THIS OPINION IS NOT INTENDED FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

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IN RE	)	CASE NO. 98-54109-S
	)	
MICHELLE A. DAVIS,	)	CHAPTER 7
	)	
DEBTOR.	)	ADV. NO. 99-5048
	)	
TERRENCE M. DAVIS,	)	
	)	
PLAINTIFF,	)	
v.	)	**ORDER RE:**
	)	**DISCHARGEABILITY OF DEBT**
MICHELLE A. DAVIS	)	
	)	
DEFENDANT.	)	

This matter came on for trial on October 26, 1999 on the "Complaint to Determine Dischargeability" filed by Terrance M. Davis. Appearing at the trial were Estelle D. Flasck, counsel for Plaintiff; Terrence M. Davis, ("Plaintiff"); Anthony J. Costello, counsel for Defendant; and Michelle A. Davis, Defendant-debtor ("Defendant"). At issue was the dischargeability of an $8,000 debt owed by Defendant to Plaintiff under the terms of a Separation Agreement (the "Agreement") entered into by the parties on November 11, 1997.

This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I). This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334(b), 157(a) and (b)(1) and by the Standing Order of Reference entered in this District on July 16, 1984.

Findings of Fact:

In accordance with Bankruptcy Rule 7052, the Court makes the following findings of fact based on the stipulations of the parties and evidence presented at trial.

1. Plaintiff and Defendant were married on September 9, 1994. On November 11,

1997 the parties entered into the Agreement which provided for the division of the parties' personal and real property. On March 19, 1998, the parties received a Decree of Dissolution that incorporated the Agreement. The parties had no children and have no other dependents.

2. Prior to the dissolution of their marriage, the parties were co-owners of a marital residence located at 237 Cranz Place, Akron, Ohio 44310. The marital residence is subject to a first mortgage with Principal Residential Mortgage in the amount of $45,621.00 and a second mortgage in the amount of $33,000.00 with the Money Store. Pursuant to the Agreement, Defendant was to quitclaim her interest in the marital residence to Plaintiff at the time of the final dissolution of the parties marriage. However, through Defendant's alleged inadvertence, she failed to quitclaim her interest in the marital residence to Plaintiff. As a result, the parties remain co-owners of the marital residence. Additionally, under the terms of the Agreement, Defendant was to pay $8,000 (the "debt") to Plaintiff at $40.00 per week in recognition of Defendant's obligation to the Money Store. Defendant has not made any payments on the obligation.

3. Defendant filed for relief under chapter 7 on December 17, 1998. Defendant is employed as a hairstylist at Judy's Shear Artistry, a beauty salon owned by her mother. Defendant's schedules list net monthly income of $1,075 and expenses of $1,069. Schedules I & J. Extrapolating from Defendant's schedules, her 1999 gross income was approximately $16,248. Defendant's1998 gross income was $14,197 and her1997 gross income was $9,838. Defendant also testified that she does not turnover her tips to her employer. Instead, she accounts for her tips by adding 4% to her gross income. Defendant testified that she typically receives $2.00 tips on a $12 haircut and $2 to $5 tips on a $28 "color job." Defendant testified that she shares her residence with a male friend

who pays one half of the household expenses.

4. On March 31, 1999, Plaintiff filed a complaint to determine the dischargeability of the debt. Plaintiff's 1998 gross income was $25,876 and his 1997 income was $24,159. Plaintiff has expenses of $1,558 per month and net month income of $1,677. Plaintiff testified that his gross income for 1999 should be approximately $30,000. Additionally, Plaintiff testified that he does not have $500 a month of disposable income because of additional automobile expenses incurred from his new job. Plaintiff estimated that automobile expenses incurred from his new job increase his expenses by $100 a month.

Issue:

Whether debt incurred by Defendant under terms of a separation agreement is dischargeable under 11 U.S.C. § 523(a)(15).

Conclusions of Law:

Plaintiff seeks to have the debt owed by the Defendant under the terms of the Agreement declared nondischargeable under § 523(a)(15) of the Bankruptcy Code. Section 523(a)(15) excepts from discharge a debt which is:

> not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, a determination made in accordance with State or territorial law by a governmental unit unless--
>
> (A) the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor and, if the debtor is engaged in a business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business; or
>
> (B) discharging such debt would result in a benefit to the debtor that

> outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor.
> 11 U.S.C. § 523(a)(15).

Accordingly, to proceed under § 523(a)(15) a former spouse must establish that the debt being challenged is not a debt described in § 523(a)(5) and that the debt was incurred by the debtor in the course of a divorce decree or separation agreement. *In re Armstrong*, 205 B.R. 386, 391 (Bankr.W.D.Tenn.1996). Upon such showing, the burden shifts to the debtor who must show either inability to pay the debt under § 523(a)(15)(A), or that the discharge would result in benefit to the debtor that outweighs the detrimental consequences to the former spouse under § 523(a)(15)(B). *In re Wynn*, 205 B.R. 97 (Bankr.N.D.Ohio 1997); *See also In re Armstrong*, 205 B.R. at 391; *In re Patterson*, 199 B.R. 21 (Bankr.W.D.Ky.1996); *In re Carroll*, 187 B.R. 197, 200 (Bankr.S.D.Ohio 1995); *In re Phillips*, 187 B.R. 363 (Bankr.M.D.Fla.1995); *In re Florio*, 187 B.R. 654 (Bankr.W.D.Mo.1995); *In re Hill*, 184 B.R. 750 (Bankr.N.D.Ill.1995); *In re Silvers*, 187 B.R. 648 (Bankr.W.D.Mo.1995); *In re Becker*, 185 B.R. 567 (Bankr.W.D.Mo.1995); *In re Comisky*, 183 B.R. 883 (Bankr.N.D.Cal.1995). Articles 2, 4 and 10 of the Agreement make it clear that the debt is not a debt described in § 523(a)(5). Further, because the debt was incurred as the result of a separation agreement, Plaintiff has satisfied his burden of demonstrating that the debt was incurred in the course of a divorce or separation. Therefore, the burden shifts to Defendant to prove one of the exceptions in § 523(a)(15)(A) or (B).

A. 11 U.S.C. §523(a)(15)(A)

Under § 523(a)(15)(A), a debt incurred through divorce or separation proceedings is nondischargeable unless "the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the

maintenance or support of the debtor or a dependent of the debtor . . . ." Thus, a debt will be dischargeable under § 523(a)(15)(A) only if the debtor cannot afford ordinary living expenses in addition to having to repay the debt. *Dunn v. Dunn (In re Dunn),* 225 B.R. 393, 399-400 (Bankr. S.D. Ohio 1998); *See also Woodworth v. Woodworth (In re Woodworth)* 187 B.R. 174, 177 (Bankr. N.D. Ohio 1995); *In re Carroll*, 187 B.R. at 200.

The Defendant has a gross monthly income of $1,354.00 and a net monthly income of $1,075.00. Defendant testified that she receives tips ranging from 16 to 18% on the amounts charged for haircuts and "color jobs." However, by Defendant's own admission, the gross income that she reported on Schedule I only reflects a small portion of the tips she receives. Defendant testified that she accounts for her tips by adding 4% to her gross income. A review of Defendant's 1998 gross income aptly demonstrates just how much her income is understated by using this method. Defendant's 1998 gross income was $14,197 including the 4% added for tips. A breakdown of this number reveals that Defendant declared approximately $546 of tips ($14,197 - [$14,197 / 1.04] = $546). However, Defendant's actual tips were probably closer to $2,500 for the year. Based on Defendant's testimony, the Court estimates that Defendant would generally earn at least $50 a week in tips. Therefore, assuming a 50 week work year, her tips would be understated by approximately $2,000 ([$50 x 50 wks.] - $546 tips included in gross income = $1,954) or $163 a month ($1,954 / 12 = $163).

Furthermore, Defendant's schedules I and J do not reflect the income of her male friend that lives with her or that one half of her expenses are paid by him. Debtor testified that her male friend was living with her at the time the petition was filed. When a living arrangement is not for purely economic means, the income earned and expenses paid by the roommate must be listed as other income in the debtor's schedules. *See In re*

Crosswhite, 148 F.3d 879, 889 n. 17 (7th Cir. 1998) (whether economic interdependence between a debtor and live-in companion improves the debtor's economic condition and ability to pay under § 523(a)(15)(A) is left to the sound discretion of the trial judge who should consider such factors as the period of time the individuals have lived together as a single economic unit and the degree to which they have commingled their assets); *See also In re Halper*, 213 B.R. 279, 284 (Bankr.D.N.J.1997); *In re Cleveland*, 198 B.R. 394, 399 (Bankr.N.D.Ga.1996) (considering income of a new spouse or "spousal equivalent" when applying § 523(a)(15)(A) is appropriate). By removing one half of the listed expenses for food, rent and utilities alone, Defendant's expenses listed on Schedule J decrease by approximately $300.00 a month. By adding the Defendant's monthly tips to the amount of expenses saved by living with her male friend, Defendant has approximately $463 more income each month than is reported on Schedule I. After making the $40 a week payments on the debt, Defendant would still have $300 of disposable income remaining each month. Defendant has the ability to pay ordinary living expenses in addition to repaying the subject debt.

B. 11 U.S.C. §523(a)(15)(B)

Even if a debtor has the ability to pay a debt for purposes of 11 U.S.C. § 523(a)(15)(A), the Debtor may still obtain a discharge of the obligation if the Debtor can prove, by a preponderance of the evidence, that "discharging such debt would result in a benefit to the Debtor that outweighs the detrimental consequences to a spouse, former spouse or child of the Debtor." *In re Smither*, 194 B.R. 102, 111 (Bankr.W.D.Ky.1996). In *In re Patterson*, the Sixth Circuit voiced approval of an eleven-part test meant to examine the "totality of the circumstances" in these type of cases which was adopted in *Smither*. *See In re Patterson*, No. 96-6374 1997 WL 745501, at 3 (6th Cir. 1997). The

Smither court reviewed the financial status of both the debtor and the former spouse in order to ascertain the actual benefit the debtor would derive from a possible discharge of the debt against any hardship the former spouse and/or children would suffer as the result of the discharge.

The *Smither* court relied on the following 11 non-exclusive factors: (1) the amount of debt and payment terms; (2) all parties' and spouses' current incomes; (3) all parties' and spouses' current expenses; (4) all parties' and spouses' current assets; (5) all parties' and spouses' current liabilities; (6) parties' and spouses' health, job training, education, age, and job skills; (7) dependents and their ages and special needs; (8) changes in financial conditions since divorce; (9) amount of debt to be discharged; (10) if objecting creditor is eligible for relief under the Code; and (11) whether parties have acted in good faith in filing bankruptcy and in litigation of §523(a)(15). *In re Smither*, 194 B.R. at 111. If, after applying the eleven *Smither* factors, the debtor's standard of living would be greater than or approximately equal to the ex- spouse's/creditor's standard of living if the debt is not discharged, then the debt should be nondischargeable under § 523(a)(15)(B). *Dunn*, 25 B.R. at 402. However, if the debtor's standard of living would fall materially below the creditor's standard of living if the debt is not discharged, then the debt should be discharged. Id. S*ee also In re Patterson*, 1997 WL 745501, at 3 (quoting *In re Smither*, 194 B.R. 102, 111 (Bankr.W.D.Ky.1996) (quoting *In re Owens*, 191 B.R. 669, 674-75 (Bankr.E.D.Ky.1996))).

Application of some of the *Smither* factors to the present case shows that Defendant has not met her burden. A review of Defendant's financial status since the dissolution shows that her income has increased approximately $5,000.00, not including tips, and that her 1999 income is projected to increase by more than $7,000. Defendant's lack of credibility concerning her wages is another factor to be considered when comparing debtor and creditor's standard of living. Defendant's schedules fail to reflect the vast majority of the tips she receives or the amount of expenses saved by living with her male friend. Further, as noted above, the Defendant will have approximately $300 a month of disposable income after making the payments on the debt. These changes in

Defendant's financial conditions show that she has prospective earning potential as well. Based on the evidence presented, the Court finds that the standard of living between the parties is approximately equal. As such, the $40 a week payment on the debt is not particularly onerous for Defendant to bear. Defendant has failed to prove that discharging the debt would result in a benefit to her that outweighs the detrimental consequences to the Plaintiff.

Conclusion

Because Defendant has failed to meet her burden of proving that the debt is dischargeable under either § 523(a)(15)(A) or (B), the Court holds that the debt is nondischargeable.

IT IS SO ORDERED.

MARILYN SHEA-STONUM

Bankruptcy Judge

DATED: 2/2/00