

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

IN RE:)
)
MICHAEL D. HOVIS,) Bankruptcy Case No. 99-33504
)
Debtor.)
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)
VICKIE R. HOVIS,)
)
Plaintiff,)
)
vs.) Adversary Case No. 00-3047
)
MICHAEL D. HOVIS,)
)
Defendant.)

OPINION

This matter having come before the Court for trial on a Complaint to determine dischargeability of debt filed by the Plaintiff, Vickie R. Hovis, on March 1, 2000; the Court, having heard sworn testimony and arguments of the parties and being otherwise fully advised in the premises, makes the following findings of fact and conclusions of law pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure.

Findings of Fact

1. The Plaintiff is a creditor of the Debtor/Defendant by virtue of a Marital Separation Agreement which was approved and made a part of the Judgment of Dissolution of Marriage entered in the Madison County, Illinois, Circuit Court, in Case No. 98-D-776, on September 10, 1999.

The Marital Separation Agreement provides in pertinent part as follows:

D. ADJUSTMENT OF UNPAID DEBTS. The parties agree that the marital debt, hereinafter listed, shall be split on a 60/40 basis with the Husband paying 60% of the said debt and the Wife paying 40% thereof, and the same shall be valued as of the time of the parties' separation on or about October 2, 1997. The said marital debt includes, but is not necessarily limited to, the following: MBNA, \$13,760.37; City Bank, \$5,948.38; Preferred, \$6,765.48. Additionally, each of the parties shall be responsible to pay any debt which they have incurred in their own name alone or after their separation on or about October 2, 1997.

2. The Debtor/Defendant has filed for relief under Chapter 7 of the Bankruptcy Code in the above-captioned case, and seeks to discharge the indebtedness owed to Associates National Bank in the amount of \$5,166, City Bank in the amount of \$4,274, and MBNA in the amount of \$12,471. These debts are debts which the Debtor/Defendant was ordered to pay pursuant to the Judgment of Dissolution of Marriage, and are the subject of this adversary proceeding.

3. The Complaint filed by the Plaintiff, Vickie R. Hovis, on March 1, 2000, alleges that the subject debts should be determined to be non-dischargeable in the Debtor/Defendant's bankruptcy proceeding, pursuant to 11 U.S.C. § 523(a)(15). Plaintiff alleges that the Debtor/Defendant has the ability to pay these debts from income or property that are not reasonably necessary to be expended for his maintenance or support of a dependent and that discharging such debts would result in a benefit to the Debtor/Defendant that would outweigh the detrimental consequences to the Plaintiff and the child of the

Debtor/Defendant.

4. At trial in this matter, on June 26, 2000, the Court heard sworn testimony of the parties, and admitted into evidence nine exhibits on behalf of the Plaintiff and one exhibit on behalf of the Debtor/Defendant.

Conclusions of Law

In order to prevail under 11 U.S.C. § 523(a)(15), the Plaintiff must first establish that she has a claim against the Debtor/Defendant other than the type set forth in 11 U.S.C. § 523(a)(5), that was awarded by a Court in the course of a divorce proceeding or separation. In re Paneras, 195 B.R. 395 (Bankr. N.D. Ill. 1996), *citing In re Silvers*, 187 B.R. 648 (Bankr. W.D. Mo. 1995). Once the Plaintiff demonstrates that the debt is other than the type set forth in 11 U.S.C. § 523(a)(5) (and this is a given in the instant case), the burden then shifts to the Debtor/Defendant to show either (1) that he lacks the ability to pay the debt at issue, or (2) that the discharge will be more beneficial to the Debtor/Defendant than detrimental to the Plaintiff. Paneras, *supra*, at 403; In re Hill, 184 B.R. 750, at 754 (Bankr. N.D. Ill. 1995). The debt will remain dischargeable if paying the debt would reduce the debtor's income below that necessary for the support of the debtor and the debtor's dependents. *See: Hill*, *supra*, at 754. Because this language mirrors the disposable income test found in 11 U.S.C. § 1325(b)(2), most Courts utilize an analysis similar to

that used in determining disposable income in Chapter 13 cases. See: Hill, supra, at 755; In re Smither, 194 B.R. 102 (Bankr. W.D. Ky. 1996); In re Carroll, 187 B.R. 197, at 200 (Bankr. S.D. Ohio 1995); in re Phillips, 187 B.R. 363, at 369 (Bankr. M.D. Fla. 1995); and In re Hesson, 190 B.R. 229 (Bankr. D. Md. 1995).

In determining the dischargeability of a debt under 11 U.S.C. § 523(a)(15), evaluation of three factors is required: (1) the debtor's ability to pay the subject debt; (2) the non-debtor spouse's ability to pay the subject debt; and (3) the financial repercussions to the non-debtor spouse of discharging the debt. It has been uniformly held and recognized that, if the debtor is found to lack the ability to repay the subject debt, the inquiry ends and the debt is deemed dischargeable. If, however, the debtor is found to have the ability to repay the subject debt, the inquiry proceeds to consider the non-debtor spouse's ability to pay the subject debt.

In the instant case, the Court finds that, based upon the sworn testimony, the Debtor/Defendant has an ability to pay the subject debt. Albeit that it will take some time, the Debtor/Defendant does have the ability to pay the debt on an installment basis. The evidence further shows that the non-debtor spouse, the Plaintiff in this instance, does not have the ability to repay the subject debt, and that the financial repercussions to the Plaintiff will outweigh the detriment to the Debtor/Defendant in having these debts determined non-dischargeable in

bankruptcy pursuant to 11 U.S.C. § 523(a)(15). This conclusion is borne out by the bankruptcy schedules of the Debtor/Defendant and Plaintiff's exhibits admitted into evidence.

ENTERED: June 29, 2000.

/s/ GERALD D. FINES
United States Bankruptcy Judge