

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON DIVISION

IN RE:

WILLIAM C. HAMMOND

CASE NO. 10-52709

DEBTOR

ORDER

This matter having come before the Court by the Motion for Relief from Stay filed by Lenora Hammond (Doc. 8), and the Debtor's Motion to Strike (Doc. 17), after a hearing having been held on October 21, 2010, and this matter having been submitted on November 9, 2010, it is hereby ORDERED that for the reasons stated hereafter, both Ms. Hammond's Motion for Relief from Stay and the Debtor's Motion to Strike are DENIED.

The Debtor filed his chapter 7 bankruptcy petition on August 23, 2010. Ms. Hammond is the ex-wife of the Debtor. In her motion for relief from the automatic stay, Ms. Hammond alleges that pursuant to a divorce decree entered by the Greenup Circuit Court, the Debtor is to pay \$1,000.00 per month towards his domestic support and property settlement obligations. Although Ms. Hammond did not attach any documentation to her motion, two orders from the Greenup Circuit Court are attached to Ms. Hammond's proof of claim which lay out the Debtor's maintenance and support obligation, as well as the parties' property settlement.

The Debtor filed an objection to Ms. Hammond's motion, contending that the divorce decree required him to pay maintenance for one year at \$400.00 monthly and that the marital residence be sold with the proceeds divided between the parties (Doc. 11). The Debtor claimed to have fulfilled his maintenance obligation by making the \$400.00 monthly payments for one year. Furthermore, the Debtor claims the marital residence was sold through a foreclosure auction which resulted in a net loss. Accordingly, he argues that there were no excess proceeds from the sale of the residence to divide between the parties.

In her response to the Debtor's objection, Ms. Hammond alleges that the Debtor stopped making payments on the residence and allowed it to go into foreclosure (Doc. 15). She further submits that the state court held a contempt hearing regarding the Debtor's failure to maintain payments on the property, and that the Debtor was ordered to pay Ms. Hammond an amount equal to the lost equity in the property and her attorney fees. Ms. Hammond's motion for relief from the automatic stay seeks to recover the amount awarded to her from the property settlement and to move forward with the contempt proceedings in the state court.

After a hearing on October 21, 2010, both parties were to supplement the record with information concerning whether maintenance was or was not paid and any additional documents from the state court case within fourteen days. After the fourteen days had run, the matter was deemed submitted. Ms. Hammond did not submit any additional information during the fourteen days. The Debtor, however, submitted documentation of twelve maintenance payments of \$400.00 each to Ms. Hammond or to his counsel in the state court case, Jeffrey D. Tatterson, Esq., who endorsed the checks over to Ms. Hammond (Doc. 21). The Debtor also submitted the affidavit of Mr. Tatterson, which states that the Debtor satisfied his maintenance requirement by making twelve monthly payments of \$400.00 each (Doc. 22).

The Debtor also filed a motion to strike Ms. Hammond's response because the response was filed twenty-five days after the Debtor filed his objection to the motion for relief from the stay. In his motion, the Debtor argued that there is no rule or statutory authority for filing a response twenty-five days after the Debtor's response.

Regarding the Debtor's motion to strike, the Debtor may not use such a motion to attack Ms. Hammond's response because a motion for relief from the automatic stay is not a pleading. Under Rule 7(a) of the Federal Rules of Civil Procedure, the complaint, answer, and reply constitute the pleadings. Fed. R. Civ. P. 7(a). Motions and responses to motions are not defined as pleadings. Fed. R. Civ. P. 7(a) and (b). Because motions are not "pleadings," they are not subject to a motion to strike. *See* 2 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 12.37[2] (3d ed. 2004) ("Only material included in a 'pleading' may be the subject of a motion to strike, and courts have been unwilling to construe the term broadly. Motions, briefs, or memoranda, objections, or

affidavits may not be attacked by the motion to strike.”). Because it relates to a motion rather than a pleading, the Debtor’s motion to strike Ms. Hammond’s response is DENIED.

The Debtor argues that Ms. Hammond should be denied relief from the automatic stay because the Debtor fulfilled his obligations under the divorce decree. The court, however, finds that the Debtor does indeed owe a debt to Ms. Hammond based upon the Greenup Circuit Court’s order requiring the Debtor to pay Ms. Hammond \$22,750.00 and attorneys fees of \$1,000.00.

The Greenup Circuit Court’s Findings of Fact, Conclusions of Law, Decree of Dissolution of Marriage and Order found the Debtor in contempt of court for going to the marital residence and for failing to pay maintenance. The court sentenced the Debtor to one-hundred-eighty (180) days in jail. The Debtor was to serve thirty (30) days and the remainder of the sentence was to be probated if he paid \$400.00 in past due maintenance and a \$500.00 attorney fee. The court also ordered the marital residence to be sold within six (6) months and the proceeds divided equally between the parties. Ms. Hammond was awarded maintenance in the sum of \$400.00 per month for a period of one (1) year.

A subsequent order from the Greenup Circuit Court notes that the Debtor was to make the mortgage payments on the marital residence, and that he was placed on probation from contempt of the Greenup Circuit Court on the condition that he make the payments and bring them current by the end of April 2010. The Debtor had failed to make the payments and as a result the residence was foreclosed upon and sold at public auction for \$71,000.00. The court noted that the residence had previously been appraised at \$117,000.00, which resulted in a net loss of \$45,000.00. The Greenup Circuit Court found the Debtor in contempt for his failure to follow the previous orders of the court, and further found that the Debtor owed Ms. Hammond \$22,750.00, which represents the portion belonging to Ms. Hammond of the net loss from the sale of the marital residence. The court also ordered the Debtor to pay attorney’s fees of \$1,000.00. The Debtor was sentenced to one-hundred-eighty (180) days in jail, but the sentence was probated on the condition that he pay the \$22,750.00 per month by making a \$1,000.00 per month payment each month. The first payment was due September 1, 2010.

The Debtor has argued and provided documentation that he has fulfilled his domestic support

obligations by paying \$400.00 per month to Ms. Hammond. He further argues that because the marital residence was sold for a loss, there is nothing for the Debtor to pay Ms. Hammond from the sale of the residence. However, the Debtor's argument fails to account for the order from the Greenup Circuit Court which was issued after the foreclosure sale and which noted that the residence had been sold for a net loss of \$45,000.00. Notwithstanding the Debtor's lack of funds to distribute to Ms. Hammond from the foreclosure sale, the court ordered the Debtor to pay Ms. Hammond the amount which represented her half of the loss, or \$22,750.00, as well as attorney's fees of \$1,000.00. The Debtor was ordered to pay the debt to Ms. Hammond by making a \$1,000.00 payment each month.

Based upon the documentation provided by the Debtor indicating that he paid \$400.00 per month to Ms. Hammond for twelve month, the court finds that the Debtor has fulfilled his maintenance obligation under the Greenup Circuit Court's order. However, the Debtor has not fulfilled his obligation to pay the \$22,750.00 debt to Ms. Hammond.

Section 362(b)(2)(B) provides that the filing of a bankruptcy petition does not operate as a stay against the collection of a domestic support obligation that from property that is not property of the estate. The Code defines "domestic support obligation" as:

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.

11 U.S.C. § 101(14A). Therefore, domestic support obligations must at a minimum be characterized as alimony, maintenance, or support in order to be excepted from the automatic stay. Debts which result from a property settlement will remain subject to the automatic stay. *See In re Dill*, 300 B.R. 658, 666 (Bankr. E.D. Va. 2003).

The \$22,750.00 debt resulted from the property settlement. In the divorce decree, the Greenup Circuit Court ordered the marital residence to be sold and the proceeds divided between the parties. These proceeds were not intended to be alimony, maintenance, or support, but rather a division of marital property. Because the \$22,750.00 debt resulted from the sale of the residence, the subsequent Greenup Circuit Court order is subject to the automatic stay.

In seeking relief from the automatic stay, Ms. Hammond has cited to section 362(d)(1), stating that she is entitled to relief to enforce the orders of the state court for good cause. However, Ms. Hammond has not given sufficient information for the court to determine whether there is cause to lift the automatic stay. She has only stated that since filing his petition, the Debtor has attempted to evade his obligations, which has resulted in hardship to Ms. Hammond.

The term "cause" is not defined by the Bankruptcy Code. Due to this lack of guidance from the Code, the moving party must present sufficient information from which the court can determine that cause exists. Ms. Hammond has merely argued that the Debtor has attempted to evade his obligations. However, the evidence presented to the court indicates that he has not attempted to evade his obligations, as shown by his fulfillment of the maintenance obligation by paying \$400.00 per month for one year. While it is true that he does owe Ms. Hammond \$22,750.00 from the property settlement, by failing to provide sufficient evidence to support her claim, Ms. Hammond

has failed to demonstrate that cause exists to grant her relief from the automatic stay. Therefore, Ms. Hammond's Motion for Relief from Stay is DENIED.

Copies to:

Robert F. Ristaneo, Esq.

Elizabeth Thomas, Esq.

Phaedra Spradlin, Chapter 7 Trustee

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***The affixing of this Court's electronic seal below is proof this document has been signed by the Judge and electronically entered by the Clerk in the official record of this case.***



**Signed By:**  
**Joseph M. Scott, Jr.**  
**Bankruptcy Judge**  
**Dated: Wednesday, December 01, 2010**  
**(jms)**