UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT

In re:

Brian D. Forant,
Debtor.

Chapter 7 Case
 # 02-10643

Corinne R. Devenger,
Plaintiff,
v.
Brian D. Forant,
Defendant.

Adversary Proceeding
 # 02-1049

MEMORANDUM OF DECISION
GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff Corinne R. Devinger ("the Plaintiff"), proceeding *pro se*, filed a Motion for Summary Judgment (doc. # 23) on January 21, 2003. The Defendant, Brian D. Forant (hereinafter, "the Debtor"), did not file a timely response to the motion.[1] For the reasons set forth below, the Plaintiff's Motion for Summary Judgment is granted.

This Court has jurisdiction over this adversary proceeding under 28 U.S.C. §§ 157(b)(2)(I) and 1334.

I. ISSUE PRESENTED

The issue presented in this Motion for Summary Judgment is whether the Debtor's obligations to the Plaintiff, as created by a divorce decree, are excepted from discharge pursuant to 11 U.S.C. § 523(a)(15).[2]

II. PROCEDURAL CONSIDERATIONS

A. The Summary Judgment Standard

Pursuant to FED. R. BANKR P. 7056, judgment should be entered in favor of the moving party if the

[1] In response to the Plaintiff's Motion for Summary Judgment, and after the time for responding had expired, the Debtor filed a Motion to Extend Time to Respond to Plaintiff's Motion for Summary Judgment (doc. #29). However, the Debtor's Motion was denied. See Order Denying Defendant's Motion for an Extension of Time to Answer Summary Judgment Motion (doc. #36) (entered Feb. 24, 2003).

[2] All references to statutes herein refer to Title 11 of the United States Code (the "Bankruptcy Code"), unless otherwise indicated.

motion for summary judgment and supporting documents establish that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. "A genuine issue exists only when the evidence is such that a reasonable [trier of fact] could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); see also Celotex Corp. v. Catrett, 477 U.S. 317 (1986). The substantive law will identify which facts are material. See Anderson, 477 U.S. at 248. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. See id. at 247. Factual disputes that are irrelevant or unnecessary are not material. See id. Furthermore, materiality is determined by assessing whether the fact in dispute, if proven, would satisfy a legal element under the theory alleged or otherwise affect the outcome of the case. See id. A court must view all the evidence in the light most favorable to the nonmoving party and draw all inferences in the nonmovant's favor. See Cruden v. Bank of New York, 957 F.2d 961, 975 (2d Cir. 2002). In making its determination, a court's sole function is to determine whether there is any material dispute of fact that requires a trial. See Anderson, 477 U.S. at 249; see also Delaware & Hudson Ry. Co. v. Conrail, 902 F.2d 174, 178 (2d Cir. 1990). Where a motion for summary judgment has been filed and the nonmovant is a *pro se* party, summary judgment may be granted as unopposed if the nonmovant *pro se* party has received adequate notice that failure to file any opposition may result in the dismissal of the case,[3] as well as there being no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. See Warren v. Chemical Bank, 1999 WL 1256249, at *2 (S.D.N.Y. 1999) (citing Champion v. Artuz, 76 F.3d 483, 486 (2d. Cir. 1996)).

B. Summary Judgment and the Local Rules

Pursuant to the Local Rules of this Court, all material facts in a movant's statement of undisputed facts are "deemed to be admitted unless controverted by a statement of disputed material facts filed by the opposing party." Vt. LBR 7056-1(a)(3); cf., Vescio v. NCS 1, L.L.C. (In re Vescio), Ad. Pro. No. 02-1005, slip op. at 4 (Bankr. D. Vt. Apr. 22, 2003) (accepting the movant's statement of undisputed facts where the nonmovant failed to file a statement of disputed facts). Moreover, pursuant to Vt. LBR 7056-2(a), a nonmovant's failure to file a memorandum in opposition to a motion for summary judgment may be deemed sufficient cause to grant the movant's motion.

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[3] In this case, the Court finds that the Debtor, who was proceeding *pro se* at the time the Plaintiff served her Motion for Summary Judgment, had adequate notice that a response to the motion for summary judgment was required to prevent the granting of the motion and the dismissal of the case. See Order on Pre-Trial Deadlines at ¶5 (Aug. 5, 2002) (doc. #2). Moreover, at the November 19, 2002, pre-trial hearing in this proceeding, the Court instructed the parties of the necessity to file responses to motions for summary judgment. See, e.g., Order Denying Defendant's Motion for an Extension of Time to Answer Summary Judgment Motion at 2, 3 (Feb. 24, 2003) ("Before the motion for summary judgment was filed, the Court advised both parties of their obligations under the Scheduling Order and strongly encouraged them to retain counsel.")(doc. #36).

III. UNDISPUTED FACTS

A. From the Plaintiff's Statement of Undisputed Facts

In this instance, by virtue of the Court's Order denying the Debtor an extension of time to file papers in opposition to the Plaintiff's Motion for Summary Judgement, see, supra, n.1, the Plaintiff's Statement of Undisputed Facts is unopposed. Therefore, all material facts in the Plaintiff's Statement of Undisputed Facts (doc. #24) are deemed to be admitted, see Vt. LBR 7056-1(a)(3):

1. The provisions in the Plaintiff and Debtor's[4] Final Order and Decree of Divorce (dated Jan. 23, 2002) ("the Final Decree") transferred 100% of the property rights of the Debtor's 401k savings plan to the Plaintiff and 75% of the property rights to the marital portion of the Debtor's VMERA pension plan to the Plaintiff;[5]

2. Pursuant to the Final Decree, the transfer of the property obligation occurred on January 23, 2001;

3. The Debtor filed for bankruptcy relief on May 8, 2002;

4. The findings of fact and conclusions of law in the Final Decree are accurate;

5. The Plaintiff has sole legal and sole physical responsibility for the Parties' four minor children;

6. The Debtor earns a higher income than the Plaintiff;

7. As between the Plaintiff and the Debtor, the Plaintiff has greater expenses; and

8. The Debtor has not objected to the Plaintiff's income or expenses, as set forth in the summary judgment motion, nor requested discovery regarding the Plaintiff's income or expenses.

B. From the Record

The Court finds additional support for the above-enumerated undisputed facts based upon the uncontroverted allegations of the Complaint and the exhibits thereto.[6] For example, the exhibits to Plaintiff's Complaint support the undisputed fact that on January 23, 2000, the Caledonia Family Court issued a Final Order and Decree of Divorce ("the Final Decree") dissolving the marriage between the Plaintiff and the Debtor. Moreover, this Final Decree awarded the Plaintiff sole possession of the Debtor's 401k savings plan held

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[4] At times for convenience, the Court shall refer to the Plaintiff and Debtor collectively as "the Parties".

[5] At times for convenience, the Court shall refer to the property rights in these two accounts singularly as either "the property obligation" or "the subject debt".

[6] The Supreme Court has instructed that "regardless of whether the moving party accompanies its summary judgment motion with affidavits, the motion may, *and should*, be granted so long as *whatever* is before the . . . court demonstrates that the standard for the entry of summary judgment, as set forth in Rule 56(c), is satisfied." Celotex, 477 U.S at 323 (emphasis added). The Court finds the exhibits attached to the Plaintiff's Motion for Summary Judgment help demonstrate that the Rule 56(c) standard had been established. The same is true for the record in this case.

through the National Rural Electric Cooperative and administered by the Hardwick Electric Department. This 401k account was valued at approximately $45,119. In the Final Decree, the Family Court also awarded the Plaintiff a 75% ownership in the marital portion of the Debtor's Vermont Municipal Employee's retirement account ("VMERA"), then valued at approximately $37,908. See Compl. at ¶5; Final Decree, attached as Ex. 1 to Compl. Moreover, having deemed the Statement of Undisputed Facts as admitted, see, e.g., Part III(A)(4), supra, this Court adopts the Family Court's finding that the allocation of assets disproportionately favored the Plaintiff, and that this disproportionate allocation of major assets was justified based upon the disparity in the Parties' gross incomes , as well as the Debtor's contribution to the depreciation of the Parties' assets. See Ex. 1 at 7, attached to Compl. Furthermore, this Court finds that the Final Decree is a final and binding order at this time.

Additionally, the Court finds that, to date, the transfer of the property rights in the 401k account and in the VMERA, as required by the Final Order, has not occurred.[7] See Compl at ¶¶11, 12, 6 (doc. #1). The Court further finds that, since the Final Decree was entered, the Plaintiff's income has declined significantly. See Compl. at ¶ 14; U.S. Individual Income Tax Return 2001 for Corinne R. (Forant) Devenger, attached as Ex. 7 to Pl.'s Mem. Supp. Summ. J.; cf., "Your Social Security Statement: Prepared especially for Corinne R. Forant" at 3 (Nov. 6, 2001), attached as Ex. 8 to Pl.'s Mem. Supp. Summ. J.; In re Corinne R. Forant, No. 96-10153, Statement of Financial Affairs at Item 1 (Bankr. D. Vt. Aug. 2, 1999) (doc. #9).

In the absence of any statement of disputed facts from the Debtor, the Court adopts these facts as true. See Vt. LBR 7056-1(a)(2).

IV. LEGAL ANALYSIS

A. The Statute

Section 11 U.S.C. § 523(a)(15) provides:

> (A) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt—
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> (15) not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce . . . or in connection with a . . . divorce decree or other order of a court of record, . . . 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

[7] In light of this unsatisfied obligation, the Court finds that the Plaintiff was a creditor of the Debtor at the time the Debtor filed this chapter 7 case. Therefore, the Plaintiff has standing to bring this action. See FED. R. BANKR. P. 4007(a).

(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.

In order to apply this statute, the Court must address the four elements articulated in § 523(a)(15):

(1) whether the debt arose out of a domestic relations case and is set forth in an agreement or court order; and
(2) whether the debt is not actually for alimony or support; and
(3) whether the debtor lacks the ability to pay it; or
(4) whether discharging the debt would result in a benefit to the debtor which is greater than the detriment the creditor would suffer from discharge of the debt.

See Rushlow v. Rushlow (In re Rushlow), 277 B.R. 216, 220 (Bankr. D. Vt. 2002).; see also In re Butler, 186 B.R. 371, 374 (Bankr. D. Vt. 1995) (Conrad, J.).

B. The Creditor's Burden of Proof

The party seeking the determination of dischargeability, pursuant to § 523(a)(15), has the threshold burden of proof as to the applicability of this provision to the marital debt. See In re Rushlow, 277 B.R. at 220-21. In other words, a § 523(a)(15) movant needs to make a *prima facie* showing that the debt satisfies the first and second elements enumerated above.

Here, it is undisputed that the subject debt arose from a divorce decree entered by a state family court of record, as required by the defining criteria set forth in subsection (15) and neither party alleges that the subject debt is actually in the nature of support or alimony. Thus, the Court finds that the Plaintiff has satisfied her threshold burden of proof for excepting the subject debt from discharge under §523(a)(15).

C. The Debtor's Burden of Proof

Once a creditor-plaintiff makes the *prima facie* showing that the debt in question fits within the threshold parameters of § 523(a)(15), the burden of proof then shifts to the debtor-defendant to rebut this presumption. See Rushlow, 277 B.R. at 221. To satisfy this rebuttal burden, a debtor must satisfy, by a preponderance of the evidence, one of the two prongs of the test. Either, pursuant to subparagraph (a)(15)(A) the debtor must show he is unable to pay the obligation, or, pursuant to subparagraph (A)(15)(B), the debtor must show, notwithstanding his or her ability to pay the obligation, the benefit to the debtor of discharging the debt outweighed the detriment the creditor would suffer from such discharge. See id.; see also Matter of Crosswhite, 148 F.3d 879 (7th Cir. 1998); In re Molino, 225 B.R. 904 (B.A.P. 6th Cir. 1998); Gamble v. Gamble (In re Gamble), 143 F.3d 223 (5th Cir. 1998); In re Jodoin, 209 B.R. 132 (B.A.P. 9th Cir. 1997); Simon v. Murrell (In re Murrell), 257 B.R. 386 (Bankr. D. Conn. 2001); In re Pino, 268 B.R. 483 (Bankr. W.D. Tex.

2001); In re Romer, 254 B.R. 207 (Bankr. N.D. Ohio 2000); In re Simmons, 193 B.R. 48 (Bankr. W.D. Okla. 1996); In re Carroll, 187 B.R. 197 (Bankr. S.D. Ohio 1995).

If the Debtor had established that he dids not have the financial capacity to pay the obligations, the Court's inquiry would end, the Plaintiff's Motion for Summary Judgment would be denied, and the obligation would be discharged. However, the Debtor has not come forth with any evidence demonstrating he is unable fulfill his obligation under the Final Decree. On the contrary, the undisputed evidence[8] submitted by the Plaintiff establishes that the Debtor has excess disposable income and is likely to be able to afford repayment of the subject debt. Therefore, the Debtor has not met his burden of proof under the first prong of the test. See § 523(a)(15)(A).

The Court next turns to the second prong of the test, set forth in subparagraph (a)(15)(B), and weighs the relative benefits and burdens the Parties would experience if the Debtor was not permitted to discharge the subject debt to his former spouse, the Plaintiff. To determine the allocation of burden and benefits, the Court must consider the totality of the circumstances. See In re Rushlow, 277 B.R. at 224 (citing Matter of Crosswhite, 148 F.3d at 888). In In re Rushlow, this Court adopted the Sixth Circuit Bankruptcy Appellate Panel's non-exclusive list of factors for making its totality of the circumstances determination. See id. (citing In re Molino, 225 B.R. 904, 909 (B.A.P. 6th Cir. 1998) (citations omitted)). Thus, this Court considers the following factors:

1. the amount of debt involved, including all payments terms;
2. the current income of the debtor and objecting creditor;
3. the current expenses of the debtor and objecting creditor;
4. the current assets, including exempt assets, of the debtor and objecting creditor;
5. the current liabilities, excluding those discharged by the debtor's bankruptcy, of the debtor and of the objecting creditor;
6. the health, job skills, training, age and education of the debtor and objecting creditor;
7. the dependents of the debtor and objecting creditor, their ages and any special needs that they may have;
8. any changes in the financial conditions of the debtor and objecting creditor which may have occurred since the entry of the divorce decree;
9. the amount of the debt that has been or will be discharged in the debtor's bankruptcy case;
10. whether the objecting creditor is eligible for relief under the Bankruptcy Code; and
11. whether the parties have acted in good faith in the filing of the bankruptcy and the litigation of the 11 U.S.C. § 523(a)(15) issues.

Id. The Debtor has failed to come forward with any evidence to demonstrate that the benefit he would experience if the debt were discharged are greater than the detriment the Plaintiff would suffer if the Debtor were discharged of his obligation to comply with the directives of the Final Decree. See In re Rushlow 277

[8] The Court notes this undisputed evidence includes the Debtor's bankruptcy schedules, of which the Court takes judicial notice, and the tax returns of the Debtor which were attached to Plaintiff's motion papers.

B.R. at 224 (citing Matter of Crosswhite, 148 F.3d 879 (7th Cir. 1998); In re Gamble, 143 F.3d 223 (5th Cir. 1998); In re Morris, 197 B.R. 236, 245 (Bankr. N.D. W. Va. 1996)).

Based upon: (a) the allegations set forth in the Plaintiff's Complaint, including the exhibits attached thereto, which have not been controverted; (b) the Plaintiff's Motion for Summary Judgment, including the exhibits attached thereto, which this Court has ruled have not been controverted; and (c) the undisputed facts of this case, as set forth in the Plaintiff's Statement of Undisputed Facts, which this Court has ruled have not been controverted and which have been deemed admitted, the Court has considered the above-enumerated list of factors and finds that, as of the date of the filing of the instant bankruptcy case:

(i) the amount of debt involved (i.e., the value of the 401k and VMERA) was significant to both parties;

(ii) the Debtor had a higher monthly income than the Plaintiff;

(iii) the Plaintiff had higher monthly expenses than the Debtor;

(iv) the Debtor has more assets than the Plaintiff;

(v) the Parties have roughly equivalent liabilities;

(vi) the health, job skills, training, age and education of the Parties are not sufficiently different from each other to be a factor in this determination;

(vii) the dependents of the Debtor and the Plaintiff, their ages and any special needs that they may have create more responsibility for the Plaintiff than the Debtor;

(viii) the primary change in the financial conditions of the Parties has been the decrease in income experienced by the Plaintiff;

(ix-x) the amount of debt to be discharged in the Debtor's bankruptcy case is not relevant since the Plaintiff has also obtained a chapter 7 discharge substantially contemporaneous with the divorce; and

(xi) there is no evidence to suggest that either party has not acted in good faith in the filing of the bankruptcy and the litigation of the 11 U.S.C. § 523(a)(15) issues.

Based upon these findings, the Court determines that the benefit the Debtor would enjoy if the Court were to discharge the subject debt is outweighed by the detriment that the Plaintiff would suffer by such discharge. Thus, the Debtor has failed to carry his burden of proof to rebut the Plaintiff's entitlement to a determination that the subject debt is excepted from discharge under the second prong of the test as well. See § 523(a)(15)(B).

V. CONCLUSION

Having found that the undisputed facts of this case establish that there are no material facts in dispute and that, based upon these facts, the Plaintiff is entitled to summary judgment on her § 523(a)(15) Complaint as a matter of law, the Court determines that summary judgment in favor of the Plaintiff is proper. The subject debt shall be excepted from discharge pursuant to 11 U.S.C. § 523(a)(15).

The Court further finds that it is in the best interest of the Parties, and the administration of this bankruptcy case, that the transfer of the Debtor's property obligation be effected promptly. Therefore, pursuant to §105(a), the Court shall direct that the Parties take all steps necessary to effect the transfer of the 401k and VEMRA within thirty (30) days of entry of this Memorandum of Decision.

This Memorandum of Decision constitutes the Court's findings of fact and conclusions of law.

September 26, 2003
Rutland, Vermont

Colleen A. Brown
United States Bankruptcy Judge