

JAN 31 2012

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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:) BAP No. AZ-11-1185-KiClJu
)
 CORNELIUS LEROY LILLY,) Bk. No. 10-26590
)
 Debtor.) Adv. No. 10-2006
)
)
 CORNELIUS LEROY LILLY,)
)
 Appellant,)
)
 v.) **MEMORANDUM**¹
)
 SHELLY SMITHSON,)
)
 Appellee.)
)

Submitted Without Oral Argument
on January 18, 2012²

Filed - January 31, 2012

Appeal from the United States Bankruptcy Court
for the District of Arizona

Honorable George B. Nielsen, Bankruptcy Judge, Presiding

Appearances: Appellant Cornelius Leroy Lilly pro se on brief;
 David W. Elston and Todd M. Akin of Jennings,
 Strouss & Salmon, PLC on brief for Appellee Shelly
 Smithson.

¹ This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

² On January 5, 2012, the Panel entered an order granting appellee's motion to submit on the briefs and appellate record.

1 Before: KIRSCHER, CLARKSON,³ and JURY, Bankruptcy Judges.

2 Appellant, chapter 7⁴ debtor Cornelius Leroy Lilly
3 ("Lilly"), appeals a bankruptcy court judgment determining that
4 debts owed by Lilly to his former spouse, appellee Shelly
5 Smithson ("Smithson"), were nondischargeable under either
6 § 523(a)(5) or § 523(a)(15). We AFFIRM.⁵

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8
9
10 ³ Hon. Scott C. Clarkson, United States Bankruptcy Judge for
the Central District of California, sitting by designation.

11 ⁴ Unless otherwise indicated, all chapter, section and rule
12 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

13 ⁵ Tabs 2 through 5 in Lilly's record contain items not
14 presented before the bankruptcy court. The items consist of
Lilly's mortgage payment history, foreclosure related documents,
15 Lilly's 2010 W-2, and Lilly's weekly pay stubs from February 2011
through July 2011. In her response brief, Smithson moved to
16 strike Tabs 2 through 5. On August 15, 2011, Lilly filed a
"Motion to Admit Evidence," requesting that Tabs 2 through 5 be
17 allowed in the record. The clerk's office issued an order
allowing Lilly to file a response specifying when and at what
18 docket entry number these items were filed, or what filed entry
they may have been attached to, in either the adversary
19 proceeding or main case. The motion and any response were to be
forwarded to the merits panel for consideration.

20 Lilly filed a response to the clerk's order on November 10,
2011. He failed to specify when or at what docket entry any of
21 the documents in Tabs 2 through 5 had been filed. However, Lilly
proceeded to attach four entirely different documents to the
22 response, claiming that these documents had been "attached to the
original bankruptcy filing," and requested that the Panel
23 consider them. These documents include: one page of Lilly's
Schedule F, a certificate of notice, a mailing matrix, and a copy
of Lilly's discharge.

24 We will not consider Tabs 2 through 5 of Lilly's record
because these documents were not presented before the bankruptcy
25 court, and they are irrelevant in any event. Kirshner v. Uniden
Corp. of Am., 842 F.2d 1074, 1077 (9th Cir. BAP 1997)(panel
26 cannot consider items not presented to the bankruptcy court when
making its decision). As for the four "new" documents Lilly
27 attached to his response, while they were filed in the bankruptcy
court, they too are irrelevant to this appeal, and we need not
28 consider them.

1 **I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

2 **A. The Divorce Decree and Related Judgments.**

3 Lilly and Smithson were married in 1996. During the
4 marriage, they had two children, both of whom are still minors.
5 Lilly filed a petition for dissolution of marriage with the
6 Superior Court of Arizona, Maricopa County, ("State Court") in
7 July 2009. On February 1, 2010, the State Court signed a minute
8 entry dated January 22, 2010, constituting the formal order for
9 the dissolution of marriage, division of community property,
10 child custody, and related matters ("Divorce Decree"). The
11 Divorce Decree was entered on February 2, 2010.

12 The State Court held a further evidentiary hearing regarding
13 the Divorce Decree on May 26, 2010, to address certain
14 outstanding issues, including custodial arrangements and
15 Smithson's attorney's fee request under A.R.S. § 25-324.⁶ In an
16 order dated May 26, 2010, and entered on June 2, 2010, the State
17 Court awarded Smithson, inter alia, \$575 per month for spousal
18 maintenance and a judgment of \$4,079.83 comprised of the

20
21 ⁶ In the case of dissolution, A.R.S. § 25-324 provides in relevant part:

22 The court . . . after considering the financial resources of
23 both parties and the reasonableness of the positions each
24 party has taken throughout the proceedings, may order a
25 party to pay a reasonable amount to the other party for the
26 costs and expenses of maintaining or defending any
27 proceeding under this chapter On request of a party
28 . . . the court shall make specific findings concerning the
portions of any award of fees and expenses that are based on
consideration of financial resources and that are based on
consideration of reasonableness of positions. The court may
make these findings before, during or after the issuance of
a fee award.

1 following: \$546.50 for debt equalization; \$500.00 for Smithson's
2 share of a rental security deposit refund; \$3,000.00 for
3 Smithson's personal property lost or destroyed by Lilly; and
4 \$33.33 for reimbursement for their daughter's medical bill.
5 ("May 26, 2010 Order"). The State Court took the matter of
6 Smithson's attorney's fees under advisement and ordered her to
7 file a China Doll Affidavit setting forth the amount of her fees
8 to date. The May 26, 2010 Order stated that such fees, whatever
9 they turned out to be, would not be entered as a support order.

10 Smithson later submitted a China Doll Affidavit for her
11 attorney's fees. Lilly filed no objection. On July 12, 2010,
12 the State Court entered a judgment in favor of Smithson and her
13 attorney, Charna Johnson, for "attorney's fees and costs incurred
14 in the Dissolution of Marriage action in the sum of \$10,000,"
15 plus interest (the "Attorney's Fee Award").

16 **B. The Adversary Proceeding.**

17 Lilly filed a chapter 7 bankruptcy petition on August 23,
18 2010. He did not list any domestic support obligations in his
19 Schedule E, but in his Schedule F he listed a debt in the amount
20 of \$10,000 to Charna Johnson for "attorney's fees (ex-wife's),"
21 and a debt in the amount of \$4,000 to Smithson for "judgment."

22 Smithson filed a nondischargeability complaint against Lilly
23 on November 10, 2010, seeking to except from discharge Lilly's
24 debts from the Divorce Decree, the May 26, 2010 Order, and the
25 Attorney's Fee Award as support obligations under § 523(a)(5) or,
26 alternatively, as debts incurred in the course of the dissolution
27 proceedings under § 523(a)(15).
28

1 In his answer, Lilly acknowledged that the alleged debts
2 were incurred in the dissolution proceedings, but denied that
3 they were in the nature of a domestic support obligation. In
4 short, Lilly disputed the underlying merits of the dissolution
5 proceedings and the State Court's related orders. Lilly did not
6 contest the monthly spousal maintenance and contended that he was
7 current on the payments. Attached to Lilly's answer was a recent
8 pay stub from his current employer.

9 On December 27, 2010, Smithson moved for summary judgment.
10 Smithson contended that no genuine issue of material fact
11 prevented a ruling that the debts at issue were nondischargeable
12 under § 523(a)(15) because Lilly had admitted they were incurred
13 in the course of the dissolution proceedings. Alternatively,
14 Smithson contended that the spousal maintenance debt of \$575 per
15 month was in the nature of a domestic support obligation
16 nondischargeable under § 523(a)(5), but the remaining debts were
17 otherwise nondischargeable under § 523(a)(15).
18

19 Lilly's opposition to Smithson's motion consisted of a copy
20 of his previously-filed answer to the complaint and five
21 exhibits. The five exhibits included: (1) a copy of Lilly's pay
22 stub reflecting "support" payments; (2) a portion of the May 26,
23 2010 Order reflecting what Lilly said was "proof of paternity;"
24 (3) a daily school attendance record for the parties' son; (4) a
25 copy of the son's report card; and (5) a letter from the son's
26 basketball coach praising the son's performance.

27 The bankruptcy court held a hearing on Smithson's motion on
28

1 April 12, 2011. Lilly contended that the debts at issue would
2 cause him an undue hardship and affect his ability to care for
3 his son, of whom he had custody, so they should be discharged
4 under a "narrow exception" to the rule.

5 After explaining to Lilly that his arguments were better
6 suited for the State Court, the bankruptcy court issued its oral
7 ruling granting Smithson's motion for summary judgment.

8 Specifically, the court found that the spousal maintenance of
9 \$575 per month was nondischargeable under § 523(a)(5), which
10 Lilly conceded. Carefully reviewing controlling authority and
11 the State Court's findings in its May 26, 2010 Order, which
12 stated that Smithson's attorney's fees "shall not be entered as a
13 support order," the bankruptcy court found that the Attorney's
14 Fee Award was in the nature of support and nondischargeable under
15 § 523(a)(5). Alternatively, it determined that the fees were
16 nondischargeable as a divorced-related debt under § 523(a)(15).
17 As for the judgment of \$4,079.83, the bankruptcy court found that
18 it was comprised of various debts created in the dissolution
19 proceedings, so it too was nondischargeable under § 523(a)(15).⁷
20

21 On April 15, 2011, the bankruptcy court entered a judgment
22

23 ⁷ The bankruptcy court also found that any remaining debts
24 incurred as a result of a hold harmless clause in the Divorce
25 Decree and May 26, 2010 Order were also nondischargeable under
26 § 523(a)(15). Lilly never disputed such debts before the
27 bankruptcy court. In any event, he does not appear to contest
28 this finding on appeal. Lilly also does not contest the
bankruptcy court's finding regarding the nondischargeability of
the monthly spousal maintenance under § 523(a)(5). Therefore, we
address only the debts Lilly disputed before the bankruptcy court
and that he contests on appeal: the Attorney's Fee Award and the
judgment for \$4,079.83.

1 consistent with its oral ruling.⁸ Lilly timely appealed.

2 **II. JURISDICTION**

3 The bankruptcy court had jurisdiction under 28 U.S.C. §§ 157
4 (b)(2)(I) and 1334. We have jurisdiction under 28 U.S.C. § 158.

5 **III. ISSUE**

6 Did the bankruptcy court err in granting Smithson summary
7 judgment determining that the debts at issue were
8 nondischargeable under § 523(a)(15)?

9 **IV. STANDARDS OF REVIEW**

10 The standard of review for legal questions is de novo and
11 clearly erroneous for factual questions. Beaupied v. Chang
12 (In re Chang), 163 F.3d 1138, 1140 (9th Cir. 1998). A finding is
13 clearly erroneous when it is illogical, implausible, or without
14 support in the record. United States v. Hinkson, 585 F.3d 1247,
15 1261-62 (9th Cir. 2009)(en banc).

16 Summary judgment determinations are reviewed de novo. Tobin
17 v. Sans Souci Ltd. P'ship (In re Tobin), 258 B.R. 199, 202 (9th
18 Cir. BAP 2001). Viewing the evidence in the light most favorable
19 to the nonmoving party, we must determine "whether there are any
20 genuine issues of material fact and whether the trial court
21 correctly applied relevant substantive law." Id.

22 **V. DISCUSSION**

23
24 Lilly's opening brief disputes the underlying merits of the
25 dissolution proceedings and related State Court orders and
26

27 ⁸ Rather than issuing a separate order granting the motion,
28 the court entered only a judgment which stated that the motion
was granted in its entirety.

provides details of his current financial situation.

1 Unfortunately, these arguments are irrelevant to the issue of the
2 nondischargeability judgment. The only argument Lilly raises
3 somewhat relevant to this appeal, is that the debts at issue
4 should be discharged because of the undue burden they will place
5 on him. However, this argument lacks merit as we discuss below.

6 Although Lilly does not articulate the actual issues on
7 appeal, we must construe pro se briefs liberally. Balistreri v.
8 Pacifica Police Dep't., 901 F.2d 696, 698-99 (9th Cir. 1990).

9 Therefore, we review the record to see if it supports the
10 bankruptcy court's decision to grant Smithson summary judgment.

11 **A. The bankruptcy court did not err in alternatively finding**
12 **that the Attorney's Fee Award was nondischargeable under**
13 **§ 523(a)(15).**

14 Section 523(a)(15) excepts from discharge a debt "to a
15 spouse, former spouse, or child of the debtor and not of the kind
16 described in paragraph (5) that is incurred by the debtor in the
17 course of a divorce or separation or in connection with a
18 separation agreement, divorce decree or other order of a court of
19 record"

20 Notably, Lilly never disputed that the Attorney's Fee Award
21 was not nondischargeable under § 523(a)(15); he only disputed it
22 as a debt in the nature of support under § 523(a)(5). We
23 conclude that the debt is nondischargeable under § 523(a)(15)
24 because it was incurred by Lilly in the course of the divorce and
25 is subject to a judgment in connection with the Divorce Decree.

26 We reject Lilly's argument for dischargeability of the fees
27 due to his inability to pay. The cases Lilly cites in support of
28

his argument are no longer controlling law. A chapter 7 debtor's
1 inability to pay was a defense to nondischargeability under
2 § 523(a)(15) prior to the Bankruptcy Abuse Protection and
3 Consumer Protection Act ("BAPCPA") of 2005. Prior to 2005,
4 § 523(a)(15) provided that debts that are not support obligations
5 but which were incurred in the course of a divorce or separation
6 are nondischargeable unless either (1) the debtor lacks the
7 ability to pay the debt, or (2) discharging the debt would result
8 in a benefit to the debtor that outweighs the detrimental
9 consequences to the spouse, former spouse, or child of the
10 debtor. Former § 523(a)(15)(A), (B). However, BAPCPA eliminated
11 the balancing test provided in subsections (A) and (B) from the
12 statute. As a result, in individual cases under chapter 7 any
13 debts incurred in the course of a divorce or in connection with a
14 divorce decree that are not in the nature of support under §
15 523(a)(5) are still nondischargeable under § 523(a)(15).

16 Accordingly, even if the Attorney's Fee Award was not in the
17 nature of support under § 523(a)(5), the bankruptcy court did not
18 err in alternatively finding that it was a nondischargeable
19 divorce-related debt under § 523(a)(15).⁹
20

21 **B. The bankruptcy court did not err in finding that Smithson's**
22 **judgment for \$4,079.83 was nondischargeable under**
23 **§ 523(a)(15).**

24 As part of the May 26, 2010 Order, the State Court awarded
25 Smithson a judgment for \$4,079.83, which comprised of \$546.50 for
26 debt equalization, \$500.00 for Smithson's share of a security

27 ⁹ We are not saying that the bankruptcy court erred in
28 finding the Attorney's Fee Award was in the nature of support.
We are only stating that we need not reach that issue, since it
is otherwise nondischargeable.

1 deposit refund, \$3,000.00 for her personal property lost or
2 destroyed by Lilly, and \$33.33 for reimbursement for their
3 daughter's medical bill. According to the order, Lilly agreed to
4 pay the \$546.50 equalization debt and the \$500.00 debt for the
5 security deposit. The State Court ordered Lilly to pay the
6 remaining two debts after the evidentiary hearing.

7 Although Lilly wishes to argue the underlying merits of the
8 State Court evidentiary hearing, we are not the proper forum for
9 such arguments, and they are not relevant to the determination of
10 the nondischargeability of this debt. We must also reject
11 Lilly's argument of his inability to pay for the same reasons we
12 stated above. The judgment for \$4,079.83 is nondischargeable
13 under § 523(a)(15) because it was incurred by Lilly in the course
14 of the divorce and is part of the Divorce Decree contained in the
15 May 26, 2010 Order.

16 Accordingly, the bankruptcy court did not err in finding
17 that Smithson's judgment for \$4,079.83 was a nondischargeable
18 divorce-related debt under § 523(a)(15).

19 **VI. CONCLUSION**

20 The bankruptcy court correctly applied the relevant
21 substantive law, and no genuine issues of material fact were in
22 dispute. Therefore, it did not err in granting Smithson summary
23 judgment. We AFFIRM.