

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re)	
)	
Charles Swanson)	Case No. 04-12211
)	
)	Adversary No. 04-01143
Debtor)	Chapter 7
-----)	
)	
Cheryl Swanson)	
)	Judge Burton Perlman
)	
Plaintiff)	
)	
vs.)	
)	
Charles Raymond Swanson)	
)	
)	
Defendant)	

DECISION

This adversary proceeding was commenced by a somewhat

irregular complaint, which was accepted because plaintiff is appearing pro se. Plaintiff is the divorced wife of defendant. In her complaint she alleges that defendant has failed to pay debts which he was obligated to pay in the divorce decree. More specifically, the debts in question are the subject of provisions of the Separation Agreement entered into between the spouses and incorporated into the Decree of Dissolution entered by the court. Plaintiff's case therefore is one arising under 11 U.S.C. §523(a)(15).

This court has jurisdiction of this matter pursuant to 28 U.S.C. §1334(b) and the General Order of Reference entered in this district. This is a core proceeding arising under 28 U.S.C. §157.

The proceeding came on for trial by the court. Based on the evidence presented we find the following facts. Defendant filed his Chapter 7 bankruptcy case on March 25, 2004. Prior to that time, on September 23, 2003 the Common Pleas Court for Scioto County Ohio, Domestic Relations Division, entered a Decree of Dissolution. That decree incorporated a Separation Agreement dated August 7, 2003 entered into between the parties. The parties had a child in their marriage, Raymond Charles Swanson, born December 24, 1989.

The Separation Agreement deals with division of property.

It is quoted in pertinent part:

ARTICLE 6: DIVISION OF PROPERTY

A. REAL ESTATE

Cheryl Swanson is the owner of real estate located at 811 Edwards Road, Lucasville, situated in Morgan Township, Scioto County, Ohio and consisting of 0.324 acres. This real estate is not subject to a mortgage and bears parcel number 13-0528.006. Cheryl Swanson shall receive and retain said real estate free and clear of all claims of Charles Swanson. Charles Swanson agrees to remove the mobile home located thereon within six (6) months of the date of execution of this agreement by the second of the parties. Cheryl Swanson shall have the right of occupancy of the mobile home located on this parcel of real estate until the mobile home is sold. Charles Swanson will be responsible for the payment of the indebtedness owed on the mobile home until it is sold and the proceeds of sale will be applied to the payoff of the mobile home indebtedness. Cheryl Swanson will pay any indebtedness associated with the real estate at 811 Edwards Road, Lucasville, Ohio, including real estate taxes but excluding any expenses associated with the mobile home located thereon.

The parties are the joint owners of real estate located at 787 Edwards Road, Lucasville, Morgan Township, Scioto County, Ohio. This real estate is owned jointly with rights of survivorship. The parties specifically agree that they shall retain their rights of joint ownership with rights of survivorship, notwithstanding the termination of their marriage. The rights of survivorship shall extend beyond the termination of the marriage by agreement of the parties. The parties further acknowledge that Cheryl Swanson will vacate the residence at 787 Edwards Road, Lucasville, Ohio prior to the final hearing for divorce or dissolution. The real estate, bearing parcel number 13-0528 and consisting of 2.672 acres is subject to a mortgage which Charles Swanson agrees to assume and pay, holding Cheryl Swanson harmless thereon. Charles Swanson shall also pay any and all other indebtedness related to the real estate and he shall hold Cheryl Swanson harmless thereon.

Charles Swanson will attempt to refinance the existing mortgage indebtedness and Cheryl Swanson agrees to execute the mortgage for the same. However, she will not execute the promissory note for a refinance. In the event Charles Swanson defaults under the existing note and mortgage or a refinanced note and mortgage, Cheryl Swanson would have the option to pay the existing or refinanced mortgage indebtedness and recover possession of the premises within thirty (30) days of the date of default. The right to enforce this provision by eviction shall apply.

* * *

D. AUTOMOBILES AND TITLED VEHICLES

Cheryl Swanson shall receive and retain the 2002 PT Cruiser subject to a loan to Navy Federal. Cheryl Swanson shall receive and retain this automobile and Charles Swanson shall pay the entire indebtedness owed to Navy Federal until paid in full within six (6) months of the date of execution of this Agreement by the second of the parties. Cheryl Swanson will be solely responsible for insurance, maintenance and repairs.

Charles Swanson shall receive and retain the 2001 Toyota Echo and the 1994 Plymouth Voyager. It is agreed, however, that Cheryl Swanson shall be permitted to use the Plymouth Voyager upon reasonable request. Charles Swanson shall be solely responsible for and shall hold Cheryl Swanson harmless as to all expenses associated with his ownership of said vehicle, including, but not limited to, insurance, maintenance and repairs.

* * *

F. DISTRIBUTE SHARE

Charles Swanson agrees to pay to Cheryl Swanson, as and for a distributive share to equalize their assets, the sum of twenty thousand dollars (\$20,000.00) payable within six (6) months of the date of execution of this Agreement by the second of the parties. The parties acknowledge that Charles Swanson may prepay all or part of said twenty thousand dollars (\$20,000.00) upon receiving proper receipt from Cheryl

Swanson and he shall be credited for any such payments. In the event payment in full is not completed within six (6) months of the date of the execution of this Agreement by the second of the parties, any balance due shall thereafter bear interest at the rate of 10% per annum.

The Separation Agreement also deals with personal indebtedness of the parties, thus:

ARTICLE 7: MARITAL INDEBTEDNESS

With respect to the financial obligations incurred by the parties during the marriage, Charles Swanson agrees to pay the following indebtedness;

1) Mobile home indebtedness owed to Navy Federal with a monthly payment of \$363.00 and an approximate balance of \$24,000.00. Charles Swanson agrees to sell the mobile home and to apply the proceeds of sale to the payment of indebtedness.

2) PT Cruiser indebtedness owed to Navy Federal. This automobile is in the possession of Cheryl Swanson and it will be paid monthly by Charles Swanson with the balance to be paid in full within six (6) months of the date of signing this Agreement by the second of the parties.

3) The indebtedness owed to Navy Federal on the 2001 Toyota Echo with a monthly payment of \$370.00 and an approximate balance of \$12,000.00.

4) Residential mortgage owed to Navy Federal with a payment of \$399.00 per month and an approximate balance of \$37,800.00.

The following indebtedness will be paid in full by Charles Swanson within six (6) months of the date of this execution of this Agreement by the second of the parties:

5) NFCU Credit Union loan with an approximate balance of \$9339.00.

6) CITI with an approximate balance of \$1,972.00.

7) Lowe's with an approximate balance of \$1,181.00.

8) Sears in the name of Cheryl Swanson and an approximate balance of \$538.00.

9) Sears in the name of Charles Swanson and an approximate balance of \$210.00.

10) Providian in the name of Cheryl Swanson and an

approximate balance of \$1,236.00.

11) Providian in the name of Charles Swanson and an approximate balance of \$954.00.

12) Capital One in the name of Cheryl Swanson and an approximate balance of \$951.00.

13) Capital One in the name of Charles Swanson and an approximate balance of \$482.00.

14) Beneficial with an approximate balance of \$8,100.00.

15) K-Mart with an approximate balance of \$282.00.

16) Birdhouse with an approximate balance of \$514.00.

17) All outstanding and previously incurred uninsured medical bills for both parties.

In addition in Article 8 the Separation Agreement expressly provides that neither party shall pay spousal support to the other. Plaintiff suffered a permanent traumatic brain injury on July 4, 2002.

At the trial it was established that the \$20,000.00 required to be paid by defendant to plaintiff by Article 6(F) of the Settlement Agreement had been paid to her. In addition the evidence established that the defendant's obligation to pay off the 2002 PT Cruiser had been met.

Plaintiff does not dispute the foregoing, but asserts that she is entitled to an additional \$20,000.00 as equity in the property located at 787 Edwards Road. There is, however, no requirement in the Separation Agreement to this effect, and plaintiff's contention in this respect therefore fails.

There remains to be dealt with the list of obligations

imposed upon defendant in Article 7 of the Separation Agreement. Resolution of this question turns on the application of 11 U.S.C. §523(a)(15) which provides:

(a) A discharge under section 727,1141,1228(1), 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 governmental 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;

The foregoing statute thus provides that there are two exceptions to nondischargeability of property settlement provisions. These are that (1)debtor proves his inability to pay the debt provided in the Settlement Agreement, or (2) a discharge of the debt would benefit the debtor more than it would harm the former spouse. Debtor bears the burden of proving by a preponderance of the evidence that to be

dischargeable a debt arising in a property settlement agreement must meet one of these two exceptions. Grogan v. Garner 498 U.S. 279, 291, 111 S.Ct. 654, 112 L.Ed.2d 755(1991); Davis v. Cox 356 F. 3rd 76, 95 (1st Cir. 2004); Gamble v. Gamble (In re Gamble) 143 F. 3rd 223, 226 (5th Cir. 1998). Neither in his answer nor in his pretrial statement has defendant stated which of these two exceptions he relies upon to support his position that his indebtedness arising from the Settlement Agreement are dischargeable. We therefore consider the evidence before us in connection with both grounds of exception.

We deal first with the question of whether defendant has the ability to pay the debts in Article 7 of the Separation Agreement. It is clear that defendant does not presently have the income to pay the indebtedness itemized in the Separation Agreement. He was, however, earning in excess of \$50,000.00 a year thru 2003. He retired, thereafter drawing a nominal income, because it became necessary for him to take custody of the son. Because of plaintiff's injury, symptoms of which continue to be apparent, she was unable to provide for the son. Defendant then quit his job to look after the son. The son is now 16 years old. Defendant has presented no evidence to show that his son continues to require so much of his time that he could not return to full time employment and to the income

which he was able to earn before. It was the observation of the court of defendant upon his appearance in court that he appears to be in good health, of middle years, and thus well able to return to full employment. We therefore conclude that defendant has failed to prove by a preponderance of the evidence that he is unable to pay the support agreement debts in question. In reaching this conclusion, it is entirely appropriate for us to consider defendant's employment history and prospects. Hart v. Molino (In re Molino) 225 B.R. 904 (6th Cir. BAP, 1998) ("We conclude that a court may look to a debtor's prior employment, future employment opportunities, and health status to determine the future earn potential of the Debtor.") See also Hastings v. Konick (In re Konick) 236 B.R. 524 (1st Cir. BAP 1999); Levin v. Farmer (In re Farmer) 250 B.R. 427 (Bankr. M.D. FLA. 2000).

We hold that defendant has failed to prove an inability to pay the debts in question.

We turn then to the second exception provided in the statute, whether discharging the debt would result in the benefit to the debtor that outweighs the detrimental consequences to the spouse. We have concluded in the preceding paragraphs that defendant has failed to prove an inability to pay the debts, and the corollary to that conclusion is that he does have the ability to pay them.

Defendant, on the other hand, suffers from permanent brain damage, and it is clear that because of that she cannot pay the debts provided for in the support agreement. From these facts, the court reaches the conclusion that defendant has failed to satisfy the balancing test of §523(a)(15), that is, that debtor has failed to prove by a preponderance of the evidence that a discharge would confer on him a benefit that outweighs the detrimental consequences to plaintiff. See Hart v. Molino (In re Molino), supra.

Defendant's obligation to make those payments specified in Article 7 of the Separation Agreement which have not been paid is therefore not discharged.

Copies to:

Cheryl Swanson
P.O. Box 881
Dublin, OH 43017

Charles Swanson
787 Edwards Road
Lucasville, OH 45648

John R. Stevenson, Esq
116 Poole Street
West Portsmouth, OH 45663

Office of the U.S. Trustee
36 E. Seventh Street
Cincinnati, OH 45202

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