

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

In re:

Bk. No. 01-10207-JMD
Chapter 7

Michael J. Cohen,
Debtor

Grace D. Cohen,
Plaintiff

v.

Adv. No. 01-1078-JMD

Michael J. Cohen,
Defendant

Grace D. Cohen
Pro Se Plaintiff

Jason Craven, Esq.
NORMAND & SHAUGNESSY
Attorney for Debtor/Defendant

MEMORANDUM OPINION

I. INTRODUCTION

The Court has before it a complaint filed by the Plaintiff, Grace D. Cohen, the Debtor's former spouse, in which she objects to the dischargeability of certain debts owed to her by the Debtor, specifically, a debt in the amount of \$7,500.00 for alimony and a debt in the amount of \$44,139.00 on account of the parties' property settlement. The Plaintiff seeks to have the alimony obligation declared non-dischargeable pursuant to 11 U.S.C. § 523(a)(5). She seeks to have the property settlement declared non-dischargeable pursuant to 11 U.S.C. § 523(a)(15). The Debtor does not dispute that the alimony should be excepted from discharge as a debt to a former spouse that "is actually in the nature of alimony, maintenance, or support." 11 U.S.C. § 523(a)(5). The Debtor does contest, however, the dischargeability of the property settlement

obligation. After conducting a trial on the dischargeability of the property settlement, the Court took the matter under advisement.

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 Debtor and the Plaintiff were married on June 15, 1975 and divorced on March 9, 1992. Paragraph 11 of the Permanent Stipulation, which is incorporated in the Final Divorce Decree (“Divorce Decree”), is entitled “Lump Sum Cash Distribution,” and it provides:

Grace Cohen is awarded any and all interest in her IRA together with \$100,000. Said sum shall be payable by Michael Cohen in two (2) equal installments. The first such \$50,000 payment shall be made within 30 days of the decree of this divorce, the second such payment shall be made one (1) year thereafter.

Exhibit 2 at ¶ 11. The Debtor paid the first \$50,000.00 installment shortly after the parties’ divorce. The Debtor also made some payments toward the second \$50,000.00 installment, with the last such payment being made in 1996. The parties agree that the Debtor still owes the Plaintiff \$44,139.00.¹

At trial, the parties submitted financial affidavits that set forth their assets and liabilities and their income and expenses. See Exhibits 21 and 101. The Debtor’s affidavit shows that the Debtor has monthly income of \$8,660.00 and monthly expenses of \$9,330.00. The Debtor’s assets consist of furniture and appliances worth \$2,000.00, a checking account containing \$1,000.00, and the Debtor’s interest in his closely held business corporation valued at \$140,000.00. The corporation has debts of \$320,000.00.

¹ The Debtor, however, has alleged that he is entitled to some offsets with respect to payments made on behalf of the parties’ children. Prior to the commencement of the trial, the parties agreed that the offset issue would not be tried in this Court. The parties are free to return to state court to have this issue considered.

The Plaintiff's affidavit shows that she has monthly income of \$6,102.00 and monthly expenses of \$6,629.00. She owns a home valued at \$130,000.00, which is subject to a mortgage in the amount of \$55,533.00, a car valued at \$26,525.00, which is subject to a lien in the amount of \$20,373.00, a vacant piece of real estate valued at \$64,000.00, which is subject to a mortgage of \$325,000.00, furniture and appliances worth \$2,000.00, bank accounts totaling \$3,461.00, and a retirement account worth \$26,261.00.

III. DISCUSSION

The Court must determine the dischargeability of the Debtor's property settlement obligation.

Section 523(a)(15) provides:

- (a) A discharge . . . does not discharge an individual debtor from any debt—
 - (15) not of a kind described in paragraph (5) [i.e., not alimony, maintenance, and support] 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 a 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 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). The parties agree that the debt at issue arose from the Divorce Decree and that it constitutes a property settlement. Therefore, the threshold requirements of section 523(a)(15) have been established. The Plaintiff must demonstrate that the Debtor has the ability to pay the \$44,139.00 debt from income or property not reasonably necessary for the maintenance and support of the Debtor and his dependents.² She must also show that the benefit the Debtor would obtain from the discharge does not

² The Plaintiff has the burden of persuasion with respect to all elements under section 523(a)(15), but the Debtor has the burden of going forward with evidence which supports any alleged inability to both

outweigh the detriment to her if the debt is discharged. If the Plaintiff is unable to show that the Debtor has the ability to pay the debt or that the benefit of the discharge does not outweigh the harm, the debt is dischargeable. See Hadley, 239 B.R. at 436. The financial testing elements of section 523(a)(15) are applied as of the time of the trial, not as of the time of the Divorce Decree entered. See Konick, 236 B.R. at 529; Hadley, 239 B.R. at 436; Brasslett v. Brasslett (In re Brasslett), 233 B.R. 177 (Bankr. D. Me. 1999); Dressler v. Dressler (In re Dressler), 194 B.R. 290, 300 (Bankr. D.R.I. 1996).

A. Debtor's Ability to Pay the Property Settlement Debt

The relevant inquiry under section 523(a)(15)(A) is whether the Debtor has the ability to pay the debt from income “not reasonably necessary” for the support of the Debtor and his dependents. See Hadley, 239 B.R. at 438. Expenses that are not reasonably necessary for the maintenance and support of the Debtor and his dependents should not be considered as expenses in making the determination under section 523(a)(15)(A). See id. In determining the Debtor's ability to pay, it is proper to use the disposable income test. See Konick, 236 B.R. at 527; Hadley, 239 B.R. at 437-38.

In support of his alleged inability to pay the debt, the Debtor offered into evidence his personal financial statement dated October 29, 2001. See Exhibit 101. The Debtor's financial statement reflects gross monthly income from his closely held corporation of \$8,660.00, expenses of \$9,330.00 and a monthly deficit of \$670.00. The Debtor's financial statement reflects no equity in any assets which could be converted to cash through a sale or a loan in order to service the property settlement debt. The Debtor's financial statement does not reflect any expenditures for the continuation, preservation or operation of his closely held corporate business. All expenses are for the maintenance or support of the Debtor and his dependents.

The parties stipulated that the Debtor's financial statement could be admitted into evidence, subject to examination of the Debtor. Accordingly, the Court will view the Debtor's financial statement as his direct

support himself and his dependents and pay the property settlement debt. Garrity v. Hadley (In re Hadley), 239 B.R. 433, 437 (Bankr. D.N.H. 1999). See also Hastings v. Konick (In re Konick), 236 B.R. 524, 527 (B.A.P. 1st Cir. 1999); Adie v. Adie (In re Adie), 197 B.R. 8 (Bankr. D.N.H. 1996).

testimony on ability to pay. During her examination of the Debtor, the Plaintiff challenged many, but not all, of the Debtor's entries on his financial statement. Therefore, the Court will find that the unchallenged entries on the Debtor's financial statement establish the level of expense for the Debtor for those items.

1. Monthly Income

The Plaintiff questioned the Debtor extensively regarding his computation of gross monthly income from his closely held corporation and the taxes withheld from that compensation. The Plaintiff argued that the evidence shows that the Debtor maintains a high life style while playing a shell game in moving assets between his business and various relatives. The Plaintiff contends that the Debtor's financial statement reflects that he is paid gross income of nearly \$104,000.00 per year while ascribing no value to the business. She points out that the Debtor admits to failing to file corporate and personal federal income tax returns since 1997 and that he has taken money out of the corporation as a "loan to shareholder." The Debtor testified that the "income" of \$95,000.00 in 1999 and \$90,000.00 in 2000 reflected in his answer to Question 1 in his Statement of Financial Affairs, Exhibit 8, were loans from his corporation. The Debtor also testified that the gross income number in his financial affidavit reflects his best estimate of the monthly average of his anticipated gross income for 2001. He explained that his income is not necessarily uniform during the year due to the retail nature of his corporation's business which results in a significant percentage of its income being received during the last two months of the year. The Plaintiff also challenged the \$2,847.00 per month in federal income tax withholding, Social Security and Medicare taxes. The Debtor testified that the tax deductions from his income were computed by his accountant and, based on his accountant's advice, the Debtor included that figure in his financial affidavit. Overall, the Debtor's testimony on his income and payroll tax deductions, as well as other entries on his personal financial statement, reflected at best a casual approach to record keeping and accuracy and at worst an attempt to be less than forthcoming in his answers. However, the Plaintiff failed to establish that the Debtor's gross income and payroll tax estimates were inaccurate or overstated.

2. Housing Expenses

The Debtor's financial statement reflects housing expenses of \$2,500.00 per month for a mortgage payment and \$200.00 per month for maintenance. The Debtor admitted that these numbers were estimates based upon the adequate protection payments he had been making earlier in his bankruptcy proceeding and upon the cost of maintaining his home. However, the Debtor has not made any mortgage payments since September 2001 and in October 2001 the holder of the first mortgage on the Debtor's home sold the property at a foreclosure sale. The Debtor did testify that he expected to complete negotiations for a short term lease of the property, where he and his dependents still reside, in the near future, but expected to need to relocate to another property within six months. The Debtor desires to continue to live in either Henniker or Weare in order that his teenaged children can continue to attend their current high school. Although the Plaintiff appears to agree with the Debtor that he should continue to live in the area so that the children can continue to attend the same school, she contends that the Debtor can find an adequate residence for much less than \$2,500.00 per month. While the evidence revealed that the Debtor has undertaken some activity in looking for another residence, neither he nor the Plaintiff were able to establish any monthly cost parameters. The Plaintiff suggests that the Debtor will be able to purchase another residence with help from his relatives. The Debtor contends that no such agreement exists. In any event, neither party presented any evidence that could provide a basis for the Court to estimate the "reasonably necessary" cost for housing the Debtor and his two dependents. Yet, such expense will need to be incurred and, therefore, must be estimated by the Court.

The Court has looked at two separate methods to estimate such expenses. The current Collection Financial Guidelines of the Internal Revenue Service for a family of three residing in Merrimack County, New Hampshire, would allow \$1,314.00 per month for housing and utilities.³ These guidelines have been proposed to be utilized as part of means testing under pending bankruptcy reform legislation. The guidelines are national standards established by the Secretary of the Treasury as providing adequate means for five categories of necessary living expenses. However, the IRS need not follow the guidelines if the taxpayer

³ This is available at <www.irs.gov/bus_info/tax_pro/irm-part/part05/29227053.GIF>.

provides sufficient documentation to support a determination that the use of the guidelines would leave the taxpayer without an adequate means of providing for basic living expenses. Internal Revenue Service, Financial Analysis Handbook 5.8 at § 5.5.⁴ The current guidelines became effective October 1, 2000. Although neither party has presented any evidence which could be used to depart from these guidelines, the Court takes judicial notice of the fact that the communities of Henniker and Weare are rural in nature and have a limited supply of apartments. In addition, recent press reports have cited substantial increases in the cost of rental housing in southern New Hampshire over the past two years. Accordingly, the Court finds it necessary to examine the expense involved in either renting or purchasing a house. Unfortunately, it is unlikely that the Debtor could qualify for the necessary financing for his purchase of a home without assistance from his family and no evidence of rental cost was submitted by the parties.

During the examination of the Debtor by the Plaintiff, the Debtor admitted that he believed that he could find a home in the Henniker area that would meet the needs of him and his dependents at a cost of \$175,000.00. Since that admission is the only evidence upon which the Court may base any estimate for the cost of renting or purchasing a house, the Court shall use that number. Assuming that the Debtor were to get assistance from his family, either through a direct loan or credit enhancements such as additional collateral or additional signatures on the mortgage note, he might qualify for mortgage loan. Assuming financing for most, but not all of a hypothetical purchase price of \$175,000.00, if the Debtor obtained a mortgage loan for \$140,000.00, or 80% of the purchase price of a house, at an interest rate of 9.0% over twenty years, the monthly mortgage expense would be \$1,260.00. Estimating real estate taxes of \$4,200.00 per year, and some maintenance expense, say \$100.00 per month, the monthly housing expense would be \$1,710.00. In the absence of any better evidence or estimate, the Court shall utilize this amount as an estimate of the Debtor's likely ongoing expense to purchase or rent housing in the towns of Henniker or Weare.

3. Groceries and Meals Eaten Out

⁴ This is available at <www.irs.gov/bus_info/tax_pro/irm-part/part05/27844.html#ss17>.

The Debtor's financial statement reflects \$700.00 per month for groceries and \$175.00 for meals eaten out by himself and his dependents. The Plaintiff attempted to question the Debtor on the basis for these entries. However, during his direct examination by the Plaintiff, the Debtor refused to answer questions regarding where he shopped for groceries. After being directed by the Court that he had to answer the Plaintiff's question, he continued to refuse. The Court indicated that if he continued to refuse to answer the Plaintiff's question, the Court would have no choice but to discount the grocery entry on his financial affidavit in its entirety. The Debtor did not answer the Plaintiff's question. Accordingly, the Debtor has not presented any competent evidence to the Court on the level of expenses for himself and his dependents for food, which includes meals eaten out.

Similar to the housing expense, even in the absence of evidence, the Debtor will bear an expense for food for himself and his dependents. In the absence of any evidence from either party for necessary food expenses, the Court shall utilize the Collection Financial Guidelines of the Internal Revenue Service for a family of three at the Debtor's income level. Those guidelines would allow \$737.00 per month for food. However, since the IRS guidelines do include meals eaten out, the Debtor's total food expenses in the amount of \$875.00, for groceries plus meals eaten out, shall be reduced by \$138.00 to \$737.00 per month.

4. Utilities

The Debtor listed \$250.00 per month for electricity. However, he admitted that the only evidence of monthly billings which he provided to the Plaintiff during discovery were the bills for January 2001 in the amount of \$226.46 and July 2001 in the amount of \$99.83. See Exhibit 1B. The Debtor also testified that his electric bills are highest during the winter months. Based upon the evidence presented, the Debtor could not support his estimated monthly electricity expense. The Court shall estimate the Debtor's average monthly electricity expense at \$175.00.

5. Miscellaneous Expenses

The Plaintiff challenged the Debtor's estimate for sports and camp expenses for his dependents based upon her contributions towards those expenses. However, on cross examination by his counsel, the Debtor fully explained the basis for his \$345.00 average monthly expense estimate and the Plaintiff did not rebut that testimony.

After direct examination by the Plaintiff regarding the Debtor's estimate for uninsured prescription drug expense, the Debtor admitted that his original \$150.00 per month estimate was erroneous and agreed that \$70.00 was a more accurate estimate. The Court finds that \$70.00 is supported by the evidence. See Exhibit 1A.

The Plaintiff argues that the Debtor's monthly expense estimates of \$100.00 for cigars and \$10.00 for lottery tickets are not items "reasonably necessary" for the support of the Debtor or his dependents. The Court agrees.

6. Conclusion

Based upon the findings of fact and rulings of law discussed above, the Debtor's net monthly income is computed, for purposes of this trial, as follows:

Gross monthly income per Exhibit 101	\$8,660.00
Monthly expenses per Exhibit 101	<u>-\$9,330.00</u>
Net monthly income per Exhibit 101	- \$ 670.00
Adjustments:	
Housing expense (\$2,500.00 - \$1,710.00)	\$ 790.00
Groceries and meals eaten out (\$875.00 - \$737.00)	\$ 138.00
Electricity (\$250.00 - \$175.00)	\$ 75.00
Uninsured prescriptions (\$150.00 - \$70.00)	\$ 80.00
Cigars and lottery tickets (\$110.00 - \$0.00)	<u>\$ 110.00</u>
Adjusted Net Monthly Income	\$ 523.00

The Court finds that the Debtor's monthly income less expenditures reasonable necessary for the support of himself and his dependents is \$523.00.⁵ The parties agree that the maximum amount of the unpaid property settlement debt is \$44,139.00. After a resolution of various credits claimed by the Debtor, the balance owed may be less. The Court finds that the Plaintiff has proven that the Debtor has sufficient net monthly income to pay the property settlement obligation.

B. The Balancing Test

Under the so-called "balancing test" contained in section 523(a)(15)(B), the Plaintiff must show that the benefit to the Debtor of a discharge of the debt does not outweigh the detriment that would result if the debt were discharged. In making its determination, the Court must compare both parties' financial circumstances, including their disposable income. See Hadley, 239 B.R. at 439. As detailed above, the Debtor should have net income each month of \$523.00 with which he could make payments toward his obligation to the Plaintiff. The Debtor did not testify as to how discharging the property settlement obligation will benefit him. Obviously, the Debtor will be in much better financial shape if he is not saddled with a \$44,139.00 obligation. However, the Debtor did not demonstrate how making payments on account

⁵ This Court's determination of the Debtor's net monthly income is solely for the purposes of this proceeding. In the event that the parties are involved in any subsequent court proceedings over the terms of payment of the property settlement obligation, neither party, nor the court in which any such proceeding is pending, is bound by the estimates or findings by this Court in this proceeding.

of this debt will affect his ability to provide for himself and his dependents nor whether it will affect his closely held business. As a result, the Court must consider the inherent benefit in discharging the debt.

The Plaintiff's evidence shows that she has a shortfall of \$527.00 per month. The Debtor did not seriously challenge any of the Plaintiff's monthly expenses except her clothing expense of \$209.00 and her car payment of \$1,100.00. The Plaintiff testified that her public relations/marketing job requires her to interact with the public and to maintain a professional image. In light of that testimony, the Court does not find that the Plaintiff's clothing expense is unreasonable.

With respect to the car payment, the Plaintiff acknowledged that the amount is high. At the time she purchased her car, the Plaintiff had income from a consulting job which she expected to use to make her car payments. Shortly after purchasing the car, the Debtor lost her consulting job. The Court finds that the Plaintiff's car payment is unreasonable and, accordingly, will count that against her in conducting the balancing test.

The Plaintiff testified that she needs to make repairs to her house, which include replacing the roof, window casings, and clapboards, and removing trees that lean over her house. The Plaintiff stated that such repairs will cost between \$7,000.00 and \$12,300.00. The Plaintiff also testified that she has not been able to save adequately for her retirement, to insure against disability, or to prepare for possible future unemployment. In addition, she has been unable to create any security for her children's future. At the time of the divorce, her interest in the marital home was put in trust for the benefit of the couple's children; however, the home has been foreclosed upon and the children's interest has been lost. In addition, the Divorce Decree awarded the Plaintiff a twenty acre tract of land; however, that land is subject to a lien in favor of the Debtor's brother.

Given this evidence, the Court finds that the balancing test is a close call. Both parties are in a less than ideal financial situation. The Debtor has lost his home through foreclosure and is now searching for a new residence. He has no retirement account or savings. However, he does own a business from which he has been able to earn approximately \$100,000.00 per year for the last several years and he has \$523.00 in

disposable income each month. The Plaintiff needs to make repairs to her home, and while she has some money in a retirement account and savings, the amounts are not large. In addition, the Plaintiff's income over the past three years has been less than the Debtor's, and she has experienced periods of unemployment in the past. See Exhibits 8 and 19. It appears that the Plaintiff's current job pays less than the Debtor's and provides less job security.

Both parties are in similarly difficult but currently sustainable financial positions. Because the statute requires that the benefit to the Debtor outweigh the harm to the Plaintiff and because the evidence does not support such a finding in this case, the Court must conclude that the Plaintiff has met the requirements of section 523(a)(15)(B) regarding non-dischargeability. Accordingly, the Court finds that the Plaintiff has established that the benefit of the discharge to the Debtor does not outweigh the detriment to the Plaintiff.

IV. CONCLUSION

For the reasons outlined above, the Debtor's property settlement obligation is excepted from discharge pursuant to section 523(a)(15) as the Debtor has the ability to pay the debt and the benefit of the discharge of the debt to the Debtor does not outweigh its detrimental consequences to the Plaintiff. This opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. The Court will issue a separate judgment consistent with this opinion.

DATED this 3rd day of January, 2002, at Manchester, New Hampshire.

J. Michael Deasy
Bankruptcy Judge