

In the United States Bankruptcy Court

for the Northern District of Iowa

Western Division

WENDY LUETJE

Debtor(s).

Bankruptcy No. 97-50441S

Chapter 7

DAVE ROTHE

Plaintiff(s)

Adversary No. 97-9109S

vs.

WENDY LUETJE

Defendant(s)

ORDER RE: DISCHARGEABILITY

The matter before the court is the final trial of David Rothe's complaint to determine the dischargeability of debt under 11 U.S.C. § 523(a)(15). Trial was held April 8, 1998 in Sioux City. Julie Schumacher appeared for plaintiff Rothe. Eric Neu represented debtor-defendant Wendy Luetje. The court now issues its findings of fact and conclusions of law as required by Fed.R.Bankr.P. 7052. This is a core proceeding under 28 U.S.C. § 157(b)(2)(I).

Findings of Fact

Wendy Luetje filed a Chapter 7 bankruptcy petition on February 24, 1997. She scheduled approximately \$25,000 in unsecured debts. No other creditor objected to the discharge of a debt. The court takes judicial notice that Luetje did not reaffirm any of her debts. She received her Chapter 7 discharge on June 10, 1997.

David Rothe is the former spouse of Luetje. The parties were married in 1992. They separated in 1995. No children were born of the marriage. Exhibit 1, ¶ 1. On October 16, 1996, a decree of dissolution was filed in the Iowa District Court for Crawford County, Equity No. 1889, dissolving the parties' marriage. Exhibit 1.

During the marriage the parties jointly owned real estate locally known as 501 North 14th Street, Denison, Iowa. The divorce decree valued the property at \$35,000 and awarded it to Rothe. Exhibit 1, ¶ 5, page 3. The court found there was no equity in the property. *Id.* at 4. Rothe was assigned a total of \$36,498.72 in debt "associated with the residence." *Id.*

Rothe was assigned additional debts of approximately \$11,200. *Id.*, ¶ 9. Luetje was ordered to pay debts of approximately \$22,000. *Id.*, ¶ 8. The court ordered the parties each to pay half the court costs and to bear their own attorney fees, finding that Luetje was "voluntarily unemployed ... but ... capable of being

employed." Exhibit 1, ¶ 11. The court awarded items of personal property to each party. *Id.*, ¶¶ 6, 7, 10.

Among the debts assigned to Luetje were \$1,525.78 owed to Flex Bank One credit card, \$370 owed to Gene's Service, and \$4,484.02 owed to National Bank of Iowa, Denison (NBI). *Id.*, ¶ 8. Rothe is jointly liable on these three debts. The Flex card debt was incurred for the purchase of a box spring, mattress and couch. Luetje has the box spring and mattress in her possession; Rothe has the couch. The debt to Gene's Service is for dirt work done at the 501 North 14th Street property by Gene Bobzien. Exhibit 2. The debt to NBI is for a note secured in part by a 1991 Dodge Spirit. Luetje has this vehicle in her possession and values it at \$500.

Among the assets awarded in the dissolution decree to Luetje was an insurance check in the amount of \$3,391.35, the proceeds of an accident claim. Exhibit 1, ¶ 6. In January 1997, the check was applied to reduce Luetje's liability on the NBI car note. Exhibit H. The parties agree that the amount of her obligation under the decree for the NBI note is \$1,092.77. Doc. 11, Joint Amended Pretrial Statement, uncontested facts. The three debts total \$2,988.55.

Luetje has made no payments on the debts to Flex card, Gene's Service and NBI. The creditors have contacted Rothe for collection. He has made payments on the Flex card. Flex stopped billing him after Luetje filed her bankruptcy petition. The debt to NBI is also secured by one of Rothe's vehicles. He has continued to make payments to NBI. He maintains liability insurance on Luetje's Dodge Spirit.

On November 8, 1996, Wendy Luetje married Jay Luetje. This was her fourth marriage. The Luetjes live in Westside, Iowa with Jacob Luetje and Jerrod Luetje, Jay's sons from a previous marriage, and Jessica Powers, Wendy's daughter from a marriage prior to her marriage to Rothe. Jessica is 14, Jacob is 12, and Jerrod is 10.

Wendy Luetje described Jacob as a "special needs" child. In 1996 he was evaluated by the Western Hills Area Education Agency. Exhibit K. The AEA report stated that Jacob has a mental disability which has resulted in significant delays in several areas of his development. *Id.*, unnumbered page 2. Luetje keeps a journal on Jacob for his doctor, teachers and AEA staff. She says Jacob continues to have serious problems. He exhibits inappropriate behavior, such as eating inedible objects, so that he requires constant adult supervision. He has seizures at times. He does not speak, but communicates through noises and gestures. Jacob has some capacity for learning, however. He has become toilet trained relatively recently. He is beginning to learn sign language. He goes to school from 8:00 a.m. and 4:00 p.m. each day at the same elementary school that his brother attends.

Luetje is a homemaker. She drives the children to school, which allows Jacob to arrive early enough for special education. He has an 8:00 a.m. speech therapy class and is learning to serve himself breakfast. During the day, Luetje is at home to be "on call" in case Jacob is unable to make it through the school day, which she says happens often. She says no one else is available to do this. Jay Luetje's work requires out-of-town travel. His parents are in their 70s. His mother recently had bypass surgery after suffering a heart attack. Jacob's mother lives in Sac City, about 45 miles away. She apparently has had little involvement with Jacob in recent months; she does not exercise her visitation rights.

Wendy Luetje is 37 years old. She has a high school diploma and has attended school to become a real estate broker. During her marriage to Rothe, she sold real estate. She earned between \$9,000 and \$14,000 annually. She let her license lapse. The court infers this happened sometime in 1996, because she and Jay reported business income for that year. Exhibit C; *cf.* Exhibits D-F (Wendy Luetje's separate income for

tax years 1993-1995 shown as business income).

Exhibit A lists Wendy Luetje's current debts. Her separate debts consist of delinquent income taxes and attorney fees for tax matters. She owes the Internal Revenue Service approximately \$1,800 for tax year 1993 and \$1,400 for 1994. Exhibit A-2. She owes the Iowa Department of Revenue approximately \$145. Jay and Wendy Luetje filed a joint federal income tax return for 1997 requesting a refund of \$3,766, most of which is an earned income credit. Exhibit B. Wendy expects that after the IRS offsets Jay's delinquent child support obligation and her tax obligations against the refund, she will still owe a small amount for delinquent taxes. Jay's child support debt is approximately \$1,324. Exhibit A, page 2.

Jay Luetje works for Cook Siding as an installer of siding and replacement windows. He earns gross wages of approximately \$1,600 per month; deductions total approximately \$370. Exhibit A, page 2, part II.A. He receives \$440 per month in Social Security disability benefits for Jacob. His former spouse pays \$75 per month in child support. His total net income is approximately \$1,745. *Id.* The family has approximately \$1,690 in monthly living expenses and installment payments on debts. *Id.*, part II.D. Jay Luetje owns three vehicles: an overencumbered 1987 pickup, a 1982 Firebird valued at \$500, and a disassembled Harley Davidson with parts missing. *Id.*, page 1.

Rothe is 38 years old. He has a high school diploma. His marriage to Luetje was his first. He has not remarried and has no dependents. He works for Coleman Motors as a mechanic and in sales. His wage is \$8.50 per hour. He earns 25% of the profit as a commission on sales. In 1997, Rothe had gross income of approximately \$26,700. He estimates his present take home pay is \$450 per week.

Rothe owns a Corvette worth about \$8,000, which is pledged to NBI. He also has a Harley Davidson motorcycle valued at \$8,000-\$10,000, a high-mileage pickup worth about \$1,000, and a pistol worth \$400.

Rothe's monthly expenses include \$352 for his mortgage payment, between \$150 and \$200 for electricity and gas, and \$60 for auto insurance. He tries to make payments of \$200 each month on credit card bills. He has a Discover card and a balance of about \$1,000 on the MNBA card assigned to him in the dissolution decree. Other debts include a mortgage balance of approximately \$26,000, a \$7,000 debt to his mother, a \$3,000 loan against a life insurance policy, attorney fees of \$600, and approximately \$2,500 owed to NBI. The debt to NBI includes money borrowed to prevent foreclosure of the 501 North 14th Street property. Four mortgage payments were missed during the time the parties were separated and Luetje was living in the house.

A debt of \$6,841.45 to Color Center was assigned to Rothe in the dissolution decree. Exhibit 1, ¶ 5, page 4. The debt was for cabinets installed at 501 North 14th Street when Rothe was not living there. Luetje introduced Exhibit G, titled "Release of Mechanic's Lien," evidently in an effort to prove that Rothe is not personally liable on that debt. The document states that Color Center "contracted with Warren Skarin" to make improvements at the house. Skarin is Luetje's father. Skarin has paid the debt to Color Center. Rothe says, however, Skarin claims he had the cupboards installed while acting as the agent of Wendy Luetje. Skarin is attempting to collect the debt from Rothe with 10 percent interest. The court is unable to determine whether Rothe is liable to Skarin, and assumes for the purpose of this decision that he is.

Discussion

Rothe requests the court to determine that Luetje's obligation under the dissolution decree to hold him harmless from the debts to NBI, the Flex card and Gene's Service be excepted from her discharge pursuant

to 11 U.S.C. § 523(a)(15). That section provides that a Chapter 7 discharge does not discharge 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, 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.

The parties agree that the debt at issue was incurred in connection with the dissolution and is not in the nature of support. The debt is of the type described in the first clause of § 523(a)(15). The debt is nondischargeable unless either subsection (A) or (B) applies. The burden is upon Luetje to prove the existence of either of the two exceptions to nondischargeability. Becker v. Becker (In re Becker), 185 B.R. 567, 569 (Bankr. W.D. Mo. 1995). She must establish her proof by the preponderance of the evidence. Grogan v. Garner, 498 U.S. 279, 111 S.Ct. 654 (1991).

Luetje's contends she is unable to pay the debt. The test of a debtor's ability to pay for purposes of § 523(a)(15)(A) is similar to the disposable income analysis in Chapter 13 cases. Taylor v. Taylor (In re Taylor), 191 B.R. 760, 765-66 (Bankr. N.D. Ill. 1996), aff'd, 199 B.R. 37 (N.D. Ill. 1996). The court must consider the debtor's current and prospective financial circumstances, rather than her situation at a particular moment in time. The analysis examines a debtor's economic prospects and the ability to pay the debt over time. Cleveland v. Cleveland (Matter of Cleveland), 198 B.R. 394, 398 (Bankr. N.D. Ga. 1996); McGinnis v. McGinnis (Matter of McGinnis), 194 B.R. 917, 920 (Bankr. N.D. Ala. 1996); In re Smither, 194 B.R. 102, 107-08 (Bankr. W.D. Ky. 1996).

Jay Luetje supports the family with the income he receives from wages, Social Security and child support. If Wendy were employed, she would have disposable income. The amount of debt at issue is relatively small. The court finds that she would have the ability to pay the debt within a reasonable time even if she were working at a part time job.

Wendy Luetje says her primary reason for staying at home during school hours is to be available to pick up Jacob from school. This arrangement is no doubt convenient for the school, for Jay and for Jacob's mother. Even so, her decision to be "on call" is a choice. Moreover, the choice does not require her to forgo all opportunities for outside employment.

In In re Britten, No. X88-00556S, (Bankr. N.D. Iowa April 9, 1991), the debtor requested a Chapter 13 hardship discharge. One of the reasons for the debtor's failure to make plan payments was her decision to quit her job in order to stay at home with her small children. This court held that she did not prove that her failure to make plan payments was "due to circumstances for which the debtor should not justly be held accountable" within the meaning of 11 U.S.C. § 1328(b)(1). Id., slip op. at 9-10. The decision was understandable as a family matter, but the debtor was held financially responsible for that decision. Id.

Several courts have held that a debtor who has voluntarily reduced or eliminated his or her income has failed to prove the inability to pay exception under 11 U.S.C. § 523(a)(15)(A). See, e.g., Johnson v. Rappleye (In re Rappleye), 210 B.R. 336, 341 (Bankr. W.D. Mo. 1997) (debtor who previously owned retail businesses, then became church missionary for virtually no income, failed to show inability to pay property settlement); Johnston v. Henson (In re Henson), 197 B.R. 299, 304 (Bankr. E.D. Ark. 1996) (debtor with experience in insurance field was "employable" but chose not to work; same result); Humiston v. Huddelston (Matter of Huddelston), 194 B.R. 681, 690 (Bankr. N.D. Ga. 1996) (debtor with variety of employable skills voluntarily limited income to about \$780 per year; same result); see also Florio v. Florio (In re Florio), 187 B.R. 654, 657 (Bankr. W.D. Mo. 1995) (post-petition, debtor quit job as surgical technician to work for nothing as pet groomer; court found she had ability to earn amount shown on schedules).

Luetje reported no health problems of her own and appears fit. She is an intelligent person. She was able to acquire a real estate broker's license, and worked for a number of years selling real estate. She conceded there would be employment opportunities in the neighboring towns of Denison and Carroll. She has not looked for work, either in real estate or other areas of employment. The court finds and concludes that Luetje is voluntarily unemployed, and thus has failed to prove that she does not have the ability to pay the debt.

Nor has Luetje shown that discharging this debt would result in a benefit to her that outweighs the detriment to Rothe. Luetje has already received a discharge of approximately \$25,000 in debts. Excepting her debt to Rothe from discharge would not deprive her of a fresh start. Discharging the debt would relieve her of the obligation to pay a small amount of debt that she has the ability to pay. Although Rothe has a good income, he also has substantial debts. He does not want to file bankruptcy. He has worked extra hours to be able to stay current with his debts. If the court discharged Luetje's debt to Rothe, he would remain liable on the debts. His debt to NBI is secured in part by an automobile Luetje has in her possession. Regardless of the low value Luetje places on the vehicle, Rothe's obligation to continue paying on the debt that allows her to keep it is an equitable factor that the court considers.

The court finds and concludes that Luetje has failed to prove either of the two exceptions to nondischargeability under 11 U.S.C. § 523(a)(15). Rothe is entitled to judgment in his favor.

ORDER

IT IS ORDERED that Wendy Luetje's obligation to hold David Rothe harmless on the debts to Flex Bank One, National Bank of Iowa, and Gene's Service, as decreed in Equity No. 1889 in the Iowa District Court for Crawford County, is excepted from her discharge pursuant to 11 U.S.C. § 523(a)(15).

SO ORDERED THIS DAY OF APRIL 1998.

William L. Edmonds
Chief Bankruptcy Judge

I certify that on I mailed a copy of this order by U.S. mail to Julie Schumacher, Eric Neu and U.S. Trustee.