

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF TENNESSEE
WINCHESTER DIVISION

In re:

No. 95-14763
Chapter 7

JAMES ALLEN HOLT, JR.

Debtor

JENNY RENEE NASH HOLT

Plaintiff

v.

Adversary Proceeding
No. 96-1035

JAMES ALLEN HOLT, JR.

Defendant

MEMORANDUM

Appearances: Robert L. Huskey, Manchester, Tennessee, Attorney for Plaintiff

Lena Ann Buck, Smithville, Tennessee, Attorney for Defendant

R. THOMAS STINNETT, UNITED STATES BANKRUPTCY JUDGE

The plaintiff obtained a divorce from the debtor, Mr. Holt, about two months before he filed bankruptcy. The divorce decree requires the debtor to pay certain debts.

The complaint in this adversary proceeding alleges that five of the debts cannot be discharged in the debtor's bankruptcy case. The debtor's answer admits that four of the debts are not dischargeable. This leaves only one debt in question. The divorce decree ordered the debtor to pay a fee to the plaintiff's attorney for representing her in the divorce case. The plaintiff has filed a motion for summary judgment with regard to the debt for the attorney's fee.

The court can grant summary judgment to the plaintiff only if there is no genuine issue of material fact, and the plaintiff is entitled to judgment as a matter of law. *Fed. R. Bankr. P. 7056; Fed. R. Civ. P. 56(c)*.

Section 523(a) of the Bankruptcy Code contains two exceptions from discharge for debts arising in connection with a divorce. The old exception appears in paragraph (a)(5). 11 U.S.C. § 523(a)(5). It excepts a debt from discharge only if it is actually in the nature of alimony, maintenance, or support. 3 Lawrence P. King, et al., *Collier on Bankruptcy* ¶ 523.15[5] (15th ed. 1996).

The state courts also have jurisdiction to decide cases under the old exception in paragraph (a)(5), and there is no time limit for filing a complaint. 11 U.S.C. § 523(c); *Rosenbaum v. Cummings (In re Rosenbaum)*, 150 B.R. 994, 995-996 (E. D. Tenn. 1993).

The new exception from discharge appears in paragraph (a)(15). 11 U.S.C. § 523(a)(15). It became effective on October 22, 1994 and applies only to cases filed after that date. 3 Lawrence P. King, et al., *Collier on Bankruptcy* ¶ 523.19E, note 1 (15th ed. 1996). It applies to this case since it was filed in November 1995.

The federal courts have exclusive jurisdiction of claims under the new exception in paragraph (a)(15). The complaint must be filed in the bankruptcy court within the deadline set by the Code and Rules. 11 U.S.C. § 523(c)(1); *Fed. R. Bankr. P.* 4007(c); *Dollar Corp. v. Zebedee (In re Dollar Corp.)*, 25 F.3d 1320, 1325 (6th Cir. 1994); *In re Smither*, 194 B.R. 102, 106 (Bankr. W. D. Ky. 1996).

Paragraph (a)(15) did not replace or restrict the scope of the old exception in paragraph (a)(5). Paragraph (a)(15) applies, however, only if the debt is not excepted from discharge under paragraph (a)(5). In other words, the new exception may apply to debts that are *not* actually in the nature of alimony, maintenance, or support.

The debt for the attorney's fee may be excepted from discharge under the old exception if the evidence shows that the debt is actually in the nature of alimony, maintenance, or support. *Silverstein v. Glazer (In re Silverstein)*, 186 B.R. 85 (Bankr. W. D. Tenn. 1995); *Martin v. Morello (In re Morello)*, 185 B.R. 753 (Bankr. E. D. Tenn. 1995); *Chism v. Chism (In re Chism)*, 169 B.R. 163, 170 (Bankr. W. D. Tenn. 1994). If the debt is not actually in the nature of alimony, maintenance or support, then it may still be excepted from discharge under the new exception.

The plaintiff's complaint relies generally on § 523. The complaint does not expressly rely on the old exception or the new exception. The plaintiff has filed two briefs in support of the motion for summary judgment. These briefs seem to rely solely on the new exception. On the other side, the debtor has argued that the debt should be discharged because it does not come within the old exception. This leaves the court wondering whether the debtor is relying on both exceptions from discharge or only the new exception in paragraph (a)(15).

The debtor contends the old exception does not apply because he can pay the debt directly to the plaintiff's attorney. According to the debtor, this means the debt is not owed to the plaintiff as required by the old exception. The debtor has stipulated, however, that the plaintiff will be liable for the fee if the debtor fails to pay it. *See Martin v. Morello (In re Morello)*, 185 B.R. 753 (Bankr. E. D. Tenn. 1995). Furthermore, the plaintiff has not expressly conceded the correctness of the debtor's argument on this point. Thus, the court can not say that the parties have eliminated the old exception as a basis for the plaintiff's complaint.

In light of this confusion in the pleadings, the court declines to make any ruling under paragraph (a)(5) at this time. The court will deal only with the question of summary judgment under the new exception, § 523(a)(15), which provides:

(a) A discharge . . . 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 federal 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 parties have stipulated the authenticity of the divorce decree. It provides:

James Allen Holt, Jr. is ordered and directed to pay Ms. Holt's attorney of record the sum of \$1,750.00, toward her attorney's bill. This amount may be paid directly to said attorney but by check, money order, or other verifiable means.

The parties have stipulated that the plaintiff will be liable to her attorney for the fee if the debtor does not pay it.

Section 523(a)(15) does not expressly assign the burden of proof on any issue to any party. The statute may require the creditor to prove that the debtor is able to to pay the debt or that the benefit of a discharge to the debtor will outweigh the detriment to the creditor. Some courts, however, shift the burden of proof to the debtor once the creditor has proved: (1) the debt is marital debt as described in paragraph (a)(15), and (2) the debt is not excepted from discharge under § 523(a)(5). *In re Smither*, 194 B.R. 102, 106-107 (Bankr. W. D. Ky. 1996). Under this approach, the debtor has the burden of proving inability to pay or that the benefit of a discharge will not outweigh the detriment to the creditor.

Without regard to the burden of proof, the pleadings and the stipulations do not allow summary judgment for the plaintiff under (a)(15). They fail to show the debt is not within the old exception. In addition to the stipulations, the court can take judicial notice that the debtor has received a discharge of his debts. This fact does not prove the exception. It does not show that the debtor is able to pay the debt or that the benefit of a discharge to the debtor will outweigh the detriment to the plaintiff. The plaintiff's brief in effect recognizes this problem by arguing facts not in the record. The evidence is not sufficient to support summary judgment for the plaintiff under § 523(a)(15). There are genuine issues of material fact. The court will enter an order denying the motion.

This Memorandum constitutes findings of fact and conclusions of law as required by Fed. R. Bankr. P. 7052.

At Chattanooga, Tennessee.

BY THE COURT

[entered 3/18/97]

R. THOMAS STINNETT
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF TENNESSEE

In re:

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JAMES ALLEN HOLT, JR.

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ORDER

In accordance with the Memorandum entered by the court,

It is ORDERED that the plaintiff's Motion for Summary Judgment is DENIED.

ENTER:

BY THE COURT

[entered 3/18/97]

R. THOMAS STINNETT
U.S. BANKRUPTCY JUDGE