

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

In re

STEVEN L. CLAUSE

Debtor

Case No. 00-10438
Chapter 7

LOU ANN S. CLAUSE

Plaintiff

-against-

Adversary No. 00-90115

STEVEN L. CLAUSE

Defendant

APPEARANCES:

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Hon. Robert E. Littlefield, Jr., U.S. Bankruptcy Judge

MEMORANDUM-DECISION AND ORDER

The issue before the Court is Plaintiff Lou Ann S. Clause's ["Plaintiff"] assertion that an obligation owed to her by Defendant Steven L. Clause ["Defendant"], her ex-husband, is nondischargeable pursuant to 11 U.S.C. § 523(a)(15). The Court has jurisdiction of this core proceeding via 28 U.S.C. §§ 157(b)(2)(I) and 1334(b).

FACTS

The following facts are gleaned from the submissions of counsel, the trial transcript and admitted exhibits:

1. Plaintiff and Defendant were married on December 4, 1976.
2. There are three children of the union:
 Brendan M. (date of birth 2/16/78);
 Ryan A. (date of birth 8/6/82);
 Travis A. (date of birth 10/30/85).
3. The parties separated on May 1, 1997.
4. The parties signed a “Divorce Settlement Agreement” on October 15, 1999.
5. The parties were divorced on November 29, 1999.
6. The parties stipulated on October 16, 1998 to joint custody of the minor children with the primary residence to be with the plaintiff.
7. The parties further stipulated to child support on the same date.
8. The Plaintiff waived any entitlement to alimony and/or maintenance effective September 17, 1999.
9. The Defendant is a licensed pharmacist in the State of New York.
10. The parties stipulated in the matrimonial action that the Plaintiff’s interest in the Debtor’s professional license and degree was to be valued at \$80,000 and payable in the amount of \$400 per month, representing interest only at 6% from November 1, 1999 until the earlier of May 30, 2001 or when the Debtor “returns to full-time employment at Albany Medical Center Hospital as a Pharmacist,” and thereafter at the rate of \$675 per month for a term of fifteen years.
11. The Defendant voluntarily elected to reduce his full-time employment to a one-half time basis with Albany Medical Center to enable him to participate in a Doctor of Pharmacy Studies Program from September 1, 1999 through May of 2001.
12. The parties further agreed that the Debtor would indemnify the Plaintiff on the mortgage payment obligation and any mortgage deficiency claim owed to Citibank regarding the former marital residence located at 296 Sixth Avenue, Troy, New York.

13. The Defendant filed this Chapter 7 petition on January 31, 2000.
14. In 1998, the median annual salary for male pharmacists was \$59,592.
15. At the time of trial, the Plaintiff was employed at LaSalle Institute.
16. At the time of trial, Plaintiff was earning approximately \$31,500.
17. At the time of trial, both Plaintiff and Defendant were approximately 46 years old.

DISCUSSION

11 U.S.C. 523(a)(15) excepts from a Chapter 7 discharge any debt, not characterized as support or maintenance and

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, 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 a debt from income or property of the debtor or a dependant 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 objecting creditor bears the burden of proving nondischargeability. *In re Butler*, 186 B.R. 371 (Bankr. D. Vt. 1995). Based on the testimony of Peter Jones regarding the Defendant's ability to pay and the testimony of the Plaintiff regarding her financial circumstances, the court found, at trial, that the Plaintiff had carried her burden. Thus, the Defendant is now required to prove either that he did not have the ability to pay or that the potential discharge of this debt would be more beneficial to him than its denial would be to the Plaintiff.

In the complaint dated May 1, 2000, the Plaintiff argues that five specific obligations assumed by the Debtor during the course of the matrimonial action should be excepted from

discharge pursuant to the above section:

- 1) an indemnification agreement holding Plaintiff harmless for payments and any deficiency obligations regarding the mortgage on the former matrimonial residence;
- 2) an agreement by Debtor to transfer title on a 1996 Ford Windstar;
- 3) an agreement regarding the Debtor's pension;
- 4) an agreement to compensate Plaintiff for the stipulated value of the Debtor's pharmacy license and degree; and
- 5) the Debtor's agreement to be solely responsible for paying as part of the divorce the 1996 auto loan on the 1994 Chrysler, all credit card debts in his name, and the loan from his 403 b Retirement Account.

The Plaintiff's case at trial focused only on two of those five obligations: the indemnification agreement on the former residence and the \$80,000 debt to compensate the Plaintiff for the value of the Debtor's pharmacy license and degree. Thus, to the extent that they have not been withdrawn or abandoned, the other three potential exceptions to discharge are overruled for failure to carry the required burden.¹

Defendant's post-trial submission addresses only the professional license and indemnification issues. He posits that Plaintiff endeavored to impoverish him by keeping more of the support sent to her than she was entitled to retain. Additionally, Defendant argues that Plaintiff has unclean hands having testified falsely about what she was or was not receiving. Defendant thus contends that equity dictates she should not prevail; Defendant offers no legal basis or authority for this proposition. Alternatively, he argues that unless a discharge is granted he will face "severe hardship." It is unclear whether this alleged severe hardship relates to his ability to pay the obligation pursuant to § 523(a)(15)(A) or the balancing test under § 523(a)(15)(B).

¹ The plaintiff testified to the amount of the Windstar payment. (Tr. pp. 38, 47-8.) Seemingly, the title was in fact transferred.

ABILITY TO PAY

The Court finds Defendant has the ability to pay the obligations. Testimony elicited at trial demonstrated that his income at the time he agreed to the obligations was \$26,500. (Tr. p. 23-24.) The testimony did not establish a change of circumstances for him after the matrimonial agreement and before he filed his petition. As to why he agreed to pay the obligations, the Defendant stated:

I knew when we went into that agreement that we had reached an area where there would be no further concessions, no further point of agreement rather than to go into trial. And at that particular point, I didn't want to drag the kids and everyone into a trial, and I was close enough to something that I felt was reasonable that with a little bit of help from my family that I could get through. (Tr. p. 68.)

Further, on cross-examination, he stated his salary had increased from the \$26,500 he was earning at the date of divorce settlement agreement. (Tr. p. 78.) Testimony also establishes that one child is in his final year of private school at LaSalle and the Defendant is not under any obligation to assist in college. (Tr. p. 85-86.) Testimony further demonstrates that any overpayment of support arrears would reduce the amount he would need to pay in the future. (Tr. p. 89.) Thus, the Debtor's obligations pursuant to the agreement have begun or will soon begin to diminish.

Ultimately, the Defendant is on course for a Doctor of Pharmacy degree in a profession where a male with only a Bachelor of Science degree has a median income of more than \$59,000. (Plaintiff's Ex. 4 p. 3.) A court may look to a Debtor's prior employment and to future employment opportunities to determine future earning potential. *In re Molino*, 225 B.R. 904, 908 (B.A.P. 6th Cir. 1998). The Defendant testified that he would not be able to live day to day if the obligations were not discharged, however, other than that self-serving statement, no credible

proof was offered. Thus, the Defendant has failed to convince the court of his inability to pay the obligation.

THE BALANCING TEST

The second prong of § 523(a)(15) requires that the court balance the potential hardships faced by each party and, in effect, award judgment to whatever party can least afford to lose. *In re Mehlenbacher*, Adv. Pro. 98-7001 (Bankr. N.D.N.Y. 1998). The *Molino* Court summarized the (a)(15)(B) test as follows:

[T]he best way to apply the 11 U.S.C. § 523(a)(15)(B) balancing test is to review the financial status of the debtor and the creditor and compare their relative standards of living to determine the true benefit of the debtor's possible discharge against any hardship the spouse, former spouse and/or children would suffer as a result of the debtor's discharge. If, after making this analysis, the debtor's standard of living will be greater than or approximately equal to the creditor's if the debt is not discharged, then the debt should be nondischargeable under the 523(a)(15)(B) test. However, if the debtor's standard of living will fall materially below the creditor's standard of living if the debt is not discharged, then the debt should be discharged under 11 U.S.C. § 523(a)(15)(B). *In re Molino*, 225 B.R. at 908-909 (citations omitted).

The record is replete with testimony from the Plaintiff as to her income and expenses with two teenage boys. She testified that she does not have a teaching certificate and no opportunity for overtime or for increased pay. (Tr. p. 31.) Her income of approximately \$31,000 is a little more than one-half the median income of a male pharmacist. She further testified to the following reasonable expenses:

1)	rent	\$525
2)	utilities	\$ 92
3)	telephone	\$ 50
4)	clothing	\$200
5)	food	\$450
6)	laundry/dry cleaning	\$ 70
7)	car insurance	\$ 65
8)	gasoline	\$125

9)	car payment	\$355
10)	charity	\$ 50
11)	internet use	\$ 42
12)	cable television	\$ 42
13)	newspapers/school supplies	\$ 50
14)	misc.	\$150

Total: \$2266. (Tr. pp. 36-39.)

She also testified that her take home pay plus child support totals \$2,321.11 per month. (Tr. pp. 36, 51.) She was credible and her testimony was not seriously challenged on cross examination. Indeed, Mr. Weisz conceded during cross examination that the Plaintiff was “holding on, but barely.” (Tr. p. 51.) Finally, the Plaintiff stated that her monthly budget does not include certain medical, dental, insurance and recreational expenses. (Tr. pp. 40-42.)

The conclusion is that the detriment to this Plaintiff and her two children clearly outweighs any benefit to the Defendant. Under the *Molino* standard, the Defendant has future earning opportunities that will, absent a drastic change of circumstances, always dwarf the Plaintiff’s income. The Plaintiff is doing her best to raise two teenage sons under difficult circumstances. It would simply be inequitable for these debts to be discharged.

After carefully considering the evidence at trial, the parties’ submissions, oral arguments and the applicable law, and for the reasons stated herein, it is hereby

ORDERED that both the indemnification agreement by Defendant holding Plaintiff harmless for payments and any deficiency obligations regarding the mortgage on the former marital residence and the agreement to compensate plaintiff for the stipulated value of the Debtor’s pharmacy license and degree are nondischargeable pursuant to 11 U.S.C. § 523(a)(15).

Dated: October 23, 2001

Hon. Robert E. Littlefield, Jr.
U.S. Bankruptcy Judge