Signed: December 11, 2008

SO ORDERED

ROBERT A. GORDON
U. S. BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND
at Baltimore

In Re:	*		
Donna Hill Flohr	*	Case No.	07-13714-RAG
	*	Chapter	7
	*		
Debtor	*		
**********	*		
David L. Flohr	*		
	*		
	*		
Plaintiff	*		
vs.	*	Adversary	No. 07-0545
Donna Hill Flohr	*		
	*		
	*		
Defendant	*		

MEMORANDUM OPINION IN SUPPORT OF ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AS TO COUNT II AND FINDING DEBT TO BE NONDISCHARGABLE UNDER 11 U.S.C. § 523(a)(15)

I. Preliminary Statement

On April 23, 2007, Debtor, Donna Hill Flohr, filed her Voluntary Petition under Chapter 7 of Title 11 of the United States Code. On Schedule F, Creditors Holding Unsecured Nonpriority Claims, Debtor listed debts totaling $61,694.15. Slightly less than half of that total is attributable to

a judgment in favor of Plaintiff, David Lloyd Flohr, listed in the amount of $28,015.00. After conducting the meeting of creditors, the Chapter 7 Trustee filed a report of no distribution on May 26, 2007. Thus, no assets will be available to satisfy the claims of creditors in this case. Thereafter, Debtor received a discharge of her pre-petition debts pursuant to 11 U.S.C. § 727(b) on July 24, 2007.

On July 12, 2007, Plaintiff filed a two-count Complaint for Determination of Nondischargeability of Debt under 11 U.S.C. § 523(a)(5) and (a)(15) (Dkt. No. 1). In summary, Plaintiff alleged that a Washington State Court had erroneously compelled him to pay his ex-spouse, the Debtor-Defendant herein, alimony in an amount greater than what he was legally obligated to pay pursuant to the terms of a divorce settlement agreement executed by the Parties. The Circuit Court for Howard County later agreed with Plaintiff and retroactively reduced the amount of alimony owed. Plaintiff now argues that the judgment in his favor resulting from the earlier overpayment should be excepted from the Debtor's discharge. On August 22, 2007, the Defendant filed her Answer, in which she generally admitted the substance of the averments in the Complaint but disagreed with Plaintiff's legal conclusion (Dkt. No. 7).

On October 23, 2007, Defendant filed her Motion for Summary Judgment (Dkt. No. 15). Plaintiff filed his Opposition and Cross Motion for Summary Judgment on November 19, 2007 (Dkt. No. 20). The Court conducted a hearing on the Motions on December 17, 2007. The matter was taken under advisement and the Parties were given thirty days to submit supplemental memoranda and any relevant portions of the record from the state court proceedings. Plaintiff filed his Post-Hearing Memorandum and Documents (sic) Production (Post-Hearing Memorandum) on January 16, 2008 (Dkt. No. 26). Attached to the Post-Hearing Memorandum are excerpted portions of the record from the state court proceedings. With those filings in hand, the Court agrees the matter is ripe for decision in the form of summary judgment.

II. Factual Background

The material and relevant facts in this cross-country drama are not subject to dispute. Mr. Flohr and Ms. Flohr were married on March 26, 1971 and separated on January 25, 1990. A Judgment of Absolute Divorce (Judgment of Divorce) was entered on September 15, 1992. The Judgment of Divorce incorporated the terms of a Settlement Agreement (Agreement) executed by the Parties on July 13, 1992. The Agreement[1] defined the rights of the Parties including, *inter alia*, allocation of marital property, custody of the children, the amount of child support, the amount of alimony, and the use of the marital home. At issue in this case is the provision concerning the payment of alimony. In relevant part, the Agreement envisioned that Mr. Flohr would pay Ms. Flohr alimony according to the following stepped-down schedule:

- From July 1, 1992 until August 1, 1997, monthly payments of $1,700.00
- From August 1, 1997 until receipt by Ms. Flohr of her share of Mr. Flohr's pension, monthly payments of $900.00
- Upon receipt by Ms. Flohr of the pension proceeds, monthly payments of the lesser of $900.00 or 10% of Mr. Flohr's "gross monthly income from all sources in excess of interest income, dividends, and his monthly pension plan benefits, PSP or disability payments".

See Agreement, Exh. A to Post-Hearing Memorandum, at Section 6, pgs. 6-7.

Also pursuant to the Agreement, Mr. Flohr waived his right to claim alimony, spousal support, or maintenance from Ms. Flohr. *Id.* at pg. 8.

The Parties operated smoothly under the Agreement for approximately a decade. However, problems arose after Mr. Flohr retired in April 2002. Ms. Flohr began to receive distributions from Mr. Flohr's pension in June 2002, thus triggering the third step of the alimony schedule and the potential reduction in the amount of the monthly obligation. *See* Excerpt of Appellant's (Ms. Flohr's) Brief before the Maryland Court of Special Appeals, Exh. G to Post-Hearing Memorandum.

[1] Ten pages of the 28-page Agreement were attached to the Post-Hearing Memorandum.

Around this time, Mr. Flohr stopped making alimony payments, arguing that he was entitled to do so because he was retired, had no income, and therefore no alimony was due according to the Agreement. Ms. Flohr, however, questioned Mr. Flohr's income and felt that he was obligated to continue to make payments at the then maximum level of $900.00 per month. As Mr. Flohr was then residing in the State of Washington, Ms. Flohr filed an action there to both enforce the Agreement and collect what she believed to be the unpaid alimony.

In August 2003, the Superior Court for Snohomish County (Washington Court) entered an order on show cause and judgment (Washington Judgment), which determined that Mr. Flohr had failed to comply with an earlier order of the court and found that he owed back alimony for the period of June 2002 through July 2003, calculated at the amount of $900.00 per month. *See* Washington Judgment, Exh. B to Post-Hearing Memorandum. Judgment was entered in the amount of $6,084.00 plus approximately $3,500 in interest, attorney's fees, costs, and sanctions.[2] Additionally, Mr. Flohr was ordered to pay $900.00 per month going forward, subject to adjustment by the appropriate Maryland Court. In furtherance of the same, the Court attached $30,000.00 from the proceeds of the sale of Mr. Flohr's Washington real property to secure such future performance.[3]

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[2] The electronically-created Washington Judgment is heavily edited by frequently illegible handwriting. It appears that the judgment amount was originally $11,700.00, but that Mr. Flohr was credited for a payment of $5,616.00. The Washington Judgment notes that Mr. Flohr contended that the proper amount of alimony was $432.00 per month, but provides no explanation of why the Court found instead that the appropriate amount was $900 per month. It also provides that the judgment amount was to be held in trust until the appropriate Maryland Court addressed the issue and decided the amount of the arrears once and for all.

[3] The Washington Court apparently granted this relief because Mr. Flohr was preparing to move to South Carolina. *See* Ms. Flohr's Answer to Petition to Clarify Alimony, Exh. D to Post-Hearing Memorandum; Opinion of the Court of Special Appeals, Exh. H to Post-Hearing Memorandum at pg. 4. These funds were held in trust by Ms. Flohr's Washington attorney and distributed to Ms. Flohr at the rate of $900 per month. *Id.*

In December 2003, Mr. Flohr petitioned the Circuit Court for Howard County (Maryland Court) to clarify the proper of amount of alimony to be paid pursuant to the Judgment of Divorce and Settlement Agreement. In September 2005, the Circuit Court for Howard County entered an order determining that, contrary to the Washington Judgment, Mr. Flohr had been overpaying alimony since the time Ms. Flohr began receiving distributions from his pension in June 2002. While the Court treated Mr. Flohr's records with some amount of skepticism, it still held that Mr. Flohr overpaid alimony by $3,289.72 in 2002, $9,392.16 in 2003, $9,200.40 in 2004, and $6,133.60 in 2005, and entered Judgment in favor of Mr. Flohr for $28,015.88 (Maryland Judgment). *See* Memorandum and Order of the Circuit Court for Howard County, Exh. F to Post-Hearing Memorandum. The Court of Special Appeals affirmed the Circuit Court for Howard County in an unpublished opinion in October 2006.

III. Analysis

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334, 157, and Local Rule 402 of the United States District Court for the District of Maryland. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I).

Fed. R. Civ. P. 56(c), made applicable by Fed. R Bankr. P. 7056, sets forth the procedure to be followed when a motion for summary judgment is made. Summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986). A material fact is one that might affect the outcome of the suit. *Id.* at 248, 106 S.Ct. at 2510. A genuine issue of material fact exists where "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 248, 106 S.Ct. at 2510. In determining the facts for summary judgment purposes, the court may rely on affidavits

made with personal knowledge that set forth specific facts otherwise admissible in evidence and sworn or certified copies of papers attached to such affidavits. Fed. R. Civ. P. 56(e). Permissible inferences to be drawn from the underlying facts are viewed in the light most favorable to the nonmoving party, but if "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party," summary judgment may be granted. *Miller v. FDIC*, 906 F.2d 972, 974 (4th Cir.1990).

The material facts, as principally contained in the documents attached to the Post-Hearing Memorandum and stipulated in the Pleadings and Motions of record, are not in dispute and the applicable law may be determined.[4] As only the ultimate legal effect of the material facts is subject to challenge, the Parties agree that this matter should be resolved by declaring a winner between the dueling motions for summary judgment. Accordingly, for the reasons stated below, the Court finds that Plaintiff is entitled to judgment as a matter of law as to Count II of his Complaint under 11 U.S.C. § 523(a)(15).[5]

Section 523(a)(15), as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), provides:

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt--
> (15) *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, or a determination made in accordance with State or territorial law by a governmental unit. (emphasis supplied)

[4] The Debtor did not challenge either the authenticity or genuineness of the documents attached to the Post-Hearing Memorandum nor did she supply any supplemental materials.

[5] Hereafter, all statutory references are to the Bankruptcy Code, found at Title 11 of the United States Code.

The operative language of Section 523(a)(15) (which was not revised by BAPCPA) is broad and sweeping. A finding of nondischargeability under Section 523(a)(15) requires that three elements be satisfied: 1) the defendant-debtor owes a debt to the plaintiff and the plaintiff is the spouse, ex-spouse, or child of the debtor,[6] 2) the debt is not of a kind described in Section 523(a)(5), and 3) the debt was incurred in the course of a divorce, separation or separation agreement or in connection with the proceedings related thereto. The plaintiff has the burden of demonstrating that Section 523(a)(15) is applicable to the debt in question. *In re Dexter*, 250 B.R. 222, 224 (Bankr. D. Md. 2000) (citing *Matter of Gamble*, 143 F.3d 223, 226 (5th Cir. 1998)).

The first element is undisputably satisfied, since Ms. Flohr owes a debt resulting from a final judgment in favor of Mr. Flohr and Mr. Flohr is the ex-spouse of Mrs. Flohr.

The second element requires the Court to briefly address Plaintiff's alternative cause of action, Count I, pursuant to Section 523(a)(5). Sections 523(a)(5) and (a)(15) are mutually exclusive. Hence, inclusion of Plaintiff's debt under Section 523(a)(5) will automatically exclude it from Section 523(a)(15). The thrust of Plaintiff's argument under Count I is that Debtor was initially "over-supported" under the Agreement and that her resulting "obligation to repay the alimony overpayment" thus qualifies as a "domestic support obligation" under the Bankruptcy Code. Complaint at pg. 3.

Section 523(a)(5), as amended by BAPCPA, provides:

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[6] In this case, the non-debtor ex-spouse filed the civil action seeking a determination that the debt is nondischargeable. A debtor may also initiate a civil action seeking a declaration that such debt is dischargeable.

Prior to BAPCPA, non-debtor ex-spouse creditors were required to bring suits under Section 523(a)(15) within sixty days of the first date set for the meeting of creditors, pursuant to Section 523(c)(1) and Fed. R. Bankr. P. 4007(c). BAPCPA however removed Section 523(a)(15) actions from the application of Section 523(c)(1) and may now be brought at any time under Fed. R. Bankr. P. 4007(b).

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt--
> (5) for a domestic support obligation.

Alimony owed to an ex-spouse fits squarely within the definition of a domestic support obligation. *See* Section 101(14A).[7] One purpose of Section 523(a)(5), as demonstrated by the definition of a domestic support obligation, is to insulate the obligation to pay alimony from the debtor's discharge. In this case, Ms. Flohr may be the debtor, but she is the beneficiary of the obligation, not the designated payor. Stated another way, the Agreement's pure obligation to pay alimony flows only to the Debtor, Ms. Flohr, and not to the Plaintiff. As explained above, the Agreement is clear on this point.

The 4th Circuit has long held that the proper test for determining if payments made pursuant to a voluntarily executed marital settlement agreement are alimony is whether the parties mutually

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[7] Section 101 provides:
In this title the following definitions shall apply:
(14A) The term "domestic support obligation" means a debt that accrues before, on, or after the date of the order for relief in a case under this title, including interest that accrues on that debt as provided under applicable nonbankruptcy law notwithstanding any other provision of this title, that is--
(A) owed to or recoverable by--
(i) a spouse, former spouse, or child of the debtor or such child's parent, legal guardian, or responsible relative; or
(ii) a governmental unit;
(B) in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of such spouse, former spouse, or child of the debtor or such child's parent, without regard to whether such debt is expressly so designated;
(C) established or subject to establishment before, on, or after the date of the order for relief in a case under this title, by reason of applicable provisions of--
(i) a separation agreement, divorce decree, or property settlement agreement;
(ii) an order of a court of record; or
(iii) a determination made in accordance with applicable nonbankruptcy law by a governmental unit; and
(D) not assigned to a nongovernmental entity, unless that obligation is assigned voluntarily by the spouse, former spouse, child of the debtor, or such child's parent, legal guardian, or responsible relative for the purpose of collecting the debt.

intended that the payments be for support rather than as a property settlement. *Matter of Long*, 794 F.2d 928, 931 (4th Cir. 1986); *Tilley v. Jessee*, 789 F.2d 1074, 1077-1078 (4th Cir. 1986). In this instance, the Agreement reflects an unmistakable intention that Ms. Flohr is the one intended to receive support payments. Indeed, Mr. Flohr expressly waived any right to receive alimony. It would fly directly in the face of the Agreement to hold that Ms. Flohr now has, or ever had, an obligation to pay alimony to Mr. Flohr.

The mere fact that the Maryland Judgment is premised on the overpayment of alimony does not transform it into an offsetting right in favor of Mr. Flohr to receive alimony. While Mr. Flohr may have been wrongfully compelled to over pay alimony, the resulting judgment does not create an entitlement for him to collect "alimony" in return. The right to alimony arises solely from the Agreement, incorporated into the Judgment of Divorce. Thus, Mr. Flohr's judgment is not a domestic support obligation, Plaintiff's Count I under Section 523(a)(5) fails to state a claim upon which relief can be granted, and Count I will be dismissed with prejudice. However, as the Court finds that the debt is not in the nature of a domestic support obligation – and therefore not captured by Section 523(a)(5)'s reach – the second element under Section 523(a)(15) has been established.

The third element requires that the debt be incurred in the course of a divorce or in connection with a separation agreement or divorce decree. Defendant contends that Section 523(a)(15) is only meant to address debts for the division or allocation of marital property or the assumption of marital liabilities and that it does not cover debts incurred more than ten years after the divorce. While actions seeking a determination of nondischargeability under Section 523(a)(15) usually arise within the parameters suggested by the Defendant,[8] the statute's plain language belies the assertion that the debt before the Court may be justly excluded from its scope. The cases cited

[8] *See Dexter*, 250 B.R. 222 (Bankr. D. Md 2000); *In re Brasington*, 274, B.R. 159 (Bankr. D. Md. 2002).

by the Defendant do not craft any such limitation. *See In re Brock*, 227 B.R. 813, 814 (Bankr. S.D. Ind. 1997) (holding that Section 523(a)(15) nondischargeability arises in situations where 1) the parties entered into an agreement regarding a marital debt or 2) the court ordered one of the parties to pay a marital debt).

The debt at issue arose on the basis of the Washington Court's misinterpretation of the Agreement. The Agreement provided for a tiered payment scheme for alimony. The amount to be paid after the commencement of distributions from Mr. Flohr's pension was to be determined by reference to the amount of his other income, capped by a maximum payment of $900.00 per month. Ms. Flohr challenged the amount Mr. Flohr was paying pursuant to the Agreement and the Washington Court sided with her. The Maryland Court disagreed and found that Mr. Flohr had in fact overpaid by a substantial amount. Thus, this litigation finds it genesis in the Agreement and is plainly intended to adjust an integral term that the Parties could not agree upon. Indeed, as the formula incorporated shifting variables, it was reasonably foreseeable that such intervention would be necessary when the Agreement was executed.

The fact that it took several years for the bottom line to be reached does not diminish the nexus between the debt and the Agreement. Indeed, a lengthy relationship was anticipated at the outset if only because of the ongoing alimony payments. The debt arose from a (mis)calculation of a marital obligation expressly included within a divorce settlement agreement. As such, the Court finds that there is a material and immediate connection between the debt and the separation agreement at issue. Thus, the Court concludes that the debt was incurred by the Debtor "in connection with a separation agreement", thereby satisfying the third element of Section 523(a)(15).

In sum, Ms. Flohr received the windfall of significant, accelerated overpayment and in the end will not have been deprived of any rights under the Agreement. Mr. Flohr has likewise performed his obligations under the Agreement. In the end, both Parties will have received the

benefits of the bargain they entered into.[9] And while the somewhat inverted factual scenario justifies the level of analysis set forth above, there is no doubt that the debt itself falls comfortably within the confines of Section 523(a)(15).

A separate order will issue.

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End of Order

[9] The Court notes that during oral argument, Counsel for Defendant said that there was no continuing obligation for Mr. Flohr to continue to pay alimony. The Settlement Agreement however provides that the Plaintiff must continue to make alimony payments until one of the three termination events outlined in Section 6(c) occurs. Counsel for Plaintiff corrected the record by noting that Mr. Flohr is not making alimony payments at the moment because the interest accruing on the judgment is greater than the current obligation in the amount of approximately $123.00 per month. Hence, it therefore appears that Mr. Flohr will not be required to make any more alimony payments unless and until the Maryland Judgment is satisfied by the Debtor.