UNITED STATES BANKRUPTCY COURT
FOR THE
DISTRICT OF NEW HAMPSHIRE

In re: BK No. 99-12646-MWV
Chapter 7

David W. Martin,
Debtor

Elizabeth Neveu,
Plaintiff

v. ADV No. 99-1175-MWV

David W. Martin,
Defendant

John C. Emery, Esq.
Attorney for the Plaintiff

Mark E. Wolterbeek, Esq.
Attorney for the Defendant

MEMORANDUM OPINION
BACKGROUND

Before the Court is a complaint filed by Plaintiff Elizabeth Neveu against the Debtor, David W. Martin, seeking to except from discharge the Debtor's obligation on a joint debt owed to AT&T Universal MasterCard pursuant to 11 U.S.C. §§ 523(a)(2)(A), (a)(5) and (a)(15). At the close of evidence, the Plaintiff agreed that no evidence regarding § 523(a)(2)(A) was provided. Accordingly, that count was dismissed. Therefore, the issues before the Court regard the applicability of §§ 523(a)(5) and (a)(15).

The facts in this proceeding are straightforward. The Debtor and the Plaintiff were married on June 22, 1996. In August of 1996, the couple purchased a truck which was operated by the Debtor in a trucking business. The Debtor provided the down payment for the truck and the Plaintiff obtained financing for the remaining principle in her name only. In addition, the Plaintiff added the Debtor to her AT&T Universal

MasterCard account, which was to be used solely for expenses related to the trucking business.

The Debtor filed for divorce in the Hillsborough County Superior Court on February 20, 1998. On May 27, 1998, the parties entered a Permanent Stipulation ("Stipulation") which provides, inter alia, "David W. Martin shall assume and be solely responsible for the following marital debts and obligations incurred during the marriage. . . i. Credit Card Debt. AT&T Universal MasterCard, 9,000.00 [sic]." See Plaintiff's Exhibit 2, Permanent Stipulation. In addition, the Stipulation provides: "Other than as set forth in these stipulations or other order of this court . . . each party releases and agrees to defend, indemnify and hold the other harmless from any and all claims of any nature whatsoever arising out of the marriage . . . ." Id.

On August 20, 1999, the Debtor filed his Chapter 7 bankruptcy petition. On his schedules, the Debtor listed an unsecured nonpriority debt to AT&T Universal in the amount of $8,847.00. He also listed the Plaintiff as a codebtor on the AT&T Universal account. An order granting the Debtor's discharge was entered on December 1, 1999.

DISCUSSION

At the outset, the Court notes that the Debtor's obligation to AT&T Universal is not at issue in this case. That debt has been discharged. Rather, the issue is the Debtor's liability to the Plaintiff, pursuant to the Stipulation, should she become liable as a codebtor on the AT&T Universal account. See Garrity v. Hadley (In re Hadley), 239 B.R. 433, 435 (Bankr.D.N.H. 1999)(obligation at issue where Debtor has entered into indemnification agreement with ex-spouse codebtor is obligation to the ex-spouse should she pay the debt).

A. Section 523(a)(5).

Section 523(a)(5) excepts from discharge any debt "to a spouse, former spouse, or child of the

debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement . . . ." 11 U.S.C. § 523(a)(5). Whether a debt is in the nature of alimony, maintenance or support or whether it is a property settlement is a question of federal law. Bourassa v. Bourassa (In re Bourassa), 168 B.R. 8, 10 (Bankr.D.N.H.1994). Thus, the court does have some discretion in recharacterizing awards as alimony or support for purposes of § 523. Id.

In determining whether the obligation in question is alimony or support the Court "looks no further than the intent of the parties at the time a separation agreement is executed." Id. (quoting In re Brody, 3 F.3d 35, 38 (2nd Cir. 1993)). Thus, in order to determine that the obligation to pay the AT&T Universal debt was in the nature of alimony or support the Court must determine that the Plaintiff and the Debtor intended such a result at the time they entered into the Stipulation. There is no such evidence in the Stipulation itself. First, the Stipulation specifically states that "neither party requests any alimony from the other party." See Plaintiff's Exhibit 2. Second, although the provision in the Stipulation making the Debtor responsible for the AT&T Universal debt is not specifically labeled as a property settlement agreement, it is listed under the heading "Allocation of Debts," which follows several other categories dividing property between the parties. Id. This plain language of the Stipulation indicates an intent to effectuate a property settlement rather than alimony or support. Furthermore, nowhere else in the Stipulation is there any language indicating that the Plaintiff would receive alimony or support.

The Court does not satisfy its inquiry solely from the language of the stipulation, however. "If the agreement fails to provide explicitly for spousal support, the court may presume that the property settlement is intended for support if it appears under the circumstances that the spouse needs support." Goin v. Rives (In re Goin), 808 F.2d 1391, 1392-93 (10th Cir.1987). The Court finds no evidence of the Plaintiff's relative financial condition at the time of the divorce that would lead it to conclude that the assumption of the obligation was in the nature of alimony or support. Both parties filed financial affidavits with the

Superior Court in connection with the divorce proceedings showing that at the time of the divorce the Debtor had gross monthly income of $2,598.00 and the Plaintiff had gross monthly income of $2,000.00. However, the affidavits do not provide any evidence of the expenses of either party. The Plaintiff's gross earnings at the time of the divorce were approximately eighty percent of the Debtor's, and there is no evidence that she had significantly greater expenses. Therefore, the Court cannot conclude that the Plaintiff was in need of support at the time of the divorce. Finally, there was testimony that the parties permanently separated only eleven months after they were married and they did not have any children. Both of these factors suggest that the parties did not contemplate alimony or support as part of the Stipulation.

The Court finds that there was insufficient evidence from the Stipulation itself or from the relative financial position of the parties at the time of the divorce to show that the agreement to assign the AT&T Universal obligation to the Debtor was in the nature of alimony or support rather than a property settlement agreement. Accordingly, the Plaintiff's claim as it pertains to § 523(a)(5) is denied.

B. Section 523(a)(15).

The remaining issue is whether the obligation is excepted from discharge pursuant to § 523(a)(15). Section 523(a)(15) makes nondischargeable any debt that is:

> 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 or record, a determination made in accordance with State or territorial law by 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 . . . .

11 U.S.C. § 523(a)(15).

In order for a debt to be excepted from discharge pursuant to § 523(a)(15) "the nondebtor spouse must show that the debt arises from a separation agreement. The nondebtor former spouse must then show that debtor has the ability to pay such debt, and that the detrimental consequences to the nondebtor former spouse are greater than the benefits resulting to debtor from his discharge of such debt." Konick 236 B.R. at 524.

The Court finds that the Plaintiff has satisfied the threshold burden of showing that the debt is of a type that falls under § 523(a)(15). Section 523(a)(15) deals with debts that are not in the nature of alimony, maintenance or support, yet should not be discharged for public policy reasons. See 4 King et al., Collier on Bankruptcy ¶ 523.21(15th rev. ed. 1998). Those debts include agreements to make payments of marital debts, holding the other spouse harmless for those debts. Id. (quoting 140 Cong. Rec. H10,752 (daily ed. October 4, 1994)). The obligation here is in this nature. As part of the Stipulation, the Debtor agreed to pay the AT&T Universal Debt and to indemnify and hold the Plaintiff harmless for any claims arising out of the marriage. Therefore, the initial burden of showing that § 523(a)(15) is applicable is satisfied.

Once the threshold requirement of showing that the debt is of a kind contemplated by § 523(a)(15) is satisfied, there is a presumption that the debt is nondischargeable, unless one of the two conditions of § 523(a)(15) exists: (A) the debtor is unable to pay the debt; or (B) the benefits of discharge to the debtor outweigh the detrimental effects of discharge on the spouse. Hadley, 239 B.R. at 436. The Bankruptcy Appellate Panel for the First Circuit has held that the ultimate burden of proof with respect to each of these elements lies with the nonbebtor spouse. Konick, 236 B.R. at 527. In Garrity v. Hadley (In re Hadley), 239 B.R. at 437, Judge Deasy, from this District, took the Konick holding a step further by dissecting the term "burden of proof" as it applies to § 523(a)(15)(A). Judge Deasy noted that the term "burden of proof" involves two distinct concepts: a burden of production and a burden of persuasion. He found that the burden of production is met when a party presents sufficient evidence to make out a prima facie case (i.e. when enough evidence is provided so that a reasonable person could infer the existence of the fact to be proven). Where this burden is not met, the party bearing the burden of production will suffer an adverse

ruling on the issue. On the other hand, he found that the burden of persuasion is a higher burden, requiring sufficient evidence to persuade the trier of fact that the alleged fact is true by the relevant evidentiary margin. Id. Judge Deasy then ruled that the debtor holds the burden of production with regard to § 523(a)(15)(A) while the nondebtor spouse holds the burden of production and persuasion with regard to all other elements of § 523(a)(15) as well as the ultimate burden of persuasion with respect to § 523(a)(15)(A). Id. The Court concurs with Judge Deasy and will apply his reasoning to the instant proceeding.

When considering the Debtor's ability to pay and the relative harm for purposes of § 523(a)(15) the Court looks at the Debtor's financial circumstances as of the time of trial. See Hadley, 239 B.R. at 436; Dressler v. Cressler (In re Dressler), 194 B.R. 290, 300 (Bankr.D.R.I. 1996). The Court also applies the disposable income test to determine the Debtor's ability to pay. Konick, 236 B.R. at 528; Hadley, 239 B.R. at 437. At trial the Debtor provided evidence that his current net income after taxes and medical insurance deductions is $1,327.27 per month. He also provided evidence that his monthly expenses equal $1,900.84 per month, including rent, utilities, transportation costs, groceries, out of pocket medical expenses, and student loan payments. Thus, the Debtor is left with a net deficit each month of $573.57.

The Debtor also testified that his current wife works and assists in his monthly bills. For purposes of the a § 523(a)(15) analysis, the Court considers the income of a debtor's spouse. See Hadley, 239 B.R. at 438. The Debtor testified that his current wife earns $11.00 per hour. He also testified that she shares several "joint" monthly expenses with him. Her share of these expenses include $450.00 for rent, $238.60 for utilities, $106.75 for car insurance, and $260.00 for groceries. She also pays her own car payment and medical insurance, but the Debtor could not testify as to how much these and her other individual expenses total. The wife's share of the "joint" expenses alone totals $1055.35. Despite the fact that the Debtor has failed to provide detailed information regarding her monthly income and other expenses, the Court finds it highly unlikely that she has sufficient disposable income, earning $11.00 per hour, to completely offset the Debtor's $573.57 monthly deficit.

Based on the evidence submitted and testimony given, the Court finds that the Debtor has met his

burden of production with respect to § 523(a)(15)(A). The Court also finds that all of the Debtor's listed expenses are reasonably necessary for the maintenance and support of the Debtor and should be considered for purposes of the § 523(a)(15)(A) analysis. The evidence revealed that the Debtor is faced with reasonable expenses that exceed his net income by nearly $600.00 per month. Furthermore, the Court is not persuaded that even with the assistance of his current wife that he possess the ability to pay the debt in issue. Accordingly, the Court finds that the Plaintiff has failed to meet her burden of persuasion with regard to § 523(a)(15)(A).

Because the Plaintiff has failed to meet her burden of persuasion with regard to § 523(a)(15)(A) it is unnecessary to consider the benefits and detriments of discharge pursuant to § 523(a)(15)(A).

CONCLUSION

The Court finds that the obligation to pay the debt owed on the AT&T Universal MasterCard incurred as part of the divorce stipulation between the Debtor and Plaintiff is not in the nature of alimony, support or maintenance and, therefore, is not excepted from discharge under § 523(a)(5). Furthermore, the Plaintiff failed to satisfy her burden of persuasion under § 523(a)(15)(A) by showing that the Debtor possesses the ability to pay the obligation. Accordingly, the Plaintiff's complaint for relief pursuant to §§ 523(a)(5) and (a)(15) is denied. A judgment consistent with this opinion will be entered separately.

DATED this 26th day of May, 2000, at Manchester, New Hampshire.

_____
Mark W. Vaughn, Bankruptcy Judge