

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:)
)
RITA BRIGGS,)
)
Debtor(s).) CASE NO. BK03-81858
MARK MONGE,) A04-8009
)
Plaintiff,) CH. 7
)
vs.)
)
RITA BRIGGS,)
)
Defendant.)

MEMORANDUM

Trial was held in Omaha, Nebraska, on August 30, 2004, on the adversary complaint concerning dischargeability of a debt under 11 U.S.C. § 523(a)(15). Clyde Christian appeared for the debtor, and Howard Duncan appeared for the plaintiff. This memorandum contains findings of fact and conclusions of law required by Federal Rule of Bankruptcy Procedure 7052 and Federal Rule of Civil Procedure 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(I).

The parties were previously married to each other. Their marriage was dissolved in November 2000. No alimony or child support was awarded to either party. As part of the property settlement in the divorce decree, the debtor was ordered to pay a car loan and a credit card, both to USAA. The balance of the credit card was around \$13,000. The decree also contains a "hold harmless" and indemnity clause protecting each spouse from liability on debts assigned to the other. Ms. Briggs made payments on the USAA debts until a few months before she filed her Chapter 7 bankruptcy petition in 2003. She reaffirmed the car loan in her bankruptcy case, so she is obligated to continue those payments. However, Mr. Monge ultimately took out a second mortgage on his residence to pay off the USAA credit card to protect his credit rating. He paid a total of \$13,733 on that debt.

The issue before the court is whether Ms. Briggs' obligation to hold Mr. Monge harmless on the USAA credit card debt should

be excepted from discharge, which hinges on a determination as to whether Ms. Briggs has the ability to pay it.

"Section 523(a)(15) excepts from discharge those debts arising out of marital dissolution proceedings that do not constitute nondischargeable alimony, maintenance or support under § 523(a)(5); i.e. property settlement awards." Moeder v. Moeder (In re Moeder), 220 B.R. 52, 54 (B.A.P. 8th Cir. 1998). In determining whether a non-support debt incurred in the course of a divorce is dischargeable, the first step is to determine that it is in fact a division of property rather than alimony, maintenance, or support. The non-debtor spouse bears the burden of establishing this. Upon such a showing, the burden shifts to the debtor to prove by a preponderance of the evidence that she does not have the ability to pay the debt, or, if she has the ability to pay, the benefit to her of a discharge is greater than the detriment to her former spouse. Fellner v. Fellner (In re Fellner), 256 B.R. 898, 902-03 (B.A.P. 8th Cir. 2001) (citing Rush v. Rush (In re Rush), 237 B.R. 473 (B.A.P. 8th Cir. 1999)).

To establish her inability to pay, the debtor must show that excepting the debt from discharge would reduce her income to less than the amount necessary for the support of the debtor and her dependents. Whitlach v. Allgor (In re Allgor), 276 B.R. 221, 224 (Bankr. N.D. Iowa 2002). To make such a determination, the court looks at the debtor's current and future financial status, including potential earnings, and whether her expenses are reasonably necessary. Id.; Grunwald v. Beck (In re Beck), 298 B.R. 616, 623 (Bankr. W.D. Mo. 2003). The debtor's circumstances as of the time of trial are what the court is to consider. Id.

In this case, the parties agree that the obligation at issue is a non-support debt. Ms. Briggs asserts that she has no money with which to pay the obligation because her living expenses exceed her income. She testified that she works a full-time job with a net monthly income of \$2,396, and her monthly expenses are \$2,441. Her parents provide cash to assist her with bills owed. The parties share joint custody of their three children, who divide their time between the two households.

After reviewing Ms. Briggs' monthly expenses, it appears that she will have funds available in the not-too-distant future with which to make payments toward this debt. She testified that she owes the Internal Revenue Service \$1,200, which she is paying off at a rate of \$100 per month. That debt will be paid off in a year, thereby freeing up \$100. She owes \$400 on post-petition debt on two credit cards, on which she is paying \$50

per month. Those cards will be paid off in less than a year. She is also paying \$50 per month on her daughter's student loan, on which \$840 is owed. That debt should be paid off in approximately a year and a half. Thus, Ms. Briggs will have \$150 per month available in a year, and \$200 per month shortly thereafter, which can be paid to Mr. Monge on the USAA credit card debt.¹

The next step of the analysis requires the court to balance benefit and detriment. The relative living standards of the parties are to be compared, and if the debtor's standard of living is greater than or equal to the creditor's, then discharge of the debt is not warranted. Allgor, 276 B.R. at 225. When the debtor's former spouse has suffered a loss due to the failure of the debtor to pay an assumed debt which the former spouse has subsequently paid, the balance tips in favor of a finding of detriment to the former spouse that is greater than a benefit to the debtor. Id. This is especially significant when the debtor is unable to provide evidence of a benefit that would outweigh the detriment to the former spouse. Id.

The facts of this case are similar to those of the Allgor case, in which the wife, as part of the decree of dissolution, assumed responsibility for a joint \$3,000 credit card debt. She paid part, but not all, of that debt, so her former husband paid it off to protect his credit rating. The bankruptcy court excepted the debt from discharge under § 523(a)(15)(A) and (B) in the wife's bankruptcy case, finding that she could afford to pay the debt and that requiring her to do so would not materially decrease her standard of living. In balancing the benefit and detriment, the court found:

[T]he benefit to Debtor would not be greater than the detriment to Plaintiff in granting a discharge of the debt, particularly where as here, the nature of the debt is one where Plaintiff has incurred a loss of funds. This debt occurred due to Debtor's failure to pay the assumed credit card debt pursuant to the settlement agreement. Plaintiff was forced to "assume"

¹As noted above, Mr. Monge testified that he incurred additional debt in the form of a second mortgage to pay off the USAA credit card. He pays \$150 per month on that mortgage. In essence, the credit card debt was converted into a mortgage obligation, so Ms. Briggs' debt to USAA became a debt to Mr. Monge.

this debt. This debt is in addition to other debt he assumed under the settlement agreement. The settlement agreement contains a hold harmless clause, compelling the parties to pay these respective assumed debts. The purpose of this clause was to protect each party from the very circumstances which have occurred in this case. To grant Debtor a discharge would require the Court to ignore this hold harmless clause and place a detriment upon Plaintiff disproportionate to the benefit to Debtor. Utilizing a benefit versus detriment balancing test, Debtor would not receive a benefit that outweighs the detriment to Plaintiff if the debt was discharged.

Allgor, 276 B.R. at 226.

Mr. Monge submitted his budget for the court's consideration. It indicates that his financial situation is similar to the debtor's, in that his expenses exceed his monthly income. Their lifestyles and standard of living do not appear to be significantly different. Forcing him to bear the USAA debt would place a disproportionate burden upon him, one which is not outweighed by the benefit to the debtor of having this debt discharged.

Because the debtor will have the ability within a relatively short time to begin payments on the debt at issue here, and because the detrimental consequences to the plaintiff of a discharge would outweigh the benefit to the debtor, that debt will be excepted from discharge under 11 U.S.C. § 523(a)(15)(A) and (B). Separate judgment will be entered.

DATED: October 1, 2004

BY THE COURT:

/s/ Timothy J. Mahoney
Chief Judge

Notice given by the Court to:

Clyde Christian
*Howard Duncan
U.S. Trustee

Movant (*) is responsible for giving notice of this order to all other parties not listed above if required by rule or statute.

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JUDGMENT

Trial was held in Omaha, Nebraska, on August 30, 2004, on the adversary complaint concerning dischargeability of a debt under 11 U.S.C. § 523(a)(15). Clyde Christian appeared for the debtor, and Howard Duncan appeared for the plaintiff.

IT IS ORDERED: Judgment is hereby entered in favor of the plaintiff and against the debtor defendant. The debt owed to the plaintiff, representing the credit card debt to USAA assigned to the debtor in the decree of dissolution but paid by the plaintiff, is excepted from discharge under 11 U.S.C. § 523(a)(15)(A) and (B). See Memorandum entered this date.

DATED: October 1, 2004

BY THE COURT:

Timothy J. Mahoney
Chief Judge

Notice given by the Court to:
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