

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
ROOM 211
FEDERAL BUILDING AND U.S. POST OFFICE
225 SOUTH PIERRE STREET
PIERRE, SOUTH DAKOTA 57501-2463

TELEPHONE (605) 224-0560
FAX (605) 224-9020

IRVIN N. HOYT
BANKRUPTCY JUDGE

August 26, 2005

A. Thomas Pokela, Esq.
Counsel for Plaintiff
Post Office Box 1102
Sioux Falls, South Dakota 57101

Douglas G. Lorenzen, Esq.
Counsel for Defendant-Debtor
Post Office Box 84435
Sioux Falls, South Dakota 57118

Subject: *Stacy Coffey v. George C. Sleeman*
(*In re Sleeman*), Adv. No. 03-4007;
Chapter 7, Bankr. No. 02-41307

Dear Counsel:

The matter before the Court is a complaint to determine dischargeability filed by Plaintiff Stacy Coffey regarding her claim against Defendant-Debtor George C. Sleeman. This is a core proceeding under 28 U.S.C. § 157(b)(2). This letter decision and accompanying order shall constitute the Court's findings and conclusions under Fed.R.Bankr.P. 7052. As set forth below, a judgment will be entered for Plaintiff Coffey.

Summary. George C. Sleeman ("Debtor") filed a Chapter 7 petition on November 14, 2002. Debtor scheduled Stacy Coffey as a co-debtor on a partially secured debt owed to Conseco Finance for a mobile home, and he also included her on his case mailing list.

On February 18, 2003, Stacy Coffey timely filed a complaint seeking a determination that her pe-petition claim against Debtor was nondischargeable under 11 U.S.C. § 523(a)(15). She stated Debtor was her former husband, and she alleged the divorce court ordered him to assume certain debts, including one owed to Conseco Finance. She further alleged Debtor has a better ability than she to pay this debt and the detrimental consequences to her if the debt is discharged outweigh the consequences to Debtor if it is not discharged.

Debtor timely answered and acknowledged that under the divorce he had agreed to assume the debt to Conseco Finance, which was secured with a lien on a mobile home. He further stated he

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currently was on active duty with the South Dakota National Guard. Pursuant to the Soldiers and Sailors Relief Act, 50 App. U.S.C.A. §§ 513 and 521, the adversary proceeding was stayed while Debtor remained on active duty. The stay was lifted in early 2005 after Debtor returned from Iraq and his attorney was able to locate him.

By agreement of the parties, the matter was submitted to the Court on stipulated facts and briefs, in large part because Debtor was no longer living in the area. The parties stipulated to their respective income and expenses in 2002. The other facts set forth below were found in other pleadings or briefs.

Coffey and Debtor were divorced on May 3, 2002. By stipulation, Debtor agreed to assume the mortgage debt to Conseco Finance on their mobile home and to hold Coffey harmless on that debt. The current debt owed to Conseco Finance is not known. A footnote in Debtor's July 6, 2005, brief indicates the mobile home secured by Conseco Finance was sold at some point, leaving an unknown deficiency. The current amount of the debt was never provided to the Court.

Coffey's gross income in 2002, based on her federal income tax return, was \$21,426.00, which equals monthly income of \$1,785.50.¹ Coffey has two children who reside with her. Their ages were not stated, though at least one was in diapers and attended daycare in 2002. Coffey's regular monthly expenses total \$1,770.00. Though it is not clearly stated, it appears these expenses are also for 2002. They include:

rent	\$ 600.00
credit cards	75.00
utilities	100.00
medical	75.00
daycare	480.00
diapers	30.00
food	250.00
gas	80.00
insurance	<u>80.00</u>
TOTAL	\$1,770.00

Debtor's monthly net income in November 2002 was \$977.70. His

¹ Coffey's net income after mandatory deductions for taxes and the like would have been more helpful to the Court.

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deductions included \$201.30 for "retirement," but it is unknown whether the contribution was mandatory. Debtor shared his household with another adult. Her monthly net income was \$1,359.18. Their combined household net income was \$2,336.88. Debtor has three dependent children, but it is unknown whether they resided with him in 2002 or now.

Debtor's monthly expenses in November 2002 were \$2,204.67. The expenses included:

housing and taxes	\$862.67
utilities	214.00
satellite tv	24.00
home maintenance	20.00
food	500.00
clothing	100.00
medical	50.00
transportation	60.00
recreation	95.00
charities	20.00
insurance	159.00
student loans	100.00

Debtor's housemate's expenses were \$1,306.00. They included:

food	\$230.00
clothing	50.00
medical	80.00
transportation	50.00
insurance	83.00
auto payment	246.00
credit cards	150.00
student loan	80.00
day care	300.00
storage	37.00

Debtor's housemate did not pay any share of the household expenses for housing and taxes, utilities, satellite television, or home maintenance. It is unknown whether any children or other dependents resided with her in 2002 or now. Combined household expenses for Debtor and his housemate were \$3,510.67.

In his brief, Debtor argued (based on the November 2002 income and expense statements) his household's expenses exceeded his household's income by over \$1,000 even if he trimmed some expenses.

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Consequently, he urged the Court to conclude he did not have the ability to assume a monthly payment of \$796 for the mobile home. He further argued they have now moved to Colorado and their income still falls short of their expenses by \$500.00. He further argued his standard of living would fall "materially" below Coffey's standard of living if the Conseco Finance debt were not discharged. For his arguments, Debtor relied primarily on *In re Dunn*, 225 B.R. 393 (Bankr. S.D. Ohio 1998).

Plaintiff did not file a brief. The matter was taken under advisement.

Applicable law. Under 11 U.S.C. § 523(a)(15), a marital property settlement debt is presumptively nondischargeable unless the debtor can demonstrate he does not have the ability to pay the debt or the benefit of a discharge to him is greater than the detriment to his former spouse if the debt is discharged. *Johnston v. Henson (In re Henson)*, 197 B.R. 299, 302 (Bankr. E.D. Ark. 1996)) (citing generally *Straub v. Straub (In re Straub)*, 192 B.R. 522 (Bankr. D.N.D. 1996) (discussing placement of the burdens of proof upon the debtor and nature of elements to be proven), and *In re Gantz*, 192 B.R. 932 (Bankr. N.D. Ill. 1996) (burdens of proof)). The marital debt need not be owed to the spouse or former spouse but may be owed to a third party. *Henson*, 197 B.R. at 303.

The non-debtor spouse's threshold burden is merely to show she had a divorce-related claim not covered by § 523(a)(5). *Straub*, 192 B.R. at 527-28; *Henson*, 197 B.R. at 302-03. The burden then shifts to the debtor to show either he does not have the ability to pay the debt or discharging the debt would result in a benefit to the debtor that outweighs the detrimental consequences to the former spouse. 11 U.S.C. §§ 523(a)(15)(A) and (B); *Henson*, 197 B.R. at 303 (citing *In re Morris*, 193 B.R. 949 (Bankr. S.D. Cal. 1996)). The debtor must make these showings by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 291 (1991).

Under subsection (A) of § 523(a)(15), the Court must look at the debtor's ability to pay the debt from his disposable income, *Moeder v. Moeder (In re Moeder)*, 220 B.R. 52, 54 (B.A.P. 8th Cir. 1998, now or in the future. *Beggs v. Beggs (In re Beggs)*, 314 B.R. 401, (Bankr. E.D. Ark. 2004). The inquiry begins with an analysis of the debtor's current financial circumstances and ends with an analysis of whether that situation is fixed or likely to change in the foreseeable future. *Straub*, 192 B.R. at 528.

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[O]nce the court has taken into account a debtor's "reasonably necessary" personal and business expenses, the court must determine if the debtor has enough assets or income sufficient to pay the obligations at issue. See *In re Beck*, 298 B.R. [616,623-24 (Bankr. W.D. Mo. 2003)] (citing *Stuart v. Koch (In re Koch)*, 109 F.3d 1285, 1289 (8th Cir. 1997)). In doing so, the court should consider the debtor's entire economic circumstances. *Id.*

Beggs, 314 B.R. at 417. Those circumstances include the debtor's future ability to pay the debt, especially where the debtor has the ability to pay the debt over time. *Beggs*, 314 B.R. at 418; *Straub*, 192 B.R. at 528.

Under subsection (B) of § 523(a)(15), the debtor must demonstrate "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 point in time to weigh these benefits and detriments to each party is at the time of the dischargeability trial, not when the divorce order was entered; this allows the Court to fully examine the benefits of the "fresh start" to the debtor, any change in circumstances in employment, and other good or bad fortune which may have befallen the parties. *Henson*, 197 B.R. at 303. In considering changed events, and particularly the benefits of discharge given one party, the current and future financial circumstances of the parties are better analyzed. *Id.* (citing *In re Dressler*, 194 B.R. 290 (Bankr. D.R.I. 1996), and *In re Taylor*, 191 B.R. 760 (Bankr. N.D. Ill. 1996)).

Discussion. There was no dispute between the parties the debt to Conseco Finance fell under § 523(a)(15). Thus, the burden fell upon Debtor to show one of the two exceptions - either § 523(a)(15)(A) or § 523(a)(15)(B) - applied so as to allow the Conseco Finance debt to be discharged. Debtor wholly failed in that burden of proof.

Ability to pay. The only income and expense information provided for Debtor was more than two years old. The Court, however, can only find an inability to pay when a debtor does not have a present ability or an ability in the foreseeable future to pay the subject debt. Thus, the record was devoid of any information on which the Court could rely. Debtor should have provided the current amount of the debt to Conseco Finance and his household's present income and expenses, demonstrated the reasonableness of his expenses, and set forth evidence regarding

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whether his income or expenses will change in the future. That was not done. Debtor made the choice of submitting his case through limited documents, and he must live with those consequences.

Even based on the November 2002 income and expense information alone, the Court could not conclude Debtor did not have the ability to pay the Conseco Finance debt. He failed to provide any evidence, and thus any justification, regarding why he bore the entire burden for his household's expenses for housing and taxes, utilities, satellite tv, and home maintenance although his housemate's net income each month exceeded his.

Balancing of hardships. It was also Debtor's burden to show any detriment Coffey would suffer if the Conseco Finance debt were discharged was outweighed by the benefits he would receive if the debt were discharged. Again, the current amount owed to Conseco Finance was not known, and there was no current income and expense information for either party on which the Court could rely. Further, there was nothing in the record regarding what would happen to Coffey and her dependents if Debtor failed to pay the Conseco Finance debt. Thus, the Court had no information on which it could rely to weigh the respective benefits and detriments.

Since Debtor failed to show either exception under § 523(a)(15)(A) or § 523(a)(15)(B) applied, the law presumes the Conseco Finance debt is nondischargeable. An appropriate order and judgment will be entered.

I hereby certify that a copy of this document was electronically transmitted, mailed, hand delivered or faxed this date to the parties on the attached service list.

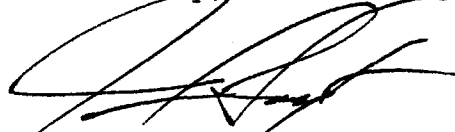
AUG 26 2005

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court, District of South Dakota
By DM

INH:sh

CC: case file (docket in case file and serve parties in interest)

Sincerely,



Irvin N. Hoyt
Bankruptcy Judge

NOTICE OF ENTRY
Under F.R. Bankr.P. 9022(a)
Entered

AUG 26 2005

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota

Stacy Coffey
6420 W. 54th Street
Sioux Falls, SD 57106

Douglas G. Lorenzen
PO Box 84435
Sioux Falls, SD 57118

Lee Ann Pierce
Trustee
PO Box 524
Brookings, SD 57006

A. Thomas Pokela
PO Box 1102
Sioux Falls, SD 57101

George C. Sleeman
1820 Franklin Avenue
Canon City, CO 81212