

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION**

In re:

Case No. 3:05-bk-15337-PMG

ALMA JEANNE SLIZYK,

Debtor.

Chapter 7

STEVEN A. SMILACK,

Plaintiff,

vs.

Adv. No. 3:05-ap-321-PMG

ALMA JEANNE SLIZYK,

Defendant.

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND MEMORANDUM OPINION
REGARDING DISCHARGEABILITY OF DEBT UNDER SECTION 523(a)(15) OF THE
BANKRUPTCY CODE**

THIS CASE came before the Court for a final evidentiary hearing to consider the dischargeability of a debt owed by the Debtor, Alma Jeanne Slizyk, to the Plaintiff, Steven A. Smilack, pursuant to §523(a)(15) of the Bankruptcy Code.

On March 24, 2005, the Plaintiff obtained a judgment against the Debtor in the parties' dissolution of marriage action. The issue currently before the Court is whether discharging the debt "would result in a benefit to the Debtor that outweighs the detrimental consequences" to the Plaintiff within the meaning of §523(a)(15)(B) of the Bankruptcy Code.

Background

The Debtor is the former wife of the Plaintiff. On June 1, 1998, the Florida Circuit Court in Volusia County, Florida, entered a Final Judgment of Dissolution of Marriage in the parties' divorce proceeding. (Doc. 1, Exhibit A). Pursuant to the Final Judgment, the Debtor was required to pay the Plaintiff the sum of \$10,848.00 "in order to achieve equitable distribution of the parties' marital assets and liabilities."

The Plaintiff subsequently filed a Motion to Increase the Judgment Amount in the divorce proceeding. On March 24, 2005, the state court entered an Order granting the Plaintiff's Motion, and increased the judgment amount to \$62,072.68, with interest to accrue at the legal rate. (Doc. 1, Exhibit D).

On October 14, 2005, the Debtor filed a petition under Chapter 7 of the Bankruptcy Code.

On December 2, 2005, the Plaintiff filed a Complaint in the bankruptcy case Objecting to Discharge of Certain Debts and Discharge of Debtor. (Doc. 1). In Count IV of the Complaint, the Plaintiff sought a determination that the debt owed to him under the Final Judgment of Dissolution of Marriage is nondischargeable pursuant to §523(a)(15) of the Bankruptcy Code.

On August 28, 2006, the Bankruptcy Court (Proctor, J.) entered a Judgment in the dischargeability action. The Judgment provided, in part, that the debt evidenced by the Final Judgment of Dissolution of Marriage is excepted from the Debtor's discharge pursuant to §523(a)(15). (Doc. 58).

On September 18, 2006, the Debtor filed a timely Notice of Appeal of the Judgment to the United States District Court for the Middle District of Florida. (Doc. 65).

The District Court affirmed the Judgment entered by the Bankruptcy Court (Docs. 100, 107, 109), and the Debtor filed a further appeal to the United States Court of Appeals for the Eleventh Circuit.

On May 21, 2008, the Eleventh Circuit issued its decision on appeal. Slizyk v. Smilack, 2008 WL 2123339 (11th Cir.). The Eleventh Circuit determined as an initial matter that the Bankruptcy Court did not clearly err in finding that the Debtor is able to pay the judgment amount to the Plaintiff. The Eleventh Circuit further determined, however, that:

[T]he bankruptcy court nonetheless abused its discretion in holding that the debt was not dischargeable, because there is no indication in the record that the court ever applied the correct legal test to determine whether discharging the debt "would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor."

Slizyk v. Smilack, 2008 WL 2123339, at 2. Accordingly, the Eleventh Circuit instructed the District Court to vacate the portion of the Bankruptcy Court's Judgment determining that the debt owed to the Plaintiff was not dischargeable, and to remand the case to the Bankruptcy Court for further proceedings consistent with its decision. Id.

On August 5, 2008, the District Court entered an Order remanding the case to this Court in accordance with the Eleventh Circuit's instructions. (Doc. 110).

Discussion

The Debtor's Chapter 7 petition was filed on October 14, 2005. On the date of the petition, §523(a)(15) of the Bankruptcy Code provided:

11 USC §523. Exceptions to discharge

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) 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 separation or in connection with a separation agreement, divorce decree or other order of a court of record, a determination made in accordance with State or territorial law by a government unit; 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.

11 U.S.C. §523(a)(15)(as in effect prior to October 17, 2005)(Emphasis supplied). With respect to cases filed prior to October 17, 2005, the provision governs the dischargeability of property settlement debts, as opposed to support obligations, that were incurred in connection with a divorce. Under the section as structured, the creditor is initially required to show that a particular debt was incurred by the debtor in connection with a divorce or separation, and that it is not in the nature of alimony, maintenance, or support. If the creditor makes the initial showing, the burden then shifts to the debtor to establish that the debt is nevertheless dischargeable pursuant to either subsection (A) or subsection (B) of §523(a)(15). In re Perez, 2007 WL 760386, at 5 (Bankr. M.D. Fla.).

In this case, it is clear that the Judgment was entered in connection with the parties' divorce, and that the Judgment does not evidence a support obligation. Additionally, the Bankruptcy Court found, and the Eleventh Circuit affirmed, that the Debtor did not establish that the debt is dischargeable pursuant to subsection (A) of §523(a)(15). (Doc. 57, p. 12; Slizyk v. Smilack, 2008 WL 2123339, at 2). Accordingly, the only issue remanded to this Court is whether discharging the debt "would result in

a benefit to the debtor that outweighs the detrimental consequences" to the Plaintiff, within the meaning of subsection (B) of §523(a)(15). Slizyk v. Smilack, 2008 WL 2123339, at 2.

Subsection (B) involves the application of a balancing test. In performing the balancing test, courts may "consider the totality of the circumstances, including the parties' incomes, assets, liabilities, health, job skills, training, age, education, future earning capabilities, and long-term financial prospects." Slizyk v. Smilack, 2008 WL 2123339, at 1(citing In re Bowers, 357 B.R. 663, 668 (Bankr. M.D. Fla. 2006) and In re Daniel, 290 B.R. 914, 918 (Bankr. M.D. Ga. 2003)). Balancing the interests "requires a review of the totality of the circumstances in comparing the financial situation of both parties and considering any other relevant subjective factors." In re Perez, 2007 WL 760386, at 6(citing In re Gamble, 143 F.3d 223, 226 (5th Cir. 1998)).

For purposes of §523(a)(15)(B), the parties' relative circumstances are considered as of the date of the dischargeability proceeding, and not as of the date of the divorce decree. In re Perez, 2007 WL 760386, at 6(citing In re Christison, 201 B.R. 298, 308 (Bankr. M.D. Fla. 1996)).

Additionally, according to the Eleventh Circuit, balancing the benefits and detrimental consequences to the parties under §523(a)(15)(B) "requires the bankruptcy court to reach an equitable conclusion rather than a factual or legal one." Slizyk v. Smilack, 2008 WL 2123339, at 1(quoted In re Myrvang, 232 F.3d 1116, 1121 (9th Cir. 2000)). In other words, courts should exercise their equitable powers to "make a value judgment in deciding which party suffers the most." Slizyk v. Smilack, 2008 WL 2123339, at 1(quoted In re Henrie, 235 B.R. 113, 121 (Bankr. M.D. Fla. 1999)).

Finally, in reaching this equitable determination, it is generally recognized that courts construe exceptions to discharge liberally in favor of the debtor. Slizyk v. Smilack, 2008 WL 2123339, at

1(quoting In re Miller, 39 F.3d 301, 304 (11th Cir. 1994)). "The benefits of the debtor's discharge should be sacrificed only if there would be substantial detriment to the nondebtor spouse that outweighs the debtor's need for a fresh start." In re Perez, 2007 WL 760386, at 6(quoting 4 Collier on Bankruptcy, 523.21[1], at 523-120).

Application

In applying the balancing test under §523(a)(15)(B), the Court must compare the financial and personal situation of the Debtor with the financial and personal situation of the Plaintiff. Based on the evidence presented at trial, the Court makes the following findings regarding the relative circumstances of the Debtor and Plaintiff:

A. The Debtor

The Debtor is sixty-four years old, is not married, and has no dependents. (Transcript, pp. 42, 255).

The Debtor is an educated person. She received a bachelor of arts degree in 1994, a juris doctorate degree in 1998, and a master of arts degree in applied sociology in 2004. (Plaintiff's Exhibit 3; Transcript, p. 33).

She has been gainfully employed in the past. The Debtor previously held a real estate license and a real estate broker's license, and it appears that she was successfully involved in the real estate industry for a period of time in the 1980's. Her real estate licenses are no longer valid, however, and she is not licensed to practice law in Florida or in any other state. (Plaintiff's Exhibit 3; Transcript, pp. 36, 253).

The Debtor has not been employed since May of 2006. (Plaintiff's Exhibit 3; Transcript, p. 56). Her sole income consists of social security benefits in the amount of \$706.00 per month. (Debtor's Exhibit 31; Transcript, p. 56).

The Debtor has lived in a home on North Riverside Drive in New Smyrna Beach since 1990. The property has been owned since that time by a Trust that was created for the benefit of the Debtor and her son. She currently lives in the home with her adult son and his family. The property is worth approximately \$452,966.00, and is not encumbered by any mortgages. In addition to the Riverside Drive property, the Trust also owns other unencumbered real property described at trial as the "government lots." (Plaintiff's Exhibit 13; Transcript, pp. 67, 104, 107-08, 162-64, 240).

The evidence at trial did not establish that the Debtor owns any personal property of substantial value. She drives a 1994 Honda that is in poor condition. (Plaintiff's Exhibit 3; Transcript, pp. 219, 239).

As set forth above, the Debtor owes the Plaintiff the principal amount of \$62,072.68, pursuant to the Order entered in their divorce proceeding on March 24, 2005. In addition to the judgment debt owed to the Plaintiff, the Debtor owes the approximate sum of \$110,000.00 in student loans, and the approximate sum of \$22,000.00 in unpaid medical bills. (Main Case, Doc. 1; Transcript, pp. 57, 59, 230-31).

Although not fully incapacitated, the Debtor suffers from chronic health conditions including arthritis and osteoporosis. She claims that the arthritis affects her hand mobility, and that the osteoporosis causes periodic fractures of her bones. She has applied for and received a "temporary

emergency Medicaid identification card." (Debtor's Exhibits 30, 32; Transcript, pp. 150, 159, 206-18, 240, 246).

B. The Plaintiff

The Plaintiff is fifty-six years old. He is married, and has a nineteen-year old stepson. (Debtor's Exhibit 21; Transcript, pp. 167, 172, 179-80).

The Plaintiff is also an educated person. He received a bachelors degree in accounting in 1981, and a juris doctorate degree in 1996. (Debtor's Exhibit 21).

The Plaintiff is a certified public accountant in the state of Florida, and is also a certified general contractor and real estate broker/salesman in Florida. The Plaintiff is licensed to practice law in Florida, and has practiced law as a construction litigation attorney for approximately ten years. (Debtor's Exhibit 21; Transcript, pp. 135, 180).

The Plaintiff owns a townhome located on Harbor Circle in Delray Beach, Florida. The townhome is valued at approximately \$384,567.00, and is not encumbered. The Plaintiff uses the townhome as rental property, and received \$19,000.00 in rental income from the property in 2008. (Debtor's Exhibit 1, 21; Plaintiff's Exhibit 22; Transcript, pp. 167, 177). Additionally, the Plaintiff owns a fifty percent interest in an office condominium in Pompano Beach, which is also unencumbered. His fifty percent interest in the commercial property is valued at approximately \$114,320.00. (Debtor's Exhibit 1, 21; Plaintiff's Exhibit 22; Transcript, p. 167).

The Plaintiff is the sole shareholder of two Subchapter S corporations:

1. Smilack Construction, Inc. owns three lots located in St. Lucie County with a total value of approximately \$41,000.00. The corporation also owns a financial account containing more than \$200,000.00. According to the Plaintiff, Smilack Construction,

Inc. is not currently engaged in any construction projects. (Debtor's Exhibit 1, 21; Plaintiff's Exhibit 22; Transcript, pp. 168-70).

2. Steven A. Smilack, P.A. is the Plaintiff's law firm. Steven A. Smilack, P.A. is an active legal practice that owns financial accounts containing more than \$107,000.00, and a receivable in the amount of \$20,000.00. The Profit and Loss Statement prepared by the Plaintiff indicates that Steven A. Smilack, P.A. generated fees in the amount of \$207,896.73 in 2009. According to the 2009 Profit and Loss Statement, the firm earned a net income after expenses of \$93,382.48 for that year. (Debtor's Exhibits 1, 21; Plaintiff's Exhibits 22, 23; Transcript, pp. 171, 175).

The Plaintiff's joint income tax return for 2008 reflects that the total income received by the Plaintiff and his wife in 2008 equaled \$253,813.00. Of that total, the sum of \$140,612.00 represented the combined income from Smilack Construction, Inc. and Steven A. Smilack, P.A. (Debtor's Exhibit 1).

The Plaintiff asserts that he individually owes Marilyn Robinson the principal sum of \$88,909.19, plus interest of \$164,759.04, for a total indebtedness of \$253,668.23. With respect to these liabilities, the Plaintiff submitted a series of nine Promissory Notes payable to Robinson. The Notes range in date from 1995 to 1998, and were each payable in five years from the date of the Note or upon demand. (Plaintiff's Exhibit 22; Transcript, p. 168).

The Plaintiff also asserts that Smilack Construction, Inc. owes Marilyn Robinson the principal amount of \$250,000.00, plus interest of \$111,022.00, for a total indebtedness of \$361,022.00. With respect to this liability, the Plaintiff submitted a copy of a Mortgage Note payable to Marilyn Robinson "on demand" that he signed on behalf of Smilack Construction, Inc. The Mortgage Note, which is dated September 6, 2005, states that it is secured by a mortgage on real estate "of even date herewith," but no separate mortgage containing a legal description of any encumbered property was submitted. (Plaintiff's Exhibit 22; Transcript, p. 169).

Marilyn Robinson is the Plaintiff's mother. (Transcript, p. 168). The record does not indicate that Marilyn Robinson has ever demanded payment of the Notes or otherwise sought to enforce the obligations.

In any event, the Plaintiff asserts that his current net worth totals \$253,947.77, after the debts owed to his mother are subtracted from the value of his assets. (Plaintiff's Exhibit 22; Transcript, p. 174).

Finally, the Plaintiff's current wife independently owns a home valued at approximately \$348,000.00, with equity of more than \$216,000.00, and financial accounts containing the approximate sum of \$360,422.48. According to the Plaintiff, his wife has an independent net worth of \$589,747.46. (Plaintiff's Exhibit 22; Transcript, pp. 172-74, 178-79).

C. Conclusion

The Court has considered the relative financial and personal circumstances of the Debtor and the Plaintiff, and finds that discharging the debt owed by the Debtor to the Plaintiff will result in a benefit to the Debtor that outweighs the detrimental consequences to the Plaintiff.

First, the Court finds that the future earning power of the Plaintiff is greater than that of the Debtor. Although both parties have sound academic credentials, the Debtor is not currently established in any employment position, and has not been employed for four years. Given her age and general condition, the Court agrees with the Debtor that it would be difficult for her to re-enter the workforce at this point in any kind of professional or well-paying position.

The Plaintiff, by contrast, is engaged in an on-going and active legal practice as a construction attorney, and earned fees in 2009 of more than \$207,000.00. (Plaintiff's Exhibit 23). The Plaintiff is also the sole owner of an existing construction company with significant current assets. The Court

acknowledges the present economic climate in the construction industry. Nevertheless, it appears that the Plaintiff's recent business experiences place him in a better position than the Debtor to generate income in the future.

Second, the Court has attempted to evaluate the comparative lifestyles of the parties, although this factor is more difficult to measure. Based on the evidence, it does not appear that either party lacks the essentials necessary for a decent standard of living. Both parties live in comfortable homes, and are able to provide for their basic needs. On balance, however, the Court finds that this comparison weighs in favor of discharging the debt.

The Debtor lives with her son and his family. She acknowledges that their home is situated on a valuable lot, but asserts that the home was built in 1918 and is in need of significant repairs. (Transcript, pp. 157-58). Even though the Debtor transacts her business mainly in cash, the record does not establish that she lives extravagantly, or that she has made any extraordinary expenditures. The Court is satisfied that she suffers from general health concerns that affect her daily life. Finally, in addition to the debt owed to the Plaintiff, it appears that the Debtor may owe student loans that exceed \$100,000.00, and unpaid medical bills in the amount of \$22,000.00.

The Plaintiff, on the other hand, maintains a standard of living that includes the ownership of a townhouse as rental property, and an interest in the commercial property where his law office is located. The Plaintiff's 2008 tax return reflects the existence of a significant stock portfolio that yielded long-term capital gains. (Debtor's Exhibit 1). By his own account, the Plaintiff's net worth is \$253,947.77. (Plaintiff's Exhibit 22; Transcript, p. 174). The only liabilities claimed by the Plaintiff consist of the obligations to his mother.

In reaching an equitable conclusion regarding "which party suffers the most," the Court finds that the comparative lifestyles of the parties weighs in favor of discharging the debt. See Slizyk v. Smilack, 2008 WL 2123339, at 1 (quoting In re Henrie, 235 B.R. 113, 121 (Bankr. M.D. Fla. 1999)).

Third, and perhaps most importantly, the Court has attempted to determine the specific consequences to both parties that will result from discharging the judgment debt.

If the debt is discharged, of course, the Debtor will be permanently released from the obligation, and she will receive the benefit of the discharge that she initially sought by filing this bankruptcy case in 2005. The discharge will presumably operate as a major step in finally concluding the oppressive and protracted litigation that began almost twenty years ago. As a result, the Debtor will be free to apply her efforts and income to the payment of other valid obligations and expenses, without the burdens associated with this dispute.

Conversely, it appears that the Plaintiff will suffer only one detriment if the judgment debt is discharged: he will not be able to collect the debt that he believes is owed to him. (Transcript, p. 279). It does not appear that the discharge of the judgment debt will significantly and adversely affect the financial or personal circumstances of the Plaintiff. It does not appear, for example, that the Plaintiff is depending on the collection of the debt for his maintenance or support. In fact, it does not appear that his lifestyle or circumstances would change in any material way if the judgment debt is discharged.

"The benefits of a debtor's discharge should be sacrificed only if there would be substantial detriment to the nondebtor spouse that outweighs the debtor's need for a fresh start." In re Perez, 2007 WL 760386, at 6 (quoting 4 Collier on Bankruptcy, 523.21[1], at 523-120).

In this case, the Court has considered the totality of the circumstances regarding the financial and personal situation of the Debtor and the Plaintiff, and determines that discharging the judgment debt will result in a benefit to the Debtor that outweighs the detrimental consequences to the Plaintiff. The judgment debt should be discharged in the Debtor's Chapter 7 case pursuant to §523(a)(15)(B) of the Bankruptcy Code.

Accordingly:

IT IS ORDERED that:

1. The debt owed by the Debtor, Alma Jeanne Slizyk, to the Plaintiff, Steven A. Smilack, as evidenced by the Order on Motion to Increase Judgment Amount entered by the Circuit Court for Volusia County, Florida, on March 24, 2005, in the case styled Alma Jeanne Smilack v. Steven Allen Smilack, Case No. 91-0698-FM-CI, is discharged in the above-captioned Chapter 7 case pursuant to §523(a)(15)(B) of the Bankruptcy Code.

2. A separate Final Judgment shall be entered consistent with this Opinion.

DATED this 30 day of June, 2010.

BY THE COURT

/s/ Paul M. Glenn

PAUL M. GLENN
Chief Bankruptcy Judge