

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE**

In re:

Bk. No. 00-11190-JMD
Chapter 7

Thomas M. Girard,
Debtor

Lyn Marie Denton,
Plaintiff

v.

Adv. No. 00-1095-JMD

Thomas M. Girard,
Defendant

Edward J. Moloney, Jr., Esq.
EDWARD J. MOLONEY, JR.
Attorney for the Plaintiff

Michael B. Feinman, Esq.
LAW OFFICES OF MICHAEL B. FEINMAN
Attorney for the Defendant

MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

On February 1, 2001, the Court held a trial regarding a complaint filed pursuant to 11 U.S.C. § 523(a)(2)(A) and (a)(15). Evidence was presented by both parties and at the end of the trial the Court took the matter under submission.

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the “Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire,” dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

II. FACTS

The Plaintiff, Lyn Marie Denton (“Denton”), and the Defendant, Thomas Mark Girard (“Girard”), were married in May of 1991. In September of 1996 Denton moved out of the marital residence. In January of 2000 the parties were divorced. The parties separation agreement (the “Agreement”) was incorporated into the Judgement of Divorce issued in Massachusetts. See Ex. 1. As part of the Agreement the marital home was to be sold with the cooperation of both parties. Id. Any proceeds from the sale of the marital home were to be divided equally between both of the parties. The Agreement further stipulated that “from his net proceeds or otherwise” Girard was to pay tax liens owed to the IRS for 1990 and 1996-1997, and was to pay a 1997 condominium lien. Id. Pending the sale of the marital home, Girard was to keep current all expenses of the marital home, including the mortgage, condo fee payments, real estate taxes, insurance, and utilities. Id. Further, Girard was to indemnify Denton for any failure to do so. Id. Upon sale of the marital home the entire amount of the proceeds had to be used to pay the liens, and in fact, Denton was required to pay \$21.38 out of her own pocket to fully satisfy all liens against the home.

On April 20, 2000, the Debtor filed a Chapter 7 bankruptcy petition. Subsequently, Denton filed the above captioned adversary proceeding claiming Girard owed her \$12,182.68 for breach of the Agreement and sought to have the debt declared non-dischargeable. Denton claims that Girard fraudulently induced her into signing the Agreement in that he never intended to carry out its provisions. Further, Denton believes that the debt should not be discharged because the benefit to Girard would outweigh the detriment to her.

Girard testified that when he signed the Agreement he believed that all of the liens he had agreed to pay in the Agreement would be paid out of the proceeds. When specifically asked what he thought the language “or otherwise” meant, Girard stated that he thought all of the liens would be paid from the proceeds of the sale of the marital home. Girard also testified that he believed Denton would be receiving approximately \$12,000.00 as her portion of the proceeds from the sale of the home and that he believed that amount to be fair.

With regards to the ability to pay and the detriment to the parties, both sides presented evidence of income and expenses. The evidence presented by Girard showed that he had a monthly deficit of \$366.61. Testimony also showed that Girard is within a couple of payments of paying off his truck loan, but that a new vehicle would have to be purchased almost immediately as the truck has approximately 300,000 miles on it. Girard's testimony further revealed that Girard was paying \$1,200.00 a month for a one bedroom apartment in Lawrence, Massachusetts. When asked if he was paying a rather high amount for an apartment, Girard claimed that any cheaper apartments he could find were not in good neighborhoods or were not well kept.

The testimony with regards to the income and expenses of Denton showed that Denton had a weekly deficit of approximately \$94.75, or \$410.58 per month ($(\$94.75 \times 52) \div 12$). Further testimony revealed that Denton had suffered a previous knee injury that had required her to move to a new desk position at work. The testimony also revealed that Denton would require further surgery in the future that would cause her to be off from work for a period of time.

III. DISCUSSION

A. Section 523(a)(2)(A)

Under 11 U.S.C. § 523(a)(2)(A) a debt that is owed for money obtained by false pretenses or fraud is not dischargeable under the Bankruptcy Code. In order to be successful on this claim Denton must prove the following six elements: (1) Girard made a false representation; (2) Girard did so with fraudulent intent; (3) Girard intended to induce Denton to rely on the misrepresentation; (4) the misrepresentation actually induced reliance; (5) the reliance was justifiable; and (6) the reliance caused damage. See Palmacci v. Umpierrez, 121 F.3d 781, 786 (1st Cir. 1997). In order for a representation to be false, at the time the debtor's statement of future action is made the debtor must not have intended to carry out the stated future action. Id. at 786-87. Denton must prove each of the above elements by a preponderance of the evidence. Grogan v. Garner, 498 U.S. 279, 291 (1991).

The Agreement provides that Girard was responsible for paying IRS tax liens for 1990 and 1996-97 and a 1997 condominium lien totaling \$20,654.13 “either from his net proceeds [from the sale of the marital home] or otherwise.” See Exhibit 1, ¶ 9(a)(1)(2) (emphasis added). When specifically asked what he thought the language “or otherwise” meant, Girard stated that he thought all of the liens would be paid from the proceeds of the sale of the marital home. The testimony and exhibits presented at trial revealed that the amount of the liens listed in the Agreement were the original recorded amounts, not the then current balances, and that at least some payment had been made on account of those liens between the time of the parties’ separation in 1996 and the date of the Agreement on January 18, 2000. However, evidence at trial also documented that the IRS advised the title company handling the transfer of the marital residence that as of March 24, 2000, a little over two months from the date of the Agreement, that the payoff for the 1990, 1996 and 1997 IRS tax liens was \$21,924.36 and not the \$19, 637.58 listed in the Agreement. See Exhibit 2.¹ A lien release delivered by the condominium association stated that the lien for unpaid assessments on the marital home as of March 30, 2000 amounted to \$2,441.00, not the \$1,016.55 listed in the Agreement. In summary, just over two months after the parties executed the Agreement obligating Girard to pay the unknown balance owed on an original \$20,654.13 in liens “from his net proceeds or otherwise,” the closing on the marital home occurred and the balance owed on the liens was \$24,365.36.

The closing took place on March 17, 2000. The IRS was paid \$25,370.20 from the proceeds of the closing for tax liens arising from the 1990 and 1994-97 tax years. The 1994 and 1995 tax years were not included in the Agreement and Denton has not disputed that she should pay her share of the IRS tax liens for those years. Based upon the testimony and evidence submitted at trial, Denton’s damages under paragraph 9(a)(1) of the Agreement with respect to tax and condominium liens are calculated as follows:

¹ The total IRS tax liens listed in the payoff calculation in Exhibit 2 was \$25,370.20. However, that sum included \$3,445.84 in tax liens for the 1994 and 1995 tax years.

ITEM	AMOUNT	SUBTOTAL	REFERENCE
IRS 1990 Tax Lien	\$12,072.62		Exhibit 2
IRS 1996 Tax Lien	\$7,264.11		Exhibit 2
IRS 1997 Tax Lien	\$2,587.63		Exhibit 2
Total IRS Tax Liens		\$21,924.36	
Condominium Lien	\$1,016.55	\$1,016.55	Exhibit 1, ¶ 9(a)(1)(2)
Total Lien Payments		\$22,940.91	

A review of exhibits 1 and 2 and the testimony at trial indicate that neither party knew the exact amount owed for the liens as of the date of the Agreement. Denton testified that she understood that Girard would obtain any amounts needed in excess of his share of the proceeds from family loans or gifts. Girard testified that he thought the liens would be paid from the sale of the home. The Court notes that Girard's thinking appears to have been flawed in that the total amount of proceeds he should have expected to constitute his share of the proceeds was approximately \$12,000.00 and the liens he had agreed to pay were approximately \$20,000.00. However, no further testimony was presented to show that Girard never intended to pay the liens at the time he signed the Agreement. The testimony at trial was that at the time Girard signed the Agreement he expected the liens stated in the Agreement to be paid from the proceeds of the sale. Girard also testified that he expected Denton to receive approximately \$12,000.00 as her share of the sale proceeds. The only evidence presented by Denton to contradict Girard's testimony was Girard's further testimony that the possibility of filing for bankruptcy had been suggested to him during the time prior to the signing of the Agreement.

The Court agrees that the timing of Girard's bankruptcy, his acknowledged thoughts about bankruptcy during the divorce negotiations, and his contacting an attorney about bankruptcy shortly after the closing raises a question regarding his intent in entering into the Agreement. However, Girard's testimony during the trial was that at the time he signed the Agreement he intended for the liens to get paid and for Denton to receive approximately \$12,000.00. The testimony at trial also established that during the

period of the parties' separation and prior to the execution of the Agreement, the IRS had made a number of levies on a number of payments received by the Debtor on accounts owed to his former proprietorship. No evidence was presented to indicate that either Girard or Denton had any actual knowledge of the exact amount owed on any of the IRS liens prior to the execution of the Agreement in January 2000.

Denton is required to prove each element by a preponderance of the evidence and the Court finds that she has failed to show by a preponderance of the evidence that Girard made a false representation when he signed the Agreement. As Denton must prove each and every element in order to be successful on a claim under section 523(a)(2)(A), the Court finds it unnecessary to address the remaining five elements of the section.

B. Section 523(a)(15)

Under 11 U.S.C. § 523(a)(15) a debtor may not discharge a debt owed to a spouse or a former spouse when such debt is in the nature of a property settlement that arose from a divorce or separation agreement, if and only if: (1) the debt arose out of a divorce decree or separation agreement; (2) the debt is not in the nature of alimony, maintenance, or support; (3) the debt is owed to a spouse or a former spouse; (4) the debtor has the ability to pay the debt from income or property not reasonably necessary to maintain or support the debtor or a dependant of the debtor; and (5) discharging the debt will not result in a benefit to the debtor that outweighs the detrimental consequences to the ex-spouse. See 4 Michael H. Goldstein et al., Collier on Bankruptcy ¶ 523.21 (Lawrence P. King ed., 15th ed. 2000); Adie v. Adie (In re Adie), 197 B.R. 8 (Bankr. D.N.H. 1996). Further, the fourth and fifth elements, regarding finances, are applied as of the date of the trial and not as of the date of the divorce decree. See Brasslett v. Brasslett (In re Brasslett), 233 B.R. 177, 182-83 (Bankr. D. Me. 1999).

As with the section 523(a)(2)(A) claim, the plaintiff must prove all of the elements by a preponderance of the evidence. See Brasslett, 233 B.R. at 183. The plaintiff also has the burden of persuasion on all of the elements. See Garrity v. Hadley (In re Hadley), 239 B.R. 433, 437 (Bankr. D.N.H.

1999); Adie, 197 B.R. at 8 n.1. Finally, the plaintiff has the burden of production with respect to all of the elements except that the defendant has the burden of production with regards to the fourth element, his ability to pay the debt. Hadley, 239 B.R. at 437.

Denton claims that Girard's obligation to her under the terms of the Agreement was to pay her the fifty percent of the proceeds from the sale of the marital home or \$12,973.69 (50% x \$25,947.39). After examination of the Agreement, the Court finds that Girard's obligations to Denton under the Agreement consist of two separate and distinct obligations. Girard incurred a debt to Denton in connection with his obligation under paragraph 9(a)(1)(2) of the Agreement to pay certain tax and other liens of \$22,940.91 (the "Lien Payment Obligation"). See Section III.A above. Under the terms of the Agreement, Girard was also obligated to pay and keep current all expenses of the marital home, which was under his control and possession, until it was sold and to indemnify Denton for any failure to pay such expenses (the "Indemnification Obligation"). See Exhibit 1, paragraph 9(a)(1). Based upon the evidence admitted at trial, Girard's Indemnification Obligation under the Agreement is \$3,385.57, calculated as follows:

ITEM	AMOUNT	SUBTOTAL	REFERENCE
Unpaid Mortgage Interest	\$1,723.51		Exhibit 4
Unpaid Late Charges	\$239.83		Exhibit 4
Unpaid Other fees	\$10.00		Exhibit 4
Total Mortgage Arrearage		\$1,973.34	
Final Water Bill	\$58.35		Exhibit 5, line 514
Final Sewer Bill	\$28.63		Exhibit 5, line 515
Less: R.E. Tax Proration	-\$99.20		Exhibit 5, line 406
Condo Lien Payoff	\$2,441.00		Exhibit 5, line 508
Less: 1997 Condo Lien	-\$1,016.55		Exhibit 1, ¶ 9(a)(1)(2)
Net Unpaid Expenses		\$1,412.23	
Total		\$3,385.57	

Girard's Lien Payment Obligation (\$22,940.91) and Indemnification Obligation (\$3,385.57) total \$26,326.48. Under the terms of the Agreement, the parties were to divide the "net proceeds" from the sale of the marital home equally before any payment of Girard's other obligations. See Exhibit 1, paragraph 9(a)(1)(1). Since the net proceeds after payment of Girard's obligations was zero, the "net proceeds" under the terms of the Agreement should have been \$26,326.48 with Denton receiving \$13,163.24 and Girard receiving a credit of \$13,163.24 against the Lien Payment Obligation. After application of his share, the balance remaining under the Lien Payment Obligation is \$9,777.67 (\$22,940.91 less \$13,163.24) and the Indemnification Obligation is \$3,385.57.

It was undisputed at trial that the debts in question arose out of the parties' divorce decree and were owed to the plaintiff ex-spouse. Further, no one pled or argued that the debts owed were in the nature of alimony or support. Therefore, the first three elements of section 523(a)(15) have been satisfied.

Next, the Court must consider whether or not Girard has the ability to pay the debts. At trial evidence was presented showing that Girard had a monthly income deficit of \$366.61. Two noteworthy

items included in Girard's expenses were his truck payment and his apartment rent. Girard's truck payment was noteworthy in that testimony revealed that Girard had only two to three payments left before the truck loan would be paid in full. Further testimony revealed that the truck had almost 300,000 miles on it and would need to be replaced immediately after the loan had been paid in its entirety.

The testimony concerning Girard's apartment rent was also noteworthy. Girard testified that he was living in a one bedroom apartment in Lawrence, Massachusetts and was paying \$1,200.00 per month in rent. Girard testified that he could not find an apartment that was in good condition or in a good neighborhood for any less rent per month. It was also noted by Girard's counsel that even if Girard's rent was excessive, Girard would have to reduce his rent to around \$833.00 per month just to break even. Girard specifically testified that when he looked for apartments he did not find any apartments at or near \$833.00 per month.

There were two additional pieces of information regarding ability to pay that the Court will address in this opinion. First, there was the testimony of Girard that at his current place of employment there are many opportunities for advancement and he has in fact applied for several promotions. Second, there was Girard's testimony that he had approximately \$2,000.00 in a savings account. Denton argues that facts such as these show that Girard has the ability to pay the debts that are owed.

The Court, however, must look at the debtor's ability to pay as of the date of the trial. While Girard may have opportunities for advancement at his current place of employment, any such promotion is purely speculation at this point in time. Further, while Girard's rent is higher than a typical individual with his income would be expected to pay, Denton presented no evidence or argument that Girard's monthly income deficit would be eliminated through a more modest rental obligation. There was no evidence presented by Denton to show when the \$2,000.00 in Girard's savings account accrued, but given his current monthly deficit, it must have accrued prior to occupancy of his current apartment or from a one time source such as a tax refund.

After reviewing the testimony presented at trial, the Court finds that Girard has satisfied his burden of going forward with evidence showing that he has no current ability to pay, or any likely ability to service over time, his \$9,777.67 Lien Payment Obligation to Denton. Denton has not presented sufficient evidence to overcome Girard's evidence of his inability to pay the Lien Payment Obligation. However, Girard has not presented sufficient evidence to show that he cannot pay the Indemnification Obligation in the amount of \$3,385.57 to Denton. The Indemnification Obligation represents current living expenses that Girard failed to pay, despite the terms of the Agreement, forcing Denton to pay them from her share of the proceeds of the marital home. Girard has approximately \$2,000.00 in a savings account and his truck loan will be paid in full within sixty days. Between the savings on his truck loan payments and his savings account, he has the ability to pay the Indemnification Obligation to Denton.

Since Girard has not presented sufficient evidence to establish an inability to pay the Indemnification Obligation to Denton, the Court must determine whether Denton has satisfied her burden to prove that the harm to her from a discharge of the Indemnification Obligation outweighs the benefit Girard would obtain from the discharge of that obligation. 11 U.S.C. § 523(a)(15)(B). The evidence at trial established that Girard has approximately \$2,000.00 in his savings account and will shortly pay off his truck loan resulting in approximately \$500.00 per month of additional funds. Although Girard testified that his truck will need to be replaced in the near future due to its condition and high mileage, the relative size of the Indemnification Obligation in comparison to the truck loan payments and his savings account indicate that he can pay the Indemnification Obligation without significant detriment. The evidence also shows that Denton's monthly income and expenses are essentially at breakeven or slightly negative and that a work related injury would require further surgery and lost time for recuperation. In addition, the evidence shows that while both Girard and Denton may have erroneously believed that Girard's Lien Payment Obligation would be paid from his share of the proceeds of sale of the marital home, both parties contemplated that the expenses which make up the Indemnification Obligation were to be paid from Girard's regular income as part of his ordinary living expenses. Since neither party was to receive any alimony or support payments

from the other and both parties have little or no positive monthly cash flow, the harm to Denton by imposing upon her Girard's living expenses outweighs the benefit to him of keeping his savings account and several months of not making a \$500.00 truck payment.

IV. ORDER

In accordance with the above opinion, the Court finds that Denton has failed to meet her burden of proof on her claim under section 523(a)(2)(A). Further, the Court finds that the Debtor has successfully shown that he does not have the ability to pay the \$9,777.67 Lien Payment Obligation owed to Denton. However, the Debtor can afford to pay the \$3,385.57 Indemnification Obligation to Denton, and the benefit to the Debtor from the discharge of that obligation outweighs the harm to Denton. Therefore, the Debtor's \$3,385.57 Indemnification Obligation is not dischargeable under section 523(a)(15) and the \$9,777.67 Lien Payment Obligation is dischargeable.

This opinion and order constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052.

DATED this 23rd day of March, 2001, at Manchester, New Hampshire.

J. Michael Deasy
Bankruptcy Judge