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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re the Marriage of PAUL and ELAINE  
KASTEINER.

PAUL ANTHONY KASTEINER,

Appellant,

v.

ELAINE KASTEINER,

Respondent.

D067433

(Super. Ct. No. FAMRS1001644)

APPEAL from a judgment of the Superior Court of San Bernardino County, David Williams, Judge and Michael J. Torchia, Commissioner. Affirmed.

David B. Dimitruk for Appellant.

Law Offices of Pittullo, Baker & Associates, P. Timothy Pittullo and Jonathan A. Zitney for Respondent.

## INTRODUCTION

Paul Anthony Kasteiner filed a petition to dissolve his marriage with Elaine Kasteiner.<sup>1</sup> During the divorce proceedings, the court appointed an accounting expert to conduct a business valuation and cash flow analysis and ordered Paul to pay for the evaluation, subject to allocation. Elaine moved for terminating sanctions after Paul failed to comply with multiple court orders to, among other things, pay the accounting expert's retainer fee and to cooperate with the evaluation. Just before the hearing for terminating sanctions, Paul filed for bankruptcy and the proceedings were stayed. After discharge of the bankruptcy, the court granted Elaine's renewed motion for terminating sanctions and entered a default judgment. On appeal, Paul contends the court lacked authority under state and federal law to issue terminating sanctions because bankruptcy law precluded enforcement of the court-ordered accountant's retainer fee, which he contends was discharged in the bankruptcy. We disagree and affirm the judgment.

## FACTUAL AND PROCEDURAL BACKGROUND

### A

Paul and Elaine were married more than 18 years and had two minor children together before they separated in March 2009.<sup>2</sup> Paul petitioned for dissolution of the marriage in May 2010. At a hearing in August 2010, the court granted Paul's request for a

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<sup>1</sup> Because the parties share a surname, we refer to them by their first names to avoid confusion. No disrespect is intended.

<sup>2</sup> One son attained the age of majority prior to judgment.

continuance to seek counsel, but made orders regarding access to the family residence, joint custody of the minor children, and guideline support from Paul to Elaine.

In October 2010 the parties stipulated Paul would comply with discovery requests. Paul represented he would bring his support obligation current by November 1, 2010, and he would bring current the first and second trust deed on the family home. Paul also indicated he would give an accounting of what was done with a tax return check from the prior year.

In February 2011 the parties stipulated to assignment of vehicles. The court did not permit a short sale of the home as Paul wished. Instead, the court ordered Elaine to have exclusive use and possession of the family home to allow her the opportunity to try to modify the existing loan and to potentially save it from foreclosure. The court granted the parties a dissolution of marriage, with entry of judgment of dissolution conditional upon Paul providing Elaine with a medical insurance policy.

## B

On the date set for trial in March 2011, the court found Paul in arrears on his support payment. Counsel for Elaine stated she had a statement from Paul's employer indicating his gross revenue was approximately \$150,000 per year, but she did not have an audited statement of expenses. Elaine's counsel asked the court to appoint an accounting expert because Elaine "has significant disagreements with the representations of the expenses based upon her knowledge from during the marriage."

After an unreported chamber's conference, the court ordered a cash flow analysis to be done "as well as a determination of whether or not the business that [Paul] operates

does have any present value." The court stated, "I think we do need some expert analysis and my experience with [the Friedman CPA firm] is when [they] get the information and they get the funds, they will do an analysis relatively quickly." The court ordered the business valuation and cash flow analysis to be conducted by the Friedman CPA firm and further ordered Paul to pay for the evaluation, subject to allocation.

After hearing testimony and arguments from the parties, the court ordered Paul to use the 2010 tax refund, estimated to be \$4,000, to pay property taxes of \$1,388 and the remaining amount to be paid for attorney fees for Elaine's counsel. The court further ordered Paul to cooperate with Elaine in her attempts to obtain a loan modification or refinance of the family residence, including signing any and all necessary documents to allow her to pursue that option.

## C

In May 2011 Elaine submitted a request for sanctions and an order compelling compliance with the court-appointed accountant or an order to show cause why his pleading<sup>3</sup> should not be stricken. In support, Elaine produced copies of correspondence in which the accountant, Howard Friedman, requested Paul to return a retainer fee, sign a retainer agreement and produce documents. After more than a month of failing to

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<sup>3</sup> Elaine requested an order to show cause why the court should not strike Paul's "response." Paul is the petitioner in this proceeding because he filed a petition for dissolution of marriage. Elaine filed a response and request for dissolution of marriage. At a hearing, the court ordered Paul to file a formal responsive pleading and an income and expense declaration, which he did when he filed his income and expense declaration and supplemental declaration. We infer it is this pleading Elaine asked the court to strike. We use the term "pleading" to avoid confusion.

respond to multiple inquiries, Paul responded indicating he did not have the money to pay for the retainer fee.

Paul opposed the request for sanctions stating he did not have the funds to pay the accountant's retainer fee and he had produced certain records to Elaine's counsel. Paul provided a listing of various expenses from January 2011 through April 30, 2011, including a pay-off of his truck loan, and credit card payments.

At the hearing, Paul's counsel admitted Paul received the 2010 tax refund, but, instead of paying the property taxes as ordered by the court, Paul paid his truck loan to avoid repossession. Paul's counsel requested Paul be given additional time to pay the property taxes. Counsel for Elaine requested an order finding Paul in noncompliance with the court's prior order, sanctioning him and directing him to pay or strike his pleading.

Elaine's counsel also noted Paul's failure to either pay for the accounting expert or make arrangements to pay the retainer fee. Elaine's counsel asked the court to sanction Paul and give him a deadline to pay for the accountant or to strike his pleading. Paul's counsel argued Paul was under significant financial pressure and had no credit sources available to him. The court asked, "How do I resolve this case without a cash flow analysis? Keeping in mind it is an insurance industry which has very special financial consequences that derive from the way that business is operated."

After taking the matter under submission, the court ordered Paul to pay: (1) property taxes due, along with late fees, (2) arrearages at a rate of \$100 per month, and (3) payment of attorney fees for Elaine's counsel of \$2,500 as monetary sanctions,

payable in \$100 monthly increments. The court ordered Paul to sign an interspousal transfer deed to allow Elaine to refinance the family residence.

The order further stated, "On March 2, 2011, the court appointed [the Friedman CPA firm] to conduct a business valuation and cash flow analysis of [Paul's] business. [Paul] was directed to advance the cost, subject to reallocation. Despite the expert[']s willingness to conduct the valuation and analysis, the process has not been commenced, because [Paul] has not paid the fees. [Paul] maintains he has no present ability to pay said fees, and has no available credit. The court believes and so holds he is able to do so, and orders him to advance the costs to [the Friedman CPA firm] forthwith." The court set August 10, 2011, as the deadline for receipt of the accounting expert's report. The court concluded the order stating, "At said time, if there is further non-complying with any of this court[']s orders, the court will consider monetary, issue and pleading sanctions against the non-complaining party."

#### D

One month later, Elaine again sought ex parte relief requesting an order to show cause as to why Paul should not be ordered to make certain payments in compliance with prior orders. Elaine notified the court she had nearly completed a renegotiation of the first mortgage to allow her to keep the home and they had received an offer to resolve the second mortgage at a significant discount, to which Paul had not responded. Elaine requested an order compelling Paul to sign the necessary agreements to resolve these issues and to be responsible for half of the reduced rate on the second mortgage. She noted he had not brought the first and second mortgages current, as previously ordered.

She also requested sanctions for Paul's failure to pay property taxes, as he was ordered to do in May 2011, because it could impact the loan modification process. Elaine reported Paul had not signed the interspousal transfer deed, as previously ordered and requested the court either order Paul to sign it or appoint the clerk of the court to sign it in his place.

At a hearing in July 2011, Paul's counsel opposed the request to pay part of the settlement of the second mortgage. He represented Paul had no ability to pay this obligation and was talking with a bankruptcy attorney. He also acknowledged Paul had not paid the property taxes as previously ordered. Elaine's counsel requested a sanction order striking Paul's pleading and proceeding to a default judgment. Elaine's counsel pointed out Paul still had not paid the retainer fee for the court-appointed accountant, had not signed the retainer agreement, and had not produced documents in willful disobedience to the court's prior order.

The court expressed concern the nonpayment of property taxes was another impediment to the loan modification for the house. Paul refused to pay even though the court ordered him to do so twice based on representations Paul either had the money available or would have it available to pay. The court noted the deadline for receipt of the accountant's report was August 10, 2011, and stated, if there was no report by that date, the court would consider economic or terminating sanctions.

The court ordered Paul to sign the documents necessary to effectuate a modification of the second mortgage and to pay the property taxes, as previously ordered. The court indicated it would consider sanctions, including potentially terminating sanctions, for failure to comply with the court's prior orders, including failure to

cooperate with the accounting expert by producing documents. Shortly after the hearing, Paul filed a substitution of counsel to represent himself.

## E

Prior to the next hearing, Elaine filed points and authorities in support of her motion for terminating sanctions. The basis for the motion was Paul's noncompliance with the court's order regarding the appointment of the accounting expert including the failure to pay the retainer fee, failure to sign the retainer agreement and failure to produce the requested documents. Elaine argued an additional basis for the request for terminating sanctions was Paul's failure to comply with the court's order to pay the property taxes, which frustrated Elaine's efforts to refinance the family residence.

Paul opposed the request for sanctions. He stated he could not afford extra expenses and he had filed for bankruptcy.<sup>4</sup> He stated he could not pay the \$4,000 retainer fee for the accountant and had listed this expense item on his bankruptcy filing. He indicated he would cooperate with the accountant if the report could be prepared without his payment. The August 10, 2011, hearing was continued at the request of Elaine's counsel.

At the hearing on September 21, 2011, Paul advised the court and Elaine's counsel he had filed for bankruptcy. The court agreed Paul had failed to comply with "any court

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<sup>4</sup> Paul actually filed for bankruptcy over a month later, on September 15, 2011. Although Paul's request for judicial notice did not fully comply with rule 8.252 of the California Rules of Court, we exercise our discretion pursuant to Evidence Code section 452, subdivision (d), to grant the request for judicial notice of the voluntary petition for bankruptcy filed on September 15, 2011.

orders." It stated its intention to grant Elaine's motion for terminating sanctions, if the bankruptcy had not been filed. Otherwise, the court stayed the proceedings.

## F

At a hearing to modify support orders held at the end of November 2011, Paul stated he had not given the accountant any information because he could not pay the \$4,000 retainer fee. Paul argued he submitted certain documents to the court regarding his income and expenses. Counsel for Elaine argued Paul's statements and the documents were inadequate and lacked sufficient foundation, and there was a large discrepancy between his claim that he made \$5,000 per month and Elaine's claim that he made \$12,000 per month, which is why an accounting analysis was needed. The court continued the hearing pending the bankruptcy proceedings.

Paul's bankruptcy was discharged on December 28, 2011. Thereafter, Elaine filed a motion to restore her motion for terminating sanctions.

## G

On March 21, 2012, the court granted Elaine's renewed motion for terminating sanctions and struck Paul's pleading. The court explained to Paul this meant Elaine would proceed with a default judgment against him. The court modified the spousal and child support orders and set the matter for a further hearing.

Paul obtained new counsel, who moved to set aside the default pursuant to Code of Civil Procedure section 473, subdivision (b). Paul contended the bankruptcy discharged obligations imposed on him by the trial court, including the court's order to pay the retainer fee for the court-appointed accountant. Elaine opposed the motion

arguing there was no evidence Paul's obligations arising from the court's orders regarding the court-appointed accountant were discharged in bankruptcy and there was no basis for relief under Code of Civil Procedure section 473 because Paul disregarded court orders. Elaine presented a letter brief from her bankruptcy counsel with authorities supporting her position the debts arising from family law court orders were not dischargeable in bankruptcy because they were either debts for domestic support obligations or debts incurred in the course of a divorce proceeding.

After considering the arguments and authorities presented by both sides, the court denied the motion to set aside the default. The court concluded it had jurisdiction to enter the default and there were insufficient grounds under Code of Civil Procedure section 473, subdivision (b), to set it aside.

## H

The trial court entered judgment on May 9, 2013. The court noted it considered the arguments from both parties regarding the impact of the bankruptcy proceeding and concluded Paul produced no evidence the bankruptcy discharged the court's prior order to pay the court-appointed accountant's retainer fee. The court also noted Paul had not been "forthcoming regarding his income and actual business expenses since the commencement of these proceedings. [Paul] alleges financial hardships however the success of his business is under his control as is his ability to manipulate his monthly personal and business expenses." The court concluded Paul significantly understated his income and overstated some expenses. The judgment again ordered Paul to advance the cost of the retainer to the court-appointed accountant so a business evaluation and

controllable cash flow report can be conducted. It further stated there was no debt incurred to the accountant because Paul did not comply with the court's orders to cooperate with the accountant. The judgment also concluded the property taxes were not discharged in bankruptcy and ordered Paul to pay these taxes, including late fees.

## DISCUSSION

### I

#### *Authority for Terminating Sanctions*

We review an order for terminating sanctions for abuse of discretion. In doing so, we "view the entire record in the light most favorable to the court's ruling, and draw all reasonable inferences in support of it. [Citation.] We also defer to the trial court's credibility determinations. [Citation.] The trial court's decision will be reversed only 'for manifest abuse exceeding the bounds of reason.' " (*Stephen Slesinger, Inc. v. Walt Disney Co.* (2007) 155 Cal.App.4th 736, 765 (*Slesinger*); see *Laguna Auto Body v. Farmers Ins. Exchange* (1991) 231 Cal.App.3d 481, 491, disapproved on other grounds in *Garcia v. McCutchen* (1997) 16 Cal.4th 469, 478, fn. 4.)

Evidence Code section 730 allows a court, on its own motion or the motion of any party, to appoint an expert to investigate, prepare a report and testify at trial, if necessary, regarding an issue for which expert evidence may be required. In this case, the court appointed an accounting expert to conduct a business valuation and cash flow analysis to assist it in making the support order. As part of this appointment, the accountant contacted Paul and requested documents to conduct the evaluation along with payment of a retainer fee. Paul refused to comply with these requests despite numerous contacts

from the accountant and several orders from the court to pay the retainer fee and to cooperate with the accountant. The court considered Paul's argument he was unable to pay the retainer fee, found it not credible, and ordered him to pay.

The appointment of the accounting expert to obtain the information and analysis necessary to understand the nature, value and cash flow of Paul's business to make an appropriate support order was in the nature of a discovery order. Therefore, the court had authority under both Code of Civil Procedure section 2023.030 and its inherent judicial powers to impose terminating sanctions for failure to comply with court orders and for misuse of the discovery process. (*Slesinger, supra*, 155 Cal.App.4th at p. 758; Code Civ. Proc., § 2023.030, subd. (c), (d); see *Do It Urself Moving & Storage, Inc. v. Brown, Leifer, Slatkin & Berns* (1992) 7 Cal.App.4th 27, 31-33, 36 [nonmonetary sanctions appropriate for willful noncompliance with discovery obligations related to accounting audit].) "When a [party's] deliberate and egregious misconduct in the course of the litigation renders any sanction short of dismissal inadequate to protect the fairness of the trial, California courts necessarily have the power to preserve their integrity by dismissing the action. Without such power, the court would sacrifice its essential role of determining, in accordance with the fair application of relevant law, who should prevail in the case or controversy presented." (*Slesinger, supra*, 155 Cal.App.4th at p. 762.)

Paul's refusal to cooperate with the court-appointed accountant over a period of months in violation of multiple court orders was deliberate and egregious. This alone was sufficient to support the court's nonmonetary sanction. Given the nature of Paul's business, his ability to manipulate his monthly income and expenses, and his apparent

understatement of his income, there was no way for the court to make meaningful support or property division orders without the accounting report.

The failure to cooperate with the accountant was in addition to Paul's other failures to comply with court orders, such as using a tax refund to pay for a car expense instead of paying community property taxes and other expenses, as ordered by the court. The court previously imposed monetary sanctions against Paul with a direction that the court would consider terminating or pleading sanctions if he continued to fail to comply with court orders, yet there was no change in behavior. Under these circumstances, it appears no adequate sanctions were available short of striking Paul's pleading and proceeding to a default judgment to preserve the fairness of the proceeding. Therefore, we conclude the court did not abuse its discretion in imposing terminating sanctions.

## II

### *Bankruptcy Did Not Discharge Paul's Court-Ordered Accounting Obligation*

Paul contends federal law prohibited the court from imposing terminating sanctions based upon his failure to pay the retainer fee for the accountant because this debt was discharged in the bankruptcy proceedings. We disagree.

First, the terminating sanction order, which forms the basis of the default judgment, was entered on March 21, 2012, after Paul's bankruptcy was discharged in December 2011. Therefore, we need not reach the issue of whether or not the sanction order, if issued earlier, could have violated a bankruptcy stay. (See 11 U.S.C. § 362(b)(4); *Keitel v. Heubel* (2002) 103 Cal.App.4th 324, 334 [sanctions not barred by automatic bankruptcy stay because "courts have inherent regulatory power to prevent

abuses of the court system and ... the automatic stay is not an 'escape mechanism' from the enforcement of this important regulatory power"].)

Second, assuming, without deciding, the court's order to pay the accounting expert's retainer fee can be considered a debt, it is not a dischargeable debt. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (11 U.S.C. § 523(a)(15)) (§ 523(a)(15)) provides a bankruptcy discharge does not discharge a debtor from any debt "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." Under this provision, "if a debt is not a domestic support obligation, but was 'incurred by the debtor in the course of a divorce ...,' it is excepted from discharge." (*In re Dumontier* (Bankr. D. Mont. 2008) 389 B.R. 890, 896.)

We conclude this statutory exception applies in this case. In order to obtain the information necessary to make support and property division orders, the court ordered Paul to pay the retainer fee for the accounting expert to conduct a business valuation and a cash flow analysis. A "debt" is a "liability on a claim" (11 U.S.C. § 101(12)) and a "claim" is defined as a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured" or a "right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured,

unmatured, disputed, undisputed, secured, or unsecured." (11 U.S.C. § 101(5).) The definition of debt has been broadly interpreted "to encompass divorce decree-imposed obligations to a former spouse to make payments on a loan from a third party." (*Howard v. Howard* (Ky. 2011) 336 S.W.3d 433, 446 [divorce decree established obligation to spouse to make payment to a third-party], citing *Wodark v. Wodark (In re Wodark)* (Bankr. 10th Cir. 2010) 425 B.R. 834, 837-838 [same].) The Ninth Circuit has held "[t]here is no requirement in § 523(a)(15) that a debt obligation incurred as part of a dissolution judgment be payable directly to the ex-spouse in order to be excepted from a debtor's discharge." (*Francis v. Wallace (In re Francis)* (Bankr. 9th Cir. 2014) 505 B.R. 914, 919-920.)

We are not persuaded by Paul's citation to *Bendetti v. Gunness (In re Gunness)* (Bankr. 9th Cir. 2014) 505 B.R. 1, 6-7, in which the Ninth Circuit concluded § 523(a)(15) did not apply to a debt owed by the debtor to her husband's first wife, because there was no requisite familial relationship between the debtor (the second wife) and the husband's first wife. After reviewing authorities from other circuits holding § 523(a)(15) applicable to third-party debts, the Ninth Circuit noted, "[e]ven when the debt was not directly payable or owed to the spouse, former spouse or child of the debtor, the bounty of that debt had flowed to one of those family members explicitly covered by the statute, or the discharge of the debt would have adversely impacted the finances of one of those explicitly-covered family members." (*In re Gunness, supra*, 505 B.R. at p. 6.)

In this case, there is no doubt Elaine is Paul's former spouse and falls within the familial relationship described by the statute. The nature of the order obligating Paul to pay the accountant's retainer fee was a debt owed to Elaine and incurred in the course of the divorce proceedings. The bounty of the debt flowed to Elaine and their minor son because the accounting analysis was necessary for the court to make an informed support order. Discharge of this debt would adversely affect the finances of Elaine and their minor son who require an informed and adequate support order. Therefore, we conclude the debt was not discharged in the bankruptcy proceedings and the court properly entered orders to enforce this obligation, including the terminating sanction order.

#### DISPOSITION

The judgment is affirmed. Respondent shall recover her costs on appeal.

McCONNELL, P. J.

WE CONCUR:

HUFFMAN, J.

IRION, J.