

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE: *
*
JOHN MARK MILLER, *
* CASE NUMBER 05-40560
*
Debtor. *
*

*
MICHELLE DeJACIMO-MILLER, *
* ADVERSARY NUMBER 05-4112
*
Plaintiff, *
*
vs. *
*
JOHN MARK MILLER, *
* THE HONORABLE KAY WOODS
*
Defendant. *
*

M E M O R A N D U M O P I N I O N

This cause came before the Court for a bench trial on April 17, 2006. Plaintiff Michelle DeJacimo-Miller ("Plaintiff") was present and represented by Jeffrey D. Adler, Esq. Defendant John Mark Miller ("Debtor/Defendant") was present and represented by Roger R. Bauer, Esq. The Court received the testimony of both parties.

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334. Venue in this Court is proper pursuant to 28 U.S.C. §§ 1391(b), 1408, and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I). The following constitutes the Court's findings of fact and conclusions of law pursuant to FED. R. BANKR. P. 7052.

Plaintiff, who is Debtor/Defendant's former spouse, alleges that two debts, which Debtor/Defendant incurred as a result

of the parties' divorce and which remained unpaid as of February 9, 2005 ("the Petition Date"), are nondischargeable pursuant to 11 U.S.C. § 523(a)(15). Debtor/Defendant counters that he is not responsible for one of the debts based upon the specific terms of the parties' divorce decree, and, in the alternative, that both debts are dischargeable pursuant to the exceptions to non-dischargeability listed in 11 U.S.C. § 523(a)(15)(A) and (B).¹

LAW

Congress added 11 U.S.C. § 523(a)(15) to the Bankruptcy Code in 1994, in order to protect spouses who had agreed to reduced alimony or accepted a smaller property settlement in exchange for being held harmless on joint debts. *Craig v. Craig (In re Craig)*, 196 B.R. 305, 308 (Bankr. E.D. Va. 1996) (*citing* H. R. Rep. No. 835, 103rd Cong., 2nd Sess. 54, reprinted in 1994 U.S.C.C.A.N. 3340, 3363).

Section 523(a)(15) reads:

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt--

. . .

(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 . . . unless--

(A) the debtor does not have the

¹The exceptions set forth in Section 523(a)(15)(A) and (B) were eliminated by the Bankruptcy Abuse and Consumer Protection Act ("BAPCPA"). Since Debtor petitioned this Court for relief prior to the effective date of BAPCPA, the exceptions are still applicable to this proceeding.

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 the 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) (1998) (emphasis added). Since the two exceptions to nondischargeability in Section 523(a)(15) are written in the disjunctive, such a debt will be discharged upon a finding that either of the exceptions in Subsections (A) or (B) are applicable. *Bubp v. Romer (In re Romer)*, 254 B.R. 207, 212 (N.D. Ohio 2000).

The plaintiff bears the initial burden of proving the debt arose from a separation agreement or divorce decree. *Biederman v. Stoodt (In re Stoodt)*, 302 B.R. 549, 555 (N.D. Ohio 2003). The burden then shifts to the debtor to establish, by a preponderance of the evidence, that one of the two exceptions to nondischargeability are applicable to the proceeding. *Hart v. Molino (In re Molino)*, 225 B.R. 904, 907 (6th Cir. B.A.P. 1998).

The starting point for the determination of a debtor's ability to pay under subsection 523(a)(15)(A) is the time of trial, but a debtor's future circumstances and earning potential may also be considered. See *Jestice v. Jestice (In re Jestice)*, 2006 WL

305654, *5 (6th Cir. 2006) (citing *Smither v. Smither (In re Smither)*, 194 B.R. 102, 108 (Bankr. W.D. Ky. 1996)).

The majority of courts employ the disposable income test to determine a debtor's ability to pay marital debt. See *id.* (citing *Hammermeister v. Hammermeister (In re Hammermeister)*, 270 B.R. 863, 877 (Bankr. S.D. Ohio 2001)). "Under [this] test, a marital obligation will be discharged under § 523(a)(15)(A) only if repaying the debt reduces the debtor's income below the level reasonably needed for his support or the support of his dependents." *Id.*

Reasonably necessary expenses are those which are adequate, and not luxury items. *Id.* "[A] debtor, although not expected to live in poverty, is expected to tighten [his] financial belt, and thus do without many amenities to which [he] may have otherwise become accustomed." *Stoodt*, 302 B.R. at 557.

A court may also consider any income earned by a spouse or live-in companion in order to determine the extent of the debtor's disposable income. See *Morgan v. Woods (In re Woods)*, 309 B.R. 22, 31 (Bankr. W.D. Mo. 2004); *Brown v. Brown (In re Brown)*, 302 B.R. 637, 642 (Bankr. N.D. Iowa 2003); *Shea v. Shea (In re Shea)*, 221 B.R. 491, 499-500 (Bankr. D. Minn. 1998) ("When supplemental income from a new spouse or live-in companion serves to alter the debtor's financial prospects, the Court must factor that consideration into its evaluation of [the debtor's] ability to pay. . . .").

Accordingly, in order to determine Debtor/Defendant's

ability to pay, this Court must conduct a two-step analysis. *Romer*, 254 B.R. at 212. First, this Court must determine if Debtor/Defendant has any disposable income to pay the marital debt. *Id.* If Debtor/Defendant does not have any disposable income, the debt must be discharged. *Id.* Second, if this Court finds that Debtor/Defendant has disposable income, the marital debt is still discharged unless Debtor/Defendant can realistically pay the debt in a reasonable time. *Id.*

In the alternative, this Court can discharge a portion of the marital debt if the circumstances of the particular case would make it equitable to do so. *Id.* (citing *Miller v. Miller (In re Miller)*, 247 B.R. 412, 415-16 (Bankr. N.D. Ohio 2000)).

This Court need not accept the figures as calculated by Debtor/Defendant. See *Romer*, 254 B.R. at 212. "It is axiomatic that a bankruptcy court should undertake its own independent examination of a debtor's financial situation to determine if either an upward adjustment in income or a downward adjustment in expenses is appropriate." *Id.* (citing *Marquis v. Marquis (In re Marquis)*, 203 B.R. 844, 851 (Bankr. D. Me. 1997)). These adjustments ensure that the calculation of Debtor/Defendant's finances reflects a true and accurate picture and protects Plaintiff from having Debtor/Defendant's obligations discharged due to "fuzzy" math.

Section 523(a)(15)(B) contains a second possible exception to nondischargeability; a balancing test which allows discharge of the marital debt if discharging such debt would result in a benefit to Debtor/Defendant that outweighs the detrimental conse-

quence to Plaintiff and their three-year-old son. See 11 U.S.C. § 523(a)(15)(B).

The balancing test employed in this Circuit was first articulated by the Western District of Kentucky in *In re Smither, supra*. The test requires a review of the financial status of each of the parties and a comparison of their relative standards of living, in order to determine the true benefit of the Debtor/Defendant's possible discharge against any hardship that Plaintiff and their son would suffer as a result of a discharge. See *Patterson v. Patterson (In re Patterson)*, 132 F.3d 33, 1997 WL 745501, *3 (6th Cir. 1997).

The *Smither* Court listed 11 non-exclusive factors to be considered in a section 523(a)(15)(B) challenge to dischargeability: (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 the former spouse 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). See *In re Smither*, 194 B.R. at 111; see also *Armstrong v. Armstrong (In re Armstrong)*, 205 B.R. 386, 392 (Bankr. W.D. Tenn. 1996).

If, after making this analysis, Debtor/Defendant's

standards of living will be greater than or approximately equal to the standard of living of Plaintiff if the debt is not discharged, then the debt is nondischargeable. *Patterson* at *3. However, if Debtor/Defendant's standard of living will fall materially below Plaintiff's standard of living if the debt is not discharged, then the debt should be discharged. *Id.* (citing *Belcher v. Owens (In re Owens)*, 191 B.R. 669, 674-75 (Bankr. E.D. Ky. 1996)).

FACTS

The terms of the parties' divorce are set forth in a Judgment Entry, captioned "Final Divorce Decree," which was entered by Judge Pamela Rintala in the Trumbull County Domestic Relations Court, Case No. 03 DR 222 ("the Divorce Decree") on December 11, 2003. The Divorce Decree reads, in pertinent part:

The sale proceeds [from the marital residence] are to be used to pay off the Bank One loan obligation; the GM debt obligation; and the Lowe's credit card obligation. Any remaining debt shall be paid by [Debtor/Defendant], including bills that are in [Plaintiff's] name for the birth of the minor child, and he shall hold [Plaintiff] harmless.

. . .

Family Room Furniture will be sold to [Debtor/Defendant] for \$400.00 (including tables). Payment will be made on a monthly basis once the dissolution is final at \$100.00/month due on the 15th.

(Divorce Decree at 1-2, and Exhibit C.)

It is undisputed that the Bank One, GM, and Lowe's obligations represent marital debt even though such obligations were incurred solely in Plaintiff's name. It is also undisputed that the

sale of the marital residence did not realize sufficient proceeds to pay off those debts. Moreover, on April 27, 2004, Plaintiff consolidated the Bank One, GM, and Lowe's obligations onto the Bank One (now Chase) card in order to take advantage of a lower interest rate. Consequently, for the sake of clarity, the Court will refer to the Bank One, GM, and Lowe's obligations collectively as "the Chase obligation."

According to Plaintiff's testimony, Debtor/Defendant made the minimum monthly payment on the Chase obligation until October 2004. Plaintiff testified that she has assumed responsibility for the Chase obligation since October 2004 due to her concerns that a default on the account would damage her credit rating. Plaintiff further testified that she has been using money provided to her by Debtor/Defendant for child support to make the minimum monthly payment, and that she (rather than Debtor/Defendant) has paid a total of \$1,819.36 to reduce the Chase obligation since the divorce. The balance on the Chase obligation as of the date of trial was \$3,564.03.

According to Debtor/Defendant's testimony, he "got money to [Plaintiff] when [he] could afford to" after the divorce. He estimated that he has given Plaintiff \$350.00 over time. Plaintiff provided no testimony on the specific amount of money provided by Debtor/Defendant, and Debtor/Defendant did not testify about the specific time frame of the payments. As a consequence, Debtor/Defendant's testimony does not contradict Plaintiff's testimony about the amount of money he gave her or that he gave it to her

pre-petition.

On the other hand, their testimony did conflict on the subject of which debt was intended to be reduced by Debtor/Defendant when he made the sporadic payments. Actually, it is more correct to say that portions of Debtor/Defendant's testimony conflicted with Plaintiff's testimony on the specific debts, because Debtor/Defendant's testimony on that subject changed several times.

First, Debtor/Defendant stated that, although he has not paid Plaintiff any money on the furniture obligation, he has paid her approximately \$350.00 since the divorce for the Chase obligation. Later in his testimony, Debtor/Defendant twice testified that the \$350.00 was provided to Plaintiff in recognition of both debts, and that Plaintiff had the discretion to determine whether to apply the money to the Chase obligation or the furniture obligation. Finally, at the close of his testimony, Debtor/Defendant admitted that he did not pay anything on the furniture obligation.²

Based upon the conflicting testimony provided by Debtor/Defendant on this issue, the Court accepts Plaintiff's recitation of the payments made by the respective parties since the divorce on the Chase obligation. Further, the Court finds that Debtor/Defendant still owed the entire balance of the furniture obligation to Plaintiff on the Petition Date. Accordingly, in the event that

²The following exchange took place at the close of Debtor/Defendant's testimony:

Atty. Bauer:	Did you pay for the furniture?
Mr. Miller:	No.
Atty. Bauer:	How much do you owe on it?
Mr. Miller:	Probably \$400.00.

the Court concludes that the marital debt in this case is non-dischargeable, Debtor/Defendant will owe Plaintiff a total of \$5,783.39.

The remainder of the relevant testimony centered on the monthly income and maintenance expenses of each party. Debtor/Defendant stated that his current monthly gross income of \$5,124.00 is generated from two sources, a full-time position with Trumbull Memorial Hospital and what he described as a position as an "on-call problem solver" with Ivy Hill of Bazetta Condominium Association ("Ivy Hill Condominium"). After subtracting his federal, state, and local income tax liability, Debtor/Defendant concluded that his monthly net income is \$3,587.00.³

Debtor/Defendant further testified that he receives income from a self-owned business called M Squared Enterprises ("M Squared"), which has been in the snow removal business for eight years and the lawn care business for two years. Debtor/Defendant testified, however, that M Squared had only six accounts for snow removal for Winter 2005 and has only one client for lawn cutting (at \$40.00 a week) for Summer 2006.⁴

With the exception of the single lawn cutting account, Debtor/Defendant did not provide any additional testimony to establish the projected net income for the lawn service or the snow

³Debtor/Defendant estimated his tax liability to be 30% of his gross income.

⁴Debtor/Defendant did not offer any testimony regarding the nature of his accounts, that is, whether he provides service to residential or commercial customers, or both. However, based upon the evidence that his Summer 2006 account pays \$40.00 a week, the Court surmises that M Squared serves a residential customer for lawn care.

plowing service in 2006. As a matter of fact, Debtor/Defendant was intentionally vague when asked by Plaintiff's counsel about M Squared's past and future income.

For instance, in response to counsel's inquiries regarding M Squared's profitability since the addition of the lawn care service, Debtor/Defendant testified that he has not completed his federal income tax returns for 2004 and 2005, and, therefore, he does not know the amount of net income generated by M Squared for the last two years.

When asked directly by Plaintiff's counsel whether M Squared was a profitable business, Debtor/Defendant responded, "It's cash flow. . . . It generates income, because of the nature of the business, the, when the expenses are paid, sometimes not receiving income for 60, 90 days after performing a service, it's hard to regulate."

In fact, the paucity of evidence that Debtor/Defendant provided regarding M Squared's past income is useless to the Court in projecting the business' future net income. Debtor/Defendant stated that the snow removal business generated between \$2,300.00 and \$3,200.00 in 2003, and between \$2,000.00 and \$5,000.00 a year over the course of the last eight years. However, in light of Debtor/Defendant's later testimony that he has undertaken over \$32,000.00 in long-term debt and \$3,500.00 in monthly debt in order to operate M Squared, *see infra*. pp. 13-14, 21-24, projecting future business income is impossible based upon past performance.

Moreover, although Debtor/Defendant initially appeared

content to characterize M Squared as a fledgling business which generates a modest annual net income, he later scrambled to justify the astronomical operating expenses claimed by Debtor/Defendant on behalf of M Squared, see *infra*. pp. 13-14, 21-24. When challenged to provide a reasonable justification for M Squared's current operating expenses, Debtor/Defendant stated that M Squared's snow plowing income from last year was much higher than in previous years, and that M Squared had gross receipts in 2005 of \$15,000.00 for snow removal alone. Of course, without an accounting of M Squared's expenses for snow plowing in 2005, Debtor/Defendant's testimony regarding M Squared's gross income is valueless for the purposes of forecasting Debtor/Defendant's income from M Squared.

Furthermore, because Debtor/Defendant has the burden of proof to establish that either of the exceptions in § 523(a)(15)(A) or (B) apply, the fact that he either failed to produce or actively withheld evidence establishing his income from M Squared reveals an effort by Debtor/Defendant to artificially reduce his monthly income and correspondingly inflate his business expenses for the purpose of avoiding payment of the marital debt in this case.

However, regardless of Debtor/Defendant's motivation in failing to provide information regarding his income from M Squared, this Court has no choice but to accept the uncontroverted testimony at trial that Debtor/Defendant's income from M Squared will be \$160.00 a month throughout the summer. Consequently, the Court calculates Debtor/Defendant's monthly income for the purposes of

this case to be \$3,699.00.⁵

Debtor/Defendant listed the following monthly maintenance expenses:

Item	Monthly Expense
Rent	\$ 500.00
Child support	\$ 500.00
Sewage	\$ 13.00
Well water treatment	\$ 20.00
Garbage removal	\$ 8.00
Electric	\$ 50.00
Natural gas	\$ 110.00
Food	\$ 400.00
Cable and internet	\$ 65.00
Telephone	\$ 21.00
Entertainment	\$ 100.00
Medical expenses	\$ 50.00
Day care	\$ 162.50
Total	\$ 1,999.50

Despite the testimony that M Squared currently generates \$160.00 in gross income a month for a single lawn cutting account, Debtor/Defendant listed the following monthly operating expenses for M Squared:

Item	Monthly Expense
Lease on 2005 GMC Crew Cab Pick-Up Truck	\$ 680.00
Gas, oil and maintenance	\$ 1,000.00
Snow plow and lawn spreader (for 2005 GMC Crew Cab Pick-Up Truck)	\$ 250.00
Commercial auto insurance American General (reaffirmed) (snow plow and lawn spreader for 1995 Suburban) purchased three years ago	\$ 340.00
FNANB loan (reaffirmed) (computer)	\$ 100.00
Work clothes, dry cleaning, and tools	\$ 50.00
Cellular phone	\$ 130.00
Total	\$ 120.00
	\$ 2,670.00

In addition, Debtor/Defendant listed the following long-

⁵The additional amount of \$112.00 reflects the \$160.00 in gross income reduced by Debtor/Defendant's tax liability.

term business debts, which he incurred post-petition through loans provided to him by family members:

Item	Indebtedness	Owed to	Paid to date
1995 Chevy Suburban	\$ 4,000.00	Father	
Lawn Equipment	\$ 18,200.00	Father	
		incurred debt on (one year same as cash)	
Discover card (line of credit) for monthly business expenses	\$ 8,000.00- \$ 9,000.00	Father	\$1,100.00 to \$1,500.00 per month
Utility trailer	\$ 2,600.00	Uncle	\$1,000.00
Total	\$ 32,800.00		

Debtor/Defendant testified that the foregoing monthly expenses for his maintenance and the operation of his business leave him with no disposable income each month to pay the Chase obligation or the furniture obligation.

Turning to Plaintiff, her sole income is derived from a self-owned business called Diva's Designers of Hair and Nails. Plaintiff testified that she works as a hair stylist three days a week and rents the remaining stations in the shop to other hair stylists on a monthly basis.

She provided a detailed monthly accounting of her wages, rental earnings, and her business expenses for calendar year 2005. The accounting reflects that Plaintiff collected an average of \$2,443.00 a month for station rentals at the shop, and an additional \$2,103.00 a month for styling hair. With a deduction for a number of business expenses clearly listed in the accounting (on average

\$3,316.00 per month), Plaintiff had an average gross monthly income of \$1,230.00 in 2005.⁶

In order to keep the calculation of Plaintiff's monthly income consistent with the foregoing calculation of Debtor/Defendant's income, the Court will adjust Plaintiff's gross income by 20% in recognition of her estimated federal, state, and local tax liability. Plaintiff also receives \$500.00 a month in child support from Debtor/Defendant for the parties' three year old son. Consequently, based upon the Court's independent calculation, the Court estimates Plaintiff's monthly income as \$1,484.00.

Plaintiff listed the following monthly maintenance expenses:

Item	Monthly Expense
Mortgage (with taxes and insurance)	\$ 717.00
Electric	\$ 122.00
Natural gas	\$ 140.00
Water and sewer	\$ 12.00
Automobile	\$ 154.00
Food	\$ 200.00
Homeowners and auto insurance	\$ 140.00
Medical bills	\$ 225.00
Gasoline	\$ 80.00
Cable, phone, and internet	\$ 140.00
Cellular phone	\$ 44.00
COBRA (health insurance through 12/2006)	\$ 287.00
Day care	\$ 162.50
Total	\$ 2,423.50

⁶Plaintiff testified that her net income in 2005 was \$11,000.00, or \$917.00 a month. However, Plaintiff did not indicate whether this amount reflects her adjusted gross income or her taxable income, therefore, the Court will rely on the figures provided in the 2005 accounting to calculate Plaintiff's projected income. However, the Court is mindful that Debtor/Defendant testified about his net income (exclusive of taxes), so comparison of the monthly income of Plaintiff and Debtor/Defendant will not be "apples to apples" without consideration of Plaintiff's estimated income tax liability.

According to Plaintiff's testimony, her monthly expenses exceed her monthly income, and, therefore, she is unable to pay the Chase obligation or forgive the furniture obligation.

ANALYSIS

The parties entered into two stipulations of fact prior to the commencement of trial. First, the parties agreed that the Chase obligation and the furniture obligation arose from a separation agreement or divorce decree. Second, the parties agreed that the obligations are not spousal support. The foregoing stipulations relieved Plaintiff of her initial burden to prove the nature of the debts, and, therefore, Debtor/Defendant had the sole burden of proof at trial, *i.e.*, to demonstrate that the Chase obligation and the furniture obligation are dischargeable pursuant to the exceptions set forth in 11 U.S.C. § 523(a)(15)(A) and (B).

Debtor/Defendant's first argument was one of contract interpretation and is based upon the specific terms of the Divorce Decree. Debtor/Defendant contends that he is not responsible for payment of the Chase obligation because the domestic relations court directed that the debt should be paid with the proceeds of the sale of the marital residence. (See Divorce Decree at 1-2. "The sale proceeds [from the marital residence] are to be used to pay off [the Chase obligation]"). Because the sale proceeds of the marital residence were insufficient to pay the Chase obligation, Debtor/Defendant concludes that he is not responsible for the shortfall from the sale.

Debtor/Defendant's argument might be compelling if the sentence cited from the Divorce Decree existed in a vacuum. In fact, Debtor/Defendant's argument either conveniently ignores or hopelessly misinterprets the clear and unambiguous language of the next sentence of the Divorce Decree, which reads: "Any remaining debt shall be paid by [Debtor/Defendant], including bills that are in [Plaintiff's] name for the birth of the minor child, and he shall hold the [Plaintiff] harmless." (Divorce Decree at 1-2.)

Not surprisingly, neither Debtor/Defendant nor his counsel articulated any reasonable interpretation of the phrase "any remaining debt" which would not include the Chase obligation. In fact, Debtor/Defendant relies exclusively on the period after the word "harmless" to convince the Court that the "any remaining debt" language should be interpreted as being wholly independent from the prior sentence.

The plain meaning of the phrase "any remaining debt" indicates Plaintiff is not responsible for any of the Chase obligation beyond that amount which could have been paid out of her half interest in the marital residence. Since the proceeds from the sale of the residence were insufficient to pay off the Chase obligation, the clear and unambiguous terms of the Divorce Decree include the Chase obligation as "remaining debt."

Moreover, Debtor/Defendant's conduct following the divorce belies his current interpretation of the Divorce Decree. As stated earlier, Debtor/Defendant testified that he paid Plaintiff approximately \$350.00 after the divorce. Although Debtor/Defendant

provided conflicting testimony with respect to the specific application of the \$350.00 to the debts, *see supra*. pp. 9-10, both versions of his testimony support the conclusion that he believed that he was responsible for the payment of the Chase obligation.

As Debtor/Defendant's contract interpretation argument flies in the face of plain contract language and his own post-divorce actions, the Court finds that Debtor/Defendant is responsible for the Chase obligation based upon the terms of the Divorce Decree.

Next, Debtor/Defendant argues that both the Chase obligation and the furniture obligation are dischargeable because he has no disposable income after he subtracts his reasonably necessary maintenance and business expenses from his monthly net income. However, because Debtor/Defendant failed to demonstrate that M Squared will generate more than \$160.00 in monthly income, the Court finds that the business expenditures listed at trial are not "necessary," as required by the statute, and, therefore, the Court will not include those expenses in its calculation of Debtor/Defendant's disposable monthly income.

In his closing argument, Debtor/Defendant's counsel observed that the parties actually generate the same amount of yearly gross income.⁷ Counsel then argued that it is unfair to include Plaintiff's business expenses in her disposable income

⁷As stated earlier, Debtor/Defendant testified that his gross income from the Trumbull Memorial Hospital and Ivy Hill Condominium is \$5,124.00. The gross receipts for Diva's Designers of Hair and Plaintiff's wages for cutting hair in 2005 totaled \$54,807.00.

calculation but reject Debtor/Defendant's business expenses in his disposable income calculation.

Of course, the distinction between Plaintiff's business expenses and Debtor/Defendant's business expenses is obvious: Plaintiff's expenses are "expenditures necessary for the continuation, preservation, and operation of the business." See 11 U.S.C. § 523(a)(15)(A). In other words, a review of the accounting reveals that the listed expenses are reasonable expenses consistent with the operation a small beauty salon.⁸

Furthermore, the evidence adduced by Plaintiff demonstrates that her business generated an average net monthly income of \$1,230.00 in 2005. Debtor/Defendant produced no similar evidence about the income generated from his business.

Debtor/Defendant, in fact, hamstringing his business expense argument by failing to provide any evidence of M Squared's past or projected future profitability. Instead of providing a list of expenses reasonably designed to operate a fledgling business, Debtor/Defendant lists tens of thousands of dollars of monthly and long term debt, which he asks this Court to conclude are "necessary" to the operation of M Squared.

For example, included in his monthly operating expenses for M Squared are a \$680.00 payment on a note securing the 2005 GMC Crew Cab Pick-Up Truck, a \$340.00 payment for commercial automobile

⁸It is important to note that, despite his protestations, Debtor/Defendant's counsel did not challenge the necessity or the amount of the expenses Plaintiff listed in the accounting on cross-examination, nor did he argue that any of the expenditures in the 2005 accounting were not necessary expenses.

insurance on the 2005 truck and the 1995 Suburban, \$350.00 for two snow plows and two spreaders, and a \$1,000.00 payment for "gas, oil, and maintenance."

Debtor/Defendant testified that the note on the 2005 GMC Crew Cab Pick-Up Truck is held by his house mate, but he is responsible for the monthly payment on the note. Although Debtor/Defendant testified that the 2005 GMC Crew Cab Pick-Up Truck is a business expense, it strains credulity to suggest a late model truck is a "necessary" expense for a snow plowing and lawn care business, particularly a snow plowing and lawn care business with one current client.⁹

Likewise, Debtor/Defendant's spotty testimony regarding the work performed and the income generated by M Squared also calls into question the necessity of having two vehicles, two snow plows, two spreaders, and a monthly expense of \$1,000.00 for gas, oil and maintenance.

Incidentally, Debtor/Defendant's testimony further revealed that the list of monthly business expenses which he provided at trial is by no means a complete list. Debtor/Defendant testified that he would be unable to personally perform lawn care services this summer, due to his full time position with the hospital and on call position with Ivy Hill Condominium. Therefore, Debtor/Defendant stated that he will have to hire "helpers" in the event he adds to his current lawn care client list. Consequently,

⁹Because of the scarce and inconsistent evidence about M Squared's clients and income, it is not clear if M Squared has any on-going snow removal clients.

the \$2,670.00 amount to which Debtor/Defendant attested in court does not even reflect all of M Squared's projected monthly operating expenses.

In addition to the expenses which Debtor/Defendant undertakes on a monthly basis, he testified that he has also incurred long-term post-petition debt in the amount of \$32,800.00 in order to operate M Squared. Although the loans are from family members, Debtor/Defendant testified that he pays his father between \$1,100.00 and \$1,500.00 a month for the Discover Card debt, and that he has paid his uncle \$1,000.00 over time for the utility trailer. Consequently, in addition to the nebulous expense of "helpers" this summer, it is reasonable to add another \$1,100.00 to \$1,500.00 to M Squared's monthly expenses to reflect Debtor/Defendant's payment to his father for the Discover Card debt. With the addition of the Discover card payments made by Debtor/Defendant to his father, M Squared's monthly expenses are between \$3,770.00 and \$4,170.00.

As stated earlier, the sole testimony as to the work performance and profitability of M Squared was Debtor/Defendant's statement that the snow plowing business generated between \$2,000.00 and \$5,000.00 per year over the course of the past eight years.¹⁰ This testimony, however, does little to convince the Court of M Squared's future success.

First, Debtor/Defendant testified that he does not know

¹⁰According to the testimony of Debtor/Defendant, his current monthly operating expenses equal or exceed the historical annual revenues for M Squared. Under the circumstances, there is no business justification for M Squared's alleged monthly expenses.

the net income for the company for 2004 and 2005, which are the only two years that would reveal the amount of work performed and income generated by the lawn maintenance operation.

Next, Debtor/Defendant's testimony that the company has one client for Summer 2006 is disconcerting, particularly since he provided no explanation regarding the nature of the business, *i.e.*, the number of clients projected or likely to hire M Squared for lawn services in the upcoming months. The scarcity of evidence on this issue is particularly confounding since Debtor/Defendant's counsel stated in his closing argument that Debtor/Defendant "has a business plan and intends to follow it." No testimony about any such business plan was adduced at trial.

Most disturbing to the Court, however, is that the dearth of evidence to establish the past net income of M Squared cannot be relied upon to forecast the future profitability of the company because Debtor/Defendant testified that he has incurred \$32,000.00 in long term debt and \$2,670.00 in monthly debt *since he filed his Petition*.

Simply stated, Debtor/Defendant has not carried his burden of proof to demonstrate that the business expenditures he listed at trial are "necessary for the continuation, preservation, and operation" of M Squared. See 11 U.S.C. § 523(a)(15)(A). The abject failure by Debtor/Defendant to demonstrate ANY projected work, beyond the single existing lawn maintenance contract, completely subverts his argument that the \$3,770.00 to \$4,170.00 in monthly expenses are "necessary" for the continued operation of the

business. Those monthly expenditures are patently unreasonable when considered in conjunction with the testimony (or lack thereof) regarding M Squared's current or future accounts. Furthermore, the Court finds that Debtor/Defendant's decision to mire himself, via M Squared, in post-petition debt is completely indefensible and certainly cannot be employed by him as a device to swallow up his disposable monthly income. As a consequence, the Court will not consider any of the business expenses for M Squared in calculating Debtor/Defendant's monthly maintenance.

After eliminating M Squared's business expenditures, the Court finds that Debtor/Defendant has sufficient disposable income at the end of each month to pay the Chase obligation and the furniture obligation in a reasonable period of time. Based upon his testimony at trial, Debtor/Defendant has \$1,579.50¹¹ in disposable income each month after his maintenance expenses are subtracted from his net monthly income. Because Debtor/Defendant has over \$1,500.00 in disposable monthly income, the Court finds that he can pay off the Chase obligation and the furniture obligation, as well as reimburse Plaintiff for her post-petition payments to the Chase obligation, in a reasonable period of time.

The conclusion that Debtor/Defendant has sufficient disposable income to pay the marital debt in a reasonable time, however, does not end the Court's inquiry. The Court must next

¹¹In calculating Debtor/Defendant's disposable income, the Court included the \$120.00 for his cell phone service because he testified that 24/7 access is essential to his employment with Ivy Hill Condominium. The Court included the cost of the cell phone service in its calculation despite the fact that \$120.00 appears to be an unreasonable charge for cell phone service.

determine whether the benefit to Debtor/Defendant of discharging the debt outweighs the detrimental consequences to Plaintiff and the parties' three year old son. In order to make that determination, the Court must consider the factors listed in *Smither, supra*.

First, the amount of the debts are by no means overwhelming – particularly to an individual with over \$1,500.00 of monthly disposable income. Likewise, the payment terms of the Chase obligation do not create a problem, since even though Debtor/Defendant is capable of making a large monthly payment on the Chase obligation, he may make the minimum payment if necessary.

Neither party provided any testimony with respect to their current assets and neither party testified to any change in their financial condition since the divorce. Although Plaintiff testified that she is making mortgage payments, there was no testimony to establish the amount of equity, if any, Plaintiff has built in the residence.

Insofar as Plaintiff's expenses clearly exceed her income, she may be eligible for relief under the Code. Counsel for Debtor/Defendant flippantly suggested in his closing argument that Plaintiff should work five days a week (instead of three) in order to "find 72 bucks to pay this payment" (referring to the Chase obligation). However, it appears from the testimony at trial that Plaintiff may need to work five days a week in order to pay her own

bills.¹²

Finally, although there is no evidence that Debtor/Defendant acted in bad faith in filing his Petition, his sketchy testimony regarding the income generated by M Squared suggests that he was either hiding income or attempting to claim exorbitant business expenses for a business that is hopelessly mired in debt.

Ultimately, Debtor/Defendant's standard of living will still be greater than the standard of living of Plaintiff if the debt is not discharged. If Debtor/Defendant paid Plaintiff \$600.00 a month, he could pay off the debt in approximately one year and he would still have over \$900.00 a month in disposable income to dedicate to M Squared. Because Debtor/Defendant's standard of living will not fall materially below Plaintiff's standard of living, the Chase obligation and the furniture obligation will not be discharged.

CONCLUSION

Marital debt is among the kinds of debt that Congress specifically excepted from the general discharge provisions of the Code. As such, Debtor/Defendant had the burden of proof at trial to demonstrate that his reasonable maintenance expenses and necessary business expenses exceed his monthly income, or that paying the marital debt would significantly lower his standard of

¹²The Court makes no finding regarding the reasonableness of Plaintiff's three-day work week. Given the fact that the parties' child is only three years old, an increased work schedule would likely result in increased child care expenses. Additionally, since there was no testimony on this subject at trial – just defense counsel's closing salvo – it is not clear that Plaintiff does not "rent" out her chair to another operator in lieu of working additional days.

living. Debtor/Defendant did not carry his burden of proof with respect to either of those issues.

In fact, the evidence at trial revealed that Debtor/Defendant has more than enough disposable monthly income to pay the Chase obligation and the furniture obligation in a reasonable period of time. Debtor/Defendant's reliance on the operating expenses of M Squared to establish that he does not have any disposable monthly income was wholly misplaced. His testimony regarding both the operation and the operating expenses for M Squared was hazy, incomplete, inconsistent, and, as a result, simply not credible. Finally, the evidence at trial established that Debtor/Defendant can pay the marital debt within a year, without lowering his standard of living below Plaintiff's standard of living.

Accordingly, this Court finds that the Chase obligation and the furniture obligation are nondischargeable.

An appropriate order will follow.

HONORABLE KAY WOODS
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

JOHN MARK MILLER,

Debtor.

MICHELLE DeJACIMO-MILLER,

Plaintiff,

vs.

JOHN MARK MILLER,

Defendant.

CASE NUMBER 05-40560

ADVERSARY NUMBER 05-4112

THE HONORABLE KAY WOODS

O R D E R

For the reasons set forth in this Court's memorandum opinion entered on this date, the obligations of Debtor/Defendant John Mark Miller, as set forth in the Divorce Decree in Case No. 03 DR 222 on December 11, 2003, to assume the Bank One loan obligation; the GM debt obligation; and the Lowe's credit card obligation (now the Chase obligation) and to pay \$400.00 for the family room furniture are nondischargeable pursuant to 11 U.S.C. § 523(a)(15).

IT IS SO ORDERED.

HONORABLE KAY WOODS
UNITED STATES BANKRUPTCY JUDGE