

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:)
)
KENNETH W. & JULIE A. RICHARD,) CASE NO. BK98-83127
) A99-8034
DEBTOR(S).)
_____) CH. 7
SHERRY M. THEOS,)
formerly Sherry M. Richard,)
)
Plaintiff(s),)
)
vs.)
)
KENNETH W. RICHARD,)
)
Defendant(s).)

MEMORANDUM

Hearing was held on November 17, 1999, on the adversary complaint. Appearances: Richard Jones for the debtor/defendant and Victor Lich, Jr., for the plaintiff. This memorandum contains findings of fact and conclusions of law required by Fed. Bankr. R. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(I).

Background

The plaintiff, Sherry M. Theos, was previously married to defendant, Kenneth W. Richard. The marriage ended in a Dissolution of Marriage Decree entered in 1983. Pursuant to such decree, defendant was ordered to pay certain obligations and to hold plaintiff harmless thereon. Those obligations included the sum of \$2,753.09 to the Burlington Northern Credit Union and \$910.00 on the Montgomery Ward charge card. Defendant failed to make such payments and plaintiff was required to and did pay them.

In 1989, plaintiff obtained a judgment against defendant in the amount of \$3,663.09 representing the total of the amounts referred to above. This judgment was revived, pursuant to a Nebraska law, in November of 1998. The total

amount of the judgment as of March 1, 1999, including accrued interest, is \$6,868.94 plus interest at the rate of 9.27% per annum from March 1, 1999.

Since the judgment was entered, defendant has paid little, if any, on the judgment and, in late 1998, the defendant and his current wife filed this Chapter 7 bankruptcy case. Plaintiff brought this adversary proceeding under 11 U.S.C. § 523(a)(15) requesting a finding that the obligation of the defendant to the plaintiff resulting from the Dissolution of Marriage Decree and represented by the 1989 judgment, plus accruing interest, be deemed nondischargeable in this bankruptcy case.

The defendant's response to the complaint is that he does not have sufficient disposable income to permit him to make such payment and/or even if he does have sufficient income, discharging the debt would result in a benefit to the defendant that outweighs the detrimental consequences to the plaintiff and, therefore, the debt should be discharged.

Law

The obligation which is the subject matter of this adversary proceeding is not in the nature of support under 11 U.S.C. § 523(a)(5). Therefore, since it is an obligation resulting from a Decree of Dissolution of Marriage, it does fit under 11 U.S.C. § 523(a)(15) and the burden is on Mr. Richard to prove, by a preponderance of the evidence, that the discharge provision of 11 U.S.C. § 523(a)(15)(A) and (B) apply to his situation. Williams v. Williams (In re Williams), 210 BR 344, 346 (Bankr. D. Neb. 1997).

Facts

Considering the monthly family income and household expenses of Mr. and Mrs. Richard, it appears that they have approximately \$1,400.00 per year net disposable income which could be applied to this debt. This amount was determined by reviewing Exhibit 18, a summary of schedules I and J, and modifying the numbers shown on Exhibit 18 by the testimony provided at trial. The income and expense items are shown below.

Item of Income	of Expense	Income	Expense	Net Income
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Calculation of Net Income

H's gross income from W-2 and 1998 tax return	25,224		
Fed. Tax paid per return		3,042	
State tax paid per return		770	
Social security paid per W-2		1,563	
Medicare paid per W-2		365	19,484
W's average income 207.50 per week (50 weeks)	10,375		
W's cash business expenses per tax return		<u>1,734</u>	<u>8,641</u>
Sub totals	35,599	7,474	28,125

Monthly expenses

Rent at \$600 per month	7,200
Dodge Dakota payment at \$315 per mo.	3,780
Car insurance at \$470 every six mos.	940
Prescriptions at \$16 per mo.	192
Renter's Insurance \$144 per year	144
MUD at \$79 per month	948
OPPD at \$64 per month	768
Telephone at \$45 per month	540
Food at \$400 per month	4,800
Cats at \$50 per month	600
Church donation at \$50 per week	2,600
Health Insurance at \$139 per month	1,668
Gas at \$100 per month	1,200
Hair care at \$20 per month	240
Cable TV at \$18 per month	216
Nebraska Furniture Mart at \$29 per month	348
Sears at \$17 per month	204
Kohls at \$25 per month	<u>300</u>
Sub total of monthly expenses	26,688

Total net disposable income 35,599 34,162 1,437

Because some of Mr. Richard's gross income is derived from non-guaranteed overtime pay, if the income and expense items shown above actually represented the total financial situation of Mr. Richard, one could conclude that he does not have the ability to pay the obligation. However, Mr. Richard is the personal representative of the estate of his deceased mother. He anticipates that his net beneficial share of the

estate will be approximately \$2,500.00. In addition, he has provided labor to the estate of his mother with the intent of repairing and cleaning her house, thereby making it marketable. His testimony is that he has provided at least 350 hours of labor, for which he intends to be compensated from the estate at the rate of \$10.00 per hour for a total of \$3,500.00. Therefore, the total he anticipates receiving from estate funds comes within \$1,000.00 of covering the complete obligation to Ms. Theos. He can afford to pay his debt to Ms. Theos.

Although it is the position of Mr. Richard that permitting him to discharge his obligation to Ms. Theos would be of a greater benefit to him than detriment to her, his evidence on this fact issue is insufficient.

Ms. Theos's testimony, on cross examination by counsel for Mr. Richard, is that she is employed and receives a net annual income of approximately \$23,000.00. Her current husband is employed and, in prior years, he netted approximately \$35,000.00 per year. However, in 1999, he has been injured and off work and she believes that their total household income will be approximately \$48,000.00. She believes her total individual net worth is approximately \$2,000.00. From her net income, she pays \$11,000.00 a year for her daughter's college education. The daughter is now in her second year of college. Although her payment for her daughter's education is voluntary because her daughter has reached majority, she believes it is important to provide the child, whose father is Mr. Richard, with a college education.

As mentioned above, Mr. Richard does not have much available net disposable income. However, he does have the ability to pay this obligation by the use of funds to be received from his mother.

Balancing the equities, it is not obvious that discharging the debt would be of greater benefit to him than detriment to her. She has been owed this money since 1983. Although he may not have had the ability to make payment on this obligation over the last sixteen years, he now has a fund available which will provide for almost full payment of the obligation. He presented no evidence concerning any special needs for he or his current spouse.

Conclusion

After considering all of the evidence on the issue of ability to pay and/or benefit versus detriment as required under 11 U.S.C. § 523(a)(15)(A) and (B), judgment shall be entered in favor of the plaintiff and against the defendant/debtor, Mr. Richard, and the obligation represented by the revived judgment, plus the accruing interest, is deemed nondischargeable in this Chapter 7 bankruptcy case.

Separate journal entry shall be filed.

DATED: December 9, 1999

BY THE COURT:

/s/Timothy J. Mahoney
Chief Judge

Copies faxed by the Court to:

JONES, RICHARD M. "DEACON" 334-8072
LICH JR, VICTOR 292-2716

Copies mailed by the Court to:

United States Trustee

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

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_____) CH. 7
SHERRY M. THEOS,)
formerly Sherry M. Richard,)
) JOURNAL ENTRY
Plaintiff(s),)
) DATE: December 9, 1999
vs.) HEARING DATE: Nov. 17, 1999
)
KENNETH W. RICHARD,)
)
Defendant(s).)

Before a United States Bankruptcy Judge for the District of
Nebraska regarding Adversary Complaint.

APPEARANCES

Richard Jones, Attorney for debtor/defendant
Victor Lich, Jr., Attorney for plaintiff

IT IS ORDERED:

Judgment is entered in favor of the plaintiff and against
the defendant/debtor, Mr. Richard, and the obligation
represented by the revived judgment, plus the accruing interest,
is deemed nondischargeable in this Chapter 7 bankruptcy case.
See Memorandum entered this date.

BY THE COURT:

/s/Timothy J. Mahoney
Chief Judge

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