UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

DENNIS JAMES BENSON — CASE NO. 98-60541

Debtor — Chapter 7

KATHERINE BENSON

Plaintiff

vs. — ADV. PRO. NO. 98-70729A

DENNIS JAMES BENSON

Defendant

APPEARANCES:

CUMMINGS, MCGUIRE, DUNCKEL & CAMPANY
Attorneys for Plaintiff
7557 State Street
Lowville, New York 13367-0112

SCOTT R. NORTZ, ESQ.
Of Counsel

ROBERT J. BENSON, ESQ.
Attorney for Defendant
234 Genesee Street
P.O. Box 127
Chittenango, NY 13037-0127

Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

Presently under consideration by the Court is the complaint filed by Katherine Benson ("Plaintiff") on April 20, 1998, seeking a determination that a certain debt owed to her by Dennis James Benson ("Debtor") is nondischargeable pursuant to §§ 523(a)(4), (5) or (15) of the

Bankruptcy Code (11 U.S.C. §§ 101-1330) ("Code"). Issue was joined by the filing of an Answer by the Debtor on April 29, 1998.

A trial was conducted on July 13, 1998, in Utica, New York, and the parties were afforded an opportunity to file memoranda of law in lieu of closing arguments. The matter was submitted for decision on August 13, 1998.

JURISDICTIONAL STATEMENT

The Court has core jurisdiction over the parties and subject matter of this adversary proceeding pursuant to 28 U.S.C. §§ 1334, 157(a), (b)(1) and (b)(2)(I).

FACTS

Plaintiff and the Debtor were married on September 28, 1981. According to the Plaintiff, approximately five years into the marriage she transferred ownership of the marital residence owned by her prior to the marriage into both spouses' names at the Debtor's request. Plaintiff testified that refinancing on the marital residence was obtained in order for the Debtor to pay off certain bills. Thereafter, he remained obligated for the mortgage payments while she paid other household expenses. On June 19, 1995, both Plaintiff and the Debtor executed a Separation Agreement ("Agreement"). *See* Debtor's Exhibit 1. According to ¶17(a) of the Agreement, Debtor agreed to pay Plaintiff $15,000 in cash upon the transfer of her half interest in the marital residence. *See id.* In addition, Debtor agreed to pay the Plaintiff $9,000 upon the cashing in of

a "Thrift Plan," but no later than one year from the date of the Agreement. *See id.* at ¶ 17(d). Plaintiff testified that except for the $9,000, the Debtor's obligation under the terms of the Agreement have been met.[1]

On cross-examination, Plaintiff testified that because of the monies she expected to receive from the Debtor pursuant to the terms of the Agreement, she had agreed to waive any additional alimony/support. Debtor testified that he felt it was unnecessary to pay her support or alimony as she was working at the time of the Agreement and he was not. It was his testimony that he had agreed to pay the Plaintiff $9,000, which at the time was thought to be approximately half of the monies in the Thrift Plan. He had not anticipated that it would take four years to get the money. Debtor acknowledged that he had received a check for $15,000 from his Thrift Plan in January 1997 and had not made any payment to the Plaintiff from the funds. Instead, he used the money to pay medical bills and to make needed repairs on the marital residence. It was the Debtor's position that even if he had the money, Plaintiff "would see God before she saw another nickel from me."

Sometime in the latter part of 1997 in connection with a divorce action commenced by the Debtor, Plaintiff allegedly agreed to accept $5,000 in satisfaction of the Debtor's obligation. Although Debtor agreed to make the payment of $5,000, he testified that he had been unable to borrow the money to pay the Plaintiff. On January 30, 1998, Debtor filed a voluntary petition pursuant to chapter 7 of the Code. According to Schedule F, attached to his petition, Debtor listed Plaintiff as an unsecured creditor with a claim of $10,200.

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[1] Plaintiff testified that she recovered between $2,000 and $3,000 from the Debtor as a result of an action she brought against him in Small Claims Court.

Debtor testified that he last worked in December 1993. He is currently receiving disability benefits of $1,111 per month. He explained that he has a disc problem in his back, two bad knees, a problem with his kidneys and has had two heart attacks. Plaintiff testified that she works full-time on a seasonal basis at $8.00 per hour at a golf course run by her family. She is trained as a beautician, but has not worked in that capacity for approximately three years. There are no children from the marriage and as yet there has been no divorce, allegedly due to the Debtor's failure to comply with the payment terms of the Agreement.

DISCUSSION

In order to effectuate the fresh start purpose of the Code, exceptions to discharge are narrowly construed in favor of the debtor against the creditor. *See National Union Fire Ins. Co. v. Bonnanzio (In re Bonnanzio)*, 91 F.3d 296, 300 (2d Cir. 1996). The party opposing the discharge of a particular debt bears the burden of establishing by a preponderance of the evidence that the requirements of the relevant subsections of Code § 523(a) have been met. *See Grogan v. Garner*, 498 U.S. 279, 287-88, 111 S.Ct. 654, 659-60, 112 L.Ed.2d 755 (1991). In this case, Plaintiff seeks a determination that Debtor's indebtedness to her is nondischargeable pursuant to Code §§ 523(a)(4), (5) or (15).

Code § 523(a)(4)

Plaintiff alleges that the Debtor "illegally and unlawfully" withdrew monies from the Thrift Plan with Kraft Foods, Inc. and that the transfer was made with intent to defraud her. A

debt is nondischargeable pursuant to Code § 523(a)(4) if it arose as a result of fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny. Based on the facts, it is clear that the debt did not arise as a result of either the Debtor's embezzlement or larceny; it arose pursuant to the Agreement. Therefore, the focus of the Court's analysis is on whether a fiduciary relationship existed between Plaintiff and the Debtor.

"Fiduciary," as defined by Federal law, refers to a relationship arising from an express or technical trust established by virtue of a formal agreement or pursuant to statute or common law. *See L.S.P. Inv. Partnership v. Bennett (In re Bennett)*, 989 F.2d 779, 784-85 (5th Cir. 1993) (citations omitted). Plaintiff has not cited to any statute or common law creating a trust under the circumstances. Furthermore, nothing in the language of the Agreement establishes an express or technical trust. Therefore, the Court concludes that no fiduciary relationship existed between the Debtor and Plaintiff. *See In re Wright*, 184 B.R. 318, 322-23 (Bankr. N.D. Ill. 1995). Accordingly, the Court finds no basis pursuant to Code § 523(a)(4) to deny the Debtor a discharge of the debt owed to the Plaintiff.

Code § 523(a)(5)

In this case, the parties characterized the payment of $9,000 to the Plaintiff as a property settlement and waived any right they might have to claim maintenance or support from one another. *See* Debtor's Exhibit 1 at ¶ 17. For purposes of determining nondischargeability under Code § 523(a)(5), the characterization of an obligation as alimony, maintenance or support is a question of federal bankruptcy law. *See Brody v. Brody (In re Brody)*, 3 F.3d 35, 39 (2d Cir. 1993). It requires the Court to examine the nature of the obligation to determine whether it was

intended to provide support to the Plaintiff even though it might not qualify as such under state law. *See Gianakas v. Gianakas (In re Gianakas)*, 917 F.2d 759, 762 (3d Cir. 1990).

In order to determine whether an obligation is in the "nature of support," courts have examined a number of factors relevant to the parties' intent at the time they executed the separation agreement. *See Brody*, 3 F.3d at 38 (citations omitted). Included among the factors considered by the courts are (1) the language and substance of the separation agreement in the context of the surrounding circumstances, (2) the financial circumstances of the parties at the time of the separation agreement, and (3) the function served by the obligation. *See Gianakas*, 917 F.2d at 762-63.

Plaintiff testified that because she anticipated receiving monies from the Debtor pursuant to the terms of the Agreement, she waived her right to any future payments of support or maintenance. Included in the Agreement is a provision by which the Plaintiff was to receive $15,000 for her one-half interest in the marital residence. It was Plaintiff's testimony that she believed she would be able to "start over" with the monies representing her interest in the house. Arguably, this particular obligation could be construed to be in the nature of support in that it provided Plaintiff with the means to obtain alternative housing once she moved out of the marital residence. However, according to the Plaintiff, the Debtor has satisfied the $15,000 obligation set forth in the Agreement and the only debt she is requesting to be deemed nondischargeable is that of the $9,000 referenced in ¶ 17(d) of the Agreement. The Debtor testified that while he had agreed to pay the Plaintiff what approximated one-half of what he estimated to be the funds in his Thrift Plan, he had no intention of providing her with any support or maintenance given the fact that he was on disability and she was employed at the time the Agreement was executed.

Based on the sparse record created by the parties, the Court concludes that the $9,000 which the Debtor agreed to pay to the Plaintiff represented an allocation of an asset acquired during the marriage and was not in the nature of support.

Code § 523(a)(15)

Debts arising in connection with a separation agreement, although found not to be in the nature of support or maintenance, may still be found to be nondischargeable unless (A) the debtor does not have the ability to pay the debts from income or property not reasonably necessary for the maintenance and support of the debtor or a dependent of the debtor; or (B) discharging the debts would result in a benefit to the debtor that outweighs the detrimental consequences to the creditor. *See* Code § 523(a)(15). As noted in a recent decision of this Court, there is a division among the bankruptcy courts concerning the placement of the burden of proof for Code § 523(a)(15)(A) and (B). *See Ravas v. Mehlenbacher (In re Mehlenbacher)*, Case No. 97-66615, Adv. Pro. 98-70001, slip op at 8 (Bankr. N.D.N.Y. Sept. 18, 1998). This Court has adopted the position that the burden of proof lies with the party opposing discharge. *See id.* Accordingly, the Court must determine first whether the Plaintiff has proven that the Debtor has the ability to pay her the $9,000 under Code § 523(a)(15)(A). If it is concluded that the Debtor has the ability to pay her, then the Court must also find that the benefits of discharge to the Debtor are not outweighed by the detrimental impact on the Plaintiff in the event that the debt is discharged. *See* 11 U.S.C. § 523(a)(15)(B).

The Debtor testified that he receives $1,111 per month from Social Security disability. He also indicated that he has difficulty living on that amount due in part to his medical expenses

associated with a variety of physical problems. Plaintiff failed to elicit any credible testimony that would contradict the Debtor's statement and presented no documentary evidence to establish the Debtor's ability to pay her. Even if the Court were to conclude that the Debtor was able to pay her, Plaintiff has not provided the Court with any evidence which would enable it to balance the benefit to the Debtor with the detrimental consequences to the Plaintiff if the obligation were to be discharged. Other than her testimony that she currently works approximately 40 hours per week at $8.00 per hour and that she has no expenses for rent or mortgage as she is currently living with someone, there is no evidence of the extent of her expenses or that of the Debtor to be able to determine the extent of their respective disposable incomes. After consideration of all of the facts presented, the Court concludes that the Plaintiff has failed to establish by a preponderance of the evidence that the debt of $9,000 should be excepted from the Debtor's discharge.

Based on the foregoing, it is hereby

ORDERED that the relief requested in Plaintiff's Complaint that the debt owed to her by the Debtor pursuant to the Agreement be determined to be nondischargeable pursuant to Code §§ 523(a)(4), (5) and (15) be denied.

Dated at Utica, New York
this 9th day of October 1998

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge