IN THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF IOWA

IN RE:)
) Chapter 7
JEFFREY A. BARTMESS,)
)
Debtor.) Bankruptcy No. 02-02265
---------- KIMBERLY A. BREWER,)
) Adversary No. 02-9132
Plaintiff,)
)
vs.)
)
JEFFREY A. BARTMESS,)
)
Defendant.)

ORDER RE COMPLAINT TO DETERMINE DISCHARGEABILITY

The above-captioned matter came on for hearing on April 17, 2003 on Plaintiff's complaint to determine dischargeability of a debt. Plaintiff Kimberly Brewer appeared in person with Attorney Guy Booth. Defendant Jeffrey Bartmess appeared in person with Attorney Douglas Wolfe. Evidence was presented to the Court. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I).

FINDINGS OF FACT

The parties were married in 1991 and granted a dissolution of marriage after a contested trial in Iowa District Court on September 13, 2000. The trial court made detailed findings. In its decree, the court determined custody, visitation and child support. In addition, it divided the parties' assets and liabilities. As part of the distribution of liabilities, the court determined at paragraph 19: "Kimberly [Plaintiff] shall be solely responsible for and hold Jeffrey [Debtor] harmless on the following debts: one-half joint credit card debt incurred during the marriage; any and all other indebtedness incurred in her name alone." One of the issues in this case is Debtor's liability for one-half of this credit card debt.

After the entry of the decree, Debtor appealed. On January 28, 2002, the Iowa Court of Appeals affirmed the District Court's decree. In its affirmance, the Iowa Court of Appeals stated: "Upon review, we find it appropriate to award Kimberly $1,800.00 in appellate attorney's fees." The dischargeability of this attorney fee award constitutes the second issue in this case.

The evidence reflects that prior to and at the time of the parties' dissolution, Plaintiff Kimberly Brewer was employed by Wells Fargo. Since the entry of the dissolution, she has remarried and has a child of this marriage. Therefore, she has two children in her primary care. Ms. Brewer terminated her employment at Wells Fargo as of April 2001 and now operates a home daycare facility taking care of nine children of whom two are her own. Her net income from this enterprise is slightly less than her income was while employed at Wells Fargo.

Before and at the time of the parties' dissolution, Debtor Jeffrey Bartmess was employed by Foundry Equipment earning$18.60 per hour. Since then, he has become employed by Ace Refrigeration in the drafting department and earns $19.35 per hour. Mr. Bartmess submitted a financial statement to the Court which reflects that, at this time, he has net income slightly less than at the time of the entry of the dissolution decree. However, the evidence also reflects, though the financial statement does not, that Mr. Bartmess resides with another individual who pays no rent or, apparently, any portion of the expenses which are

listed in Mr. Bartmess's financial statement.

The debt in question involves three credit cards: CitiBank, Wells Fargo and Union Planters. These three credit cards existed at the time of the dissolution. Ms. Brewer states that the balances on the credit cards, at or about the time of the dissolution, were: $140 owed to CitiBank; $2,800 owed to Wells Fargo (Norwest Bank); and $400 owed to Union Planters. Mr. Bartmess seems to take some exception to the accuracy of these balances though his report of amounts due, as reflected in the pretrial statement, were: $200 owed to CitiBank, and "Unknown" as to Wells Fargo (Norwest Bank) and Union Planters.

The Court finds credible the evidence supporting the figures provided by Ms. Brewer. They appear consistent with the other physical evidence and her testimony as to her payment record. She testified that since the time of the dissolution, she has paid $322.99 to CitiBank which was the entire amount owing. She paid this amount in order to protect her credit record. She testified that she made payments of approximately $45 or $50 per month to Wells Fargo. This account was closed at about the time of the dissolution with no new charges since then. However, with interest and other penalties, the current balance remains $2,450. The final obligation was to Union Planters and this balance is currently $213.47. Ms. Brewer testified that she has, since the dissolution, paid one-half of the original balance. Finally, she testified that, to the best of her knowledge, Mr. Bartmess has never made any payments toward these obligations.

The record establishes that Plaintiff Kimberly Brewer incurred attorney's fees in defending the appeal pursued by Debtor Jeffrey Bartmess. The Iowa Court of Appeals awarded her $1,800 as partial attorney's fees in this appeal. She testified that Mr. Bartmess has not paid anything towards these attorney fees.

SECTION 523(a)(15)

The dischargeability of non-support debt incurred in the course of a divorce is governed by § 523(a)(15) of the Code. This section provides that "a discharge under 727 of this title does not discharge an individual debtor from any debt--not of a kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation." 11 U.S.C. § 523(a)(15). To find a § 523(a)(15) debt nondischargeable, the court must initially determine whether the debt is one not of kind described in § 523(a)(5). In re Fellner, 256 B.R. 898, 902 (B.A.P. 8th Cir. 2001).

If the debt is a nonsupport property settlement award, a rebuttable presumption of nondischargeability is created. In re Moeder, 220 B.R. 52, 56 (B.A.P. 8th Cir. 1998). The burden then shifts to Debtor to establish that either: 1) he is unable to pay the debt; or 2) the benefit to him of discharging the debt would outweigh the detriment to Plaintiff. Id. Debtor must prove one of these exceptions to § 523(a)(15) by a preponderance of evidence. Grogan v. Garner, 498 U.S. 279, 286 (1991).

An inability to pay exists under § 523(a)(15)(A) if excepting a debt from discharge would reduce a debtor's income to below a level necessary for the support of the debtor and the debtor's dependents. In re Hall, No. 98-1035-W, slip op. at 4 (Bankr. N.D. Iowa Sept. 16, 1999) (citing In re Anthony, 190 B.R. 433, 436 (Bankr. N.D. Ala. 1995)). To make this determination, the Court may consider factors similar to those applied in a Chapter 13 disposable income analysis under § 1325(b)(2). In re Windom, 207 B.R. 1017, 1021 (Bankr. W.D. Tenn. 1997) (noting the language in § 523(a)(15)(A) is nearly identical to language in § 1325(b)(2)).

In calculating disposable income for purposes of Chapter 13, this Court looks at Debtor's current and future financial status, including potential earnings, and whether Debtor's expenses are reasonably necessary. In re Barker, No. 97-01813-C, slip op. at 8 (Bankr. N.D. Iowa Apr. 7, 1998) (citing In re Jodoin,

209 B.R. 132, 142 (B.A.P. 9th Cir. 1997)). In evaluating whether expenses are reasonably necessary, this Court seeks a balance between allowing a debtor a reasonable lifestyle and insuring a serious effort to pay creditors by eliminating "unnecessary and unreasonable expenses." In re Beckel, 268 B.R. 179, 183 (Bankr. N.D. Iowa 2001); In re Gleason, 267 B.R. 630, 633 (Bankr. N.D. Iowa 2001).

When conducting a § 523(a)(15) analysis, it is appropriate for a court to take into account the income of a second spouse or live-in companion. In re Shea, 221 B.R. 491, 499 (Bankr. D. Minn. 1998). The court in Shea stated:

> [W]hen 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". . . . Absent consideration of a new spouse's income and its debt-absorbing impact upon the family's finances, . . . the Court cannot determine exactly what quantum of the debtor's own income truly is "necessary" for the support of himself and his dependents. Consequently, when applying the "ability to pay" standard of § 523(a)(15)(A), a court must consider the income of a new spouse or spousal equivalent in order to reach a complete satisfaction of the task before it.

Shea, 221 B.R. at 499-500. The court in In re Adams, 200 B.R. 630, 634 (N.D. Ill. 1996), also considered the financial situation of Debtor's second spouse when proceeding with § 523(a)(15) analysis. It is the opinion of this Court that these cases appropriately direct consideration of the income and expenses attributable to Debtor’s current spouse or live- in companion when proceeding with the analysis.

The second prong of the alternative test under § 523(a)(15) requires the Court to determine whether the benefit to Debtor is greater than the detriment to Plaintiff in discharging the debt. Fellner, 256 B.R. at 904. In balancing benefit versus detriment, the Court compares the relative standards of living of the parties. In re Lumley, 258 B.R. 433, 437 (Bankr. W.D. Mo. 2001). When a debtor's standard of living is greater than or equal to the creditor's, discharge of the debt is not warranted. In re Williams, 210 B.R. 344, 347 (Bankr. D. Neb. 1997). Conversely, if the debtor's standard of living falls materially below that of the creditor's, a court may grant a discharge under § 523(a)(15). Id.

CONCLUSIONS

The evidence amply supports the conclusion that Mr. Bartmess is earning approximately the same amount of money which he did during the marriage of the parties. He is enjoying a lifestyle which is roughly consistent with that experienced by the parties during the marriage. Mr. Bartmess has experienced no unusual health problems and has been continuously employed at a consistent income level since the dissolution of the parties.

The burden under § 523(a)(15) is on Mr. Bartmess to show that he would suffer a greater detriment than Plaintiff would experience a benefit if he were required to make these payments. Mr. Bartmess’s explanation as to why he has not made any payments are less than compelling. At one point, he testified that he did not make any payments because he did not know where to send the money. Clearly, Mr. Bartmess has failed to establish by a preponderance of evidence the requirements of § 523(a)(15). The credit card obligations constitute a property settlement in connection with the parties' dissolution decree and are within the purview of § 523(a)(15). As Debtor has failed to meet his burden on the elements of 11 U.S.C. § 523(a)(15), these debts are, therefore, nondischargeable.

Additionally, the attorney's fees awarded by the Iowa Court of Appeals are part of the dissolution process, having been awarded after an unsuccessful appeal by Mr. Bartmess.
The attorney's fees and their award are directly related to Mr. Bartmess's decision to appeal the District Court decree. These fees are part of the marital res.

The Court must apply the same legal standards under § 523(a)(15) to the award of attorney's fees. Again, the Court concludes that Mr. Bartmess is in a financial position to pay these fees if he elects to do so. The Court finds that the Defendant has failed to establish the requisite elements under § 523(a)(15) necessary to discharge this obligation.

WHEREFORE, for all the reasons set forth herein, the complaint to determine dischargeability filed by Plaintiff and against Defendant is GRANTED.

FURTHER, the credit card debts which are a part of this complaint are determined to be nondischargeable.

FURTHER, if the actual amounts owing are in controversy, that amount can be clarified in the Iowa Courts.

FURTHER, the award made by the Iowa Court of Appeals in favor of Plaintiff and against Defendant for $1,800 in attorney's fees is determined to be nondischargeable.

SO ORDERED this 23rd day of April, 2003.

_____ PAUL J. KILBURG
CHIEF BANKRUPTCY JUDGE