

In the United States Bankruptcy Court

for the Northern District of Iowa

RICK LEE BURGIN
Debtor.

Bankruptcy No. 94-31841XF
Chapter 7
Contested No. 6037

DANNA BURGIN
Plaintiff

Adversary No. 95-3040XF

vs.

RICK LEE BURGIN
Defendant.

DECISION

Danna Burgin, debtor's former spouse, asks that her claim against debtor arising from a dissolution decree be excepted from discharge. The proceeding was consolidated for trial and decision with a contested matter proceeding brought by debtor seeking to avoid Danna Burgin's judicial lien against exempt property. Trial was held July 25, 1996 in Fort Dodge. Kurt T. Pittner, Esq. appeared for Danna Burgin; James W. McCarthy, Esq. appeared for Rick Lee Burgin. The adversary proceeding is a core proceeding under 28 U.S.C. 157(b)(2)(I); the motion to avoid lien is a core proceeding under 28 U.S.C. 157(b)(2)(O). This decision is issued pursuant to Fed.R.Bankr.P. 7052(a).

FINDINGS

Rick Lee Burgin (BURGIN or DEBTOR) filed his chapter 7 petition on November 14, 1994 (exhibit 11). He scheduled, among other things, interests in a 1990 pickup truck valued at \$10,000, a boat valued at \$2,500, farm machinery and fixtures having an aggregate value of \$79,000, livestock valued at \$21,450, harvested beans (155.6 acres), and unharvested corn (163.9 acres). The crops had been grown on property rented by debtor. He claimed as exempt: the pickup to the extent of \$5,000; farm implements to the extent of \$10,000; and livestock to the extent of \$10,000. Although the implements had been itemized in the schedule of property, the claim of exemption was not. No one objected to the claim of exemptions, although it appears that the aggregate claims to livestock and machinery exceeded the amounts allowable under Iowa Code 627.6(11)(a) and (b). The livestock was abandoned by the trustee as having no value to the estate (the court takes judicial notice of the abandonment as set out in docket no. 7).

On the motion of the trustee and pursuant to court order, the debtor amended his schedules to show interests in several firearms and motor vehicles. The amendment (exhibit 12) showed a revised

debtor's opinion as to the value of farm implements and fixtures (\$71,500) and as to the value of the livestock (\$5,650). The crops were valued at \$87,155.76. The claims of exemption were not amended.

Debtor scheduled several secured creditors, no priority creditors, and four unsecured creditors. The largest scheduled unsecured creditor was Danna Burgin with a claim of \$24,000. her former attorney was scheduled as having a claim of \$1,000. The Clerk of Court for Hamilton County was scheduled as an unsecured creditor in the amount of \$119. The latter two claims were likely related also to the debtor's dissolution. The only unsecured creditor which appears unrelated to the dissolution was Doolittle Oil Co. with a scheduled claim of \$3,000.

The parties' marriage was dissolved in October 1992 (exhibit 6). They had been married nearly 10 years. They have three children. Sara, who is now nearly 18, was born to Danna and another prior to the marriage. Burgin adopted her. They have two sons, Scott, age 13, and Shane, age 10. Sara and Shane live with Danna who has remarried and who is now Danna Chapman. Scott lives with Rick Burgin.

The divorce was acrimonious. In 1992, the state court thrice found Burgin in contempt for failure to abide by court orders, including support requirements. Danna initially was given custody of the three children. However, the parties agreed to a modification to the dissolution decree in 1996, and Scott went to live with Rick Burgin. His support obligation was reduced from \$500 to \$100.32 per month. Burgin has another son not from this marriage. He presently pays \$100 per month in support for his benefit.

Burgin is a 38-year old farmer. He is in good health. He lives on a farm owned by his father. He farms its 194 acres for cash rent of \$20,000 per year and farms also 38 acres which he rents from another for a half share of the crop. Burgin farmed during the entire time of his marriage to Danna. She helped him farm and also worked off the farm.

In the dissolution, Mrs. Chapman received no alimony. The state court separately awarded her and Rick Burgin personal items. Mr. Burgin was awarded all of the farming assets and was to be responsible for the farm debts. The court noted that Burgin's February 19, 1992 financial statement showed farm assets of \$227,543 and debt of \$130,181. In equitably dividing all assets between the couple, the court awarded Danna a lump sum property settlement of \$24,000 (exhibit 6, page 6). The court further determined that "Danna shall be given a lien on all farm equipment, inventory and livestock to secure payment of the property award." (Exhibit 6, page 9). Burgin was required to pay the property settlement in installments; \$8,000 on or before December 1, 1992, another \$8,000 on or before December 1, 1993, and the remaining \$8,000 on or before December 1, 1994 (exhibit 6, page 9).

In June 1994, the court found, in one of the contempt proceedings, that Burgin was in contempt of court for failure to make any payments to Danna on the property settlement. In finding Burgin in contempt, the court stated:

Although Rickie has been experiencing financial difficulties, as has Danna, he has had the financial ability to pay at least something toward the cash property settlement. If anything, Rickie's present financial condition may be somewhat better than it was when the decree was entered. Rickie has assets which could be liquidated to pay at least part of the cash property settlement. It is readily apparent from the Decree of Dissolution that the Court then expected Rickie to liquidate certain assets to pay Danna her fair share of the property.

Exhibit 9, Order, page 3. Thereafter, Burgin made no payments on the property settlement.

Burgin's present farming operation is reduced from prior years. He is going out of the livestock business. He presently has eight sows and 100 head of fat hogs. He plans to sell these. Because of livestock costs, he does not plan a livestock operation for 1997.

The evidence was contradictory as to Burgin's present crop acres. I find he presently has 109 acres of growing corn and 94 share acres. This takes into consideration only his share of the crop share arrangement on some of his acres. Burgin considers the potential income from his crops to be somewhat unpredictable at present because of factors that cannot yet be determined--weather, the remaining length of the growing season, possible calamities, all of which affect yields, and because of prices. In his view, he may obtain crop income of \$71,860. Based on his 1995 yields, however, he could have income as great as \$105,583. Burgin considers 1995 to be a good, but unrepresentative, farming year for him. He points out that in prior years, his farm income was not so great (exhibits A-H).

From his income, he has various obligations that have post-dated or survived bankruptcy. He owes his father \$20,000 in cash rent for the present crop year. He owed Van Diest Supply \$20,000 for 1996 crop inputs, Crow Seed Corn \$6,000 for seed corn, approximately \$5,000 in fuel expenses, and a payment of nearly \$14,000 to First American Bank on a reaffirmed debt secured by farm assets. He also expects as much as \$11,000 in repair expenses yet this year and living expenses of \$10,000.

Also, a payment must be made by December 31, 1996 to his bankruptcy trustee, David A. Sergeant, to complete a settlement made with Sergeant on behalf of the estate. The payment required is \$15,174 plus 8 per cent interest from January 23, 1996. The payment will be about \$16,300.

Part of the settlement involved debtor's purchase of non-exempt property of the estate including various motor vehicles, guns, an insurance policy, and the non-exempt portion of the pickup truck. Debtor testified the settlement also included his purchase of the value of a boat in excess of an incumbrance to Norwest Bank. Burgin reaffirmed the debt to Norwest and, subsequent to settling with the trustee, paid off the balance on the boat.

Considering Burgin's estimate of the value of the 1996 crop and the projected remaining expenses for the year, there would be insufficient income to pay the bills. Burgin says he will probably have to ask his father if he can postpone payment of some of the 1996 rent.

If the higher estimates are used, there could be as much as \$3,200 in net income available to pay something on the property settlement. Danna Chapman is willing to take payments over time.

Burgin has earned some extra money between crop seasons. Last winter he earned about \$200 working part-time in a bar and \$700-\$800 helping build a house in Des Moines. Last spring he earned \$400-\$600 helping another farmer with planting.

In addition to purchasing the boat from the estate and paying off the encumbrance, he recently purchased a used Harley-Davidson motorcycle for \$9,000; he paid \$2,000 down and agreed to payments over time. He says he uses it to run errands for the farm. He has other vehicles which would suffice for that purpose.

Mrs. Chapman is 38 years old. She lives in Humboldt with her husband Jeff, whom she married two years ago. She works for a business called Western Edge earning \$5.15 per hour for a 35-hour week.

Previously, she worked for a Hy-Vee grocery store where she was earning \$5.50 per hour when she changed jobs.

She tries to earn extra money by selling bath products part-time. Her husband earns \$20,000 per year gross on a production line at Chantland Mfg. She had hoped to use the \$24,000 property settlement to purchase a home. Prior to her remarriage, she had trouble making "ends meet." She received help from public assistance programs.

DISCUSSION

It is undisputed that Burgin is obligated to Danna Chapman for \$24,000 as a debt incurred in connection with a divorce decree. Such a debt is nondischargeable under 11 U.S.C.

523(a)(15) unless one of two exceptions to nondischargeability applies. In pertinent part, 523(a)(15) states:

A discharge under section 727 . . . does not discharge an individual debtor from any debt--

* * *

(15) not of the kind described in paragraph (5)⁽¹⁾ that is incurred by the debtor . . . in connection with a . . . divorce decree . . . 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 . . . former spouse, or child of the debtor.

11 U.S.C. 523(a)(15).

The burden is on the debtor to show that one of these two exceptions to nondischargeability applies. Becker v. Becker (In re Becker), 185 B.R. 567, 569 (Bankr. W.D. Mo. 1995). Contra Kessler v. Butler (In re Butler), 186 B.R. 371, 373-74 (Bankr. D. Vt. 1995)(creditor has burden on exceptions under subsections (A) and (B)). Burgin contends that his obligation to Danna Chapman should be discharged under either. He testifies essentially that farming is a financially precarious business and that he has been unable, but not unwilling, to pay. He said he would have paid if he had had additional money. He did not pay because "it just flat wasn't there." (Debtor responded "correct" when his attorney asked if that was why he had not paid.)

Moreover, Burgin fears that his wife, out of feelings of vengeance, will attempt to execute on the farm assets, thereby shutting his operation down and putting him out of the farming business. He asks that

the property settlement obligation be discharged and that the court avoid Danna Chapman's judicial lien in his farm assets. As to the lien avoidance issue, she argues that the most he is entitled to is avoidance of the lien on exempt farm implements, not all farm assets, and that that is not now possible because debtor failed to itemize his exemptions.

Regardless of which party has the burden of proof, the preponderance of evidence in this case is that Burgin does have the ability to pay out of income which is not needed for support or his business. The evidence is insufficient to show that discharging the debt would result in a benefit to him that outweighs the detrimental consequences to his former spouse.

I find Rick Burgin not to be a credible witness. I believe he would say anything to avoid paying this debt. His avoidance of payment is not predicated on his need to support himself and his dependents or his need to keep his farming operation going. He takes the position that he cannot pay, yet he finds the money to purchase a motorcycle and a boat. His contentions are without merit.

His tax returns do not corroborate his position. From 1988 through 1995, he has had average net farming income of about \$13,000 per year, if one does not consider the non-cash expense of depreciation. He has also enjoyed tax refunds during many of those years.

His fear that if the debt is not discharged his former spouse will execute on her lien and shut down the business is not well-founded. At best, he could avoid the lien only on otherwise exempt equipment or livestock. Exemption of these types of property is limited to \$10,000 in the aggregate. Discharge would not avoid the lien as to the balance of the farm assets. So even if the debt were discharged, she could execute on much of the equipment. To the extent that other creditors holding security interests have priority over her lien, she would have to pay them off on execution (Iowa Code 626.34-.36) or the levy would be lost. If the First American Bank security interest is prior, and as it is owed more than \$40,000, it is unlikely she could do so.

I agree with Mrs. Chapman's position that Burgin is not entitled to avoid the lien even on purportedly exempt property because Burgin has failed to properly specify which of his farm equipment, implements and livestock are exempt. Also, he has claimed implements and livestock of a value in excess of the state law's allowance. Although that may prevent general unsecured creditors from reaching the property, it does not prevent a secured creditor from resisting lien avoidance on that ground. Because he has failed to itemize his exemption claim and because it is in excess of the state law allowance, the debtor's motion to avoid the judicial lien of Danna Chapman will be denied.

IT IS ORDERED that judgment shall enter that Rick Lee Burgin's property settlement obligation to Danna Burgin (Chapman) arising out of judgment in In re Marriage of Burgin, Case No. 1564, Iowa District Court for Hamilton County, is excepted from debtor's bankruptcy discharge pursuant to 11 U.S.C. 523(a)(15).

IT IS FURTHER ORDERED that the motion of Rick Lee Burgin in contested matter 6037 to avoid the judicial lien of Danna Burgin (Chapman) in debtor's property is denied.

SO ORDERED THIS 5th DAY OF AUGUST 1996.

William L. Edmonds
Chief Bankruptcy Judge

I certify that on _____ I mailed a copy of this order and a judgment by U.S. mail to: Kurt Pittner, James McCarthy, David Sergeant and U.S. Trustee.

1. Paragraph (5) excepts from a debtor's discharge any debt to a former spouse or child for alimony, maintenace or support in connection with a divorce decree. 11 U.S.C. 523(a)(5).