United States Bankruptcy Court
District of New Mexico

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Case Number:	**03-01247**
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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:
MICHAEL ANTHONY ARTHUR,
Debtor. No. 7-03-13511 S

GRETCHEN M. HANNUM,
Plaintiff,
v. Adv. No. 03-1247 S

MICHAEL ANTHONY ARTHUR,
Defendant.

MEMORANDUM OPINION

This matter came before the Court for trial on the merits of Plaintiff's complaint against Defendant to determine dischargeability of a debt. Plaintiff appeared through her attorney Gary B. Ottinger. Defendant was self-represented. This is a core proceeding. 28 U.S.C. § 157(b)(2). Having reviewed the testimony and exhibits presented and the applicable law, the Court enters these findings of fact and conclusions of law and decision.

FACTS

The complaint in this action centers around a stipulated divorce decree (Ex 1) and its modification (Ex 3). Plaintiff Ms. Hannum and Defendant Mr. Arthur agreed in the divorce decree that, inter alia, Defendant would be responsible for paying the house mortgage (on 314 Aragon Rd. Belen, NM) and would indemnify Ms. Hannum from any liability to the mortgagee

credit union. The divorce decree was entered 25 January 2001. The parties had then, and still have, a child, Sarah Joan Arthur. The decree found that each party was or could be self-supporting and that there would be no spousal support or child support going from either party to the other. It found that Ms. Hannum's separate property included her "Property oil royalties" [sic], which, she testified at trial, if taken together with her teacher's salary, at that time equaled $6,667 per month, her total income is now down to $2,500 per month. It found that Mr. Arthur's separate property included his business Benchmark Woodworking.

In the modification (ex 3), entered 14 June 2002 after a hearing on that day and following a previous hearing on 16 November 2001, the State Court awarded Ms. Hannum $325/mo. in child support, beginning 1 December 2001. This modification and support order was entered after and because Mr. Arthur was not making the mortgage payments. These payments of $325 were not directly the subject of the hearing conducted by this Court on 8 October 2003, and presumably are not dischargeable. (Given the wording of § 523(c)(1), Plaintiff need not have filed an action to prevent the discharge of the child support obligation, at least to the extent it is covered by § 523(a)(5).)

In November 2002 the house was sold at a foreclosure sale and a transcript of judgment was filed in December listing both parties and showing a deficiency owed of about $37,000. (Ex 4, 5 and 7.) Ms. Hannum at that time got a judgment against Mr. Arthur for the deficiency. (Ex 6.) On April 30, 2003, Mr. Arthur filed a bankruptcy petition. This adversary proceeding was timely filed 27 May 2003.

Ms. Hannum seeks a ruling that Mr. Arthur is liable to her for that mortgage deficiency debt, and the debt is not dischargeable as to her, on the alternative grounds that (1) Mr. Arthur's obligation to pay the house debt and indemnify her is essentially child support (§ 523(a)(5)) or (2) the obligation is a property settlement and (a) the debtor can afford to pay it and (b) discharging the debt would result in a benefit to Ms. Hannum or Sarah, their child, that outweighs the detriment to the debtor. (This is a paraphrase of the statute; of course the language of the statute governs in the event that there is conflict between the statute and the Court's paraphrase.)

LEGAL STANDARDS § 523(a)(5)

The terms "alimony" and "support" are to be given a broad construction to support the Congressional policy that favors enforcement of spousal and child support, thereby overriding

the general bankruptcy policy which construes the exceptions to discharge narrowly. Collier ¶ 523.11[2], at page 523.78, citing Jones v. Jones (In re Jones), 9 F.3d 878, 881 (10th Cir. 1993)(the term "support" as used in § 523(a)(5) is entitled to a broad construction); Dewey v. Dewey (In re Dewey), 223 B.R. 559, 564 (10th Cir. BAP 1998), aff'd 1999 WL 1136744 (10th Cir. 1999) ("Dewey") (the term "support" is to be read broadly and in a realistic manner).

Whether an obligation to a former spouse is in the nature of support is resolved according to federal bankruptcy law, not state domestic relations law. Young v. Young (In re Young), 35 F.3d 499, 500 (10th Cir. 1994) ("Young"); Sylvester v. Sylvester, 865 F.2d 1164, 1166 (10th Cir. 1989)(per curium)("Sylvester") (citing Goin v. Rives (In re Goin), 808 F.2d. 1391, 1392 (10th Cir. 1987)) ("Goin"). That determination is made as of the time of the divorce, not later, Sampson, 997 F.2d at 725-26, regardless of the ex-spouses' current needs or circumstances. Young, 35 F.3d at 500; Sylvester, 865 F.2d at 1166. On the other hand, nothing about the federal basis for making the dischargeability decision precludes either party from returning to State Court to pursue a change in the substance of the support obligation as may be permitted under state law. Federal courts should

not put themselves in the position of modifying state matrimonial decrees. Sylvester, 865 F.2d at 1166.

In Young the Tenth Circuit Court of Appeals gave clear guidance to the Bankruptcy Courts in making 523(a)(5) determinations through analyzing its earlier Sampson case:

> In re Sampson ... held that a bankruptcy court must conduct a two-part inquiry when resolving the issue of whether payments from one spouse to another incident to divorce settlement are in the nature of support. In re Sampson, 997 F.2d at 722-23. First, the court must divine the spouses' shared intent as to the nature of the payment. Id. at 723. This inquiry is not limited to the words of the settlement agreement, even if ambiguous. Id. at 722. Indeed, the bankruptcy court is required to look behind the words and labels of the agreement in resolving this issue. Id. Second, if the court decides that the payment was intended as support, it must then determine that the substance of the payment was in the nature of support at the time of the divorce – i.e., whether the surrounding facts and circumstances, especially financial, lend support to such a finding. Id. at 725-26.

In re Young, 35 F.3d at 500.

The Sampson Court held that the "critical inquiry" with respect to the first element is the "shared intent of the parties at the time the obligation arose." Sampson, 997 F.2d at 723. (Citation omitted.) "A written agreement between the parties is persuasive evidence of intent." Id. (Citation omitted.) In that case the court examined a marital

settlement agreement that contained an Article I denoted as Maintenance and Spousal Support, and an Article III that addressed the property settlement. The court found that this structure in the agreement provided "compelling evidence" that the parties intended the obligation as maintenance.

The Sampson court held that the "critical inquiry" with respect to the second element is the "function served by the obligation at the time of the divorce." Sampson, 997 F.2d at 723. (Citation omitted.) "This may be determined by considering the relative financial circumstances of the parties at the time of the divorce." Id.

DISCUSSION § 523(a)(5)

In this instance, the parties made clear in the written divorce decree that there would be no spousal or child support. This is literally what the words of the decree say. In addition, the recitation in the decree is that Ms. Hannum had considerable income such that she did not need either child or spousal support, even though she has testified that the current child support expenses for Sarah are about $570/mo. In addition, according to the divorce decree, Mr. Arthur was to have the child for half the time, thereby by definition undertaking at least some of the support obligations for the child. It is true that Ms. Hannum

testified that the parties agreed that Mr. Arthur would make the house payments and she would pay for the schooling, etc. for Sarah, and that is why that wording does not appear in the decree. However, the Court finds that if the parties had such an agreement that rose to the level of an explicit understanding of child support or its equivalent, that would have appeared in the decree. And it appears that under the child support guidelines, Ms. Hannum probably would have owed child support to Mr. Arthur. In short, the Court finds that the parties did not intend in the divorce decree that the payments serve as spousal or child support. Nor is there a basis for finding that the payments – at least the few that were made by Mr. Arthur – had that function.

The decree was subsequently modified by the order of 14 June 2002 (ex 3). That modification had as a base the original decree, which did not provide for the mortgage payment to be treated as support. Thus, the modification itself must contain the evidence of the parties' shared intent and of the function of the payments as support. The Court finds also that the modification does not meet the standards set out in the cited case law. Again, the child support issue is directly addressed – it requires a specific payment of $325/month and of the proportionate shares of medical, dental,

etc. expenses. By addressing specifically what it is that will be child support, the modification leaves the strong inference that the other obligations, such as car and credit card payments, are not support, but rather debt and property allocations. Indeed, it appears that the intent of Ms. Hannum at the time of the modification was, more than anything, an attempt to preserve her good credit standing. And if Ms. Hannum had sought to make the payments of the debts for the house, credit card and truck support of some sort, she presumably could have obtained that result with her counsel, K. Dianne Katz. This is particularly the case because by June of 2001, Mr. Arthur was already falling behind on the house payments; indeed, the parties may have already been behind on the payments when the decree was being prepared. It is true that Ms. Hannum's circumstances have now changed such that she no longer has the ability to make these payments herself, and thus is suffering the consequences of nonpayment. However, as the case law makes clear, it is the parties' original intent and actions that govern, not the current situation.

In conclusion, there is no basis for finding that payment of the mortgage (deficiency) should be treated as child or spousal support for purposes of § 523(a)(5).

At the conclusion of the evidence, this was largely the section and argument that Ms. Hannum had ended up relying on for her complaint. However, the complaint originally asked for relief under § 523(a)(15). The Court will consider that issue as well.

LEGAL STANDARDS § 523(a)(15)

The Bankruptcy Reform Act of 1994 added section 523(a)(15) as an exception to supplement the exception of section 523(a)(5). 4 Lawrence P. King, Collier on Bankruptcy (15th ed. rev.) ¶ 523.21, at page 523-104. Subsection (5) establishes that alimony, maintenance and support are nondischargeable obligations; subsection (15) then establishes that any marital debt other than alimony, maintenance or support that is incurred in connection with a divorce is also nondischargeable. Appeal of Ginter (In re Crosswhite), 148 F.3d 879, 883 (7th Cir. 1998).

Subsection (15) offers two exceptions to nondischarge-ability: (A) if the debtor does not have the ability to pay the debt from disposable income, or (B) the benefit to the debtor in discharging the debt outweighs the detrimental consequences to the former spouse or child. Crosswhite, 148 F.3d at 883.

Most courts that have applied this subsection put the burden on the creditor to show that a debt falls within subsection (15), and then shift the burden to the debtor to show that he or she meets the exceptions in subpart (A) or (B).

> [T]here is a clear shift in the burden of proof under §523(a)(15). The burden of proving initially that she holds a subsection (15) claim against the debtor should be borne by the creditor (nondebtor/former spouse). To make that showing, the creditor must establish that the debt is within the purview of subsection (15) by demonstrating that it does not fall under § 523(a)(5) and that it nevertheless was incurred by the debtor in the course of the divorce or in connection with a divorce decree or similar agreement. Once that showing has been established, the burden of proving that he falls within either of the two exceptions to nondischargeability rests with the debtor. In short, once the creditor's initial proof is made, the debt is excepted from discharge and the debtor is responsible for the debt unless either of the two exceptions, subpart (A), the "ability to pay" test, or (B), the "detriment" test, can be proven by the debtor.

Id. at 884-85. See also, e.g., Johnson v. Johnson (In re Johnson), 212 B.R. 662, 666 (Bankr. D. Kan. 1997)("The majority of courts have held that the debtor has the burden of proof as to subsections (A) and (B).") and Schottler v. Schottler (In re Schottler), 251 B.R. 441, 1999 WL 766100 at 3 (10th Cir. B.A.P. 1999)(unpublished opinion)(Noting that how section 523(a)(15) should be applied in the Tenth Circuit is

undecided, but recognizing "majority rule" is that burden is on debtor to prove 523(a)(15)(A) or (B).)

This majority rule has been adopted by various bankruptcy courts within the Tenth Circuit. See Slover v. Slover (In re Slover), 191 B.R. 886, 891 (Bankr. E.D. Ok. 1996); Simons v. Simons (In re Simons), 193 B.R. 48, 50 (Bankr. W.D. Ok. 1996); Johnson, 212 B.R. at 666; Dennison v. Hammond (In re Hammond), 236 B.R. 751, 766-67 (Bankr. D. Ut. 1998).

DISCUSSION § 523(a)(15)

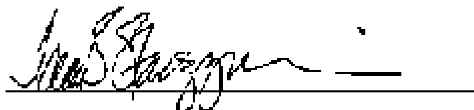
Ms. Hannum made a prima facie case that the mortgage debt was "incurred by the debtor in the course of a divorce ... agreement, divorce decree or other order of a court of record." 11 U.S.C. § 523(a)(15). This prima facie case establishes a rebuttable presumption that the debt is nondischargeable. See Slover, 191 B.R. at 892. The evidence showed in essence that while both parties are clearly less well off than they were prior to the end of 2001, Mr. Arthur has come much closer to hitting bottom than Ms. Hannum. (By saying this, the Court does not mean to suggest that Ms. Hannum is not suffering as well; she certainly is.) Nevertheless, the Court finds, taking into consideration such things as Mr. Arthur's loss (by sale) of tools, failure of the business he tried to make work, his foot injury, the truck

problems and an inability to get extra work, that Mr. Arthur did meet his burden of proof to show that either of the exceptions of 523(a)(15)(A) or (B) were met. In fact, he met the burden on both of those defenses. Although he did not present a current budget that would show an inability to pay, see Johnson, 212 B.R. at 666 (court uses "disposable income test" to determine ability to pay), schedules I and J filed by Mr. Arthur at the beginning of the case show monthly net income of $1,500 and monthly expenses of $1,976. Mr. Arthur's financial situation was not sufficient in April 2003 when he filed his petition to make him liable for this obligation after his discharge, and nothing in any testimony presented suggested that Mr. Arthur's situation has improved. Mr. Arthur also showed sufficiently that discharging this debt will result in a benefit to Mr. Arthur that outweighs the detriment to Mr. Hannum and their child. The fact is that Mr. Arthur simply has no ability to deal with this debt and needs to be able to move along with his life, and that Ms. Hannum and Sarah have the resources (at least some resources) to move on with their lives even if this debt is declared dischargeable.

Again, this is not to say that both parties are not suffering; they clearly are. That suffering is a result of a

series of unfortunate events, detailed above and including the decline in oil and gas revenue to Ms. Hannum and the inevitable increase in living expenses that accompany a separation or divorce. But the suffering of the parties will not be alleviated in any significant way by holding the mortgage deficiency to be nondischargeable. Despite Mr. Arthur’s earnest plea that he would very much like to pay off the debts in question were he able to do so, he simply does not have the resources to do that. Thus, he cannot pay the debt, and the benefit to him of the discharge of the debt outweighs the detriment to Ms. Hannum and their child.

Therefore, the Court finds that, to the extent any of the mortgage debt was not support, it should be discharged under 11 U.S.C. § 523(a)(15). Judgment will enter declaring that Mr. Arthur’s obligation to hold Ms. Hannum harmless from the home mortgage debt is discharged in his chapter 7 proceeding.



Honorable James S. Starzynski
United States Bankruptcy Judge

I hereby certify that on October 10, 2003, a true and correct copy of the foregoing was either electronically transmitted, faxed, delivered, or mailed to the listed counsel and parties.

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