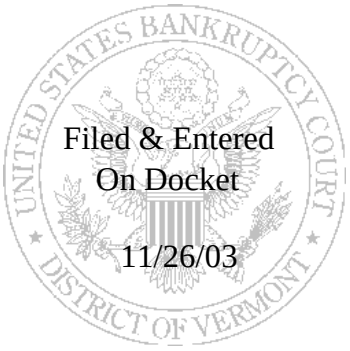
UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT



In re:

Lawrence K. Forcier, Jr.,
Debtor.

Chapter 7 Case
02-10670

Melissa Michael,
Plaintiff,
v.

Adversary Proceeding
02-1050

Lawrence K. Forcier, Jr.,
Defendant.

Appearances: *David Edwards, Esq.*
Burlington, VT
For the Plaintiff

Todd Taylor, Esq.[1]
Burlington, VT
For the Debtor-Defendant

MEMORANDUM OF DECISION
GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff Melissa Michael ("Plaintiff") filed a Motion for Summary Judgment (doc. # 24) on February 18, 2003. The Defendant, Lawrence K. Forcier ("Debtor"), did not file a response to the Motion. This Court has jurisdiction over this adversary proceeding under 28 U.S.C. §§ 157(b)(2)(I) and 1334.

For the reasons set forth below, the Plaintiff's Motion for Summary Judgment is granted.

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]

[1] Attorney Taylor is identified here as appearing on behalf of the Debtor in this adversary proceeding because he was initially counsel for the Debtor herein. However, although he represented the Debtor in the main case and also filed an Answer in this adversary proceeding, on Attorney Taylor's motion (doc. #10)an order was entered on October 17, 2003 (doc. #15), permitting him to withdraw as Debtor's counsel in this adversary proceeding.

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

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 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: (1) the nonmovant *pro se* party has received adequate notice that failure to file any opposition may result in the dismissal of the case; and (2) there are no genuine issues 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)).] To ensure the Debtor, now proceeding *pro se* in this adversary proceeding, had adequate notice that failure to file any opposition to the Plaintiff's Motion for Summary Judgment could result in summary judgment being granted to the Plaintiff, the Court, pursuant to § 105(a), ordered the Clerk's Office serve the Debtor with Special Notice and grant the Debtor a new 21-day period within which to respond to Plaintiff's Motion for Summary Judgment. See doc. #28. Despite the additional notice and time provided, the Debtor has failed to file any response to the Plaintiff's Motion for Summary Judgment.

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.

III. UNDISPUTED FACTS

A. From the Plaintiff's Statement of Undisputed Facts

In this instance, by virtue of the Defendant's failure to respond to the Plaintiff's Motion for Summary Judgement, the Plaintiff's Statement of Undisputed Facts is unopposed. Therefore, all material facts in the Plaintiff's Statement of Undisputed Facts (doc. #25) are deemed to be admitted, see Vt. LBR 7056-1(a)(3):

1. The provisions in the Plaintiff and Debtor's Final Order and Decree of Divorce (dated March 4, 2002) (the "Final Decree") required the Debtor to pay the Plaintiff the sum of $9,200 towards the marital debt. The debt is not in the nature of alimony or support, and is not the type that is dischargeable under 11 U.S.C. § 523 (a)(15). This sum was to be paid at the rate of $200 per month, commencing April 1, 2002. Additionally, said marital debt shall accrue interest at the rate of 12% per annum;
2. The findings of fact and conclusions of law in the Final Decree are accurate;
3. The Debtor filed for bankruptcy relief on May 14, 2002;
4. The Plaintiff filed for bankruptcy relief in 2001 in the Eastern District of Virginia, and an order dismissing her case was entered August 16, 2002. Her case was closed November 19, 2002;
5. The Debtor earns a higher income than the Plaintiff;
6. As between the Plaintiff and the Debtor, the Plaintiff has greater expenses;
7. The Debtor has not objected to the Plaintiff's income or expenses, as set forth in the summary judgment motion, nor requested discover 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.[3] For example, the exhibits to Plaintiff's Complaint support the undisputed fact that on March 4, 2002, the Chittenden Family Court issued a Final

[3] 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.

Order and Decree of Divorce ("the Final Decree") dissolving the marriage between the Plaintiff and the Debtor. Moreover, this Final Decree awarded the Plaintiff $9,200 for payment of debts incurred during the marriage. See Compl. at ¶ 4; Final Decree, attached as Ex. 1 to Compl. Moreover, having deemed the Statement of Undisputed Facts as admitted, see, e.g., Part III.A., supra, this Court adopts the Family Court's finding that the agreement by the parties was entered into knowingly, intelligently and voluntarily. This Court also finds that the Final Decree is a final and binding order at this time.

Attachment A to the Plaintiff's Statement of Undisputed Facts Supporting Motion for Summary Judgment (doc. #25) are the Debtor's answers to Plaintiff's first set of interrogatories, requests to produce and requests for admission (hereinafter referred to as "Interrogatory Answers"). In addition to answering the Plaintiff's interrogatories and making admissions, to accurately portray his financial situation, the Debtor attached his current employment position's bonus structure and a paycheck stub to said Interrogatory Answers. Based upon the Interrogatory Answers, the Court finds, see FED. R. BANKR. P. 7056(c), the Debtor:

a. is currently employed by Catamount Mortgage and is the Sales and Marketing Manager;

b. has a current income that includes a salary of $3,000 per month and a bonus structure based on total mortgage loans funded each month; and

c. has no other source of income not disclosed in his previous Interrogatory Answers.

The Court also notes that the Debtor made several admissions in his Interrogatory Answers. In sum, the Debtor's position, as gleaned from his admissions in the Interrogatory Answers, is that the benefit to the Debtor of discharge of the marital debt outweighs any detriment Plaintiff will suffer; therefore, Debtor posits that he is entitled to discharge and that to deny him relief would, likewise, deny him a "fresh start." However, the Court finds the Debtor's admissions are nothing more than legal conclusions. Since it for the Court to determine the appropriate conclusion of law mandated by the facts of a case, see generally FED R. BANKR. P. 7052(a), the Court, likewise, finds it need not consider the Debtor's conclusory admissions in determining the instant Motion for Summary Judgment.

The Court further finds that, to date, the Debtor has not paid over the sum directed by the Final Order. See Compl at ¶¶ 5, 7 (doc. #1). In light of this unsatisfied obligation, the Court finds that the Plaintiff was a creditor of the Debtor at the time the Debtor filed his chapter 7 case. Therefore, the Plaintiff has standing to bring this action. See FED. R. BANKR. P. 4007(a).

In his Answer to the Plaintiff's Complaint, see doc. #7, the Debtor raised an affirmative defense that since the Plaintiff has a chapter 13 case pending at this time, it is the chapter 13 trustee administering her case, rather than the Plaintiff, that has sole standing to bring this proceeding. The Court finds that the Plaintiff does have standing. In re Jakab, 293 B.R. 621, 627 (Bankr. Vt. 2003) (citing Olick v. Parker & Parsley Petroleum

Co., 145 F.3d 513 (2d Cir. 1998)); see, e.g., In re Freeman, 72 B.R. 850, 854 (Bankr. E.D. Va. 1987) ("The reality of a filing under Chapter 13 is that the debtors are the true representatives of the estate and should be given the broad latitude essential to control the progress of their case."). The pendency of the chapter 13 case affects only to whom the funds should be paid. Olick v. Parker & Parsley Petroleum Co., 145 F.3d 513 (2d Cir. 1998) (citing Seward v. Devine, 888 F.2d 957, 963 (2d Cir. 1989) (instructing bankruptcy estate includes "any causes of action possessed by the debtor")).

In the absence of any statement of disputed facts from the Debtor, the Court adopts the above-stated 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—
>
> * * *
>
> (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
>
> (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 the 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 did 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 to fulfill his obligation under the Final Decree. On the contrary, the undisputed evidence[4] in the record 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).

---

[4] The Court notes this undisputed evidence includes the Debtor's bankruptcy schedules and the responses given by the Debtor to interrogatories and Demand to Admit which are part of the record herein. See doc. #25.

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 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, $9,200, was significant to both parties;

(ii) the Debtor had a slightly higher monthly income than the Plaintiff, as well as the potential for significant bonuses;

(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; while the Plaintiff has a college degree and the Debtor does not, their different career paths and employment experiences have resulted in the Plaintiff having a lower earning capacity at this time;

(vii) the Debtor has responsibility for a dependent and the Plaintiff does not;

(viii) there are no significant changes in the financial conditions of the Parties other than the new employment of the Debtor which gives rise to his eligibility for bonuses;

(ix-x) the amount of debt to be discharged in the Debtor's bankruptcy case is not especially relevant since the Plaintiff has filed a chapter 13 case which will result in a discharge of the obligations outstanding after completion of the plan; 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 also failed to carry his burden of proof under the second prong to rebut the Plaintiff's entitlement to have the subject debt excepted from discharge. 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 marital debt shall be excepted from discharge pursuant to 11 U.S.C. § 523(a)(15).

The Court further finds that it in light of the fact that the Plaintiff has a chapter 13 case pending, the funds to be paid hereunder may be property of that bankruptcy estate. Therefore, pursuant to §105(a), the Court shall direct that the Debtor pay the sum due under the Final Decree within thirty (30) days of entry of this Memorandum of Decision, and make the check jointly payable to the Plaintiff and the Chapter 13 Trustee.[5]

---

[5] The Chapter 13 Trustee for the Eastern District of Virginia, Robert Hyman, may be contacted at (804) 775-0979.

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

November 26, 2003

Colleen A. Brown
United States Bankruptcy Judge