NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. CC-04-1609-BMaMo
HONG YE,	Bk. No. LA 04-19687-SB
Debtor.	Adv. No. LA 04-02213-SB
HONG YE,	
Appellant,	
v.	**M E M O R A N D U M**[1]
SHIAW WEN WU,	
Appellee.	

Argued and Submitted on June 22, 2005 at
Pasadena, California

Filed - September 28, 2005

Appeal from the United States Bankruptcy Court
for the Central District of California

Honorable Samuel L. Bufford, Bankruptcy Judge, Presiding

_____

Before: BRANDT, MARLAR, AND MONTALI, Bankruptcy Judges.

[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except when relevant under the doctrines of law of the case, res judicata or collateral estoppel. See 9th Cir. BAP Rule 8013-1.

Appellant Hong Ye, a Chapter 7[2] debtor, appeals the bankruptcy court's summary judgment, declaring his obligations to his ex-wife under a stipulated judgment in their dissolution nondischargeable under § 523(a)(5). Ye has paid the entire judgment.

We AFFIRM.

I. FACTS

Hong Ye ("Ye") and Shiaw Wen Wu ("Wu") were married from 1995 to 2001 (approximately five and a half years). There were no children. Ye lived in Los Angeles, and later in South Carolina, where he attended graduate school in accounting. Ye was employed as an accountant at KPMG, earning $3667 per month, which decreased to $2900 per month in May 2001 when he took a new position at the California State Board of Equalization. He later (in November 2003) obtained a Certified Public Accountant license. Ye also worked part-time as a waiter, earning roughly $200 per month.

While waiting for her U.S. immigration papers to be processed, Wu continued living and working as a medical assistant in Taiwan. Her education is roughly the equivalent of a two-year associate's degree in the U.S. The couple later settled in Los Angeles and separated in December 2000. Wu then moved in with her mother in Arcadia, California, and was unemployed until after the divorce.

Wu filed for dissolution on 12 March 2001. The parties, unrepresented by counsel, executed a stipulated judgment, entered in the Superior Court of California, County of Los Angeles, on 27 April 2001

---

[2] Absent contrary indication, all section and chapter references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330. "Rule" references are to the Federal Rules of Bankruptcy Procedure.

(No. GD029555 - the "Judgment") setting out each party's rights and responsibilities regarding support, division of marital property and debts. The complete document is not in the record. The dispute before us turns on a single provision of the Judgment, paragraph 2:

> SPOUSAL SUPPORT. Respondent [Appellant Ye] will pay to Petitioner for spousal support the sum of one thousand dollars ($1000) per month, payable in advance, on or before the third day of each month, commencing on April 1, 2001, and continuing for a period of forty eight (48) months, or until the death of Petitioner . . . , whichever occurs first, at which point spousal support will terminate absolutely. Neither the amount nor the duration of spousal support will be modifiable under any circumstances. The remarriage of either party shall not terminate the spousal support.

Paragraphs 4 and 5 of the Judgment pertain to separate property and division of community property and liability.

The partial excerpts of record provided us reflect that in 2003 Ye filed a motion for modification of support in the dissolution action, but the excerpts do not show the basis on which he sought modification.

Ye filed his chapter 7 petition on 28 April 2004. In July 2004, he filed, pro se, an adversary proceeding seeking determination of dischargeability of the Judgment under § 523(a)(5) and (a)(15),[3] and

---

[3] Section 523(a)(5)(B) excepts from discharge debts of an individual debtor owed:

> to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that--
>
> (B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support . . .

Section 523(a)(15) excepts from discharge debts of an individual debtor:

(continued...)

moved for summary judgment. Wu counterclaimed and moved for summary judgment as well. After a hearing on 23 November 2004, the bankruptcy court determined that Ye's obligation to Wu was in the nature of support and nondischargeable, ordering:

> 1. There are no triable issues of fact, and therefore Defendant [Wu] is entitled to summary judgment as a matter of law.
>
> 2. Payments made by Plaintiff to Defendant pursuant to the Stipulated Divorce Judgment entered on April 27, 2001 are in the form of support pursuant to United States Bankruptcy Code § 523(a)(5) and therefore is not dischargeable debt.
>
> 3. Payments made by Plaintiff to Defendant pursuant to the Stipulated Divorce Judgment entered on April 27, 2001 is not marital debt subject to United States Bankruptcy Code § 523(a)(15).

Order Granting Defendant Shiaw Wen Wu's Motion for Summary Judgment, 22 December 2004. A separate judgment was entered 28 January 2005.

Ye filed a notice of appeal prematurely (before the judgment was entered), as permitted by Rule 8002(a). Wu did not cross appeal. Ye informed us at oral argument (and Wu did not dispute) that he had satisfied all obligations to Wu under the Judgment.

---

[3](...continued)
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, a determination made in accordance with State or territorial law by a governmental unit unless--

. . .(A) the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor and, if the debtor is engaged in a business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business; or

(B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor[.]

II. JURISDICTION

The bankruptcy court had jurisdiction via 28 U.S.C. § 1334(b) and § 157(b)(1) and (b)(2)(I), and we do under 28 U.S.C. § 158(c).

III. ISSUES

A. Whether this appeal is moot; and

B. Whether summary judgment was proper.

IV. STANDARD OF REVIEW

We review the granting of summary judgment de novo. In re Baldwin, 245 B.R. 131, 134 (9th Cir. BAP 2000), aff'd, 249 F.3d 912 (9th Cir. 2001). Viewing the evidence in the light most favorable to the non-moving party, we must determine whether there are any genuine issues of material fact and whether the trial court correctly applied relevant substantive law. In re Bishop, Baldwin, Rewald, Dillingham & Wong, Inc., 819 F.2d 214, 215 (9th Cir. 1987).

V. DISCUSSION

Consistent with effectuating the underlying purposes of the Bankruptcy Code, exceptions to discharge under § 523 are narrowly construed. In re Su, 259 B.R. 909, 912 (9th Cir. BAP 2001), aff'd, 290 F.3d 1140 (9th Cir. 2002).

The Ninth Circuit has liberally construed pro se appellate briefs "to ensure that pro se litigants do not lose their right to a hearing on the merits of their claim due to ignorance of technical procedural requirements." Balistreri v. Pacifica Police Dep't., 901 F.2d 696, 699 (9th Cir. 1988). We may make reasonable allowance for pro se litigants

and construe their papers liberally, In re Kashani, 190 B.R. 875, 883 (9th Cir. BAP 1995), and do so here.

A. Mootness

The judicial power of federal courts is limited to cases in which an "actual controversy" exists. U.S. Const. Art. III. A justiciable case or controversy is not presented if the case is moot - that is, if we cannot fashion a meaningful remedy. See In re Vista Del Mar Assoc., Inc., 181 B.R. 422, 423-24 (9th Cir. BAP 1995); In re Sierra Pacific Broadcasters, 185 B.R. 575, 576 n.3 (9th Cir. BAP 1995).

Ye has asked us to reverse the bankruptcy court's order finding the Judgment nondischargeable, but advised at argument that he has satisfied it. Wu neither contradicted him nor argued that the appeal is moot. Nevertheless, we must consider our jurisdiction sua sponte. North Carolina v. Rice, 404 U.S. 244, 246 (1971).

"Even in cases where the court had jurisdiction at one point in time, changed circumstances may cause an appeal to become moot." Goelz and Watts, California Practice Guide: Federal Ninth Circuit Civil Appellate Practice, Ch. 10-E, 10:177 (citation omitted). See also In re Burrell, 415 F.3d 994, 997 (9th Cir. 2005).

"[T]he usual rule in federal courts is that satisfaction of judgment does not foreclose appeal." U.S. v. Timberland Paving & Constr. Co., 745 F.2d 595, 598 (9th Cir. 1984) (citing Dakota County v. Glidden, 113 U.S. 222, 224 (1885) (other citations omitted). But we are presented with a somewhat different situation — it is the underlying Judgment, declared nondischargeable by the judgment on appeal, which has been paid.

As it might be that Ye could recover some or all of his payments were we to reverse (we have received no briefing on that question or the implications of the apparent fact that at least some of the payments were involuntary, via garnishment,[4] and express no view), this appeal is not moot. Whether, as a practical matter, Ye could recover the payments is unclear. Those payments were not wrongfully received, and the bankruptcy court's judgment was not stayed.

B. Debt in the Nature of Support - § 523(a)(5)

Whether a particular debt is in the nature of spousal support is a question of federal law. In re Chang, 163 F.3d 1138, 1140 (9th Cir. 1998). Section 523(a)(5), quoted in footnote three above, excepts from discharge debts of an individual debtor owed to a former spouse for maintenance or support.

The bankruptcy court must look beyond the language of the decree and the state law characterization of the obligation to determine whether an obligation is actually in the nature of support. Shaver v. Shaver, 736 F.2d 1314, 1316 (9th Cir. 1984). And, where the obligation arises from an agreement of the parties, rather than by judicial determination after trial, "[i]n determining whether a debtor's

---

[4] The bankruptcy court retained jurisdiction to grant a motion for stay pending appeal after the notice of appeal was filed, Rule 8005; In re Ho, 265 B.R. 603, 605 (9th Cir. BAP 2001), and while the record indicates at least some of the payments were via garnishment, Ye never noted for hearing his 6 December 2004 motion in the bankruptcy court for a stay pending appeal to stop the continuing garnishment of his wages.

The motion was incorrectly docketed as a motion for leave to appeal, and the docket does not reflect that it was ever considered by the bankruptcy court. Since Ye did not raise the bankruptcy court's lack of action on his stay motion as an issue on appeal or argue it in his opening brief, he has waived that possible issue. In re Sedona Inst., 220 B.R. 74, 76 (9th Cir. BAP 1998).

obligation is in the nature of support, the intent of the parties at the time the settlement agreement is executed is dispositive." In re Sternberg, 85 F.3d 1400, 1405 (9th Cir. 1996), overruled on other grounds, In re Bammer, 131 F.3d 788, 792 (9th Cir. 1997) (citation omitted).

Here the Judgment was by agreement. The term in contention has all the appearances of spousal support, and is headed "spousal support." The payments were to commence almost immediately, continue for a prescribed period at a monthly interval, and end if appellant died during that period, but not upon remarriage. The facts are undisputed that these were to be straight cash transfers from Ye to Wu, and none of the evidence suggests the Judgment was for any purpose other than her support.

Ye's primary argument is that the amounts are excessive under California standards, and out of line with other considerations, including the length of the marriage, Wu's ability to support herself, and Ye's inability to pay. While ability to pay is relevant to dischargeability under § 523(a)(15), and to the bankruptcy characterization of a judicial award of support or maintenance not resulting from an agreement of the parties, it and the other argued considerations are at most tangential when the parties, as here, have agreed.

In any event, the parties' declarations, while they emphasize different facts regarding the history of their relationship and their economic circumstances, do not contradict each other in any significant respect. And, apart from the fact that the obligation does not terminate on remarriage, the facts are consistent with an obligation for

support, rather than a property settlement. See Sternberg, 85 F.3d at 1405, and Shaver, 738 F.2d at 1316-1317.

Regarding intent, Ye asserts in his declaration filed in support of his motion for summary judgment that he "signed the agreement due to both physical and emotional threats and harassment from her Wu [sic] and her brothers to me and my parents." Although his declaration is not explicit on this point, Ye apparently signed the agreement without assistance of counsel.

With sufficient support, these statements might present an issue of material fact regarding the intent of the parties, or at least one of them. See Sheehan v. Atlanta Int'l Ins. Co., 812 F.2d 465, 469 (9th Cir. 1987) (agreement made under threat negates meeting of the minds; contract may be avoided on ground of duress). But Rule 7056(e) requires: "Supporting and opposing affidavits . . . shall set forth such facts as would be admissible in evidence . . . an adverse party may not rest on the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits . . . must set forth specific facts showing that there is a genuine issue for trial." (emphasis added).

Ye's statement is conclusory and does not set forth specific facts, such as, for example, "On _____ April 2001, Wu's brother _____ threatened to break my arm unless I signed her proposed settlement immediately." His allegation, either by itself or together with Wu's equally general denial in her opposing declaration, does not create a factual dispute. Rather, it is an argument about the legal conclusion to be drawn from facts not stated.

Finally, while we need not decide the issue of whether the Judgment (not the bankruptcy court's judgment on appeal) could be voided if it

were obtained by duress, and thereby invalid under state law in the first instance, we note that at least one § 523(a)(5) case "found that there was no [bankruptcy court] jurisdiction to decide the issue of invalidity of the alimony agreement due to fraud or, if there was such jurisdiction, the Court abstained from exercising such jurisdiction under 28 U.S.C. § 1471(d)." Moses v. Moses, 34 B.R. 378, 378 (S.D. Tex. 1983) (affirming bankruptcy court).

In any event, because Ye did not raise the issue of coercion or duress in his opening brief, he has waived it: "[A]n appellate court will not consider issues not properly raised before the [trial] court. Furthermore, on appeal, arguments not raised by a party in his opening brief are deemed waived." Smith v. Marsh, 194 F.3d 1045, 1052 (9th Cir. 1999). See also In re Sedona Inst., 220 B.R. 74, 76 (9th Cir. BAP 1998), In re Jodoin, 209 B.R. 132, 143 (9th Cir. BAP 1997), and Laboa v. Calderon, 224 F.3d 972, 980 n.6 (9th Cir. 2000).

As there is no factual issue regarding the parties' intent, and the underlying factors preponderantly indicate an obligation for support (although this is not a mathematical exercise, and calls for judicial discretion rather than simply counting factors), the bankruptcy court did not err in granting Wu summary judgment.

C. Section 523(a)(15)

Since Ye has not argued that the bankruptcy court erred in ruling that the payments were not marital debt under § 523(a)(15), he has waived that issue. Sedona Institute, 220 B.R. at 76. In any event, §§ 523(a)(5) and 523(a)(15) are mutually exclusive, see In re Jodoin, 196 B.R. 845, 851 (Bankr. E.D. Cal. 1996), aff'd, 209 B.R. 132 (9th Cir.

BAP 1997), and we are affirming the ruling that the Judgment is nondischargeable under 523(a)(5).

D. Sanctions

We need not address Wu's request for sanctions, made in her brief, rather than a separate motion. Rule 8020.

We note that she is simply incorrect regarding the efficacy of a premature notice of appeal, Rule 8002(a), and that, while she complains that Ye is "confused about the standard of review," her brief also misstates it: we review the granting of summary judgment de novo. In re Baldwin, 245 B.R. 131, 134 (9th Cir. BAP 2000), aff'd, 249 F.3d 912 (9th Cir. 2001).

VI. CONCLUSION

This appeal was not rendered moot by payment of the Judgment. As there is no material issue of fact, we AFFIRM.