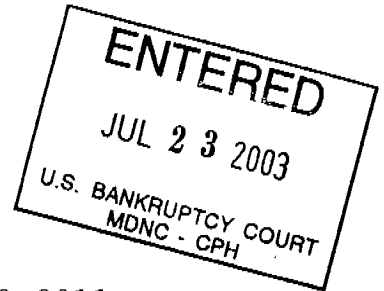


UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF NORTH CAROLINA  
DURHAM DIVISION

IN RE: )  
 )  
Merry Diane Davis, ) Case No. 02-83408C-7D  
 )  
Debtor. )  
 )  
\_\_\_\_\_)  
 )  
Terance Carter Davis, )  
 )  
Plaintiff, )  
 )  
v. ) Adversary No. 03-9011  
 )  
Merry Diane Davis, )  
 )  
Defendant. )  
 )



MEMORANDUM OPINION

This adversary proceeding came before the court for trial on June 19, 2003. David W. Silver appeared on behalf of the plaintiff and Clyde A. Wootton appeared on behalf of the defendant.

MATTER BEFORE THE COURT

This is a dischargeability action in which the plaintiff contends that obligations of the defendant under a separation agreement and a state court order are nondischargeable pursuant to § 523(a)(15) of the Bankruptcy Code. Having considered the evidence offered by the parties and the arguments of counsel, the findings and conclusions of the court pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure are hereinafter set forth.

## JURISDICTION

The court has jurisdiction over the subject matter of this proceeding pursuant to 28 U.S.C. §§ 151, 157 and 1334, and the General Order of Reference entered by the United States District Court for the Middle District of North Carolina on August 15, 1984. This is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2)(I) which this court may hear and determine.

## FACTS

The plaintiff and defendant were married in 1973 and lived together until they separated in 2000. Two children were born of the marriage, both of whom attained majority before the separation. On May 26, 2000, the plaintiff and defendant executed a Separation Agreement and Property Settlement ("the separation agreement") under which both parties waived any claim for post-separation alimony or support.

The separation agreement provided for a division of marital property under which the plaintiff retained ownership of his business and certain other property and agreed to a distributive award of \$58,000.00 to the defendant which was paid to the defendant following the execution of the agreement.

Paragraph VIII of the agreement dealt with the outstanding debts of the parties. This provision states that the defendant shall be responsible for her credit card accounts with Discover,

Preferred Value, Capital One and Citibank. In paragraph VIII each party also agreed "to hold the other party harmless and to indemnify that party if that party should be caused to make any payment other than as provided above."

In March of 2002 the plaintiff filed a suit in the District Court of Pitt County alleging that the defendant had breached the separation agreement by failing to pay certain of the debts which she agreed to pay under the separation agreement. On October 23, 2002, a default judgment was entered against the defendant finding that the defendant had failed to pay the Discover card indebtedness of \$11,693.00 and the Capital One card indebtedness of \$1,329.00 in accordance with the separation agreement and adjudging that the defendant "is required to pay the debts listed above and to assume all other liability and responsibility for the debts listed in the separation agreement by December 2, 2002." The judgment also directed that the defendant pay attorneys' fees of \$575.00 to plaintiff's attorneys pursuant to paragraph XIX of the separation agreement which provides that the prevailing party in any suit to enforce provisions of the separation agreement "shall be entitled to recover suit costs, including reasonable attorney's fees, from the other party."

On October 29, 2002, the defendant filed a voluntary petition for Chapter 7 relief in this court. The Discover and Capital One

credit card accounts were still unpaid when the defendant filed her bankruptcy case and have not been paid by the defendant. This adversary proceeding was filed on January 21, 2003, alleging that the defendant is indebted to the plaintiff in the amount of the unpaid Discover and Capital One credit card accounts, which is stipulated to be \$13,246.00, together with the \$575.00 of attorneys' fees which the defendant was ordered to pay, and that such indebtedness is nondischargeable under § 523(a)(15).

#### DISCUSSION

Under § 523(a)(15), a debt not of a kind described in § 523(a)(5) and incurred in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other court order, is not dischargeable unless (a) the debtor lacks the ability to pay the debt from property or disposable income or (b) discharging the debt results in a benefit to the debtor that outweighs the detrimental consequences to the debtor's spouse, former spouse or child. The use of triple negatives in § 523(a)(15) makes the statutory language somewhat confusing. Nevertheless, it is clear that § 523(a)(15) speaks in the disjunctive. If the debtor lacks the ability to pay the debt from property or disposable income or discharging the debt would result in benefit to the debtor that outweighs the detrimental consequences to the debtor's spouse, then the debt will be

dischargeable.

A. Burden of proof.

The first matter to be addressed is the burden of proof in an action brought pursuant to § 523(a)(15). The appropriate rule is one in which the burden of proof shifts. Initially, the plaintiff must file a timely adversary proceeding and must show a debt incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other qualifying matrimonial order. If the plaintiff does so, the burden of proof then shifts to the defendant/debtor to show inability to pay the marital obligation. If the debtor can show inability to pay the marital obligation, then the examination stops and the debtor prevails in the dischargeability action. If the debtor fails to carry the burden regarding ability to pay, a majority of courts have concluded that the debtor then has the burden of showing that the benefits of a discharge for the debtor outweigh the detriment to the plaintiff if a discharge is granted. See e.g., In re Dexter, 250 B.R. 222, 224 (Bankr. D. Md. 2000); In re Craig, 196 B.R. 305, 308 (Bankr. E.D. Va. 1996). This court adopts the majority rule and will place the burden of proof upon the debtor both as to debtor's ability to pay as well as to whether the benefits of a discharge for the debtor outweigh the detriment to the plaintiff if a discharge is granted.

B. Debt not of a kind described in § 523(a)(5) that is incurred by the debtor in the course of a divorce or separation.

In the present case, it is clear that the separation agreement creates obligations running from the defendant to the plaintiff. Paragraph VIII not only obligates the defendant to make payments to the credit card companies, it also obligates the defendant to indemnify the plaintiff with respect to any amounts that the plaintiff has to pay the credit card companies if they are not paid by the defendant. Clearly, an agreement to indemnify creates an obligation on the part of the indemnitor to the indemnitee which is legally enforceable. Since in the present case, the obligation to indemnify arises under a separation agreement, it is an obligation of the type required under § 523(a)(15). The obligation of the defendant to pay plaintiff's attorney fees under the state court order likewise is an obligation of the type required under § 523(a)(15) even though the order does not require that the payment be made directly to the plaintiff. See In re Gatliff, 266 B.R. 381, 389 (Bankr. N.D. Ill. 2000); In re Lacasse, 238 B.R. 351, 356 (Bankr. W.D. Mich. 1999); In re Hammond, 236 B.R. 751, 769 (Bankr. D. Utah 1998). Thus, by offering the separation agreement and state court order into evidence, the plaintiff established the existence of obligations not of the kind described in § 523(a)(5) that were incurred by the defendant in the course of a divorce or

separation for purposes of § 523(a)(15).

C. Whether the Debtor has the ability  
to pay the § 523(a)(15) obligations.

A majority of courts have concluded that an appropriate test for determining whether a debtor lacks the ability to pay within the meaning of § 523(a)(15) is the "disposable income test" that also applies in chapter 13 cases and is found in § 1325(b) of the Bankruptcy Code. See e.g., In re Campbell, 198 B.R. 467, 473 (Bankr. D.S.C. 1996). For purposes of § 1325(b) and § 523(a)(15), disposable income means income received by the debtor that is not reasonably necessary to be expended for the maintenance or support of the debtor or dependents of the debtor and, if the debtor is engaged in business, for the payment of expenditures necessary for the continuation, preservation and operation of such business. See In re Hesson, 190 B.R. 229 (Bankr. D. Md. 1995).

The cases are not uniform regarding the appropriate date for determining whether the debtor has the ability to pay the marital debt. The dates which have been utilized by various courts that have considered the issue include the date of the filing of the case, the date of the filing of the adversary proceeding and the date of the trial. The court has concluded that the better rule is for the determination to be made as of the date of the trial and that is the date which will be utilized in the present case.

Although a debtor's disposable income is measured as of the time of trial, a determination of a debtor's ability to pay for

purposes of § 523(a)(15)(A) does not consist of simply looking at a "snapshot" of his financial abilities at that time. See In re Huddelston, 194 B.R. 681, 687-88 (Bankr. N.D. Ga. 1996). Rather, the court should examine the totality of the debtor's financial circumstances. See In re Cleveland, 198 B.R. 394, 398 (Bankr. N.D. Ga. 1996); In re McGinnis, 194 B.R. 917, 920 (Bankr. N.D. Ala. 1996); In re Smither, 194 B.R. 102, 107 (Bankr. W.D. Ky. 1996) (rather than snapshot, court should consider prospective earning capacity). The circumstances that the court should consider include (1) the debtor's disposable income as measured at the time of trial; (2) the presence of more lucrative employment opportunities that might enable the debtor fully to satisfy the divorce-related obligations; (3) the extent to which the debtor's burden of debt will be lessened in the near term; and (4) the extent to which the debtor previously has made a good faith effort to fully employ toward satisfying the debt in question. Cleveland, 198 B.R. at 398; Huddelston, 194 B.R. at 688. If an examination of these broader considerations reveals an ability to pay the marital obligation, the debtor may not avail himself of the "safe harbor" embodied in § 523(a)(15)(A). See Cleveland, 198 B.R. at 398. See also In re Straub, 192 B.R. 522, 528-29 (Bankr. D.N.D. 1996); In re Florio, 187 B.R. 654, 657 (Bankr. W.D. Mo. 1995).

With these guidelines in mind, the next question to be determined in the present case is whether the defendant carried the



burden of proving that she does not have the ability to pay the marital obligations from income or property of the defendant not reasonably necessary to be expended for the maintenance or support of the defendant or a dependent of the defendant, within the meaning of § 523(a)(15)(A). This question must be answered in the affirmative.

The evidence established that the defendant has no property that could be used to pay the obligations in question. Although the defendant received \$58,000.00 in 2000 following the execution of the separation agreement, her evidence established that part of these funds were spent to pay her living expenses until she found full-time employment and that the balance of the funds were lost when she invested the funds with a company that failed. Thus, the only available means of paying the obligations in question is the earned income from the defendant's employment.

The defendant is employed as a secretary or administrative assistant to the dean of a department at Duke University. The defendant's current monthly income is \$2,320.00. The defendant has been employed at Duke University for approximately one year. Prior to that employment, the defendant worked at a number of part-time jobs until she was able to secure the job at Duke University. There was no evidence that the defendant is intentionally suppressing her income or that she has any income from any other source. The court, therefore, concludes that the defendant's

monthly income figure of \$2,320.00 is an appropriate figure to use in applying the disposable income test. This figure represents Debtor's gross income prior to deductions. The defendant's evidence established the following deductions from her monthly income: \$470.00 for payroll taxes and social security and \$70.00 for insurance. The evidence thus established that the defendant has net monthly take-home pay of \$1,780.00.

According to the defendant's evidence, during most months the expenses required for her maintenance and support exceed the amount of her net monthly income. The defendant's evidence showed that her current monthly expenses include rent of \$630.00, \$50.00 for electricity, \$60.00 for telephone, \$15.00 for cable service, \$400.00 for food, \$50.00 for clothing, \$20.00 for laundry and dry cleaning, \$40.00 for medical and dental expenses, \$160.00 in transportation expenses, \$200.00 for insurance, and a car payment of \$275.00, for a total of \$1,900.00 per month.

Certain standards have been recognized and utilized in assessing the amount which is reasonably necessary for the support and maintenance of a defendant in a §523(a)(15) proceeding. Thus, a debtor seeking to invoke the exception to dischargeability contained in §523(a)(15)(A) may not insist on an extravagant or luxurious lifestyle, while claiming inability to pay marital obligations. The expenses which should be accepted as necessary in deciding the defendant's ability to pay should be limited to those

expenses which are necessary for the defendant to maintain an ordinary standard of living. Expenses for luxury items or for extravagant indulgences should not be treated as reasonably necessary for the support and maintenance of the defendant. As one court has stated, the general rule is that "reasonably necessary" expenses means "adequate" but not "first class". See In re Dunn, 225 B.R. 393, 401 (Bankr. S.D. Ohio 1998). Also, the court in a §523(a)(15) proceeding should be careful to include only expenses which are related to the support and maintenance of the defendant or his dependents. See In re Metzger, 232 B.R. 658, 664 (Bankr. E.D. Va. 1999) (attorneys' fees which were being paid by periodic installments, while a legitimate indebtedness, were not reasonably necessary for the support or maintenance of the debtor).

Judged by the foregoing standards, the court is satisfied that the defendant's expenses are not excessive and are reasonably necessary for defendant's support and maintenance. The defendant's automobile, a 1999 Pontiac, is not a luxury vehicle. The rent for defendant's residence does not seem excessive, nor are the amounts claimed for ordinary living expenses. While some of the expenses arguably may be higher than might be expected, taken as a whole, the living expenses claimed by the defendant appear reasonably necessary. No amount is claimed by the defendant for recreation nor for charitable contributions. Although the expense of cablevision may not be necessary, this expense is only \$15.00 per

month and would leave the defendant with a deficit even if eliminated.

Consideration has been given to whether the defendant's income is likely to increase or her expenses are likely to decrease in the near term. Neither appears likely. Prior to her separation in 2000, the defendant's employment consisted of working at her husband's business as a bookkeeper. Following the separation, the defendant was unable to find full-time employment for more than a year. Her position as a secretary or administrative assistant at Duke University is not one in which her income is likely to increase significantly in the short term. As to the defendant's expenses, her itemization includes no expenses which are likely to disappear or decrease, since such expenses are limited to the essentials for subsistence.

Based upon the foregoing, the court concludes that the defendant does not have the ability to pay the marital obligations which are owed under the separation agreement and court order. The determination that the defendant has established her inability to pay, makes it unnecessary for the court to consider whether the benefit to the defendant outweighs the detrimental consequences to the plaintiff if the marital obligations are discharged.

#### CONCLUSION

Since the defendant's obligations under the separation agreement and court order arose pre-petition and are not excepted

from discharge by §523(a)(15), such obligations were discharged in the defendant's Chapter 7 case. Judgment, therefore, will be entered in favor of the defendant dismissing this adversary proceeding with prejudice.

This 21st day of July, 2003.

**William L. Stocks**

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William L. Stocks  
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF NORTH CAROLINA  
DURHAM DIVISION

IN RE:

Merry Diane Davis,  
Debtor.

Terance Carter Davis,  
Plaintiff,

v.

Merry Diane Davis,  
Defendant.

Case No. 02-83408C-7D

Adversary No. 03-9011

ENTERED

JUL 23 2003

U.S. BANKRUPTCY COURT  
MDNC - CPH

JUDGEMENT

In accordance with the Memorandum Opinion entered contemporaneously herewith, IT IS ORDERED, ADJUDGED AND DECREED that the relief sought in this adversary proceeding is denied and this adversary proceeding is hereby dismissed with prejudice.

This 21st day of July, 2003.

**William L. Stocks**

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William L. Stocks  
United States Bankruptcy Judge