

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
ROANOKE DIVISION

IN RE: MELISSA SOWERS, )  
 )  
 Debtor ) CHAPTER 7  
 )  
 ) CASE NO. 7-04-02837  
 )

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JASON E. MUNCY, )  
 )  
 Plaintiff )

v. )

Adversary Proceeding No. 7-04-00102

MELISSA SOWERS, )  
 )  
 Defendant )

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ORDER

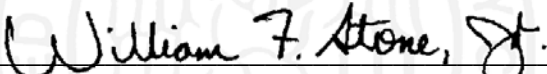
For the reasons stated in this Court's contemporaneous memorandum opinion, it is

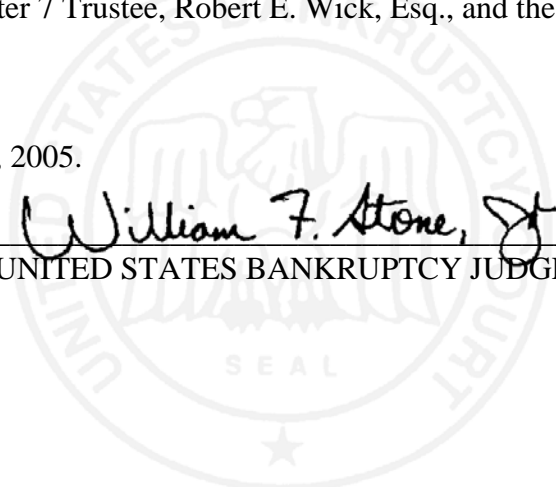
ORDERED

that the Debtor's property settlement obligation to Mr. Muncy is excepted from her Chapter 7 discharge pursuant to 11 U.S.C. § 523(a)(15).

The Clerk is directed to send copies of this order and accompanying memorandum opinion to the Debtor, Melissa D. Sowers; Debtors' counsel, I. Richard Padgett, Esq.; the Plaintiff, Jason E. Muncy; the Chapter 7 Trustee, Robert E. Wick, Esq., and the Office of the United States Trustee.

ENTER this 25<sup>th</sup> day of April, 2005.

  
UNITED STATES BANKRUPTCY JUDGE



IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
ROANOKE DIVISION

IN RE: MELISSA SOWERS, )  
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 Debtor ) CHAPTER 7  
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JASON E. MUNCY, )  
 Plaintiff )  
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 v. ) Adversary Proceeding No. 7-04-00102  
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 MELISSA SOWERS, )  
 Defendant )  
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MEMORANDUM DECISION

The parties to this adversary proceeding were formerly married to each other and both have remarried after their divorce. During their marriage the Debtor, with the consent of her husband, opened a charge account at Sears in his name for the principal purpose, apparently, of buying a set of tools for her son by a prior marriage. As a part of the process which resulted in the termination of their marriage the parties entered into a "Property Settlement Agreement" in which they agreed that the wife, who is the Debtor in the present case, would "pay off the Sears Card as soon as she can", promising to make a payment "on the card each month until it is paid in full." When the Defendant failed to do so to Mr. Muncy's satisfaction, he obtained prior to the filing of the bankruptcy petition a default judgment against her for the account balance in the amount of \$2,782 in the General District Court of Franklin County, Virginia. In this adversary proceeding he seeks to obtain a determination that this obligation should be excepted

from the Debtor's general discharge of her debts pursuant to 11 U.S.C. § 523(a)(15). Upon the following findings of fact and conclusions of law, the Court determines that the Debtor's obligation to her former husband under their Property Settlement Agreement, an obligation which she has been ordered to fulfill by a final divorce decree of the Circuit Court of the City of Salem, Virginia and which furnished the basis for a money judgment rendered against her prior to bankruptcy in the General District Court of Franklin County, Virginia, is excepted from her general discharge by reason of the provisions of 11 U.S.C. § 523(a)(15).

#### FINDINGS OF FACT

There is little factual dispute in the evidence offered by the parties and what little there is does not appear to be material to the decision of the issue. While the parties were married the Debtor obtained the opening of an account with Sears in the name of her then husband, Mr. Muncy. While the precise circumstances of the account being opened are in some dispute, Mr. Muncy does not contest that the account was opened with at least his acquiescence, if not express approval as testified to by the Debtor. The original purpose for opening the account was so that she could buy a set of tools for her son by a prior marriage. Later the parties were divorced and to that end entered into a Property Settlement Agreement dated 12/15/2000 in which the wife, the Debtor in the current bankruptcy case, agreed "to pay off the Sears Card as soon as she can" and that she would "pay on the card each month until it is paid in full." The parties were subsequently divorced by virtue of a Final Decree of Divorce entered by the Circuit Court of the City of Salem on April 25, 2002, which ordered the parties to comply with their obligations under the Property Settlement Agreement. The Debtor did commence making payments on this account, although sometimes the amount of the payment was less than the

currently accruing finance charge. Sometimes her payment was late and this resulted in a late payment charge of \$35 per occurrence. According to Plaintiff's Exhibit C admitted without objection the balance of the Sears account as of December 4, 2002 was \$1,945.84. As a result of the Debtor's payment history on the account and some additional purchases she made to it, the account balance actually increased rather than decreased and by December of 2003 had reached a balance of \$2,501.70. At about this time Mr. Muncy either closed the account or at least cancelled his former wife's use of the account. This step angered the Debtor and she stopped making any payments on the account. Since then the Plaintiff has been making payments on the account and reducing its outstanding balance as his financial circumstances have permitted. Mr. Muncy then procured the issuance of a civil warrant against the Defendant in the General District Court of Franklin County, Virginia and obtained a default judgment against her in the amount of \$2,782. When no payments were forthcoming on this judgment, Mr. Muncy obtained the issuance of a garnishment against his former wife's wages. This action resulted in the Debtor's voluntary Chapter 7 bankruptcy petition in this Court on July 7, 2004.

At the time of the bankruptcy filing the Debtor was working as an accounts payable clerk with a company known as Mastec and Schedule I accompanying her petition indicates that she was earning a gross monthly income of \$2,064 with a monthly take home pay of \$1,548. Schedule J reflected her total monthly expenses as being \$1,838, exceeding her reported net monthly pay by \$290. The Debtor lists two secured debts: one for \$10,000 on a loan secured by her 2000 Mitsubishi Eclipse and one for \$11,300<sup>1</sup> secured by a repossessed 2000

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<sup>1</sup> A Notice of Amendment to the Debtor's Schedules was filed August 13, 2004 which listed a debt to Salem VA Credit Union of \$1,539.60, but no Amended Schedule D or F was filed. Salem VA Credit Union is listed as a creditor on the repossessed Izuzu and the Court will

Isuzu Amigo. Her only other debts are three credit cards with debts totaling \$8,900 and the debt to Mr. Muncy. The Trustee in this case filed his initial report in this case, indicating that it was a “no asset” case, and the Debtor received a discharge of all of her unsecured debts by order of October 15, 2004, leaving her with only the debt on her 2000 Mitsubishi Eclipse. *But see* p. 9, *infra*.

Schedule I noted her marital status as being married, but her husband’s income was not reported on the schedule. According to her testimony at the trial of this proceeding on April 11, 2005, the Debtor’s employer ceased its business operations at the Debtor’s place of employment subsequent to her bankruptcy filing and she has been without regular employment since that time. She further testified that she has been making active efforts to obtain new employment but her efforts have been unavailing so far. The Debtor testified that at the time of trial, she was awaiting a diagnosis from her doctor regarding an injury to her knee which may require surgery. The recovery from this surgery could potentially render the Debtor unable to work for a period of time in the near future, but should not render her disabled. Based on its observation of her during her testimony, the Court finds that there is no substantial reason to believe that she will not be able to obtain new employment within the next few months if she continues her efforts to do so in good faith. Her living expenses during the interim are being paid for by her present husband.

As of the time of trial, Mrs. Sowers was not receiving any income. Mr. Muncy has also remarried and his wife is not employed outside of the home. He owns and runs a small

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presume that this amendment represents the deficiency claim of Salem VA Credit Union, giving the Debtor a total of \$13,221.60 in unsecured debt, including the claim of the Plaintiff.

computer business and he testified that his financial condition is worse now than at the time the Property Settlement Agreement was entered into.

The Court finds that while the Debtor is presently unable to pay the debt arising from the Sears account, she does have the ability to do so over a reasonably period of time. The Court has also reviewed the Property Settlement Agreement and finds that it undertakes in a reasonably comprehensive fashion to settle the mutual support obligations and property rights arising from their marriage and obviously contemplates the termination of their marriage.

#### CONCLUSIONS OF LAW

This Court has jurisdiction of this proceeding by virtue of the provisions of 28 U.S.C. §§ 1334(a) and 157(a) and the delegation made to this Court by Order from the District Court on July 24, 1984. Proceedings to determine the dischargeability of specific debts are by definition “core” bankruptcy proceedings pursuant to 28 U.S.C. § 157(b)(2)(I).

Legal obligations owed to one’s spouse and children from a marriage receive special protection under the Bankruptcy Code. Actual support obligations either to a spouse or former spouse and/or to children are not dischargeable in bankruptcy by virtue of 11 U.S.C. § 523(a)(5). In addition to support obligations, a bankruptcy debtor remains liable, assuming the filing of a “request by of the creditor to whom such debt is owed”, for debt “that is incurred by a 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”, notwithstanding the issuance of a general discharge, unless either of two situations is presented:

(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)(A), (B). This Court has previously considered the issue of the burden of proof in two unpublished opinions<sup>2</sup> and will adhere to its prior approach. As to the burden of proof, this court will follow prior rulings by Judge Anderson of this District and Judge Tice of the Eastern District of Virginia to the effect that the creditor bears the burden of proving that the obligations in dispute come within the parameters of § 523(a)(15), but once that is established, the debtor has the burden of proving the applicability of the “escape” clauses of § 523(a)(15)(A) or (B), treating such clauses as affirmative defenses. This is the approach of the majority of courts which have ruled on the burden of proof issue. *In re Bowen*, 1998 Bankr. LEXIS 649 (Bankr. W.D. Va. 1998); *In re Gordon*, 2001 Bankr. LEXIS 842 (Bankr. E.D. Va. 2001); *In re Metzger*, 232 B.R. 658, 1999 Bankr. LEXIS 847 (Bankr. E.D. Va. 1999). The burden of proof is by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 291 (1991).

The Court concludes that the Property Settlement Agreement is a “separation agreement” within the meaning of 11 U.S.C. § 523(a)(15) and that the Debtor’s obligation thereon is also a debt imposed by a “divorce decree” within the meaning of such section. Therefore Mr. Muncy, the creditor former spouse, has carried his initial burden of proving that the debt arose “in connection with a separation agreement [or] divorce decree”. § 523(a)(15). The Court declines to adopt the argument advanced by the Debtor’s counsel that an obligation

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<sup>2</sup> *Jones v. Belcher (In re Belcher)*, A.P. No. 7-02-00086, Case No. 7-02-02177-WSA; and *Sutherland v. Pruitt (In re Pruitt)*, A.P. No. 7-01-00190, Case No. 7-01-03088-WSA.

must be in the nature of or similar to alimony or support in order to be covered by § 523 (a)(15) because such an interpretation is inconsistent with the plain words of the statute. Accordingly, the burden of persuasion now rests upon the Debtor to establish that the debt is dischargeable because either (1) she lacks the ability to pay it, or (2) the benefit to herself in discharging the debt outweighs the detrimental consequence that discharge would inflict on Mr. Muncy.

The legislative history to § 523(a)(15) explains why non-support obligations should not be dischargeable in certain situations:

This subsection will make such obligations nondischargeable in cases where the debtor has the ability to pay them and the detriment of the nondebtor spouse from their nonpayment outweighs the benefit to the debtor of discharging such debts. In other words, the debt will remain dischargeable if paying the debt would reduce the debtor's income below that necessary for the support of the debtor and the debtor's dependents... The debt will also be discharged if the benefit to the debtor of discharging it outweighs the harm to the obligee. For example, if a nondebtor spouse would suffer little detriment from the debtor's nonpayment of an obligation required to be paid under a hold harmless agreement (perhaps because it could not be collected from the nondebtor spouse or because the nondebtor spouse could easily pay it) the obligation would be discharged. 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.

quoted at 4 Collier on Bankruptcy § 523.21 at 523-106 (15<sup>th</sup> ed. rev.).

Ability to Pay: § 523(a)(15)(A)

The Court concludes that the correct time to determine the debtor's ability to pay the marital obligations in dispute is the time of the trial rather than the filing date of the petition. *See In re Morris*, 193 B.R. 949, 952-3 (Bankr. D.D. Cal. 1996). The Court also concludes, however, that it should adopt the "totality of the circumstances" approach utilized by Judge Tice in the *Metzger* case, *supra*. *See also In re Craig*, 196 B.R. 305 (Bankr. E.D. Va. 1996). In short,



it should look at the debtor's circumstances at the time of trial but take into account any changes, whether positive or negative in nature, which seem reasonably likely to occur and will affect the debtor's ability over a period of time to pay the obligations. Determining the ability to pay a significant obligation is essentially a forward-looking enterprise and accordingly the Court ought to make the best estimation possible of what that future holds for the debtor financially, very much akin to determining whether a debtor's chapter 13 plan is feasible or whether a chapter 7 debtor can pay an educational loan obligation without "undue hardship."

The Court concludes that Mrs. Sowers has not borne her burden of proving that she is unable to pay the entire obligation to Mr. Muncy because the Court is not persuaded that it is likely that she will not be able to obtain new employment which will permit her to satisfy such obligation. For purposes of analysis under § 523(a)(15), it is appropriate for the Court to consider the Debtor's total household income, which includes income earned by her spouse. *In re Ballard*, 2001 Bankr. LEXIS 1661 at 66-67 (Bankr. E.D. Va. 2001), *Sutherland v. Pruitt*, Docket # 7-01-00190 (Bankr. W.D. Va. 2002). The Debtor failed to offer any such evidence. The evidence before the Court is insufficient for the Court to conclude that the Debtor has proved by a preponderance of the evidence that she is unable to pay the judgment which Mr. Muncy obtained against her.

#### Benefit to the Debtor vs. Detriment to Former Spouse

Several factors are relevant to analysis under § 523(a)(15)(B), including: the income and expenses of both parties, whether the non-debtor spouse is jointly liable on the debts, the number of dependents, the nature of the debts, the reaffirmation of any debts, and the non-debtor spouse's ability to pay. *In re Metzger*, *supra* 232 B.R. at 665. In this case the application

of these factors to the evidence presented may be summarized as follows:

1. The Debtor's current level of income and expenses does not permit payment of the Sears account debt obligation, but it is probable that she will be able to do so over a reasonable period of time. According to Mr. Muncy's testimony, his present wife is currently dependent upon him for support and he is struggling financially.

2. Mr. Muncy is legally and primarily obligated to Sears to pay the full balance of the account.

3. There are no minor children of either party. Although the Debtor testified that her 20 year old son and his daughter live with her, it was not demonstrated that either of them was dependent upon her. Mr. Muncy's wife is dependent upon him.

4. The nature of the debt is a revolving charge account owed to Sears.

5. There is no evidence of reaffirmation of any debts. The Debtor's bankruptcy case file contains her Statement of Intention to reaffirm a secured debt to Triad Financial Corp. for a 2000 "Mistubishi" [sic] Eclipse, but does not reflect that any actual reaffirmation agreement was filed with the Court and the Debtor received a discharge on October 15, 2004.

6. Mr. Muncy is able, although not easily, to pay the debt over time.

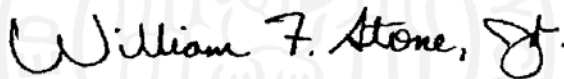
Some cases applying the relative benefit versus harm standard of § 523(a)(15)(B) have adopted the "standard of living" test. Under this test, a court is to compare the parties' relative standards of living to determine if the debtor's standard of living will fall materially below that of the creditor's standard of living if the debt is not discharged. *In re Molino*, 225 B.R. 904, 908-9 (B.A.P. 6<sup>th</sup> Cir. Ohio 1998). Applying this test to the present case, the Court concludes that the evidence fails to establish that the Debtor's standard of living would fall

below that of Mr. Muncy if she were obliged to pay the entire debt within a reasonable period of time. While she was married to Mr. Muncy, the Debtor had a good job and earned a respectable income. There is insufficient evidence to persuade the Court that such is now beyond the Debtor's grasp.

The Bankruptcy Court has been characterized by the Supreme Court of the land as one of "equity." Young v. United States, 535 U.S. 43, 50, 122 S. Ct. 2689 (2002). It is apparent that Congress intended for Bankruptcy Courts to attempt to do equity<sup>3</sup> between competing but entirely legitimate interests by requiring them in applying § 523(a)(15) to consider the debtor's ability to pay as well as the relative consequences to the parties resulting from discharging a particular marital property settlement obligation or refusing to do so. The Court concludes that the Debtor has not carried the burden of proof to establish either that she is unable to pay the Sears account debt or that the benefit to her from not having to pay such debt outweighs the detriment which would be suffered by Mr. Muncy in losing his right to require the Debtor to pay that which she freely and properly agreed to pay.

An order in accord with this opinion shall be entered contemporaneously with its signing below.

This 25<sup>th</sup> day of April, 2005.



William F. Stone, Jr.

William F. Stone, Jr.  
U.S. Bankruptcy Judge

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<sup>3</sup> "Because the 'balance of the equities' test under § 523(a)(15)(B) required the bankruptcy court to reach an equitable conclusion rather than a factual or legal one, we review the decision for an abuse of discretion." In re Myrvang, *supra*, 232 F.3d at 1121.