UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF	)	
	)	
SCOTT & JANIE CORMAN,	)	CASE NO. BK00-40329
	)	
Debtors.	)	A00-4040
	)	
JEAN STICHKA,	)	
	)	CH. 7
Plaintiff,	)	
vs.	)	
	)	
SCOTT CORMAN,	)	
	)	
Defendant.	)	

MEMORANDUM

Trial of this matter was held in Lincoln, Nebraska, on May 23, 2001. Joel Lonowski represented the plaintiff, and Gene C. Foote, II, appeared on behalf of the debtor/defendant. This memorandum contains findings of fact and conclusions of law required by Fed. R. Bankr. P. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(I).

Background & Decision

This matter is before the Court to determine the dischargeability of a debt to the debtor's former spouse resulting from the dissolution of the marriage, pursuant to 11 U.S.C. § 523(a)(5) and (a)(15). The debt is not dischargeable.

Law

Section 523(a)(5) of the Bankruptcy Code provides that debts to a spouse, former spouse, or child are non-dischargeable if the debts are for alimony, support, or maintenance. Section 523(a)(15) expands that protection to property settlement awards or other debts arising out of marital dissolution proceedings which do not constitute nondischargeable alimony, maintenance, or support obligations under § 523(a)(5).

When determining whether a particular debt resulting from the dissolution of a marriage is non-dischargeable, a court must

first ascertain whether the debt is actually in the nature of alimony, maintenance, or support of a spouse, former spouse, or child. Scholl v. McLain (In re McLain), 241 B.R. 415, 419 (B.A.P. 8th Cir. 1999). If the debt is one for spousal or child support or maintenance, the analysis ends there.

However, if the debt does not fall under the provisions of § 523(a)(5), the court then looks to § 523(a)(15), which generally creates a rebuttable presumption of nondischargeability as to property settlement debts. The non-debtor spouse bears the burden of demonstrating that the debt arose from a divorce. The burden then shifts to the debtor to establish either that he cannot pay the debt, in which case it will be discharged, or that his benefit from having the debt discharged would outweigh the resulting detriment to the claimant, which obviously requires the court to perform a balancing test. Fellner v. Fellner (In re Fellner), 256 B.R. 898, 902-03 (B.A.P. 8th Cir. 2001).

Findings of Fact & Discussion

The Statement of Uncontroverted Facts set forth in the Joint Preliminary Pretrial Statement (Fil. #7) is incorporated herein and the facts stated therein are stipulated to be true and correct for purposes of this adversary proceeding. In addition, all of the testimony and other evidence submitted at trial has been considered.

The parties were divorced in February 1995. Debtor was ordered to pay child support of $707 per month, and alimony of $300 per month. As part of the property settlement agreement incorporated into the decree of dissolution, the debtor was ordered to pay Ms. Stichka a cash settlement of $55,000.00 payable in 12 annual installments at six percent interest. Of that amount, $5,000.00 was to be paid by March 1, 1995, and the remaining $50,000.00 was in the form of a loan to be paid in 11 annual installments, beginning in 1996. The debtor specifically acknowledged in the property settlement agreement that $25,000.00 of the $50,000.00 note would not be dischargeable in bankruptcy because the amount of spousal and child support awarded would have been different had Ms. Stichka "not been able to rely on at least $25,000.00 of the remaining $50,000.00 property settlement." Ex. B to the Adversary Complaint, at ¶ 2.

The debtor made the annual payments through 1999. He filed a Chapter 7 bankruptcy petition in February 2000. In his schedules, he listed Ms. Stichka as an unsecured creditor

holding a claim for $35,390.00 as a result of the property settlement. Ms. Stichka filed this adversary proceeding to challenge the dischargeability of that debt on the basis that it is in the nature of support pursuant to § 523(a)(5) or a property settlement pursuant to § 523(a)(15).

After considering the circumstances of this case, it is clear that the debt is not dischargeable.

First, $25,000.00 of the original debt is non-dischargeable because, as stipulated by the parties and ordered by the District Court of Nuckolls County, Nebraska, that portion of the debt is in the nature of support.

When deciding whether a debt arising under a property settlement agreement is in the nature of support, a court must determine the intent of the parties and the function the award was intended to serve at the time of the divorce. McLain, 241 B.R. at 419 (citing Moeder v. Moeder (In re Moeder), 220 B.R. 52, 55 (B.A.P. 8th Cir. 1998)).

By the terms of the Cormans' property settlement agreement, the remainder of the $50,000.00 owed to Ms. Stichka was intended to divide the property and equalize the marital estate. The pertinent factors set forth in Moeder, 220 B.R. at 55, such as the parties' relative financial conditions at the time of the divorce, their respective employment histories and prospects for financial support, the division of the marital property, the periodic nature of the payments, and whether the former spouse and children would experience difficulty in subsisting without the payments, have all been considered and it is determined, as a fact, that the remaining $25,000.00 portion of the original debt is not in the nature of support and is instead a property settlement. This nonetheless renders it non-dischargeable under § 523(a)(15) unless the debtor proves that he falls under either of the exceptions, that is, that he cannot pay the debt or that his benefit in having the debt discharged would outweigh the detriment to Ms. Stichka. Moeder, 220 B.R. at 55.

Here, the debtor testified as to his inability to pay Ms. Stichka. When evaluating the debtor's ability to pay, the court is to review the debtor's current circumstances. Shea v. Shea (In re Shea), 221 B.R. 491, 499 (Bankr. D. Minn. 1998). The court should consider all the circumstances, including "any sources of supplemental income which the debtor enjoys, the extent to which the debtor can control his income and the extent to which the debtor's expenses are self-imposed." Id.

The evidence is that Debtor's expenditures could be redirected to pay Ms. Stichka. For instance, he continues to pay other unsecured debt which was discharged in the bankruptcy. Specifically, the debtor testified that he works for his father on weekends and after his shift at his off-farm job. He charges his father $9 per hour for his labor, and uses his earnings to pay down an unsecured loan from his father which has a current balance of $17,000.00.

The debtor's current expenses include $850 per month for car and truck payments for three family vehicles, and $100 per month for investments as a personal retirement plan.

It appears that, rather than being unable to make payments at all, the debtor is choosing which creditors to pay, with little or nothing left for Ms. Stichka. There is no reason under the Bankruptcy Code for the debtor to be paying his father rather than Ms. Stichka. Debtor could devote the hours he spends working for his father to a part-time job, earning at least $5-$6 an hour of actual income which he could use to pay Ms. Stichka.

In addition, Debtor testified that his vehicles will be paid off in about one-and-one-half years. There is no evidence that any of the vehicles will need to be replaced anytime soon, so in approximately 18 months, the debtor should have an additional $850 per month to devote to paying Ms. Stichka.

Finally, although everyone would like to put money into savings or investments for retirement, it is not reasonable for the debtor to put away $100.00 per month for his future while leaving unpaid his obligation to his former spouse.

The evidence therefore does not support Debtor's contention that he is unable to pay Ms. Stichka from income or property not reasonably necessary to be expended for the maintenance or support of himself and his dependents.

Moreover, Debtor's assertion that discharge of the debt will benefit him more than it will harm Ms. Stichka is not supported by the facts of this particular case.

The debtor testified that he liquidated shares of stock in January 2000 for $34,000. He had purchased the stock in 1999 for $20,000, which represented proceeds from the sale of a farm. The debtor stated on the record that he used $6,000 of the stock proceeds to reduce the debt to his father, and he paid $14,500

to his fuel supplier and an implement dealer. He paid $8,700 in state and local taxes, and used the remainder for living expenses.

These payments were made approximately one month before this bankruptcy case was filed, but the debtor did not disclose them in his Statement of Financial Affairs ("SFA"). Had Debtor reported these payments in response to questions 3a and 3b on the SFA, the Chapter 7 Trustee could have evaluated the matter and filed a preference action to recover those funds. The money could then have been distributed pro rata among unsecured creditors. If the creditors who received preferential payments are included in the total amount of unsecured claims, it appears that Ms. Stichka holds approximately 34 percent of the unsecured debt. Unsecured creditors, including Ms. Stichka, would have shared in the distribution of the recovered funds. The other unsecured debts would then have been discharged, and Debtor's subsequent available income could go toward Ms. Stichka's non-dischargeable debt.

On these facts alone, Ms. Stichka has already suffered a detriment by not receiving the pro rata distribution of recovered funds, as a result of Debtor's non-compliance with the Bankruptcy Code.

The take-home pay of both parties is essentially the same. However, this fact is of little import under the circumstances of this case. While a significant disparity in incomes may weigh in favor of finding a detriment or a benefit to one of the parties, such is not the situation here. As a creditor, Ms. Stichka does not have an option in regard to the existence and amount of the debt. The debtor, on the other hand, has been aware of the existence of the debt for more than six years, yet has decided to take on other obligations and pay other debts. Those actions do not constitute a valid reason for discharging this debt.

The total debt owed to Plaintiff in this case is non-dischargeable because part of it is in the nature of support under 11 U.S.C. § 523(a)(5) and the remainder represents the division of marital property which the debtor is capable of paying under 11 U.S.C. § 523(a)(15). Separate judgment will be entered.

DATED: December 12, 2002

BY THE COURT:

/s/Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

Copies faxed by the Court to:

Copies mailed by the Court to:
United States Trustee
Joel Lonowski, Atty. for Plaintiff, 201 N. 8th St., Suite 300, P.O. Box 83439, Lincoln, NE 68508
Gene C. Foote, II, Atty. for Defendant, 422 N. Hastings Ave., Suite 103, Hastings, NE 68901

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

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	)	
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	)	
Defendant.	)	

JUDGMENT

For the reasons set forth in the separate Memorandum of today's date,

IT IS ORDERED the debt owed by debtor Scott Corman to Jean Stichka as a result of the dissolution of their marriage is not discharged.

DATED: December 12, 2002

BY THE COURT:

/s/Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

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