

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

IN RE:)	
LAWRENCE M. MELLO,)	Bankruptcy Case No. 96-31464
)	
Debtor.)	
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AMY MELLO and)	
JOHN J. JOHNSTON,)	
)	
Plaintiffs,)	
)	
vs.)	Adversary No. 96-3179
)	
LAWRENCE M. MELLO,)	
)	
Defendant.)	

OPINION

This matter having come before the Court for trial on a Complaint to Determine Dischargeability for Child Support/ Maintenance Related Debts filed by Plaintiffs on July 12, 1996; the Court, having heard sworn testimony and arguments of counsel 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

The material facts in this matter are not in serious dispute and are, in pertinent part, as follows:

1. Plaintiff, Amy Mello, and the Defendant were married for approximately ten years and received a judgment of dissolution of their marriage on February 28, 1996, in St. Clair County, Illinois.
2. The parties had three children, ages 3, 5, and 8, whose custody was awarded to Plaintiff, Amy Mello.
3. Under the terms of the Judgment for Dissolution of Marriage, Plaintiff was awarded

maintenance and child support. The Defendant was also ordered to pay a portion of the Plaintiff's attorney's fees and certain marital debts, including debts which he is attempting to discharge in his bankruptcy proceeding.

4. The Debtor is fully employed, having received his Bachelor's Degree in the Spring of 1996. He currently earns the sum of \$64,000 per year.

5. Plaintiff, Amy Mello, is currently unemployed and attending school as a full-time student, with the goal of obtaining a certification in respiratory therapy in the Spring of 1997. The Plaintiff's current status as a full-time student is acknowledged by the Defendant to be in the best interests of the parties' minor children, and it was for this reason that the State Court ordered maintenance for the Plaintiff to continue until at least September 1999, at which point in time it was reviewable by the Court.

6. Immediately following the entry of Judgment for Dissolution of Marriage in St. Clair County, the Debtor fell behind on his child support and maintenance payments and was ordered to show cause by the Court in St. Clair County why he should not be held in contempt. In resolution of this matter, an Order was entered by the Court ordering the Debtor to cure the child support and maintenance arrearage and to pay a total sum of \$1,281.25 in attorney's fees to John J. Johnston, as attorney for Amy Mello. The attorney's fees, in the sum of \$1,281.25, were incurred as a result of an action in pursuit of collection of child support and maintenance in the State Court.

7. In his bankruptcy proceeding, the Debtor is attempting to discharge three credit card debts which he was ordered to pay pursuant to the parties' Judgment for Dissolution of Marriage. Those cards were AT&T Universal Card, with an approximate balance of \$5,200; Scott Credit Union VISA, with an approximate balance of \$2,500; and Ameritech Complete Card, with an approximate balance of \$1,800.

8. Plaintiff, Amy Mello, argues that the credit card debts listed above were to be paid by the Debtor in the nature of maintenance and, as such, are non-dischargeable pursuant to 11 U.S.C. § 523(a)(5). In the alternative, Plaintiff argues that these debts are non-dischargeable under 11 U.S.C. § 523(a)(15), in that granting a discharge of these debts would impose a greater burden on the Plaintiff,

Amy Mello, which outweighs the need for Debtor to have these debts discharged.

Conclusions of Law

The issues before the Court are whether the Defendant may discharge his obligation to hold the Plaintiff, Amy Mello, harmless for certain marital debts that were assigned to him in the dissolution of marriage proceedings and whether he can discharge the Plaintiff's attorney's fees which were ordered by the Court in St. Clair County to be paid as a result of an Order to Show Cause entered on March 6, 1996. The burden is upon the Plaintiffs to prove by a preponderance of the evidence that the debts in question are either in the nature of alimony, maintenance, or support, or that they are non-dischargeable under the provisions of 11 U.S.C. § 523(a)(15). The standard of proof is by a preponderance of the evidence. Grogan v. Garner, 111 S.Ct. 654 (1991).

Before addressing the issues and the applicable law, the Court first must note that it found the Plaintiff, Amy Mello, to be a credible witness. Given her demeanor, her appearance, and her responses to questions and how those responses related to the documents and other evidence in the case, the Court had no difficulty in believing the testimony of the Plaintiff, Amy Mello. As for the Defendant, the Court found that he was not a credible witness. The Court makes this finding based upon the evasive nature of his testimony and certain portions of his testimony concerning his monthly living expenses. In particular, the Court notes that the Debtor's insistence on paying some \$162 per month on an unsecured debt involving a computer that he no longer has and a woman's tennis bracelet for which he has no use make it apparent that the Debtor wishes to inflate his living expenses to show an inability to pay the debts which are the subject of this adversary proceeding. Furthermore, the Court finds that the Debtor's testimony concerning his need for a rather large monthly clothing allowance was not believable, leading the Court to conclude that the Debtor, if forced to do so, is much more able to pay the debts in question than is the Plaintiff, Amy Mello.

The Court will first address the issue of \$1,281.25 in attorney's fees that were ordered to be paid by the Debtor by the State Court. As noted above, the Court found that these attorney's fees were incurred by the Plaintiff, Amy Mello, in connection with her pursuit of child support and maintenance. The

Court further finds that, given the disparity in the parties' income and other factors present between the parties, the award of attorney's fees also reflected a balancing of the divorced parties' financial needs. As such, these fees are non-dischargeable in bankruptcy pursuant to 11 U.S.C. § 523(a)(5). See: In re Dalton, 139 B.R. 708 (Bankr. C.D. Ill. 1992); and In re Coil, 680 F.2d 1170 (7th Cir. 1982).

In addressing the Debtor's attempt to discharge the three credit card debts which are the subject of this adversary proceeding, the Court finds that, pursuant to 11 U.S.C. § 523(a)(5), these debts are also in the nature of alimony, maintenance, and/or child support in that, given the factors noted by the Court in Dalton, supra, there is a clear attempt by the Court to award the payment of these debts to the Debtor in order to balance the great discrepancy in the income of the parties and to provide for the three minor children of the parties during a time when the Plaintiff is furthering her education with the goal of becoming self-supportive. The Court also finds that the debts in question would be non-dischargeable pursuant to the provisions of 11 U.S.C. § 523(a)(15) had the Court not found them to be non-dischargeable under § 523(a)(5). The legislative history of § 523(a)(15) indicates that this relatively new section is an additional exception to discharge for some debts arising out of a judgment of dissolution of marriage or a separation agreement that would not traditionally be non-dischargeable under 11 U.S.C. § 523(a)(5). Section 523(a)(15) is an acknowledgment that, in some cases, divorcing parties have agreed to make payments of marital debts, holding the other spouse harmless for those debts, in exchange for smaller alimony/maintenance payments than would otherwise be required. This new section now makes such obligations non-dischargeable in instances where the debtor has the ability to repay them and the detriment to the non-debtor from their non-payment outweighs the benefit to the debtor of discharging said debts. Hence, 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. The debt will also be discharged if the benefit to the debtor of discharging it outweighs the harm to the ex-spouse. 140 Cong. Rec. H10752, H10770, (daily ed. Oct. 4, 1994). See also: In re Albrecht, Bankruptcy No. 95-70598, Adversary No. 95-7042 (Bankr. C.D. Ill. 1996); In re Gantz, 192 B.R. 932 (Bankr. N.D. Ill. 1996); and In re Hill, 184 B.R. 750 (Bankr. N.D. Ill. 1995). To prevail under § 523(a)(15), the debtor must show an inability to pay

the debt at issue. In re Hill, supra, at 754. In this case, the Court finds that the Debtor has not shown an inability to pay the debts at issue. In fact, the Court finds that, if the Debtor were to shed himself of unnecessary obligations and be more forthright about his actual expenses, the Debtor is well able to pay the obligations in question. In this matter, discharge of the debts in question would cause a substantial amount of harm to the Plaintiff, Amy Mello, and that harm, in this instance, outweighs the benefit of a discharge for the Debtor. As such, the Court finds that the three credit card debts which the Debtor was ordered to pay in the Judgment for Dissolution of Marriage of the parties are non-dischargeable under 11 U.S.C. § 523(a)(15) as well as under 11 U.S.C. § 523(a)(5).

ENTERED: October 21, 1996.

**/s/ GERALD D. FINES
United States Bankruptcy Judge**