IT IS SO ORDERED.

Dated: 02:17 PM July 14 2006

MARILYN SHEA-STONUM
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:	)	CASE NO. 05-54310
	)	
MELISSA ANN HARTWELL,	)	CHAPTER 7
	)	
DEBTOR(S)	)	
	)	**ADVERSARY NO. 05-5145**
	)	
RODNEY LEE HARTWELL,	)	JUDGE MARILYN SHEA-STONUM
PLAINTIFF(S),	)	
	)	
vs.	)	
	)	
MELISSA ANN HARTWELL,	)	**MEMORANDUM AND OPINION**
DEFENDANT(S).	)	

This matter is before the Court on the Plaintiff Rodney Lee Hartwell's complaint seeking a declaration that the Judgement Entry issued by the Court of Common Pleas, Domestic Relations Division in Summit County, Ohio against Melissa Ann Hartwell is a nondischargeable debt under 11 U.S.C. § 523(a)(15) in her chapter 7 case now before this Court. Defendant Melissa Ann Hartwell (the "Debtor") timely filed an answer to the complaint. The Court held a trial of the matter on May 9, 2006, at which Plaintiff Rodney Hartwell (the "Plaintiff"), Plaintiff's counsel, Debtor, and Debtor's counsel were present. At the conclusion of the trial, the matter was taken

under advisement.

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

FINDINGS OF FACT

The parties have stipulated to the Findings of Fact and Conclusions of Law contained in the Judgement Entry of February 1, 2006, issued by the Court of Common Pleas, Domestic Relations Division in Summit County, Ohio by Judge Carol Dezso (the "Judgment Entry") (docket #10). The Judgment Entry is attached as Appendix 1 to this Memorandum and Opinion and is hereby incorporated by reference as if fully rewritten. In addition to those stipulations, the Court makes the additional findings of fact based on the testimony adduced at trial and the pleadings filed in this case:

1. Plaintiff and Debtor were divorced in February 2002 and at the time of their divorce, there was no marital debt. The terms of their Decree of Dissolution (the "Decree") required that Debtor pay Plaintiff the lesser of $15,000 or one-half of the proceeds from the sale of their home at 528 New Milford, Atwater, Ohio (the "Marital Residence").
2. Debtor filed her Chapter 7 petition on July 14, 2005. Debtor listed Plaintiff on her Schedule F - Creditors Holding Unsecured Nonpriority Claims as having a claim for interest in real estate in the amount of $15,000. (See docket #1 - Main Case).
3. At the time of the divorce, the Martial Residence was valued at $175,000 and the parties owed $132,800 on their mortgage.
4. Debtor refinanced the Marital Residence three times prior to filing bankruptcy. In January 2002, Debtor refinanced the Marital Residence for $140,000 to effectuate the terms of the parties' divorce decree and place the mortgage and title to the Marital Residence in

Debtor's name (the "First Refinance"). Sometime thereafter, Debtor refinanced the Marital Residence for $160,000 to assist her with increasing financial obligations which stemmed from an unpaid medical leave during a pregnancy (the "Second Refinance"). Debtor again refinanced the Marital Residence in August 2003 in the amount of $180,000, which she testified was executed in an attempt to obtain a better interest rate and a lower monthly payment (the "Third Refinance"). Debtor also claims to have consolidated her then-existing credit card debt into her mortgage when entering into the Third Refinance, but she did not produce any evidence supporting that assertion.

5. The Judgment Entry operates to enforce the terms of the parties' Decree and requires Debtor to pay Plaintiff "the lesser of $15,000, or one-half of the proceeds, by June 26, 2008 or sooner if [Debtor] remarried or sold the [Marital Residence]." (See Judgment Entry ¶ 3) (the "Debt"). Debtor has not paid Plaintiff any money pursuant to the terms of the Decree or the Judgment Entry.

6. Debtor's Schedule I - Current Income of Individual Debtors reports her total gross monthly income as $3,077, with a total monthly income after deductions of $2,246. Debtor's Schedule J - Current Expenditures of Individual Debtor reports her total monthly expenses as $2,539. Debtor received a two (2) percent pay raise since the filing of this bankruptcy.

7. Debtor is employed by Allstate Insurance and has worked there for 15 years. Debtor has approximately $32,000 invested in a 401k offered through her employer and now resides in a home valued at $110,000.

8. Debtor is divorced and has a son, age 16, from her marriage to Plaintiff, and a daughter, age 2, from another relationship. Debtor receives $500 per month in child support from Plaintiff for their son; she does not receive, nor has she sought, any child support for her daughter.

9. Debtor currently pays $425 a month in installment payments on a 2005 Ford Escape which was purchased to replace a 2003 Dakota Truck that could not safely accommodate her daughter's car seat.

10. Since the time of filing, the Debtor has had an increase in monthly daycare expenses from the $60 listed on her schedules to $134 that she is now paying.

11. Debtor was uncertain what constituted the $739 payroll deduction reported on Schedule I.

12. Debtor was off work and went unpaid and without disability payments for three (3) months during the pregnancy of her now two year old daughter.

13. After the sale of the Marital Residence but before Debtor filed bankruptcy, her newly purchased home required the following home improvements: complete window replacement due to previously unidentified black mold; replacement of her refrigerator due to a fire; replacement of broken furnace and central air conditioner; and repairs to a malfunctioning stove and leaking roof.

14. Plaintiff is employed by Colonial Machine Company and earns approximately $56,000 per year, including bonus. Plaintiff pays approximately $500 per month in child support to the Debtor for their 16 year old son and provides medical insurance for him.

15. Plaintiff currently resides in a home valued at $87,000 and has an $82,000 mortgage on the property. Plaintiff owns a boat valued at $1,000 - $1,500 and has approximately $5,000 - 6,000 invested in a 401k. Plaintiff also co-owns 88 acres of uninhabited hunting land in southern Ohio.

16. Neither party asserts that the Judgement Entry at issue is not excepted from discharge under § 523(a)(5); therefore, the issue before the Court relates solely to a determination of nondischargeability under 11 U.S.C. § 523(a)(15).

CONCLUSIONS OF LAW

In a bankruptcy proceeding, the bankruptcy court is the finder of fact. *In re Caldwell*, 851

F.2d 852, 857 (6th Cir. 1988); *In re Isaacman*, 26 F.3d 629 (6th Cir. 1994). Within the purview of that responsibility, the court is charged with judging the credibility of witnesses testifying during the bankruptcy proceeding. *Caldwell*, 851 B.R. at 857; *Matter of Seeskin*, 91 B.R. 39 (S.D. Ohio 1988).

Because Debtor's Chapter 7 petition was filed prior to October 15, 2005, the effective date for most provisions of the Bankruptcy Absue Prevention and Consumer Protection Act of 2005 (the "BAPCPA"), Plaintiff's Complaint for non-dischargeability is governed by the provisions of Section 523 of the United States Bankruptcy Code as they existed prior to BAPCPA's passage (the "Pre-BAPCPA Code").[1] Section 523(a)(15) excepts from discharge a marital obligation that is:

> not the kind in paragraph (5) that is incurred by the debtor in the course of a divorce or separation . . . 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 . . . ; or
>
> (B) discharging the debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor.

The objecting creditor bears the burden to prove that the debt is the type that is excepted from discharge under § 523(a)(15); once the creditor meets this burden, the burden of proof then shifts to the debtor to prove one of the exceptions in § 523(a)(15)(A) or (B) by a preponderance of the evidence. *In re Molino*, 225 B.R. 904, 907 (6th Cir. B.A.P. 1998). Because of the disjunctive nature of § 523(a)(15)(A) and (B), a debtor need only prove one of the provision's two exceptions to have the debt discharged. *Id.*

11 U.S.C. 523 (a)(15)(A) – Ability to Pay

When considering whether a debtor has the ability to pay, the Court must consider:

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[1] Unless otherwise indicated, all subsequent citations in this Opinion shall be to the Pre-BAPCPA Code.

> (1) the amount of debt sought to be held nondischargeable; (2) the debtor's current income and the value and nature of any property retained after the bankruptcy filing; (3) the amount of reasonable and necessary expenses the debtor must incur for his support and the support of his dependents; and (4) a comparison of the debtor's property and current income with his reasonable and necessary expenses.

In re Smither, 194 B.R. 102, 108 (Bankr. W.D.Ky. 1996). Additionally, because of the identical language employed in the sections, many courts have invoked the "disposable income test" employed under § 1325(b)(2) to determine a debtor's ability to pay under § 523(a)(15)(A). Here, Debtor's Schedules I and J reflect a net deficiency of $293 per month, which arguably implies that she does not have any disposable income with which to repay Plaintiff the Debt that is due and owing.

While the Court does not specifically find any of Debtor's scheduled expenses unreasonable or unnecessary for her or her dependents' support, the unspecified $130 amount reported under "Other" expenses when accounting for utilities and the recently purchased 2005 Ford Escape with a monthly payment of $425, suggest the Debtor may have areas where she could, in all likelihood, tighten her belt. Additionally, the Court is concerned by the Debtor's inability to specify the nature of the rather significant monthly payroll deduction of $759 reported for "Insurance" when Debtor is responsible for insuring only herself and her daughter and questions whether this amount may include an ongoing contribution to Debtor's 401k account given her uncertain testimony on that issue. Those factors alone, however, do not persuade the Court in this matter. What the Court does find most persuasive as to Debtor's ability to pay in this case is her fervid and unequivocal testimony that she intentionally has not sought any form of support for her daughter from the child's father, a factor that could have a demonstrable effect on increasing her monthly income and correspondingly lowering her monthly expenses, perhaps leaving her with some amount of disposable income from which to repay the Debt owed to Plaintiff. Debtor cannot fail to mitigate her monthly expenses and deliberately suppress income available to her by not seeking an entitlement such as child

support and then ask this Court to find that she does not have the ability to repay Plaintiff the Debt, which arose from a jointly executed Separation Agreement and whose existence pre-dated the birth of her daughter. *Compare In re Stoodt*, 302 B.R. 549, 556 (Bankr. N.D.Ohio 2003) (under 523(a)(15)(A) income may be imputed to a debtor who has become voluntarily underemployed).

Furthermore, it is beyond dispute that, within the approximately 18 month time frame from the date of the First Refinance to the date of the Third Refinance, Debtor withdrew the entire $42,200 in equity in the Marital Residence that was reported at the time of the divorce and chose not to repay any portion of the debt owed to Plaintiff. The Court recognizes that Debtor was on unpaid leave for a three month period during that time frame, but does not find that her financial hardship during that unpaid interval can wholly excuse the disproportionate amount of equity in the Marital Residence that she used to her benefit, while ignoring her obligation to the Plaintiff. Indeed the Court finds the Debtor's explanation of the use of the proceeds from the Third Refinance to be utterly vague. Section 523 (a)(15)(A) "does not permit a debtor to deplete their assets to the detriment of his or her marital obligations." *Id.* at 557 (finding the ability to pay under § 523(a)(15)(A) where the debtor "completely discounted his marital obligation despite having resources available to make payments on the obligation" when he liquidated his IRA account but chose to pay debts other than the marital obligation). Based on the uncertain nature of Debtor's deductions, her unwillingness to offset her expenses by seeking additional support for her daughter, and her overt withdrawal of all equity in the Marital Residence without any attempt to repay the Debt, the Court cannot find the Debt dischargeable pursuant to § 523 (a)(15)(A).

11 U.S.C. 523 (a)(15)(B) – Balancing Test

Next, the Court must determine if the benefit to the Debtor in discharging the obligation outweighs the detrimental consequences that the discharge will have on the Debtor's former spouse. Courts generally consider the following non-exclusive list of factors when making a determination under § 523(a)(15)(B):

1. the amount of debt involved, including all payment terms;
2. the current income of the debtor, objecting creditor and their respective spouses;
3. the current expenses of the debtor, objecting creditor and their respective spouses;
4. the current assets, including exempt assets of the debtor, objecting creditor and their respective spouses;
5. the current liabilities, excluding those discharged by the debtor's bankruptcy, of the debtor, objecting creditor and their respective spouses;
6. the health, job skills, training, age and education of the debtor, objecting creditor and their respective spouses;
7. the dependents of the debtor, objecting creditor and their respective spouses, their ages and any special needs which they may have;
8. any changes in the financial conditions of the debtor and the objecting creditor which may have occurred since the entry of the divorce decree;
9. the amount of debt which has been or will be discharged in the debtor's bankruptcy;
10. whether the objecting creditor is eligible for relief under the Bankruptcy Code; and
11. whether the parties have acted in good faith in the filing of the bankruptcy and the litigation of the 11 U.S.C. § 523(a)(15) issues.

Molino, 225 B.R. at 909. Courts review the financial status of the debtor and creditor and compare their respective standards of living, with the most important consideration given to the parties' current income, expenses, and assets. *Id.*; *Stoodt*, 302 B.R. at 556. If the debtor's standard of living will be equal to or greater than the creditor, than the obligation is nondischargeable; if, however, debtor's standard will fall materially below the creditor's standard of living should the obligation not be discharged, then the obligation should be dischargeable under § 523(a)(15)(B). *Molino*, 225 B.R. at 909.

In this case, the evidence reveals that the financial circumstances of the parties is quite

comparable. Plaintiff's annual income is $56,000, which is then reduced by $6,000 per year given the amount he pays to Debtor in the form of child support; Debtor's annual income is approximately $36,000, but increases to $42,000 when including Plaintiff's child support payments. Plaintiff purchased a home valued at $87,000, has $5,000-$6,000 saved in his 401k, and co-owns 88 acres of uninhabited land in southern Ohio; Debtor purchased a home valued at $110,000 and has $32,000 saved in her 401k. Both parties are employed in what appear to be steady, reliable jobs and the record evidence does not reveal that either party has engaged in luxury or frivolous spending in recent years. Overall, the parties' standards of living are very similar, with the primary distinguishing feature being that Plaintiff is not the residential parent of his son, but pays monthly child support and medical insurance for him, while Debtor is the residential parent of two dependents, receiving child support for one, but voluntarily foregoing support for the other.

Section 523(a)(15)(B) requires a debtor show more than relatively equivalent standards of living to sustain a valid defense – a debtor must direct the Court to evidence that would "tip the balance in the debtor's favor." *Stoodt*, 302 B.R. at 558. The Debtor in this case points to no such evidence that is not the product of her own making. As under Section 523(a)(15)(A), the Debtor's decision to voluntarily forego child support cuts against her argument for discharge. *Smither*, 194 B.R. at 111 (voluntary reduction should be considered in balancing test). Debtor's nondescript testimony as to the use of the $20,000 in additional funds she removed from the equity in the Marital Residence at the time of the Third Refinance further tips the balance in Plaintiff's favor; a portion of that withdrawal alone could have satisfied the Debt in full, or at a minimum, compensated Plaintiff in part to alleviate a portion of the outstanding Debt. Finally, while the Court would not consider replacing a vehicle for child safety reasons as conduct constituting "luxury spending," the Court does note that Debtor could have purchased a more modest vehicle with a much lower monthly payment that was sufficiently safe for her daughter

instead of purchasing a 2005 Ford Escape for $425 per month. For the foregoing reasons, the Court finds that the Debtor has not met her burden of showing that the benefit she will incur by discharging the Debt outweighs the detrimental consequences that the discharge will have on the Plaintiff as required by § 523 (a)(15)(B). Therefore, the Debt is nondischargeable in this bankruptcy.

CONCLUSION

Based on the foregoing, the Court finds the Debt owed to Plaintiff from the Judgment Entry is nondischargeable in this bankruptcy pursuant to § 523 (a)(15). The Court will enter a separate Entry of Judgement consistent with this Memorandum and Opinion.

# # #

cc: Cynthia Mason/Diane Guzzo (via electronic mail)
Jerome Reidy (via regular mail)

Appendix #1

IN THE COURT OF COMMON PLEAS
DOMESTIC RELATIONS DIVISION
SUMMIT COUNTY, OHIO

Melissa Hartwell
528 New Milford
Atwater, Ohio 44201

Plaintiff

vs.

Rodney Hartwell
175 East Market Street
Akron, OH 44309

Defendant

CASE NO. 2002-01-0206

MOTION NO. 2004-1686

JUDGE CAROL J. DEZSO

JUDGMENT ENTRY
Motion for Relief from Judgment
Motion to Enforce Judgment

Findings of Fact

1) On January 18, 2005, this matter came before the Court on Defendant's motion for relief from judgment and motion to enforce judgment. Plaintiff appeared represented by Attorney Jerome Reidy. Defendant appeared represented by Attorney Cynthia Mason.

2) In July of 2005, Plaintiff filed bankruptcy. As a result, Defendant's motions were automatically stayed. However, the United States Bankruptcy has since lifted the stay for the purpose of this Court to rule on Defendant's motion for relief and motion to enforce judgment.

3) The issue before the Court involves the real estate located at 528 New Milford, Atwater, Ohio (dwelling). Pursuant to the parties' January 14, 2002 Separation Agreement, adopted by this Court's February 21, 2002 Decree of Dissolution (Decree), Plaintiff was to retain the dwelling on the condition that Plaintiff pay Husband the lesser of $15,000, or one-half of the proceeds, by June 26, 2008 or sooner if Plaintiff remarried or sold the dwelling.

4) The parties' Decree also provides that Plaintiff will hold Defendant harmless from "all obligations due or to *become* due pertaining to [the dwelling]."

5) At the time of dissolution, the dwelling had a fair market value of $175,000. The parties owed $132,800 on their mortgage. Thus, the dwelling had $42,200 of equity.

6) Plaintiff refinanced the dwelling on or about January 2002. After closing costs and fees were assessed, the mortgage totaled $140,000. Thus, the dwelling had $35,000 of equity.

7) On January 14, 2004, Plaintiff sold the dwelling for $191,000. However, Plaintiff allowed bank fees and taxes to accrue. At the time of sale, Plaintiff owed $178,675.24 on her mortgage. This is $38,675.24 more than she owed two years prior. After Plaintiff paid $12,107.47 in settlement fees and commissions, Plaintiff had a deficiency of $1,122.30.

8) Defendant is requesting an enforcement on the February 21, 2002 Decree and judgment in the amount of $15,000. In the alternative, Defendant requests that this Court set aside the Decree.

Conclusions of Law

1) Under Civ.R. 60(B), a court may relieve a party from judgment if the moving party satisfies a three-prong test: 1) the party has a meritorious defense or claim; 2) the party is entitled to one of the grounds under the Civ.R. 60(B); and 3) the motion is made within a reasonable time. GTE Automatic Electric, Inc. v. ARC Industries, Inc. (1976) 47 Ohio St.2d 146, paragraph 2 of the syllabus. Defendant has not satisfied any of the prongs of this test.

2) Interpretation of an incorporated separation agreement is based upon principals of contract law. Bryson v. Maxwell (Dec. 18, 2002), Summit App. No. 21082, unreported at 2, *citing*, Beck v. Dobrinski (April 26, 2000), Lorain App. No. 99CA007309, unreported at 4. If a contract is unambiguous on its face, courts will not construe the contract's meaning contrary to its plain terms. Aultman Hosp. Assn. v. Community Mut. Ins. Co. (1989), 46 Ohio St.3d 51, syllabus.

3) The parties' separation agreement, adopted by this Court's February 21, 2002 Decree of Dissolution, plainly states that Plaintiff shall hold Defendant "harmless from all obligations due or to become due pertaining to said

property." Plaintiff created $43,322.30 worth of new obligations by refinancing and by failure to regularly pay the mortgage and taxes. Defendant shall be made whole as if the $43,322.30 was never incurred by Plaintiff.

Order

1) Defendant's motion for relief from judgment is denied.
2) Defendant's motion to enforce judgment is granted. Judgment against Plaintiff and for Defendant in the amount of $15,000.
3) Costs to be divided equally after application of deposit.

THIS IS A FINAL APPEALABLE ORDER

JUDGE CAROL J. DEZSO

cc: Jerome Reidy, Attorney for Plaintiff
Cynthia Mason, Attorney for Defendant