THIS OPINION IS NOT INTENDED
FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION



| | | |
|---|---|---|
| In re: | ) | Case No.00-19488 |
| | ) | |
| SCOTT E. WATSON, | ) | Chapter 7 |
| | ) | |
| Debtor. | ) | Judge Pat E. Morgenstern-Clarren |
| | ) | |
| KATHLEEN FLAHERTY, | ) | Adversary Proceeding No. 01-1375 |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | **MEMORANDUM OF OPINION** |
| | ) | |
| SCOTT E. WATSON, et al., | ) | |
| | ) | |
| Defendants. | ) | |

The Plaintiff, Kathleen Flaherty, filed this adversary proceeding seeking to determine that two debts owed by her ex-husband, the Debtor-Defendant Scott Watson, are nondischargeable.[1] Through an amended complaint, Plaintiff bases her claim on 11 U.S.C. §§ 523(a)(5) and 523(a)(15).[2]

## JURISDICTION

Jurisdiction exists under 28 U.S.C. § 1334 and General Order No. 84 entered on July 16, 1984 by the United States District Court for the Northern District of Ohio. This is a core

---

[1] The complaint also named as a defendant Firstar Bank fka Star Bank. The complaint did not, however, ask for any relief as against Firstar, Firstar did not enter an appearance, and Ms. Flaherty did not make a claim against Firstar at trial. As Ms. Flaherty did not pursue this defendant, judgment will be entered in favor of Firstar based on lack of prosecution.

[2] Ms. Flaherty moved to amend the complaint to clarify that she sought relief under both cited sections. The Court granted the unopposed motion at trial.

proceeding under 28 U.S.C. § 157(b)(2)(I).

FACTS[3]

Kathleen Flaherty and Scott Watson married in 1991 and divorced in 1999. They do not have children from their marriage. Ms. Flaherty handled the finances during their marriage as both agree that Mr. Watson is financially inept. He also gambled and drank heavily during the marriage. At the time of their divorce, Ms. Flaherty earned $54,182.00 annually and Mr. Watson earned $40,000.00 annually. Shortly before their divorce, Ms. Flaherty took out a $15,000.00 home equity loan with Bank One using their marital residence, a condominium, as collateral because she wanted to consolidate and pay off several bills, including some credit card debt that was in Mr. Watson's name.

Ms. Flaherty was represented by counsel in the domestic relations case; Mr. Watson was not.[4] Their Separation Agreement, which was incorporated into their Decree of Dissolution, contains these relevant provisions:

> (D) The parties agree that the Wife has secured a home equity loan in the principal amount of $15,000.00 from Bank One which is for eighty-four (84) monthly payments of $247.35 beginning February 15, 1999. The parties further agree that the entire proceeds from the home equity loan were used to discharge obligations of Husband and Wife and as a result thereof, Husband shall remit to Wife on the first day of each month the sum of $123.67, which shall represent one-half (½) of the monthly payment for the home equity loan; that said payments from Husband to Wife shall be in

---

[3] The trial was held on May 3, 2002 and both parties testified. These findings of fact reflect the Court's determinations of credibility. In weighing the evidence and in determining the credibility of the witnesses, the Court considered the witnesses' demeanor, the substance of the testimony, and the context in which the statements were made, recognizing that a transcript does not convey tone, body language, or nuance of expression. *See* FED. R. BANKR. P. 7052 (incorporating FED. R. CIV. P. 52).

[4] Although Mr. Watson testified that he did not really read or understand the Separation Agreement, the Court finds that he nevertheless understood and agreed to its terms.

the discharge of marital obligations and shall continue until said loan is paid in full.

4. SPOUSAL SUPPORT

The parties agree that there shall be no spousal support paid to either party to this Agreement by the other party. Neither party shall make any claim or demand against the other party for support or maintenance, past, present or future, and each waives any and all right to spousal support payments of any kind from the other. The property settlement in accordance with this Agreement shall be deemed to be reasonable and in lieu of spousal support.

The Court will not retain jurisdiction to modify spousal support.

5. MOTOR VEHICLES

Wife shall retain as her own the 1998 Buick Regal automobile which is a leased vehicle and shall be and remain the property of the Wife, free and clear of any claim whatsoever on the part of the Husband. The Wife agrees to assume, indemnify and hold the Husband absolutely harmless from any claim, cost, expense or liability, including attorney's fees, in any way related to that certain obligation owing for the lease of said motor vehicle.

Husband shall retain as his own the 1996 Nissan automobile which is a leased vehicle and shall be and remain the property of the Husband, free and clear of any claim whatsoever on the part of the Wife. The Husband agrees to assume, indemnify and hold the Wife absolutely harmless from any claim, cost, expense or liability, including attorney's fees, in any way related to that certain obligation owing for the lease of said motor vehicle. It is further agreed between the parties that Husband shall pay the fee for the assumption documents and credit application submitted in respect to this leased vehicle in the approximate amount of $300.00.

Mr. Watson testified that he never intended to make payments to Ms. Flaherty on the Bank One loan because he and Ms. Flaherty agreed privately that she would make the payments. He did not, in fact, make any payments to her on this obligation and she did not demand them. With respect to the Nissan obligation, Mr. Watson tried to transfer the car lease from Ms. Flaherty's name into his name as contemplated by the Separation Agreement, but the lessor

would not do so because of his poor credit. The parties then agreed informally that Mr. Watson would give the money to Ms. Flaherty so that she could continue to make the payments. Mr. Watson made these payments to Ms. Flaherty (albeit at times not in full or on time) for about 17-18 months, at which point he dropped the car off at Ms. Flaherty's home without notice because he could no longer afford the payments. Since then, the car has been sitting unused and Ms. Flaherty has made timely lease payments. The lease expires in July 2002. The car is damaged and, although it is insured, Ms. Flaherty believes she will be liable for some repairs. Also, she will be charged for any excess mileage when the car is turned in at the end of the lease.

Ms. Flaherty made the home equity payments to Bank One until she sold the condominium in November 2000. At that time, she paid Bank One in full and received about $1,000.00 from the sale. She sold the condominium because she moved in with her fiancé and his two children and they did not need two homes. Ms. Flaherty is now remarried. She is employed as a sales representative and expects to earn about $40,000.00 in commissions this year. Her husband is self-employed and earns $26,000.00 annually. The family has $5,289.00 in monthly expenses. Ms. Flaherty meets her expenses as they become due, including the car payments.

Since the divorce, Mr. Watson has been drinking heavily (he describes himself as a drinking alcoholic as compared to a recovering alcoholic) and has incurred additional credit card debt. He recently was fired from the job he held for 26 years as a beer salesman and has been denied unemployment compensation, which decision is on appeal. He has been treated for depression for several years. He has health problems, including a cough that is triggered by exertion and exacerbated by his smoking. Mr. Watson is 54 years old, lives with his fiancé, has no specific job skills, and no

income. He has a pension which will pay him partial benefits at 62 and full benefits at 67; the anticipated pension amounts were not quantified. He has no other assets except his clothing.

Mr. Watson filed his Chapter 7 case on December 14, 2000. Although he did not initially schedule any debts to Ms. Flaherty, he did list them in an amended Schedule F on July 25, 2001. His schedule of current income (filed before he lost his job) lists net monthly income of $1,763.33. His fiancé's income is not shown, but he testified that she earns less than $30,000.00 a year. Mr. Watson's schedule of current expenses (again, filed before he became unemployed) lists monthly expenses totaling $1,998.00. His expenses have changed since the schedules were completed. For example, he lists a $393.00 monthly car installment payment which relates to the Nissan; currently, however, he drives a car purchased by his fiancé. Mr. Watson gives his paycheck to his fiancé and she pays his bills, including the car expenses of about $250.00 to $275.00 a month. Mr. Watson has lived with his fiancé since August 2001 and pays rent to her. He scheduled a $500.00 monthly rent payment but did not testify regarding his current rent obligation. He paid last month's expenses (after he was fired) by using the check he received for accumulated vacation pay and commissions.

## POSITIONS OF THE PARTIES

Ms. Flaherty argues that these two debts are "in the nature of support" and thus nondischargeable under Bankruptcy Code § 523(a)(5) because the parties structured their Separation Agreement this way in lieu of alimony. She contends alternatively that the debts are nondischargeable under § 523(a)(15) because Mr. Watson is able to pay these debts and it would be more of a hardship for her to pay the debts than for Mr. Watson to remain liable for them. Mr. Watson argues for the opposite conclusion based on several factors, including the language of the Agreement and the parties' financial positions.

## DISCUSSION

### A. 11 U.S.C. § 523(a)(5)

Section 523(a)(5) provides that:

> (a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt –
>
> * * * * *
>
> (5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that –
>
> (B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support[.]

11 U.S.C. § 523(a)(5). "[I]n order to be held nondischargeable in bankruptcy, an award in a divorce decree or settlement agreement must actually be in the nature of support. The inquiry that the bankruptcy court must undertake in making this determination depends upon the nature of the obligation and the language of the state court decree." *Sorah v. Sorah (In re Sorah)*, 163 F.3d 397, 400 (6th Cir. 1998). The non-debtor spouse bears the burden of proving that the obligation constitutes support under § 523(a)(5). *Sorah,* 163 F.3d at 401 (citing *Long v. Calhoun (In re Calhoun)*, 715 F.2d 1103, 1111 (6th Cir. 1983)).

When the domestic relations court has labeled an obligation as support and the obligation has the indicia of support, the obligation is conclusively presumed to be support under § 523(a)(5). *Sorah,* 163 F.3d at 401. However, when the domestic relations court has *not* labeled an obligation as support, the bankruptcy court must make an independent factual inquiry

to determine whether the obligation is actually support. *Goans v. Goans (In re Goans)*, 271 B.R. 528, 533 (Bankr. E.D. Mich. 2001); *Davis v. Davis (In re Davis)*, 261 B.R. 659, 661 (Bankr. S.D. Ohio 2001); *Harvey v. McClelland (In re McClelland)*, 247 B.R. 423, 426 (Bankr. N.D. Ohio 2000).

In *Calhoun*, the Sixth Circuit explained the analysis to be used for determining whether an obligation is actually in the nature of support. *Long v. Calhoun (In re Calhoun)*, 715 F.2d 1103 (6th Cir. 1983). *See In re Sorah* 163 F.3d at 400-01. Under *Calhoun,* the "initial inquiry must be to ascertain whether the state court or the parties to the divorce *intended* to create an obligation to provide support . . . In making this determination the bankruptcy court may consider any relevant evidence including those factors utilized by state courts to make a factual determination of intent to create support." *Calhoun,* 715 F.2d at 1109 (emphasis in original). *See also, Luman v. Luman (In re Luman)*, 238 B.R. 697, 705 (Bankr. N.D. Ohio 1999) (noting that the bankruptcy court may consider "any relevant evidence, including those factors employed by state courts[ ]" in making its factual determination regarding intent).

Traditional state law indicia of support include: a label of support, alimony, or maintenance; a direct payment rather than an assumption of debt; and payment that is contingent upon death, remarriage, or eligibility for social security benefits. *Sorah*, 163 F.3d at 401. Other relevant factors include: the nature of the assumed obligation; the structure and language of the agreement or decree; whether lump sum or periodic payments are required; the length of the marriage and whether there were children from it; relative earning power; the age, health, and work skills of the parties; the adequacy of other support; and evidence of negotiations or other understandings of the intended purpose of the obligation. *Calhoun*, 715 F.2d at 1108 n. 7. *See also, Bailey v. Bailey (In re Bailey)*, 254 B.R. 901, 906 (B.A.P. 6th Cir. 2000) (citing a disparity

in earning power; the need for economic support or stability; marital fault; and the presence of children as relevant factors).

In this case, the domestic relations court did not label the disputed debts as support and so this Court must determine whether they are in fact support obligations. When the debts are created by the parties' separation agreement, the focus is on what the parties intended. Based on the evidence and on consideration of the relevant factors, the Court concludes that the parties did not intend to create a support obligation when they agreed that Mr. Watson would pay Ms. Flaherty one-half the Bank One payment each month and would hold Ms. Flaherty harmless on the car lease. The debts are not labeled as support (in fact, the Separation Agreement expressly states that there is no spousal support awarded to either party) and they are not contingent on death, remarriage, or Ms. Flaherty's eligibility for social security. The agreement provided that Mr. Watson was to assume the car lease and hold Ms. Flaherty harmless on it. The agreement did not require Mr. Watson to make direct payments to Ms. Flaherty, although that is ultimately how the parties dealt with the situation when Mr. Watson could not transfer the lease to his name.

While the Separation Agreement did provide that Mr. Watson was to make his share of the Bank One payments directly to Ms. Flaherty, which would weigh in favor of characterizing the obligation as support, other factors weigh heavily against such a finding for both the Bank One and the car debts. Those factors include the relatively short duration of the parties' marriage and the absence of children. Also, Mr. Watson suffers from health problems and his income was less than Ms. Flaherty's income at the time of the dissolution. Ms. Flaherty testified that she would not have agreed to a dissolution and would have sought formal support if Mr. Watson had not agreed to these payments. She conceded, however, that in that event the agreement would

have been different on many different fronts. While the Court has considered her view on her subjective intent, it is not dispositive or persuasive on this issue when the evidence is viewed as a whole. In sum, the Court finds that Ms. Flaherty did not prove that the two debts are support obligations and the debts are, therefore, dischargeable under § 523(a)(5).[5]

B. 11 U.S.C. § 523(a)(15)

Alternatively, Ms. Flaherty argues that the debts are not dischargeable under Bankruptcy Code § 523(a)(15). That section provides that a debtor may not discharge debt that is:

> (15) 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). Stated differently, in the context of this case, divorce debts other than support obligations are not dischargeable unless (1) the debtor is unable to pay them; or (2) the discharge benefits the debtor more than it harms the debtor's ex-spouse. *Sorah*, 163 F.3d at 401.

---

[5] Mr. Watson also argued that the Separation Agreement only required him to make the Bank One payment until that loan was paid in full. As that event occurred some time ago, and as the agreement did not state that any obligation survived the payout of the loan, he contends that he no longer has an obligation. Ms. Flaherty did not specifically respond to this point. In light of the disposition reached here, however, it is not necessary to address this issue.

The non-debtor party must prove that the debt is of a type excepted from discharge under this section. *Hart v. Molino (In re Molino)*, 225 B.R. 904, 907 (B.A.P. 6th Cir. 1998). Once this burden is met, the burden shifts to the debtor to prove one of the two exceptions by a preponderance of the evidence. *Id.*

Both debts at issue here fall within the type of debt excepted from discharge under § 523(a)(15). Mr. Watson was, therefore, required to prove that he comes within one of the exceptions in that section. He argues that both exceptions apply.

1. Ability to Pay

Section 523(a)(15)(A) requires the court to determine whether the debtor is able to pay the debt. This determination takes into account the debtor's financial condition at the time of trial as well as the debtor's long term financial prospects. *Butler v. Butler (In re Butler)*, 277 B.R. 843 (Bankr. M.D. Ga. 2002). "[A] court may look to a debtor's prior employment, future employment opportunities, and health status to determine the future earning potential of the [d]ebtor." *Molino*, 225 B.R. at 908.

Mr. Watson established that he is not currently able to pay the debts. He is unemployed, has no source of income, has been denied unemployment compensation (although that decision is on appeal), and does not own any property that could be used to pay the obligations. He also has little prospect of improving his financial situation based on his age, his poor health, and his lack of marketable skills. Under these facts, Mr. Watson's debts to Ms. Flaherty are dischargeable under § 523(a)(15)(A).

2. Balance of the Hardship

In doing an analysis under § 523(a)(15)(B), a court must balance the benefit to the debtor of discharging the debt against the hardship to the former spouse of discharging it. *Molino*, 225

B.R. at 908-9. This requires comparing the parties' relative standards of living. These factors are generally considered:

(1) the amount of the debt (including payment terms);

(2) the current income of the parties and their spouses;

(3) the current expenses of the parties and their spouses;

(4) the current assets of the parties and their spouses (including the debtor's exempt assets);

(5) the current liabilities of the parties and their spouses (excluding the debtor's discharged liabilities);

(6) the health, job skills, training, age, and education of the parties and their spouses;

(7) the parties' and their spouses' dependents (their age and any special needs);

(8) any changes in the parties' financial conditions which 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 party is eligible for bankruptcy relief; and

(11) whether the parties acted in good faith in the bankruptcy filing and in the litigation.

*Molino*, 225 B.R. at 909 (citing *In re Smither*, 194 B.R. 102, 111 (Bankr. W.D. Ky. 1996)).

After determining the parties' relative standards of living, the court must determine:

> whether the debtor's standard of living will be greater than or approximately equal to that of the creditor's if the debt is not discharged. If the court finds that this is the case, then the debt is nondischargeable under § 523(a)(15)(B). On the other hand, if the court determines that the debtor's standard of living will fall materially below the creditor's standard of living if the debt is not discharged, then the court must discharge the debt under § 523(a)(15)(B).

*Melton v. Melton (In re Melton)*, 238 B.R. 686, 696 (Bankr. N.D. Ohio 1999) (citing *In re Smither*, 194 B.R. at 111). *See also, Molino*, 225 B.R. at 909.

Mr. Watson introduced evidence on some, but not all, of these factors. The evidence presented showed that the Bank One debt has been paid in full and the car lease is close to completion; Mr. Watson has discharged in excess of $23,000.00 in debt in this bankruptcy; Ms. Flaherty is employed and Mr. Watson is not; both parties are in relationships with people who are employed and contribute to household expenses, with Ms. Flaherty living with her husband and his children and Mr. Watson living with his fiancé; Ms. Flaherty's household earns about $66,000.00 a year and has $5,289.00 a month in expenses; Mr. Watson's fiancé earns less than $30,000.00 a year; Mr. Watson is in poor health, unemployed, does not receive unemployment benefits, and does not have any immediate or long term prospects of finding new employment; Ms. Flaherty is theoretically eligible for bankruptcy relief should she need it; Mr. Watson does not have any assets to speak of; and Mr. Watson's financial condition has changed for the worse since the divorce. There was no evidence that either party acted other than in good faith in the bankruptcy filing or the current litigation. Based on these factors, the Court finds that Mr. Watson's standard of living is relatively lower than Ms. Flaherty's because he has no income and is dependent on his fiancé for housing and other material needs, with no evidence that the fiancé has made a long-term commitment to meet those needs. The Court further finds that Mr. Watson's standard of living will continue to be or will fall materially below Ms. Flaherty's if the debts are not discharged, principally because he has no income, is in poor health, has no significant assets, and has no reasonable possibility that these circumstances will improve. In contrast, Ms. Flaherty is employed, did not identify any health issues, and is in a relatively stable

economic situation where she is meeting her obligations as they become due. The debts are, therefore, also dischargeable under § 523(a)(15)(B).

CONCLUSION

For the reasons stated, Mr. Watson's marital debts are dischargeable under § 523(a)(5) and § 523(a)(15). A separate judgment in favor of the Defendant-Debtor and in favor of the Defendant Firstar will be entered in accordance with this Memorandum of Opinion.

Date: 10 Jun 02

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

Served by mail on: John Salem, Esq.
Jaye Schlachet, Esq.
Firstar Bank

By: Joyce L. Gordon, Secretary

Date: 6/10/02

THIS OPINION IS NOT INTENDED
FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION



| | | |
|---|---|---|
| In re: | ) | Case No.00-19488 |
| | ) | |
| SCOTT E. WATSON, | ) | Chapter 7 |
| | ) | |
| Debtor. | ) | Judge Pat E. Morgenstern-Clarren |
| | ) | |
| | ) | |
| KATHLEEN FLAHERTY, | ) | Adversary Proceeding No. 01-1375 |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | **JUDGMENT** |
| | ) | |
| SCOTT E. WATSON, et al. | ) | |
| | ) | |
| Defendants. | ) | |

For the reasons stated in the Memorandum of Opinion filed this same date,

IT IS, THEREFORE, ORDERED that Judgment on the Complaint is entered in favor of the Defendants Scott Watson and Firstar Bank.

Date: 10 June 2002

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

Served by mail on: John Salem, Esq.
Jaye Schlachet, Esq.
Firstar Bank

By: Joyce L. Gordon, Secretary

Date: 6/10/02