

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

In re:	Bk. No. 03-10751-MWV Chapter 7
Barry J. Dyke,	
Debtor	
Kathy D'Abre,	
Plaintiff	
v.	Adv. No. 03-1327-MWV
Barry J. Dyke,	
Defendant	
 <i>Edmond J. Ford, Esq.</i> <i>FORD & WEAVER, P.A.</i> <i>Attorney for Plaintiff</i>	
 <i>A.J. Connell, Esq.</i> <i>Attorney for Debtor/Defendant</i>	

MEMORANDUM OPINION

The Court has before it the complaint of Kathy D'Abre ("Plaintiff") against Barry J. Dyke ("Debtor") objecting to the dischargeability of certain obligations arising under the decree of divorce, pursuant to sections 523(a)(5) and 523(a)(15) of the Bankruptcy Code.¹ The Court held a one-day trial concerning this matter on April 13, 2004. For the reasons set out below, the Court grants the Plaintiff's complaint.

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).

¹ Unless otherwise noted, all statutory section references herein are to the Bankruptcy Reform Act of 1978, as amended, 11 U.S.C. §§ 101, *et seq.*

BACKGROUND

The facts of this adversary proceeding are straightforward. The parties were married on February 9, 1986, and they had three children, all of whom are presently living with the Plaintiff. The parties were divorced by order of the Rockingham County Superior Court on March 21, 2002. The divorce decree provided *inter alia*, for the payment of alimony, child support, health insurance, uninsured medical expenses and extracurricular activities. The parties agree that the alimony payment in the amount of \$1,000 per month (Count I) and the child support obligation in the amount of \$2,078 per month (Count II) is not dischargeable pursuant to § 523(a)(5). Thus, the Court enters judgment in favor of the Plaintiff on those two counts.

Paragraph 17 of the divorce decree provided that the Debtor shall indemnify the Plaintiff and hold her harmless from the deficiency upon the foreclosure of the marital residence and from debts and liabilities relating to the Debtor's business. In connection with the deficiency upon the foreclosure, the Debtor owes Fleet Bank approximately \$52,000. The Plaintiff has entered into a stipulation with Fleet Bank which provides for judgment in the amount of \$40,000 and a monthly installment payment of \$250. The Debtor also has credit card debt with Chase Credit Card in the amount of \$15,000. The Plaintiff is paying on that obligation with a monthly installment payment of \$162. The Debtor filed his voluntary petition under Chapter 7 of the Bankruptcy Code with this Court on March 10, 2003, listing the Fleet Bank debt and Chase Credit Card debt on his Schedule F. The Debtor does not dispute that he has a duty to indemnify the Plaintiff against those payments under the divorce decree. The Debtor received his discharge on January 31, 2004. The Plaintiff argues that the Debtor's obligation to indemnify, defend, and save the Plaintiff harmless from the deficiency obligation owing to Fleet Bank and from the Chase Credit Card obligation is nondischargeable pursuant to § 523(a)(15).

DISCUSSION

At the outset, the Court notes that the parties dispute the allocation of payments from the Debtor to the Plaintiff. The Plaintiff argues that the Debtor owes alimony to her in the amount of \$10,759.33. On the other hand, the Debtor argues that he is current with regard to the alimony payments and that the unpaid sum of \$10,759.33 should be allocated to the children's extracurricular activities and unreimbursed medical expenses. The parties agree that the Debtor paid the Plaintiff a total of \$42,439.33 from December 30, 2002, to December 31, 2003. The Court declines to make any findings on the allocation of funds. The Court finds that the better forum to determine this issue is the Rockingham County Superior Court, which ordered the divorce.

Section 523(a)(15) provides that debts that are not alimony, maintenance, or support obligations but which were incurred in the course of a divorce or separation or in connection with a separation agreement, or divorce decree are nondischargeable 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). The parties agree that the Debtor's obligation at issue arose out of the divorce decree and that it is not alimony or support. Thus, there is a presumption that the debt is to be nondischargeable under § 523(a)(15), unless (A) the Debtor lacks the ability to pay the debt or (B) the benefits of a discharge to the Debtor outweigh the detrimental consequences of such a discharge on a spouse, former spouse, or child of the Debtor.

The threshold determination in a complaint under § 523(a)(15) is whether the Defendant/Debtor has the ability to pay. When considering the Debtor's ability to pay and the relative harm for purposes of § 523(a)(15), the Court looks at the financial circumstances of the parties as of the time of trial. See

Konick v. Konick (In re Konick), 236 B.R. 524, 529-530 (1st Cir. B.A.P.1999); Garrity v. Hadley (In re Hadley), 239 B.R. 433, 437 (Bankr. D.N.H. 1999). 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; Brasslett v. Brasslett (In re Brasslett), 233 B.R. 177, 183 (Bankr. D. Me. 1999).

The Court finds that the Debtor does have the ability to indemnify the Plaintiff against the two monthly installment payments. According to the Plaintiff's Exhibit 4, the Debtor, who is self-employed, had a gross income of \$223,865 and an adjusted gross income of \$115,889 in tax year 1997. In 1998 and 1999, his gross income was over \$240,000, with adjusted gross income over \$125,000. In 2000, the Debtor's gross income was \$224,534, with adjusted gross income of \$91,705. The Debtor's income was somewhat decreased in 2001 and 2002. See Pl.'s Ex. 17. However, the Debtor's gross income and adjusted income in 2003 were greater than those in 2002. See Def.'s Ex. 101. The Debtor currently spends \$1,500 per month for advertising service fees, and it is indicated that this monthly expense will terminate over a reasonably short period of time. The Debtor's own testimony is that his income is expected to increase within a year or so as a result of the advertising services. Even with this advertising expense, the Debtor has a projected monthly income of \$8,755.33 after his business expenses for the month of April, or \$105,063.96 on an annual basis. Def.'s Ex. 105. That amount is even greater than his past adjusted gross income in years 2000 through 2003.

The Debtor testified that his projected monthly expenses for the month of April are \$10,496.51. See Def.'s Ex. 105. However, the Debtor listed only \$8,838 as his monthly expenses on Schedule J, and this includes rent payment of \$1,600. The Debtor testified that his business pays half of the rent, which is \$800 per month, because he conducts his business at his place of residence. Thus, his actual monthly expenses could be less than \$8,838. The Court finds that the Debtor failed to demonstrate that his expenses would exceed his 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 Debtor's obligation to the Plaintiff creates a hardship to the Plaintiff that outweighs the benefits of a discharge to the Debtor. Besides the child support and the alimony, the Plaintiff had a modest gross income of \$24,668.18 in 2003. Pl.'s Ex. 8. The Plaintiff testified that she is currently working thirty-five to forty hours per week and that it is very difficult for her to work during nights and weekends because she has to take care of the three children. The Plaintiff presented very comprehensive records of her income and expenses for the period of January 1, 2003, through December 31, 2003. These records also show detailed descriptions of the economic activities of her and her children. The Court notes that the Plaintiff does not have any luxury expenses. In weighing the equities, the Court gives great weight to the fact that the Plaintiff is the primary caretaker of the three teen-aged children and her expenses will only increase in the near future. Both parties are college graduates and expect that each of the children will attend college. It was the Plaintiff's testimony that she does not believe that the Debtor will contribute to the college expenses of the children. For all of the above reasons, the Court finds for the Plaintiff; the obligation to indemnify her against the deficiency debt and the Debtor's business debt is excepted from discharge pursuant to § 523(a)(15).

CONCLUSION

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 22th day of April, 2004, at Manchester, New Hampshire.

/s/ Mark W. Vaughn

Mark W. Vaughn
Chief Judge