

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

Mary Beth Perron,

Chapter 7

Debtor.

Richard S. Perron,

Plaintiff,

Bkcty No. 03-31898-GFK

vs.

PLAINTIFF'S NOTICE OF
MOTION AND COUNTER-
MOTION IN RESPONSE TO
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

Mary Beth Perron,

Defendant.

TO: DEFENDANT Mary Beth Perron, through her attorney, Collette Medas-Forbes, 7415 Wayzata Boulevard, Suite 202, Minneapolis, Minnesota 55426

NOTICE OF MOTION

Please take notice that on November 26, 2003 at 9:30 a.m. or as soon thereafter as Plaintiff may be heard, before the Honorable Chief Judge Gregory F. Kishel, at the Warren E. Burger Federal Building, 316 North Robert Street, St. Paul, MN, Plaintiff will move the Court for an Order for Summary Judgment pursuant to Rule 56 (c) of the Federal Rules of Civil Procedure as incorporated by the Federal Rules of Bankruptcy Procedures 7056(2).

COUNTER-MOTION

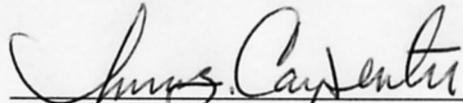
Plaintiff, Richard S. Perron, hereby moves the Court for a Summary Judgment Order granting, in its entirety, all relief requested by the Complaint to Determine Dischargeability of Debt. The motion is brought pursuant to Rule 56(c) of the Federal Rules of Civil Procedure as incorporated by the Federal Rules of Bankruptcy Procedures 7056(2), as the Court can appropriately rule in favor of Plaintiff based upon the parties' divorce decree (Findings of Fact, Conclusions of Law, Order For Judgment and Judgment and Decree) raised in Plaintiff's Complaint and provided to the Court attached to Defendant's Summary Judgment Motion.

In the alternative to Summary Judgment in favor of Plaintiff, Plaintiff requests a trial as the characterization of marital obligation pursuant to an award of attorney's fees in a marital dissolution proceeding, for dischargeability purposes, as being either in nature of property settlement or of alimony, maintenance or support is purely a question of federal law, and any denomination by state tribunal or by parties themselves, while relevant, is not dispositive. Bankr. Code. 11 U.S.C.A. Sec 523(a)(5).

This motion is made upon all the file, records, and proceedings herein together with the memorandum, affidavit and supporting documents to be timely served and filed pursuant to the Rules of the Federal Bankruptcy Court and the Scheduling Order of the Court issued on September 10, 2003.

Dated: 11/20/2005

OTTEN & ASSOCIATES, P.A.



William S. Carpenter, #315035

Attorney for Plaintiff
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1601 E. Highway 13
Burnsville, MN 55337
(952) 736-3300

**Memorandum in Support of Plaintiff's Counter-Motion for Summary Judgment and
Response to Defendant's Motion for Summary Judgment**

1. Plaintiff agrees that the issue of bad faith, fraud and perjury have already been litigated in State Court. On it's face, a close reading of the dissolution decree states the rationale for the Attorney fees award and such was based upon Respondent's bad faith and attempted fraud upon the Court. The issue for Summary Judgment is the reading of the State Court decision, not issue preclusion. The fraud engaged in deems the attorney's fees award nondischargeable in bankruptcy court under 11 U.S.C.A Sec. 523(a)(2).

At the September 9, 2003 scheduling conference, attorneys' agreed that the evidence contained in the parties' divorce decree "should be" enough for either party to prevail on Summary Judgment Motion and it was suggested that "cross summary judgment motions might resolve this case quickly," as no other discovery was necessary, short of actual testimony. Defendant's argument to dismiss Plaintiff's complaint on the basis that the issue of bad faith, forgery and fraud have already been litigated is not on point. Plaintiff and Defendant agree that the matter of bad faith, forgery and fraud have been litigated, the only issue is the interpretation of the State Court Order regarding bad faith, forgery, fraud, perjury and attorney's fees.

As Defendant points out in her Memorandum in Support of Defendant's Motion For Summary Judgment, the State Court articulated it's rationale for the basis of the Conclusions of Law in a Memorandum which was incorporated into the Judgment and Decree. Defendant points to the language on page 24 of the Judgment and Decree, however only includes the short phrase that serves her cause, intentionally missing the actual rationale used by the Court. In Defendant's Memorandum in Support of Summary Judgment, the only language cited is "unable to say with certainty." The remainder of the

sentence is literally “made up” to serve the purpose of skewing the Court’s rationale and misleading this Court interpreting the Judgment and Decree.

In context the Court states that although it is unable to say with certainty if it was Respondent who did the forgery or arranged for it, certainty is not the burden of proof. The Court continues to explain that the burden of proof is “beyond a preponderance of the evidence” and that it is most likely that the Respondent forged or arranged for the forgery of the document.

Upon a closer look, paragraph 37 of the Judgment and Decree begins by stating that Respondent engaged in bad faith litigation regarding the issues of the forged affidavit of Jodi Wait, and the issue of Respondent’s income from her employer. Further, in paragraph 38, the Court awards attorney fees, witness fees, and costs limited to those incurred by the Petitioner with regard to the issues of the forged affidavit of Jodi Wait and the issue of Respondent’s income. As Defendant states in her Motion For Summary Judgment, the attorney fees related to the specific issues of attorneys fees for forged affidavits and misrepresented income are \$15,057.11 and \$3,758.05 respectively, for a total of \$18,815.16. We agree with this figure.

As articulated in the Memorandum attached to the Judgment and Decree, specifically page 24, A. Witness Credibility, 1. The Respondent, there were several factors that led to the Courts decision that the Respondent forged or arranged for the forgery of a court document. These factors, as cited in the Memorandum of the Court, included facts that the handwriting indicated Respondent forged a signature, Respondent requesting that a friend misuse her position as Notary Public and, among other things, Respondent’s admission that Respondent lied to District Court Judge Carter.

The Court's actual rationale make it clear that the Court found Mary Beth Perron to have engaged in bad faith litigation and based an attorney's fees award upon that.

2. Question of Federal Law: Even if Defendant was correct regarding issue preclusion, it does not apply in this case. An issue in this case that is purely a question of federal law is the dischargeability of attorney fees awarded pursuant to a dissolution proceeding. 11 U.S.C.A. Sec. 523(a)(5).

When attorney's fees are awarded in a dissolution action and the obligor subsequently attempts to discharge that obligation in bankruptcy court, the debt must be characterized a certain way to fit under 11. U.S.C.A. Sec. 523(a)(5). This is the case because 523(a)(5) does not allow discharges of debts owed to a spouse for alimony, maintenance, and among other things, child support, when these obligations are in connection with a divorce decree. Some types of attorney's fees are characterized as spousal support, if the fraud is in connection with that type of litigation.

As set forth in In re Shea 221 B.R. 491 (Bkrcty.D. Minn. 1998), characterization of marital obligation, for dischargeability purposes, as being either in nature of property settlement or of alimony, maintenance or support is purely a question of federal law, and any denomination by state tribunal or by parties themselves, while relevant, is not dispositive.

Fortunately, in this case, the State Court has gone to the great lengths of providing twenty-three (23) pages of findings and an eight and one-half page memorandum of law explaining their rationale for their decisions. The Court has linked the bad faith of Respondent to the attorney's fees. All of this bad faith litigation was in relation to child custody, therefore child support and other money. The rationale in the State Court Order suggests it is appropriate to characterize this debt as an "alimony, maintenance or support obligation."

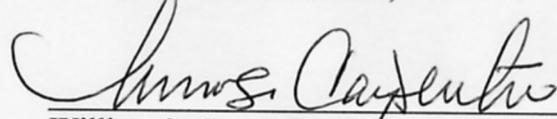
In arguing that this debt be characterized as an "alimony, maintenance or support obligation" and therefore dischargeable under 11 U.S.C.A. 523(a)(5), it has been recognized in that a Chapter 7 debtor's obligation to his former wife for attorney's fees awarded by state dissolution court would be excepted from discharge, as being in nature of "alimony, maintenance or support," without regard to whether attorney fees were incurred in attempting to enforce debtor's property settlement or support obligations; attorney fees were imposed in order to assist debtor's former wife in meeting her support responsibilities by freeing up funds which would otherwise have gone for counsel fees. Id. The Shea case then, sets the precedent that obligations to pay attorney's fees to a spouse may be characterized as being in the nature of "alimony, maintenance or support," when an award was not specifically labeled as "alimony, maintenance or support."

In the instant case, the attorney fees award is even better suited to be characterized as a support award that is nondischargeable under 11 U.S.C.A. 523(a)(5). This is the case because of the extensive Memorandum of law the State Court attached to the divorce decree explaining why the fees were imposed and reinforced by the fact that the fees in this case were expended due to the contentiousness of a custody, child support, and property dissolution proceeding.

Dated: _____

11/20/2003

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