

UNITED STATES BANKRUPTCY COURT
for the
DISTRICT OF NEW HAMPSHIRE

In re:

Bk. No. 99-13973-MWV
Chapter 7

Joel N. Fortier,
Debtor

Rita Belanger,
Plaintiff

v.

Adv. No. 00-1036-MWV

Joel N. Fortier,
Defendant

Brian Barrington, Esq.
COOLIDGE, MATHIEU, BARRINGTON, BERUBE & COUTURE
Attorney for Plaintiff

Grenville Clark, Esq.
GRAY, WENDELL & CLARK, P.C.
Attorney for Debtor/Defendant

MEMORANDUM OPINION

The Court has before it the complaint of Rita Belanger, formerly known as Rita Fortier (“Plaintiff”), against the Debtor/Defendant, Joel N. Fortier (“Defendant”), alleging that an obligation to indemnify the Plaintiff against certain marital debts pursuant to their divorce decree is excepted from discharge pursuant to 11 U.S.C. § 523(a)(15). The complaint also included a count seeking to deny the Defendant his discharge pursuant to section 727(a)(4), which the Court dismissed at the conclusion of the trial.

JURISDICTION

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).

FACTS

The Plaintiff and the Defendant were married on August 17, 1991, separated on December 14, 1997, and divorced effective August 12, 1998. There were no children of the marriage. The parties entered into a permanent stipulation on May 14, 1998, of which paragraphs 17 and 18 are as follows:

17. **Allocation of Debt:**

Any and all debts of the marriage shall be the sole responsibility of the Defendant, including but not limited to all credit card debt, mortgage, business debt and car leases, and he will indemnify and hold the Plaintiff harmless from same.

18. **Marital Homestead:**

The Defendant is awarded the real estate located at 7 Twitchell Lane, Berlin, New Hampshire, which he possessed prior to the marriage, fee [sic] and clear of any interest of the Plaintiff. The Defendant shall indemnify and hold the Plaintiff harmless from the Mortgage and note related to said property and due to Bank of America FSB. The Defendant will endeavor from time to time to remove the Plaintiff’s name from the mortgage. The Plaintiff shall execute a Quitclaim Deed of her interest, subject to the mortgage, to the Defendant.

(Pl.’s Ex. 5 at 3, 4). It is the obligation of the Defendant to indemnify the Plaintiff with respect to these debts that the Plaintiff alleges should be excepted from discharge pursuant to section 523(a)(15) of the Bankruptcy Code. It is undisputed that the following joint debts and approximate balances existed at the time the Defendant filed his petition under Chapter 7 of the Bankruptcy Code on December 23, 1999:

Bank of America, FSB (1 st mortgage obligation)	\$ 79,573.43
Citizens Bank	10,478.87
First USA Bank - NSA	800.00
MBNA America	3,826.60

The Plaintiff also alleges another joint debt of \$4,820.01 to CFX Bank, which the Defendant believes the Plaintiff is not liable for as it is a loan on his vehicle and which he is currently paying. It is also undisputed that since the parties' divorce, the Defendant borrowed approximately \$33,000 secured by a second mortgage on his premises. The Defendant testified at trial that since the bankruptcy filing the property had been foreclosed on by Bank of America, FSB, the holder of the first mortgage, although there was no factual evidence as to the result of the foreclosure.

At the time of the divorce, the Defendant was employed in a supervisory position at Crown Vantage, a paper manufacturing company located in Berlin, New Hampshire, and he was able to pay his obligations. In November 1998, he was terminated from that position. The evidence indicated that following his termination he applied for a number of positions without success, allegedly because of his educational background. He testified that he no longer desires to work in the field to which he was accustomed, citing stress and a desire to remain in the local area where he has family and friends. He is currently employed as a residential counselor at NFI Davenport School, which provides services to troubled adolescents. His gross income, as shown on Schedule I, is \$1,591.50 per month and, after deduction for taxes and insurance, his net monthly income is \$1,197.62. His expenses, as shown on Schedule J, are \$1,196.17 and include \$75 per month in legal fees for this litigation, \$150 in educational costs and \$25 for miscellaneous expenses and a cushion. He is currently taking courses to obtain a degree in the social services field, which he hopes to complete within one and one-half to two years. He testified that, with a degree, he thought he could earn \$26,000 to \$27,000 per year. He also testified that he has pension benefits from Crown Vantage with an unknown value and which cannot be accessed at this point.

The Plaintiff is remarried and works part-time at the Coos County Nursing Home. Her financial affidavit, dated November 14, 2000, shows monthly net income of \$1,304.50 and expenses of \$1,464. The

income includes a monthly figure of \$71 from an abandoned property payment and \$42 from a Christmas club. Her financial affidavit also shows that she has investments of \$9,147 and an IRA of \$3,227. Her expenses include a monthly payment of \$173 to a Christmas club. She cares for a child from a marriage previous to her marriage to the Defendant who suffers from Down's Syndrome.

DISCUSSION

Section 523(a)(15) of the Bankruptcy Code states as follows:

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any 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.

This Court, in its memorandum opinion in In re Neveu v. Martin, 2000 BNH 020, fully discussed the burdens of proof and persuasion in a complaint under section 523(a)(15) and adopts the same reasoning here. It is not contested that the obligations in question arose out of a divorce proceeding and are not alimony or support.

The threshold determination in a complaint under section 523(a)(15) is whether the Defendant/Debtor has the ability to pay. A finding that he does not have the ability ends the discussion, and

the indemnification obligation is discharged. However, that is not the case here. The Court finds that the Defendant does have the ability to make payments on these debts should the creditors in question demand payment from the Plaintiff. First, as indicated above, the Defendant's Schedules I and J show a virtual wash between income and expenses. However, it is also indicated that \$225 of these monthly expenses will terminate over a reasonably short period of time. Second, the Court may look at the current employment status of the Defendant and the possibilities of additional income in the future. See In re Konick, 236 B.R. 524, 529 (B.A.P. 1st Cir. 1999). There is no question that the Defendant has chosen his current profession for a variety of reasons, including lifestyle. It is also reasonable to assume that had the Defendant chosen to continue to seek employment in his field, his salary would be substantially higher. Also, his own testimony is that upon completion of his current education, he will be able to earn \$26,000 to \$27,000 per year, which is approximately twenty-seven percent greater than his current gross income.

Next, the Court must weigh the benefit to the Defendant against the detriment to the Plaintiff. Based on the evidence before it, the Court finds that the discharge of the Defendant's obligation to the Plaintiff creates a hardship to the Plaintiff that outweighs the benefits of a discharge to the Defendant. As the recital of the facts above show, even though the Court has found that the Debtor has the ability to pay, neither party could be considered economically strong. However, in weighing the equities, the Court gives great weight to the fact that the Defendant remortgaged the real property subsequent to the divorce and did not use the proceeds to substantially reduce the debts against which he had indemnified his wife. Furthermore, as indicated above, the Defendant has chosen to pursue a career in social services at a level of compensation that is less than he otherwise might have obtained. Also, the Plaintiff, while remarried, will probably always be burdened by the nature of the one child's illness, which will restrict the amount of time she could be gainfully employed. For all of the above reasons, the Court finds for the Plaintiff; the obligation to indemnify her against joint debts of the marriage is excepted from discharge pursuant to section 523(a)(15) of the Bankruptcy Code.

This opinion constitutes the Court's findings and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. The Court will issue a separate final judgment consistent with this opinion.

DATED this 17th day of April, 2001, at Manchester, New Hampshire.

Mark W. Vaughn
Chief Judge