

**UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa**

In the Matter of	:	Case No. 95 - 02892 - DH
	:	
BLAKE ALAN JAMES, dba BLAKE'S GUN REPAIR,	:	Chapter 7
	:	
Debtor.	:	
-----	:	
CYNTHIA A. JAMES,	:	Adv. No. 95 - 95153
	:	
Plaintiff,	:	
	:	
vs.	:	
	:	
BLAKE ALAN JAMES, dba BLAKE'S GUN REPAIR,	:	
	:	
Defendant.	:	

ORDER--COMPLAINT TO DETERMINE DISCHARGEABILITY OF DEBT

On July 11, 1996, trial was held on the Complaint to Determine Dischargeability of Debt. Debtor Blake Alan James dba Blake's Gun Repair was represented by attorney James C. Wherry; Creditor Cynthia A. James was represented by attorney Thomas J. Yeggy. At the conclusion of the trial, the Court took the matter under advisement upon a briefing schedule. Post-trial briefs have been filed and the Court now considers the matter fully submitted.

The Court has jurisdiction of this matter pursuant to 28 U.S.C. § 157(b)(1) and § 1334. This is a core proceeding. 28 U.S.C. § 157(b)(2)(I). The Court, upon review of the briefs, pleadings, evidence, and arguments of counsel, now enters its findings and conclusions pursuant to Fed.R.Bankr.P. 7052.

FINDINGS OF FACT

1. Plaintiff, Cynthia A. James (“Cynthia”), and Debtor, Blake Alan James (“Blake”) were married August 6, 1993. A Dissolution of Marriage Decree was entered in Iowa Court for Scott County on August 16, 1995. The Decree was modified by a Nunc Pro Tunc Order dated October 3, 1995.

2. Blake and Cynthia owned a business, Blake’s Gun Repair, during their marriage. The business folded on December 31, 1994 and was not operated in 1995.

3. Pursuant to the Dissolution of Marriage, Blake was awarded the real property located at 720 Kirkwood Boulevard, Davenport, Scott County, Iowa. Blake was responsible for paying the mortgages on the real property held by LaSalle Tallman Bank and First National Bank, n/k/a Bank One. Blake intends to pay these mortgages. As a further part of the parties’ property settlement, Blake assumed the debt to AT&T Visa.

4. Under the terms of the Dissolution of Marriage, Cynthia was awarded two motor vehicles and she assumed liability for debts to Harris Bank Visa and Samuel’s Charge. In November 1995, the debt to Harris Bank was \$544 and the Samuel’s Charge was \$300. Cynthia has paid these accounts in full.

5. On September 26, 1995, Debtor, Blake Alan James, filed for protection under Chapter 7 of the Bankruptcy Code.

6. On November 15, 1995, Plaintiff, Cynthia A. James, timely filed a Complaint to Determine Dischargeability of Debt under 11 U.S.C. §§ 523 (a)(5) or 523 (a)(15). The parties have since agreed the only issue is the (non)dischargeability of the AT&T Visa debt pursuant to § 523 (a)(15).

7. The AT&T Universal Visa Card debt, account #4783-5600-0010-0782, is a non-support obligation assumed by Blake pursuant to the parties' dissolution decree.

8. The balance on the AT&T Universal Visa Card debt was \$5,820.34 on September 14, 1994; the minimum amount due on the account at that time was \$122.00.

9. Since Blake filed for bankruptcy, Cynthia has been contacted by AT&T Universal Visa Card regarding the total amount due of \$6,400.

10. Since the dissolution, Blake has remarried. Although currently employed part-time at Payless Shoes, Blake's new wife, Anna, has a college degree in elementary education.

11. Since the dissolution, Cynthia has also remarried. Her husband, Russell, is employed at Metro Bank, has annual gross income of about \$65,000, and supports two children from a previous marriage.

DISCUSSION

Plaintiff, Cynthia A. James, asserts that certain debts that Debtor, Blake Alan James, is responsible for under terms of their Dissolution Decree are nondischargeable pursuant to 11 U.S.C. § 523 (a)(15). Specifically, Cynthia argues that the LaSalle Tallman Bank, AT&T Visa, and First National Bank debts are nondischargeable. Because Debtor intends to reaffirm and pay the LaSalle Tallman Bank obligation which is a mortgage on his home, Cynthia has limited this proceeding to the AT&T Visa and First National Bank obligations. Debtor argues that he is unable to pay the AT&T Visa debt, or, alternatively, that discharging the debt would not result in a benefit to himself that outweighs the detrimental consequences to Cynthia.

The debts at issue are unsecured consumer debts on joint credit accounts. Under the terms of the parties' Dissolution Decree, Blake assumed responsibility for paying them. Blake

and Cynthia both approved the Dissolution Decree as evidenced by their signatures. Counsel for each party approved it as to its form.

The Court is requested to determine that obligations incurred by Debtor pursuant to the parties' Dissolution of Marriage decree are nondischargeable under 11 U.S.C. § 523 (a)(15), which reads:

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

The standard of proof under § 523 is a preponderance of the evidence. Grogan v. Garner, 498 U.S. 279, 286-287 (1991). In a nondischargeability action under 11 U.S.C. § 523(a)(15), there is a rebuttable presumption of nondischargeability. See Straub, 192 B.R. 522 (Bankr. D.N.D. 1996); Matter of McGinnis, 194 B.R. 917, 920 (Bankr. N.D.Ala. 1996). After the non-debtor spouse establishes that the debt at issue arose from a separation agreement, dissolution decree, or other court order, and is not in the nature of support, the burden of proving dischargeability under either subsection (A) or (B) shifts to the debtor. See In re Jordan, 95-1312-CJ, Adv. 95-95108 (Bankr. S.D.Iowa April 17, 1996)(J.Jackwig Decision #194); In re Henson, 197 B.R. 299 (Bankr. E.D.Ark. 1996).

The Code provides for an all-or-nothing discharge of the non-support debt at issue. The prefatory language in § 523 (a)(15) does not provide for fragmentation of the debt into dischargeable and nondischargeable components based on the debtor's ability to pay or on a cost-benefit analysis. See 11 U.S.C. §§ 523 (a)(15)(A), (a)(15)(B); See also In re Hill, 184 B.R. 750 (Bankr. N.D.Ill. 1995); In re Silvers, 187 B.R. 648 (Bankr. W.D.Mo. 1995).

Some courts have analyzed dischargeability under § 523 (a)(15) as of the date the Adversary Complaint is filed or as of the trial date. See Hill, 184 B.R. 750; Henson, 197 B.R. at 303 (trial date plus future ability to pay). If § 523 (a)(15) were analyzed as of the filing of the Adversary Complaint or subsequent trial, the debtor's financial status would be a moving financial target for the Plaintiff; post-petition, a debtor could undertake substantial new debt that could directly impact the outcome of a § 523 (a)(15) analysis. In contrast, the order for relief provides a date certain from which the debtor seeks a fresh start and a snapshot of the debtor's finances. For the foregoing reasons, this Court will follow the other court in this district in using the date of the order for relief as the starting point for determining both the debtor's current and future potential ability to pay on the debt. See Jordan, 95-1312-CJ, Adv. 95-95108.

Debtor's ability to pay under § 523 (a)(15)(A)

Because Blake was no longer in business as of the date of filing his bankruptcy and the subsequent order for relief, this Court's focus is on Blake's ability to pay the non-support obligation from assets not reasonably necessary to support the debtor and his dependents. See 11 U.S.C. § 523 (a)(15)(A). Both Blake's financial status at the time of the order for relief and his potential future ability to pay on the AT&T Universal Visa Card debt must be examined. The

date of the order for relief in this case is September 26, 1995, the date Blake filed bankruptcy.

See 11 U.S.C. § 301.

The record reflects a mix of financial information at various times. Blake's income can be established at the time he filed bankruptcy and Blake and Anna's income is shown for calendar year 1995 tax purposes. Blake's expenses, while estimated for bankruptcy filing purposes, were modified at trial to show what they currently are.

While he had been with his current employer only 9 months, he has been employed as an auto glass technician for 12 years. At trial, Blake testified his net income is \$313 per week, which closely parallels the \$1387 per month reflected in Schedule I to his bankruptcy petition. This stream of income is supported by copies of Blake's paystubs entered into evidence. Although Blake testified his monthly bonuses range from a high of \$130 to a low of \$47, the paystubs show that as of December 11, 1995, Blake's year-to-date Profit Bonus was \$2,167.47, which is an average of more than \$180 a month. Thus, when he filed, Blake's monthly income was approximately \$1,567. Blake's scheduled expenses totaling \$2,194 would raise questions of whether some were reasonably necessary. Blake expended over \$280 per month on transportation and vehicle insurance when a vehicle was available through his employer. He scheduled unusually high telephone, cable, and utility expenses. Nonetheless, after reducing these items to reasonable levels, his expenses would still exceed his income at that time.

In addition to considering Blake's dire financial situation when he filed bankruptcy, Blake's future ability to pay on the AT&T Visa Universal Card must also be considered. Changes in Blake's financial situation post-petition may be indicative of future trends. Additionally, potential future earning capacity and any good faith attempts to pay the obligation may indicate

whether the debtor truly lacks the ability to pay or whether he has chosen to present an inability to pay.

Blake has married a college graduate which has increased his household income. Blake and Anna's 1995 tax returns show an Adjusted Gross Income for federal tax purposes of \$31,188, more than \$400 per month more than on Schedule I. While Blake's income has increased, his expenses have, too. Blake testified about post-petition adjustments to his expenses. He currently spends \$20 less on cable TV, \$60 less on clothing, \$35 less on entertainment, \$6 less on homeowner's insurance. His vehicle is supplied by his employer, which has reduced his automobile insurance by \$65. He testified that some expenses are actually higher than he estimated on Schedule J. Water and sewer are about \$77 higher and food about \$140 higher than shown. Two items of expense not supported by testimony include telephone and transportation, listed at \$105 and \$200 respectively. Basic telephone service is approximately \$30. While Blake argues the telephone is his only contact with a daughter out-of-state, there is no showing of how much in long distance charges are attributable to maintaining this father-daughter relationship. Even assuming the entire \$31.10 in AT&T charges on the phone bill in evidence were for calls to this daughter, the phone expense would still be \$43 less than scheduled. Blake's employer provides a vehicle for which Debtor pays gas and upkeep in addition the insurance. Blake's testimony that gas and upkeep cost \$20 to \$30 per week is not shown to be reasonably necessary in light of Blake working within three miles of home. Reducing this amount by half would result in a \$132 reduction in transportation costs. After making the adjustments discussed above, Blake's monthly income and expenses are \$1,967 and \$2,050, respectively. But, since the order for relief, Blake has incurred additional expenses not figured into the monthly amount above. These include debts to the Internal Revenue Service (\$151), the Iowa Department of Revenue

(\$488), for repairs to a collapsed sewer (\$379), and attorney's fees (\$1,431). Although Blake is meeting his current child support obligation through garnishment of his wages, he has child support arrearages of \$1,797.

Blake and Anna have future earning potential greater than what they presently earn. Blake testified he had expected a substantial raise from his current employer which has not yet materialized. If Anna were employed in the field in which she trained, Elementary Education, she could make more than the \$400 per month she currently makes working part-time at Payless Shoes.

Blake has made no payments on the AT&T Universal Visa debt since assuming it pursuant to the dissolution agreement.

Blake has shown his inability to pay the AT&T Universal Visa debt at the time he filed bankruptcy. He has not shown that his dire financial situation will continue into the indefinite future. He has failed to show a lack of increased future earning potential and his inability to pay on the debt in the future. For these reasons, the AT&T Universal Visa debt is non-dischargeable pursuant to § 523 (a)(15)(A).

Balancing test under § 523 (a)(15)(B)

Under § 523 (a)(15)(B), the Court must balance Debtor's fresh start against the detriment to the non-debtor spouse. As the legislative history states, "[t]he debt will also be discharged if the benefit to the debtor of discharging it outweighs the harm to the obligee. For example, if a nondebtor spouse would suffer little detriment from the debtor's nonpayment of an obligation required to be paid under a hold harmless agreement (perhaps because it could not be collected from the nondebtor spouse or because the nondebtor spouse could easily pay it) the obligation

would be discharged. The benefits of the debtor's discharge should be sacrificed only if there would be substantial detriment to the nondebtor spouse that outweighs the debtor's need for a fresh start." H.R.Rep. No. 103-835 at 54 (1994), reprinted in 1994 U.S.C.C.A.N. 3363.

A number of factors are generally considered in this cost-benefit analysis. See, e.g., In re Smither, 194 B.R. 102, 111 (Bankr. W.D.Ky. 1996). The finances, needs, and each parties position must be evaluated on a case-by-case basis. Factors Judge Jackwig found relevant to this decision include:

- (1) the amount of debt at issue relative to the total amount of debt the debtor seeks to have discharged;
- (2) whether the debt at issue can be collected from the non-debtor ex-spouse;
- (3) which of the parties is in a better position to pay the debt; and
- (4) if there are children from the marriage, which parent has custody and which parent incurs the day-to-day living expenses of the children.

See Jordan, 95-1312-CJ, Adv. 95-95108.

Other factors this Court finds relevant in the instant case are: (1) the length of time between the dissolution and the debtor's attempt to discharge non-support obligations; (2) whether the non-debtor spouse has fulfilled his/her obligations under the dissolution agreement; and (3) any changes in employment circumstances, including a voluntary reduction in income by either party since the dissolution.

The only debt in the record that Blake seeks to have discharged is the \$6,000 AT&T Universal Card debt. Cynthia is jointly liable on the debt. AT&T has made efforts to collect the debt from Cynthia.

Finding that Cynthia is in a better position to pay the debt is supported by the record. Cynthia has subsequently married Russell. Although she does not see Russell's pay stubs, she testified that he earns about \$65,000 annually. Russell pays \$900 per month in support of two

children from a previous marriage. While it has been established that Blake's expenses currently exceed his income, Cynthia's household income has been established as being \$65,000 while the only expenses available in the record are those she incurred as a single newly-divorced mother of two.

Blake and Cynthia have no children in common. After the dissolution, Cynthia, as a single mother of two children, received \$640/month in child support (not from Blake) in addition to her income earned as a full-time customer service representative. Cynthia's 1995 tax returns show an Adjusted Gross Income for federal tax purposes of \$17,989.85; she qualified for an Earned Income Credit of \$1,759. Even though she has supplied income and expense information that shows a shortfall of approximately \$300 per month, she has paid the debts she assumed under the Dissolution of Marriage.

An agreement was reached and, after review, validated by a state court. Less than two months after the dissolution was entered, Blake filed bankruptcy, seeking to have his personal liability on debts assumed under the agreement discharged. Use of the Bankruptcy Code to effect a modification of the state court decree entered less than two months earlier creates consequences detrimental to the nondebtor spouse. The nondebtor spouse is forced to litigate the non-support obligation in another forum within a relatively short time of having already litigated or negotiated a settlement. The reality is that Blake got what he bargained for in the dissolution but that is not what he really wants. A modification of the Dissolution Decree is outside the scope of this Adversary Proceeding and the jurisdiction of this Court. See Ankenbrandt v. Richards, 504 U.S. 689, 693-704 (1992)(exception to federal jurisdiction for domestic relations cases). Use of the Bankruptcy Code for this purpose might raise an issue of substantial abuse.

Blake has failed to carry the burden of showing that the detriment to Cynthia if the debt were found to be dischargeable would be outweighed by the fresh start benefit it would afford Blake. The AT&T Universal Card debt is nondischargeable pursuant to § 523 (a)(15)(B).

Attorney's fees under 11 U.S.C. § 523(d)

In answering Cynthia's Complaint, Blake asserts that he should be awarded costs and attorney's fees under § 523 (d) because Cynthia's position is not substantially justified. Blake's position is without merit. No request for a determination of dischargeability of consumer debt under § 523 (a)(2) has been made in the Adversary Proceeding.

ORDER

IT IS THEREFORE ORDERED that the AT&T Universal Card debt is nondischargeable pursuant to 11 U.S.C. § 523 (a)(15)(A).

IT IS FURTHER ORDERED that the AT&T Universal Card debt is nondischargeable pursuant to 11 U.S.C. § 523 (a)(15)(B).

Dated this _____ day of March, 1997.

RUSSELL J. HILL, CHIEF JUDGE
U.S. BANKRUPTCY COURT