IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:)	
MANUEL JESSE MARTINEZ,)	CASE NO. BK99-80585
Debtor(s).)	
MANUEL JESSE MARTINEZ,)	A01-8088
Plaintiff,)	CH. 7
vs.)	
MARIE FRANZESE,)	
Defendant.)	

MEMORANDUM

Trial was held in Omaha, Nebraska, on September 9, 2002, on the adversary complaint. George Sutera appeared for the debtor/plaintiff, and Marion Pruss appeared for the 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).

The debt is not discharged.

The debt at issue arises from a bill consolidation loan the parties obtained from Norwest Bank during their marriage. As part of the divorce decree, the debtor was ordered to pay off the loan. He did not, so Ms. Franzese ultimately made two cash payments totaling $500, surrendered her vehicle and received $600 credit toward the loan, and made a $2,455 payment in settlement of litigation to collect the loan. She asserts that the debtor is obligated to reimburse her for her payments on that debt.

The debtor brought this action to obtain a judgment discharging the debt at issue because it is not one that should be excepted from discharge under 11 U.S.C. § 523(a)(15). He asserts that he does not have the ability to pay the debt, or, in the alternative, that discharging the debt would result in a

benefit to him that outweighs the detriment to Ms. Franzese.

"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)).

In the present case, the decree of dissolution is part of the record, and it indicates that the assets and liabilities of the parties, including the Norwest loan, were divided between the parties and that no alimony was awarded to either party. Accordingly, Ms. Franzese has met her burden of demonstrating that the debt at issue falls within the ambit of § 523(a)(15).

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 record includes the debtor's federal tax returns for the last three years, as well as three weekly pay stubs from his employer, and the debtor's affidavit regarding his current income and living expenses. He states that his monthly net income is $1,658, and his monthly expenses are $1,572. He has a 12th-grade education and works as a laborer. He owns a house in which he has no equity, and an older pick-up truck. He testified that he has no other assets. His tax documents reflect that he is single with no dependents. According to the debtor's monthly income and expense figures, he has $86 of disposable income each month. However, the debtor's 2001 tax return shows taxable

income of $23,520. If his monthly expenses are annualized, they total $18,864. His income therefore exceeds his expenses by approximately $4,600 annually, which would appear to leave him with sufficient disposable income to pay the debt owed to Ms. Franzese. Even if his disposable income actually is just $86 per month, it appears that he could make nominal monthly payments to Ms. Franzese on the debt.

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 evidence indicates that Ms. Franzese rents a house and leases a vehicle. She has no dependents. She currently earns a gross monthly income of $2,700 working at a bank, having earned a bachelor's degree in business administration after the divorce. She pays $150 per month on her student loans. Her uncontroverted testimony was that she used part of her $10,000 in student loans to make the $2,455 payment to settle the litigation with Norwest.

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" 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.

The same situation exists here. The decree of dissolution orders each party to hold the other harmless for the debts incurred in their own names. The decree then orders Mr. Martinez to pay the Norwest loan. See Ex. 9 at ¶ D (Fil. #31). The record is clear that Ms. Franzese turned over cash and collateral worth a total of $3,555 on the debt that Mr. Martinez was ordered to pay. She has demonstrated a significant detriment to herself caused by the debtor's failure to repay the loan, while the debtor has put forth little evidence of a significant benefit to himself if the debt were discharged or a material drop in his standard of living if the debt were not discharged.

The debtor has not met his burden of showing that he is unable to pay the debt. Moreover, the detriment suffered by the defendant outweighs the benefit to the debtor of discharging the debt. Accordingly, the debt to Ms. Franzese resulting from her payment of the Norwest loan is excepted from discharge under 11 U.S.C. § 523(a)(15)(A) and (B).

Separate judgment will be entered.

DATED: October 17, 2002

BY THE COURT:

/s/Timothy J. Mahoney
Chief Judge

Notice given by the Court to:

*George Sutera
Marion Pruss
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.