

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:)	
)	
JAMES LYNN HAWK,)	
)	CASE NO. BK01-81166
Debtor(s).)	
)	A01-8059
ROBERTA DITTMAN,)	
)	
Plaintiff,)	CH. 7
)	
vs.)	
)	
JAMES LYNN HAWK,)	
)	
Defendant.)	

MEMORANDUM

Trial was held in Omaha, Nebraska, on March 3, 2003, on the adversary complaint (Fil. #1). Howard Duncan appeared for the debtor, and Anne Breitreutz appeared for the plaintiff.

The plaintiff challenges the discharge of the debt owed to her, asserting that it is nondischargeable under 11 U.S.C. § 523(a)(15) because it arises out of a marital dissolution.

"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 that he does not have the ability to pay the debt, or, if he has the ability to pay, the benefit to him of a discharge is greater than the detriment to his former wife. 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 his inability to pay, the debtor must show that excepting the debt from discharge would reduce his income to less than the amount necessary for the support of the debtor and his 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 his expenses are reasonably necessary. Id.

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.

The parties in this case were married for 17 years. They had no children. They divorced in April 1999. As part of the dissolution of the marriage, Mr. Hawk was directed to pay \$1,000 a month to Ms. Dittman for 24 months for "periodic maintenance." The parties agreed to a division of property and debt, with the debtor ordered to pay \$750 a month to his former spouse for 52 months to effect an equitable division of the marital property. Those payments were to begin on May 24, 2001. The provision of the property settlement and separation agreement reached by the parties regarding these payments also included the following language: "This Court intends that this obligation is not dischargeable in bankruptcy." Ex. 36 at 9.

As to the language in the property settlement agreement evidencing the parties' intention that this obligation should survive bankruptcy, the United States Supreme Court has recently ruled that the underlying nature of the debt compromised in a pre-petition settlement agreement was relevant for purposes of determining whether the debt was nondischargeable. Archer v. Warner, ___ S. Ct. ___, 2003 WL 1611437 (Mar. 31, 2003). In that case, the parties settled a lawsuit alleging fraud in the sale of a business. The parties executed releases and the sellers were to pay a monetary sum to the buyers. The sellers subsequently filed a Chapter 7 bankruptcy and attempted to discharge the debt. The court of appeals ruled that the new contract debt created as a result of the settlement of the lawsuit had replaced the original fraud debt, so the grounds for excepting it from discharge no longer existed.

The Supreme Court, however, relied on its decision in Brown v. Felsen, 442 U.S. 127 (1979), to authorize the bankruptcy court to inquire into the true nature of the debt and whether it was obtained by fraud. Likewise, in the present case, the debt must be analyzed under the appropriate statutory and case law to determine whether the debt is in fact nondischargeable under the Bankruptcy Code, even though the parties agreed in state court litigation that the debt created by the dissolution decree would not be dischargeable in a subsequent bankruptcy.

The debtor has paid all of the maintenance payments, as well as the marital debts he was ordered to pay. However, he has made none of the property equalization payments. He filed his bankruptcy petition in April 2001. Since his divorce from the plaintiff, he has married and divorced, changed jobs, and experienced financial and medical problems.

Specifically, the debtor testified that he remarried in January 2000 and divorced in April 2002. His wife moved from Omaha, Nebraska, to St. Louis, Missouri, after the marriage, and they purchased a home based on their expected combined income. However, Mrs. Hawk's anticipated employment did not materialize, and the family began experiencing financial problems. Mrs. Hawk then found work in Omaha, so the family relocated. The Missouri house was subsequently sold for a \$25,000 loss.

Mr. Hawk testified that the damage to his credit record has made it difficult for him to obtain work in the financial field. He had been vice-president of lending operations at a credit union during his marriage to Ms. Dittman, but he left that position after the divorce in order to withdraw the money in his retirement plan. He used those 401(k) funds to make his house payments and repay relatives from whom he had borrowed money to make the maintenance payments to Ms. Dittman.

After moving to Omaha, he worked as a stockbroker for less than a year. He testified that he has since worked in retail and telemarketing positions, but has experienced some difficulty in keeping a job because of his medical problems, the most serious of which is congestive heart failure. That illness was diagnosed in November 2001, and debtor was hospitalized for it during much of late 2001. He also suffers from depression and a back injury, and may have sleep apnea.

The debtor testified that he recently obtained a position as a loan underwriter. His current annual salary is \$33,000. He

testified at trial that his current monthly expenses are \$2,658, including payments on past-due state and federal taxes. He also expressed a desire to repay relatives from whom he borrowed money after his divorce from Ms. Dittman, but those presumably are unsecured debts which have been discharged. He asserts that he has no money available from which to pay the \$39,000 owed to Ms. Dittman for the property division, and he contends that the debt should be discharged because his circumstances have changed for the worse since the divorce decree was entered.

Ms. Dittman testified that she worked clerical jobs throughout her marriage to Mr. Hawk and her annual salary generally was in the \$15,000 to \$20,000 range. She earns \$24,500 in her current position as account clerk with the State of Missouri's Consolidated Health Care Plan. She cashed in her retirement fund and used that \$30,000 for living expenses during the separation and divorce. She currently has little in the way of retirement savings.

She has re-married, and her husband earns \$30,000 a year. Ms. Dittman testified that their monthly expenses are at least \$2,600, plus whatever her husband spends for gasoline, house insurance, and miscellaneous expenses.

Ms. Dittman testified that she also has some health problems, suffering from high blood pressure, arthritis, and insomnia, although there is no evidence that these conditions have materially affected her ability to work.

In comparing the relative economic situations of the parties, it appears that Mr. Hawk does not have the current ability to pay the debt at issue. At the time of trial, he had been at his new job three days, and his net monthly pay was unclear. The court will be in a much better position to determine whether Mr. Hawk will have the ability to pay this debt in the future after the debtor has had time to establish himself at his job.

For that reason, decision on this matter will be deferred for a period of six months. In that time, Mr. Hawk is directed to supplement the record with evidence of his monthly income and with medical records concerning his health status.

Separate order will be entered.

DATED: April 11, 2003

BY THE COURT:

/s/Timothy J. Mahoney
Chief Judge

Notice given by the Court to:

*Anne Breitzkreutz
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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ORDER

Trial was held in Omaha, Nebraska, on March 3, 2003, on the adversary complaint (Fil. #1). Howard Duncan appeared for the debtor, and Anne Breitzkreutz appeared for the plaintiff.

IT IS ORDERED: The debtor is directed to supplement the record, by October 1, 2003, with evidence of his monthly income and expenses, and with medical evidence regarding the current and expected state of his health. Ms. Dittman may respond within 21 days thereafter. The matter will then be considered ready for decision.

DATED: April 11, 2003

BY THE COURT:

/s/Timothy J. Mahoney
Chief Judge

Notice given by the Court to:
*Anne Breitzkreutz
Howard Duncan
U.S. Trustee

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