under 11 U.S.C. § 523(a)(2), (5), and (15), which resulted in the June 11 Order;[3]

(8) FSB was not a party in the adversary proceeding that resulted in the June 11 Order;

(9) FSB was properly listed as a creditor in Michele's bankruptcy case;

(10) Michele received her discharge on June 29, 2010;

(11) Darrall filed a voluntary chapter 13 petition on June 30, 2010;

(12) On September 20, 2010, FSB was granted relief from the co-debtor stay in Darrall's bankruptcy case as to Michele;

(13) FSB then filed suit against Michele in state court to collect all sums due and owing on the note referenced in paragraph (1), above.

According to the parties' stipulation, "the only issue in dispute is the construction and effect" of the June 11 Order. Michele argues in her motion that the June 11 Order "had no direct effect upon the debt formerly owed by Michele Taylor to First Security Bank; rather the order required Michele Taylor to hold Darrall Taylor harmless from his

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security interest in the house. The Court granted State Farm Bank's motion for relief from the automatic stay relating to the house on May 17, 2010.

[3] In their stipulations, the parties jointly requested the Court take judicial notice of the pleadings filed in 5:09-bk-75615, 5:10-bk-73388, and 5:10-ap-07017. The information contained in this paragraph (7) was obtained from Darrall's complaint, which was filed in 5:10-ap-7017.

obligation to First Security, and any obligation of Michele Taylor to First Security is entirely dependent upon Darrall Taylor having a present obligation to First Security Bank." FSB argues in its motion and brief that the June 11 Order states that Michele's debt to FSB is non-dischargeable pursuant to § 523(a)(15).

The Court entered the order to which the parties refer--the June 11 Order, titled *Order Granting 11 U.S.C. 523(a)(15)*--in the adversary proceeding that Darrall filed in Michele's bankruptcy case. Paragraph 5 of the June 11 Order appears unrelated to the specific allegations contained within that adversary proceeding.[4] Paragraph 5 states: "The First Security Bank note in the amount of $16,000.00, secured by the property at 924 Bramblewood Lane, Cave Springs, Arkansas is a co-signed note line of credit obligation which Defendant [Michele] obtained following the divorce and is not dischargeable pursuant to 11 U.S.C. Section 523(a)(4)." There is no allegation in any of the pleadings in the related adversary proceeding to suggest a cause of action under § 523(a)(4). Perhaps to settle the suit or in an abundance of caution the parties agreed that to the extent Michele owed a debt to Darrall related to the $16,000.00 that was determined to be based on fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny, the debt would be deemed nondischargeable in Michele's bankruptcy case. Of particular significance is that FSB is not a party to that agreement; it relates only to Michele's alleged obligation to Darrall. If the parties intended the June 11 Order to enure to the benefit of FSB, they should have stated in paragraph 5 that the "note in the amount of $16,000.00 . . . is not dischargeable *as to First Security Bank* . . . ."

The key finding in paragraph 5 of the Court's order is that the $16,000.00 is a secured obligation based on a line of credit and that Michele received the money. More important is paragraph 6 of the Court's order (with emphasis added): "The Defendant

[4] The Court notes that the June 11 Order is an agreed order submitted in settlement of the underlying adversary proceeding.

[Michele] is not granted a discharge under 11 U.S.C. Section 523(a)(15) *from the obligation in the divorce decree*." The divorce decree states, in relevant part, that Michele assumes and agrees to pay "any unpaid indebtedness which she has incurred subsequent to the separation of the parties. Wife [Michele] *shall indemnify and hold Husband* [Darrall] *harmless from any liability on account of said debts*." Again, FSB is not a party to the agreement. After reviewing the stipulated facts before the Court and the pleadings in the adversary proceeding between Darrall and Michele, the only conclusion the Court can draw is that the June 11 Order memorializes the parties' intent to confirm that it was Michele's obligation to indemnify Darrall that was nondischargeable.

Section 523(a)(15) relates to a debt incurred by the debtor in the course of a divorce or separation. 11 U.S.C. § 523(a)(15). The Court's June 11 Order addresses specifically a § 523(a)(15) debt related to the obligations in the parties' divorce decree. That particular obligation is the requirement that Michele hold Darrall harmless from any liability on account of the debt to FSB. The liability referred to is Darrall's obligation to FSB related to the $16,000.00 debt that was incurred by Michele. To the extent Darrall's obligation to FSB is discharged in his own bankruptcy case, Michele has no further obligation to Darrall. In a case cited by FSB in support of its position, Judge Audrey Evans describes the obligation in a footnote:

> It is only the obligation owed to the spouse or former spouse which falls within the scope of § 523(a)(15); however, in the case of an obligation to pay a debt owed to a third party, it is the obligation to hold the spouse or former spouse harmless that is presumptively nondischargeable under this section. *See* 140 Cong. Rec. H10752, H10770. "A property settlement incorporated by a divorce decree that apportions third party debt to one spouse means that the obligor-spouse indemnifies the obligee-spouse in the event that the obligee is required to pay." *In re Sturdivant*, 289 B.R. at 399 (c*iting Johnston v. Henson* (*In re Henson*), 197 B.R. 299, 303 (Bankr. E.D. Ark. 1996)).

In re Douglas, 369 B.R. 462, 464 n.2 (Bankr. E.D. Ark. 2007).

Regardless, Michele's personal obligation to FSB was discharged in her bankruptcy case.

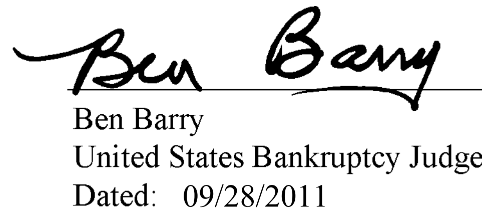
The parties stipulated that Michele properly listed FSB as a creditor in her petition and that FSB did not file a complaint to determine the dischargeability of its debt. The Notice of Chapter 7 Bankruptcy Case (Official Form 9A) stated that the deadline to file a complaint objecting to the discharge of certain debts was February 5, 2010, which was 125 days prior to the entry of the June 11 Order on which FSB now relies. There is nothing in the stipulated facts to persuade the Court that the June 11 Order was intended to somehow benefit FSB; rather, its purpose was to resolve the issue of the debtor's required indemnification under § 523(a)(5) and (a)(15). In fact, it is unlikely that FSB was even aware of Darrall's adversary proceeding at the time it was filed. To conclude, in hindsight, that an agreed order entered in Darrall's adversary proceeding was also a basis for believing its own debt was excepted from discharge is a conclusion the Court is unwilling to make.

For the reasons stated above, the Court denies FSB's motion for summary judgment and grants summary judgment in favor of the debtor, Michele June Taylor. The Court finds that the debt owed by Michele Taylor directly to FSB was not excepted from discharge in the debtor's bankruptcy case and was properly discharged on June 29, 2010. The Court also finds that FSB violated the discharge injunction under 11 U.S.C. § 524(a)(2) by filing a complaint against Michele Taylor in state court to collect "all sums due and owing" FSB relating to the home equity line of credit.

The debtor also requests damages, attorney fees, and costs "incurred in prosecuting this action and defending the action filed against her by First Security Bank . . . ." The Court respectfully denies this portion of the debtor's complaint. This adversary proceeding was filed on November 24, 2010. Three months earlier, on August 9, 2010, FSB filed its *Amended Motion for Relief From Co-Debtor Stay Pursuant to 11 U.S.C. § 1301(c)(2)* in Darrall's chapter 13 bankruptcy case. In its motion, FSB stated that Michele was also indebted to FSB on the $16,000.00 obligation and that FSB wanted relief from the co-debtor stay in Darrall's case "to permit First Security Bank to enforce the obligations as to the co-debtor." The certificate of service reflects that the motion was served on both

Michele Taylor and her attorney. Neither Michele nor her attorney responded to the motion and the Court granted the relief requested on September 2, 2010. The Court believes that FSB's motion for relief from the co-debtor stay was sufficient to put both Michele and her attorney on notice that FSB may have intended to pursue its claim against Michele. An objection to FSB's motion for relief from the co-debtor stay could have prevented state court litigation--and the accrual of attorney fees--related to any action by FSB that sought a money judgment against Michele. Accordingly, the Court is not willing to award damages, attorney fees, and costs and denies this portion of the debtor's complaint.

IT IS SO ORDERED.



Ben Barry
United States Bankruptcy Judge
Dated: 09/28/2011

cc: Forrest Stolzer, attorney for the debtor
Gary Jiles, attorney for First Security Bank