UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In Re	:	**Case No. 99-1551-DH**
DEBRA ANN HOBBS,	:	**Chapter 7**
Debtor.	:	
TERRY HOBBS,	:	**Adv. No. 99-99085**
Plaintiff,	:	
v.	:	
DEBRA ANN HOBBS,	:	
Defendant.	:	

ORDER—COMPLAINT TO DETERMINE DISCHARGEABILITY OF DEBT

On November 16, 1999, trial was held on Plaintiff's Complaint to Determine Dischargeability of Debt. Plaintiff, Terry Hobbs, was represented by attorney H. J. Pries; Defendant, Debra Ann Hobbs, was represented by attorney James L. Tappa. 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 and order of the United States District Court for the Southern District of Iowa. This is a core proceeding pursuant to 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. The plaintiff, Terry D. Hobbs (hereinafter Terry), is the former spouse and is a scheduled creditor of the defendant, Debra Ann Hobbs (hereinafter Debra).

2. Debra filed a Chapter 7 bankruptcy petition on April 23, 1999.

3. Terry and Debra were married June 22, 1980.

4. The marriage of Terry and Debra was terminated by decree entered on January 20, 1998. The parties resolved the majority of the property division by agreement. Pursuant to decree of the Iowa District Court for Scott County the marital home and the 1956 Chevrolet automobile (hereinafter the Chevy) were to be sold, and the proceeds minus costs of sales, taxes, and mortgage were to be divided equally between the parties. Also, Debra, by agreement and the court order, accepted responsibility for the payment of various credit card debt including the Visa account at issue here.

5. Terry paid Debra $20,000 as her share of the equity in the marital home by check dated March 26, 1998.

6. On May 27, 1998, Deere Harvester Credit Union filed suit in the Iowa District Court for Scott County, Cause No. 92491, to collect the credit card debt (hereinafter the Deere account). The suit was filed against both Terry and Debra. Based on the dissolution decree and modification, Terry filed a cross-petition against Debra for any amounts for which he is held responsible.

7. The parties petitioned the Iowa District Court for Scott County to modify the decree in their dissolution of marriage case on September 22, 1998. In their petition,

the parties stated that they agreed that the Chevy would be awarded to Debra for the purpose of providing sufficient assets to pay all the credit card debts awarded to the her in the dissolution. The petition further stated the she would hold Terry harmless from payment of these debts. Debra would provide proof of payment of the debts within one hundred twenty (120) days of the entry of the modification order. Further, she would be responsible for all credit card debts in the names of both parties. The same day, the Iowa District Court for Scott County entered an order, that incorporated these terms, modifying the dissolution decree.

8. Debra retains ownership of the Chevy and has not paid the credit card debt. She scheduled the Chevy as exempt personal property with a value of $5,000.

9. Terry values the Chevy at $10,000.

10. From the time of the her divorce from the plaintiff to the time of her filing the Chapter 7 petition fifteen (15) months later, Debra made deposits of $65,528.28 into her Mercantile Bank Midwest account.

11. Debra scheduled gambling losses of $14,509 in the previous year on her statement of financial affairs.

12. Debra deposited $12,732.39 in her Mercantile account on March 5, 1999. Within thirty (30) days of filing for bankruptcy protection, Debra withdrew $3,500.00 payable to cash. The account had a $0 balance on April 19, 1999.

13. Debra scheduled only two debts in her bankruptcy schedules, the Deere account for $4,217.33 and U.S. Bank National Association's claim for $4,217.33. Terry

is scheduled as co-debtor on the Deere account. Debra's total scheduled liabilities amount to $8,690.64.

14. Debra scheduled total assets in the amount of $8,800.00. These assets include the Chevy valued at $5,000.00 and a 1989 Pontiac Sunbird valued at $500.00. Both were received pursuant to the dissolution decree and modification.

15. In the fifteen month period between the dissolution of marriage and the filing of the Chapter 7 bankruptcy petition, Debra deposited $65,528.00 in her Mercantile Bank account.

16. Debra paid in full her personal credit accounts with Discover, Household Finance, and Fleet Credit Card. Debra made no payment on the joint obligation to Deere as she agreed and was required by the dissolution decree.

DISCUSSION

Terry objects to the debtor's discharge pursuant to 11 U.S.C. §§ 523(a)(2), 523(a)(5), 523(a)(15), 727(a)(2), and 727(a)(4). For the following reasons, the court holds that Terry has abandoned and waived that part of his action pursuant to §§ 727(a)(2), and (a)(4), and § 523(a)(5).

The final pre-trial conference order states that the adversary proceeding was brought pursuant to all the aforementioned Code sections; however, the statements of disputed facts, undisputed facts, legal contentions, and legal issues do not address the prima facie requirements of § 727 or § 523(a)(5). Neither Terry's pre-trial nor post-trial brief addresses the issues in the context of these sections. No authority referring to these Code sections is cited. At trial, the arguments and evidence presented were relevant to

§§ 523(a)(2)(A) and 523(a)(15). The court will, therefore, confine its analysis to these sections.

Section § 523(a)(15)

Terry asserts that Debra is responsible for certain credit card debts under terms of their dissolution decree and subsequent modification. Terry further asserts that these debts are nondischargeable pursuant to 11 U.S.C. § 523 (a)(15). In particular, Terry argues that the Deere account debt is nondischargeable. Debra argues that she is unable to pay the Deere account debt, or alternatively, that discharging the debt would not result in a benefit to herself that outweighs the detrimental consequences to Terry.

Section 523 (a) provides in relevant part:

> (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.

11 U.S.C. § 523(a)(15)(A),(B).

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), the creditor spouse must first establish that the debt at issue was incurred

from a separation agreement, dissolution decree, or other court order, other than one for alimony, maintenance, or support. Ginter v. Crosswhite (In re Crosswhite), 148 F.3d 879, 884-85 (7th Cir. 1998); Gamble v. Gamble (In re Gamble), 143 F.3d 223, 226 (5th Cir. 1998); Rush v. Rush (In re Rush), 237 B.R. 473, 475 (B.A.P. 8th Cir. 1999); Moeder v. Moeder (In re Moeder), 220 B.R. 52, 56 (B.A.P. 8th Cir. 1998). The burden of going forward with evidence then shifts to the debtor to prove dischargeability under either subsection (A) or (B). In re Crosswhite, 148 F.3d at 884-85; In re Gamble, 143 F.3d at 226; In re Rush, 237 B.R. at 475; In re Moeder, 220 B.R. at 56.

Federal law ultimately determines whether a debt is or is not dischargeable under § 523(a)(15); however, applicable nonbankruptcy law must be analyzed to determine whether the debt was incurred from a separation or dissolution decree. Gibson v. Gibson (In re Gibson), 219 B.R. 195, 203 (B.A.P. 6th Cir. 1998). "As the Supreme Court stated in Grogan, 498 U.S. at 283-84, "'the validity of a creditor's claim is determined by rules of state law[,]' and [w]e use the term 'state law' expansively herein to refer to all nonbankruptcy law that creates substantive claims." Id.; see also Carlise v. Carlise (In re Carlisle), 205 B.R. 812, 816 (Bankr. W.D. La. 1997)("[T]he creation and enforceability of obligations in a divorce settlement are governed by state law."); Johnston v. Henson (In re Henson), B.R. 197 B.R. 299, 302-03 (Bankr. E.D. Ark. 1996)("[A]lthough there is no 'hold harmless' language in the decree or complaint, under Arkansas law, the debtor incurred a debt to [his former spouse] in connection with the divorce proceeding").

In Iowa, the "allocation of marital debt inheres in the property division." In re the Marriage of Johnson, 299 N.W. 2d 466, 467 (Iowa 1980). A stipulation of settlement is

a contract between the parties that becomes a "final contract" when it is approved by the court and incorporated into the dissolution decree and order. In re the Marriage of Lawson, 409 N.W. 2d 181, 182 (Iowa 1987). When the dissolution decree is construed, '"[e]ffect must be given to that which is clearly implied as well as that which is expressed."' Id., citing Cooper v. Cooper, 158 N.W.2d 712, 713 (Iowa 1968).

Therefore, this court concludes that as to parties in a dissolution of marriage action, debt is incurred in connection with the dissolution decree. For § 523(a)(15) purposes, no express "hold harmless" language need be included in the dissolution decree if that effect is clearly implied in the order. See In re Gibson, 219 B.R. at 202; cf. King v. Speaks (In re Speaks), 193 B.R. 441 (Bankr. E.D. Va. 1995)("Indeed even in the absence of an explicit agreement, the law will imply an obligation to indemnify where one party incurs a debt for his own benefit which creates liability on the part of another").

Finally, 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 current representation of the debtor's finances. For the foregoing reasons, this court follows 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 In re Jordan, 95-1312-CJ, Adv. 95-95108 (Bankr. S.D. Iowa April 17, 1996)(J. Jackwig Decision #194).

The debt at issue is unsecured consumer debt on a joint credit account. Under the terms of the parties' dissolution decree, Debra assumed responsibility for paying them. Both Terry and Debra approved the dissolution decree and modification as evidenced by their signatures. Terry's counsel drafted the dissolution decree and the modification. The original decree allocates the Deere account debt to Debra. The modification expressly states that Debra will hold Terry harmless for all joint credit card debt. The court holds that Terry has satisfied his burden of proving that the debt was incurred in connection to a dissolution proceeding. Accordingly, the burden shifts to Debra to prove that she is unable to pay the debt or that discharging the debt would not result in a benefit to herself that outweighs the detrimental consequences to Terry.

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

The court finds that Debra has the ability to pay the debt from property not reasonably necessary for her maintenance or support. Debra has no dependants. At the time she filed the petition she was unemployed and listed no income. However, she was living with her former supervisor, Lee Hasse, and he was providing her with rent free housing and board. Debra scheduled car insurance of $28.74 per month as her only expense.

Debra scheduled two cars as personal property. The Pontiac Sunbird, which she uses for personal transportation, was not scheduled as exempt and was subsequently abandoned by the trustee. The Chevy, which Debra received in order to provide

sufficient assets to pay the credit card debt, was scheduled as exempt personal property. The car is currently in a garage and not being driven. There is no evidence that Debra has kept any insurance on the Chevy. Because Debra is not using the Chevy, and she has no maintenance expenses, the court finds that she can use the Chevy to pay the credit card debt as she originally agreed and was ordered by the district court.

The court also notes that the Iowa District Court did not award Debra support or alimony in the dissolution decree. The court found that Debra volunteered to take layoff from her job at Ralston at a time when her income exceeded $30,000 per year. All the evidence indicated that she would still be employed there at an incrementally higher wage had she not voluntarily taken layoff. The Iowa District Court determined that Debra had the ability to earn $30,000. This court accepts that determination and imputes that potential income to Debra.

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.

In this case the court finds that the facts weigh in Terry's favor. Terry currently has an income of $39,000 per year. Debra has the potential to earn over $30,000 per year. Debra has no monthly expenses other than $28.74. More importantly, the evidence indicates that Terry fulfilled his obligations under the dissolution decree and modification. He paid Debra $20,000 for her share of the equity in the marital home. He took responsibility for the debts allocated to him by the decree. Most importantly, he turned over his share of the Chevy so that she would have sufficient assets to pay the credit card debt.

Debra has presented no credible evidence to the court that the benefit she would receive for the discharge of the debt would outweigh the detriment to Terry. As previously stated, Debra received Terry's ownership interest in the Chevy specifically for the purpose of paying the credit card debt. An agreement was reached and, after review, validated by a state court. If the debt is discharged, Terry will be subject to sole liability for the credit card debt. Additionally, he will have lost his interest in the car. In essence, he will be forced to pay twice a debt that Debra agreed and was ordered to pay in the dissolution decree. The court finds that Debra's benefit does not outweigh the detriment to Terry. Debra has not carried her burden, and the debt is not excepted from discharge.

Section 523(a)(2)(A)

The debt is also excepted from discharge pursuant to 11 U.S.C § 523(a)(2)(A). The court is cognizant that 8th Circuit Bankruptcy Appellate Panel has stated that "under

normal circumstances, debts arising out of marital dissolutions are more appropriately addressed under § 523(a)(5) or § 523(a)(15)." Guske v. Guske (In re Guske), 243 B.R. 359, 364 (B.A.P. 8th Cir. 2000). However, the facts of this case place it outside of the realm of the normal circumstances of most dissolution cases.

The Bankruptcy Code provides that a debt is not dischargeable to the extent that it was obtained by "false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition." 11 U.S.C. § 523(a)(2)(A). The plaintiff has the burden of proving the debtor's deceit by a preponderance of the evidence. Grogan v. Garner, 498 U.S. 279, 286-87 (1991). The Eighth Circuit has adopted a five-part test to determine whether a debt will be excepted from discharge under § 523(a)(2)(A). The court asks whether: (1) the debtor made false representations; (2) the debtor knew these representations were false at the time they were made; (3) the debtor made these representations with the intention and purpose of deceiving the creditor; (4) the creditor justifiably relied on the representations; and, (5) the creditor sustained the alleged injury as a proximate result of the representations having been made. Caspers v. Van Horne (In re Van Horne), 823 F.2d 1285, 1287 (8th Cir. 1987) as modified by Field v. Mans, 516 U.S. 59, 74-75 (1995) (holding that § 523(a)(2)(A) requires "justifiable, but not reasonable, reliance"). The court concludes that the plaintiff has satisfied his burden of proof.

"The first, second, and third elements can be considered together by asking whether the debtor made false representations knowingly and with the intent to deceive the creditor." AT&T Universal Card Services v. Broerman (In re Broerman), No.97-

2569-CH, Adv. No. 97-97203 at 5 (Bankr. S.D. Iowa Jan. 19,1999) (Judge Hill decision book # 313). Intent to deceive may be proven by circumstantial evidence. In re Van Horne, 823 F.2d at 1287.

The court finds that Debra made false representations knowingly and with an intent to deceive Terry and the Iowa District Court in conjunction with the property settlement in their dissolution. First, the court finds Debra unconvincing and the veracity of her statements suspect. The court does not believe she had any intention to pay the joint obligation when she accepted responsibility for the debt as part of the original property settlement.

Second, as part of their divorce settlement, the parties agreed and stipulated to a division of certain assets and liabilities. The Deere account was listed as a joint obligation which Debra accepted fully. The district court judge accepted and approved the stipulation. However, there is no evidence that Debra ever made a payment on the account after the dissolution decree was entered. Terry testified that John Deere Credit Union attempted to collect the debt from both him and Debra. On May 27, 1998, the credit union filed suit in the Iowa District Court for Scott County in order to collect the debt.

Third, on September 22, 1998, the parties petitioned the district court and were granted a modification of the dissolution decree. The original decree required that the Chevy be sold and the proceeds after expenses divided equally. The modification provided that Terry would transfer his interest to Debra so that she would have sufficient

assets to pay the credit card debts awarded to her in the original decree. Additionally, the modification reiterated that Debra would be responsible for all the joint credit card debts.

Debra did not make any payment on the debt after she received the Chevy. She offered no evidence other than testimony that she attempted to sell car. She did not encumber it and use the proceeds to pay the joint debt, nor did she attempt to transfer the Chevy in satisfaction of the debt. Rather, she retained ownership of the car and claimed it exempt in her subsequent bankruptcy case.

Fourth, Debra has paid in full three of her personal credit card obligations. Evidence shows that she made payments to Household Finance, Fleet Credit Card, and Discover. None of these creditors are listed on her schedules of creditors. The court concludes that these accounts were paid in full prior to the Chapter 7 filing.

Fifth, the court finds in the intervening time period between the dissolution decree and the bankruptcy filing Debra deposited $65,528.28 into her checking account. On April 19, 1999, this account had a balance of $0.00. Debra scheduled assets in the amount of $8,800.00 including the $5,000.00 Chevy and $500.00 Pontiac she received in the dissolution and modification agreement. She scheduled her monthly expenses as $28.74. She additionally scheduled a gambling loss of $14,509.00 and payments to her attorney of $725.00, both within the last year. Therefore, Debra would have us believe that she spent approximately $46,944.00 for goods and services other than necessary living expenses and for which she accumulated no assets.

For all the foregoing reasons, the court concludes that Debra falsely represented that she would pay the Deere credit account. She knew that the representation was false

when she agreed to the stipulation of assets and liabilities, when the dissolution decree was entered, and when she agreed to the modification petition. Debra made these representations with the purpose of deceiving Terry in the original dissolution case and accompanying property settlement negotiations. She also intentionally deceived Terry when she acquired ownership of the Chevy with no intention of paying the joint credit card account.

Upon showing that Debra knowingly made a false representation with the intention to deceive, Terry must then show he justifiably relied on the representation. Courts have recognized at least three levels of reliance in the context of § 523(a)(2). Justifiable reliance is an intermediate standard. The lowest is actual reliance. This is mere reliance or reliance in fact. Thul v. Ophaug (In re Ophaug), 827 F.2d 340, 343 (8th Cir. 1987). Justifiable reliance is a higher standard. See Field, 516 U.S. at 66. The individual is "'required to use his senses, and cannot recover if he blindly relies upon a misrepresentation the falsity of which would be patent to him if he had utilized his opportunity to make a cursory examination or investigation.'" Id. at 71. Reasonable reliance is a higher standard still. Id. at 76. The individual must exercise the care of a reasonably prudent person under the circumstances. Id. at 77, 80, 81.

In this case, the court finds that Terry justifiably relied on Debra's representation to him and to the court that she would pay card debts. Debra agreed to the division of assets and liabilities and signed the stipulation. Terry was justified in believing that Debra would obey the court order, especially when she stipulated to the pertinent provisions.

The court notes that Terry preformed his obligations pursuant to the dissolution decree. Terry was ordered to provide the medical insurance coverage that Debra requested for three (3) years and up to this point has done so. He additionally paid $1,000.00 for her attorney's fees and costs of the case. He also paid her $20,000.00 for her equity in the marital home.

The court also finds that Terry justifiably relied on Debra's representation that she would pay the joint debts pursuant to the modification of dissolution decree. Terry turned over his share of ownership of the Chevy to Debra in reliance on her representation that she would pay the joint debts. Since she never paid the accounts, Terry received nothing for his share in the Chevy. The court notes that nine (9) months had passed since the original dissolution decree and Debra had not paid the account. Terry was the object of collection attempts by John Deere Credit Union and was named in a civil suit. Therefore, the court cannot say that Terry's reliance on the new representation of Debra that she would pay the debt was reasonable. However, reasonable reliance is not the standard. Terry was justified in believing that Debra would pay the debt if she received the Chevy. She could then sell the car and pay off the debt with funds left over.

Finally, the court finds that Terry sustained the alleged injury as a proximate result of the representations. Terry is a named party in a civil lawsuit commenced by John Deere Credit Union. If the debt is discharged he will have sole liability for payment of the debt in direct contravention of the dissolution decree and modification. He has had

to hire a lawyer to defend him. He has also sustained the loss of his share of ownership in the Chevy, which Debra claims as exempt property.

In conclusion, the court notes that in her post-trial brief, Debra suggests that the court sell the Chevy and pay the debt. The court declines the invitation. Debra scheduled the car as exempt, no objection was entered. Further, the trustee entered his report of abandonment of property on October 20, 1999. Therefore, the car is no longer property of the bankruptcy estate, and the court does not have jurisdiction to order its sale. However, it is apparent from Debra's offer that the parties have an avenue through which a settlement can be reached. The court encourages the respective parties and their counsel to reach such a settlement that will allow the parties to place their differences in the past and proceed with their separate lives.

ORDER

IT IS THEREFORE ORDERED, as follows:

(1) The Deere Harvester Credit Union debt is excepted from discharge pursuant to 11 U.S.C. § 523(a)(15); and

(2) The Deere Harvester Credit Union debt is excepted from discharge pursuant to 11 U.S.C. § 523(a)(2)(A).

Dated this _____ day of July, 2000.

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