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JUDGE: M. A. Mahoney

PARTIES: Robert J. Bebee, Niccole Gish Bebee

CHAPTER: 7

ATTORNEYS: B. P. Noojin, G. M. Friedlander

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

In Re

ROBERT J. BEBEE

Case No. 97-13501

Debtor.

NICCOLE GISH BEBEE

Plaintiff

v.

Adv. No. 97-1322

ROBERT J. BEBEE

Defendant.

ORDER AND JUDGMENT DECLARING DEBT DISCHARGEABLE

Bert P. Noojin, Mobile, Alabama, Attorney for Niccole Gish Bebee.

Gregory M. Friedlander, Mobile, Alabama, Attorney for Robert J. Bebee.

This matter came before the Court on the complaint of Niccole Gish Bebee to determine pursuant to 11 U.S.C. § 523(a)(15) the dischargeability of Robert J. Bebee's obligation to pay the amounts owing on five credit cards. The Court has jurisdiction to hear this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the Order of Reference of the District Court. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). For the reasons indicated below, Robert J. Bebee's obligation to pay the credit card indebtedness is dischargeable pursuant to 11 U.S.C. § 523(a)(15).

FACTS

Robert Bebee and Niccole Bebee were married in July 1987. There were no children born of the marriage. The Circuit Court of Baldwin County, Alabama granted a judgement of divorce to the parties on August 8, 1997. The judgement of divorce incorporates a settlement agreement

drafted by the parties. Plaintiff's Exhibits A and B. Relevant sections of the judgment of divorce state:

3. THAT the Defendant shall retain for his exclusive use and possession, the homeplace of the parties located at: 710 Greenwood Ave., Fairhope, AL 36532; and, the Defendant shall immediately place the homeplace on the market to sell. Furthermore, the Defendant shall be solely responsible for any and all indebtedness due thereon until same is sold. Upon the sale of the homeplace the net proceeds shall be used to pay the realtor fee, the closing costs and balances on the two Sears Accounts that were owed as of June 1st, 1997, which debts were incurred for home improvements. If there are any proceeds left, these proceeds are to be divided equally between the parties. Further, if the proceeds are not sufficient to pay these expenses and debts as abovesaid, then the Defendant shall be solely responsible for same and he shall indemnify and hold the Plaintiff harmless therefrom.

4.

5. THAT the Plaintiff shall pay and be responsible for the debts to the Limited, J.C. Penny and Dr. H. L. Strickland; and, shall indemnify and hold the Defendant harmless therefrom.

6. THAT the Defendant shall pay and be responsible for the following debts: Ford CitiBank Visa, Discover, Credit First, the Sears Account No. 0581110744843, Gayfers, ISA-MBNA Mastercard, SouthTrust VISA, Amsouth VISA, FNANB-Circuit City; and, shall he indemnify and hold the Plaintiff harmless therefrom.

7. THAT the Defendant shall pay and be responsible for the jointly incurred debts to: First Union VISA, Credit Card Plan, Chase VISA, Parisians, Consumers Edge VISA; and, he shall indemnify and hold the Plaintiff harmless therefrom. Furthermore, the Defendant shall use his share of the net proceeds from the sale of the homeplace, referred to in number 3 above, to pay these jointly incurred debts; or, if his share of the net proceeds is not enough to pay these debts in full, then he shall immediately take out a bill consolidation loan and pay these debts off, within 30 days of the sale of the homeplace and shall immediately show proof to the Plaintiff that this has been done. Further, the Defendant shall immediately put in force and maintain a life insurance policy in an amount sufficient to pay off the remaining balances of these joint debts; i.e., up until the time he consolidates them to pay them off; or, puts them into his name only as abovesaid.

During the ten year marriage of the parties, the debtor had a stable income and was never unemployed. At the time of the divorce the debtor was employed at Fitzgerald Engineering as a

technical equipment salesperson. His gross monthly salary was \$5,200. Per the judgement of divorce, the debtor received possession of the marital homeplace located at 710 Greenwood Avenue. Shortly after the divorce, the debtor notified Niccole Bebee that he had lost his job and he intended to move. The debtor moved out of the house in August 1997 and stopped paying the mortgage.

The debtor obtained new employment at Stone Mountain Applications (Stone Mountain). The new job necessitated that the debtor move to Georgia. The debtor started work at Stone Mountain in August 1997. He was to be paid \$5,400 per month. Stone Mountain Applications paid the debtor sporadically. He did not receive his first paycheck from Stone Mountain until November 1997.

The debtor filed a chapter 7 bankruptcy petition on September 30, 1997. At the time of filing, the address of the debtor was 830 Meadow Song Circle, Lawrenceville, GA 30043. The case was noticed as a no asset chapter 7. The debtor listed the value of his personal property at \$6,293. The \$6,293 amount included 'payroll transfers, inc 401K after taxes and penalties' valued at \$4,500. In his bankruptcy schedules, the debtor listed unsecured nonpriority claims in the total amount of \$86,764.13. The IRS is listed as holding an unsecured priority claim for \$8,000. The bankruptcy schedule indicates that the IRS claim pertains to a 1995 tax return. The debtor indicated on *Schedule G* that he had a \$20,000 lease agreement with Mazda American Credit for a 1997 Mazda 626. In his statement of financial affairs the debtor listed his income from employment in 1995 as \$85,236, in 1996 as \$66,376, and in 1997 as \$30,000 (as of September 1997). At the time of filing, the debtor's net monthly income was \$3,622. The debtor listed his total monthly expenses at \$2,156.60. The itemized expenses are as follows:

Rent	\$350.00
Electricity	35.00
Water and Sewer	10.00
Telephone	30.00
Home maintenance	100.00
Food	775.00
Clothing	100.00
Laundry and dry cleaning	80.00
Medical and Dental	50.00
Transportation	10.00
Recreation	10.00
Charitable contributions	25.00
Life insurance	50.00
Auto insurance	60.00
Term life insurance	20.00
Auto payment	352.60
Storage	99.00
	\$2,156.60

On October 31, 1997, Niccole Bebee filed an adversary proceeding to determine whether the debtor could discharge the credit card debts listed in paragraph seven of the judgement of divorce.

The amounts owed on the debts at the time of trial and the prevailing interest rates are as follows:

First Union	\$9,710	@ 12%
Credit Card Plan	3,828	@ 13.9%
Chase Gold	8,554	@ 21.4%
Parisians	1,054	@ 18%
Consumers Edge (Associates)	3,499	@ 22.99%
Total Balance	\$26,645	

Niccole Bebee claims the credit card debts are nondischargeable pursuant to § 523(a)(15).

She is requesting a determination that the credit card debts are nondischargeable, relief from the

automatic stay, and a specific money judgement in a sum equal to the monetary amounts necessary to pay the debts. She is also requesting attorney's fees and costs of this proceeding.

Niccole Bebee testified that she gave up any right to alimony in order to offset the debt load the debtor agreed to take. If the debts are discharged, Niccole Bebee alleges that her credit would be ruined. She would be sued by creditors. Her wages would be garnished. She would be unable to adequately support herself and her children. The debtor alleges that the potential harm to himself, if the debts are not discharged, would be greater than the relative hardship to his former spouse. If the Court finds the debts nondischargeable it would invalidate the benefit of his bankruptcy. If the Court allows the debts to be discharged, in a worst case scenario, Niccole Bebee might find it necessary to file bankruptcy.

Niccole Bebee is a high school teacher at Fairhope High School. She has been teaching for twelve years. Her net salary is \$1,723.52 per month. Niccole Bebee also receives approximately \$200 per month for tutoring after school and assisting with the administration of the ACT test. Ms. Bebee has two minor children by a prior marriage. Her children are fifteen and sixteen years old. She receives \$300 per month for child support. Her net monthly income is approximately \$2,253.52. Niccole Bebee testified that it is necessary for her to have extra jobs in order to meet her monthly expenses. She outlined her monthly expenses as follows:

Rent	\$725.00
Utilities	150.00
Telephone	60.00
Cellular Telephone	30.00
Food	500.00
Orthodontist	115.00
Dentist	25.00
Gasoline	100.00

Insurance	160.67	
Car	275.71	
TCI (cable television)	50.00	(Judge's notes 150)
Allowance for children	80.00	
Miscellaneous	75.00	
Positive _____	30.00	
J.C. Penny	60.00	(Judge's notes 160)
Limited	70.00	
Discover	70.00	
Utilities and yard care for former marital homeplace	65.00	
	<u>2,641.38</u>	

Niccole Bebee's expenses exceed her monthly income by approximately \$400 each month. She testified that she cannot realistically pay the credit cards debts at issue. Niccole Bebee gets money from her father in order to pay her current bills. The former marital homeplace is still not sold. In order to prevent foreclosure on the former marital homeplace, Niccole Bebee's father is helping with the mortgage note. In September 1997, Niccole Bebee's father paid the mortgage arrearage of \$3,712.15 (July - September) . He has made all monthly payments of \$427 since then. The parties agree that Niccole Bebee's father would be paid back all amounts he contributed when the house was sold. The house is currently listed for \$164,900. The parties owe approximately \$130,000 on the mortgage. Niccole Bebee testified that her father is currently owed approximately \$10,000. Niccole Bebee expects commissions to amount to approximately \$11,000. The debtor has a 1/2 interest in the property. The debtor claimed a homestead exemption in the property and the trustee objected. By Order dated December 3, the Court sustained the trustee's objection and disallowed the debtor's claim of exemption.

Niccole Bebee is forty-six years old. She contributes \$125.98 per month to the teacher's retirement system. Niccole Bebee is a beneficiary of the Gish family trust. Niccole testified that her father had establish the trust and she was not familiar with the terms of the trust. She did not know if she could take money out of the trust or if money in the trust would be exempt were she to file bankruptcy.

Because of the sporadic pay at Stone Mountain, the debtor found a new job with United Controls International, Inc. (United Controls). When he left Stone Mountain he was owed six months pay of approximately \$10,800. The debtor began work with United Controls in February 1998. His gross monthly salary is \$4,500 and his net monthly salary is \$2,194. Monthly deduction from the debtor's gross salary include \$92 for health insurance and \$450 for a 401K. The debtor listed his expenses as follows:

Rent and Utilities	\$600.00
Telephone	25.00
Food	430.00
Clothing	20.00
Laundry	80.00
Gasoline	175.00
Life Insurance	70.00
Automobile insurance	70.57
Dental insurance	10.64
Disability insurance	6.00
Car lease	366.57
IRS debt - \$8,000 balance	250.00
Storage	99.00
Circuit City ¹	30.00
Sears	43.00

¹ Although the debt was not scheduled, a reaffirmation agreement was filed by Circuit City Merchandise. The reaffirmation indicated that the debtor owed \$711.62.

American Express - \$1,035 balance	50.00
Loan from parents - \$1,500 balance	50.00
Rental arrearage owed to girlfriend	150.00
- \$1,800 balance	
Loan from girlfriend	50.00
- \$1,200 balance	
	\$2,575.48

The debtor's current monthly expenses total \$2,575.48. At the time he filed bankruptcy, the debtor's monthly expenses were \$2,156.50. The debtor currently lives at the same address he lived at when he filed bankruptcy. The debtor testified that his current rent and utilities are \$600; however, he indicated on his bankruptcy schedule that his rent and utilities amounted to \$395. The debtor testified that he could not significantly cut his expenses. The only thing he can delete are contributions to 401K. The debtor will be fifty-two years old in April 1998. He testified that he has a 401K vested retirement rollover IRA worth \$10,000. He has had the 401K for three years. He stated that differences in his current expenses and his expenses at the time he filed bankruptcy are due to insurance costs he was not previously required to provide, and higher travel costs. He stated that he was unable to find cheaper rent. On cross-examination the debtor revealed that he actually lived at his girlfriend's home. He stated that there had been several months that he was unable to pay his share of the rent.

LAW

Section 523 (a)(15) - General

The issue before the Court is whether the obligation to pay the credit card is nondischargeable under § 523 (a)(15). The debtor's obligation to pay the credit card debts is a

property settlement. A property settlement obligation may be discharged under § 523 (a)(15) if either of two conditions exist. If under § 523 (a)(15)(A) a debtor does not have the ability to pay a certain debt or if under § 523 (a)(15)(B) the benefit to a debtor outweighs the detrimental consequences to the non-debtor spouse, the debt should be discharged. Once the former spouse establishes the existence of the debt and the debt is determined not to be alimony, maintenance or support, the debtor has the burden of proof to establish his entitlement to a discharge under either subsection of § 523(a)(15). *In re Stone*, 199 B.R. 753, 783 (Bankr. N.D. Ala. 1996).

Section 523 (a)(15)(A)

Section 523 (a)(15)(A) requires the Court to determine whether paying the debt in question would reduce the debtor's income below the amount which is necessary for the support of himself and his dependents. First, the Court must determine what amount of money is reasonably necessary to support the debtor. The Court must then see if funds are left for payment of the credit card indebtedness.

A debtor's financial condition is determined by examining the debtor's current and future circumstances rather than the circumstances as of some fixed point in time. *Matter of McGinnis*, 194 B.R. 917, 920 (Bankr. N.D. Ala. 1996). The debtor indicated that his net monthly income is \$2,194 and his total monthly expenses are approximately \$2,575. He really has a higher net income available to him. He has \$450 per month that he is contributing to his 401K plan. This is a voluntary contribution. His age or 52 makes some retirement savings desirable, but it should not be done at the expense of his creditors. His car lease is quite high. He needs transportation, but not luxurious transportation. His rent is high. If he is paying one half of the rent and utilities, the expenses are \$1,200 per month. He could live more cheaply. Therefore, Mr. Bebee has \$500 - \$700

a month available for debt repayment that is not shown in his calculation of disposable income. However, because he calculates that he has a deficit each month and his expenses are probably \$2,200- \$2,300 per month, his real net disposable income to pay credit card bills is about \$400-\$500 per month.

The credit card debts are over \$25,000 and will approach \$30,000 with accruing interest. This sum at \$500 per month would require approximately five years to pay. If Mr. Bebee does not file a chapter 13 plan to repay the debt, interest will continue to accrue and the repayment time will stretch to approximately seven years.

Mr. Bebee must prove that he does not have the ability to pay the debt. “[A] debtor has the ability to pay an obligation, for purposes of 11 U.S.C. § 523(a)(15), if the debtor has sufficient disposable income to pay all or a material part of the property settlement within a reasonable amount of time.” *In re Smither*, 194 B.R. 102 (Bankr. W.D. Ky. 1996). In this case, Mr. Bebee could pay the debt, but it would take a substantial sum of money over 5 - 7 years. The Court concludes that this is not a reasonable period of time.

Section 523 (a)(15)(B)

Section 523 (a)(15)(B) requires that the Court weigh the effects of the discharge on the debtor and his former spouse. Mr. Bebee will definitely receive a benefit if the debts are discharged. He could, as discussed above, pay some or all of the debts in 5- 7 years. However, he would need to file another bankruptcy to insure it. Only with a chapter 13 filing could he stop the high interest accrual on the credit card debts. This is a decided disadvantage to someone who has already filed a chapter 7.

Niccole Bebee does not have the monthly disposable income to afford the credit card debts. Ms. Bebee will probably find it necessary to file bankruptcy. This might be the case even without consideration of the credit card debts since she operates at a deficit each month. It is not uncommon for divorcing parties to file bankruptcy in order to deal with marital debts. It is true Mr. Bebee plans to fund his retirement if the credit card debts are discharged. However, he is 52 years of age. Ms. Bebee also has a retirement through the school system. One or the other will be required to file bankruptcy whichever decision the Court makes.

The Court must “compare the standard of living of the debtor against the standard(s) of living of his or her spouse, former spouse and/or children to determine whether the debtor will “suffer more” by not receiving a discharge of the debts in question than his or her spouse would suffer if the obligations were discharged.” *In re Smither*, 194 B.R. 102, 110 (Bankr. W.D. Ky. 1996). If the \$25,000 - \$30,000 of credit card debt is not discharged for Mr. Bebee, he will need to file a chapter 13 bankruptcy case or he will be required to pay \$500 or more per month for 6-7 years. He will then be 58 or 59 years old. The detriment to him is substantial. Ms. Bebee, if the credit card debts are discharged for Mr. Bebee, will have more debt to pay than she already does. Even at her present debt level, she cannot meet her expenses. The additional debt load may cause her to file bankruptcy sooner, but since her income does not meet her expenses it will likely happen anyway at some point in time. Therefore, the fact she may have to file bankruptcy is not a consequence of the credit card debt alone. Therefore, the Court concludes that detriment to Ms. Bebee is not as substantial as the detriment to Mr. Bebee. A bankruptcy court should not deny the debtor his fresh start simply because his former wife has chosen not to seek the same relief on her own behalf. *In*

re Daiker, 5 B.R. 348, 352 (Bankr. D. Minn. 1980). *See also In re Hill*, 184 B.R. 750, 776 (Bankr. N.D. Ill. 1995).

CONCLUSION

A debt may be discharged under § 523 (a)(15) if either under subsection (A) a debtor does not have the ability to pay the obligations or if under subsection (B) the benefit to a debtor outweighs the detrimental consequences to the non-debtor spouse. The tests under subsections (A) and (B) are disjunctive. *In re Butler*, 186 B.R. 371 (Bankr. D. Vt. 1995). The debtor has met both tests. Pursuant to § 523 (a)(15)(A) and § 523 (a)(15)(B) the credit card debts are dischargeable.

Therefore, IT IS ORDERED that the obligation of the debtor to Niccole Bebee provided for in paragraph 7 of their judgement of divorce in the Circuit Court of Baldwin County dated August 8, 1997 is DISCHARGEABLE and judgment is awarded for the defendant.

Dated: March 31, 1998

MARGARET A. MAHONEY
CHIEF BANKRUPTCY JUDGE