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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re Case No. 98-56807-JRG-CZ
JAMES R. MOORE, SR.,
Debtor.
_____/
SUSAN P. ZENGER, Adversary No. 98-5538
Plaintiff,
vs.
JAMES R. MOORE, SR.,
Defendant.
_____/

MEMORANDUM DECISION

I. INTRODUCTION

This case involves the dischargeability of a debt arising from the dissolution of the marriage between plaintiff and defendant. Plaintiff contends that the obligation is nondischargeable based on the provision of 11 U.S.C. § 523(a)(15) which deals with the debtor's ability to pay and an evaluation of the parties' relative circumstances. For the reasons set forth below, the Court finds for the plaintiff.

1 **II. FACTUAL BACKGROUND**

2 Defendant James Moore operated a business known as Moore and
3 Sons Mercury Outboard Motors which was started in approximately
4 1973 in Santa Cruz, California. In addition to owning the
5 business, Moore owned a one-half interest in the building and land
6 on which it was situated.

7 Moore was married to plaintiff Susan Zenger through 1990. In
8 1991 Moore and Zenger separated and their marriage was terminated
9 by a Judgment of Dissolution of Marriage entered on October 9,
10 1991. Moore remarried seven months later in May 1992. His second
11 wife is known as Cynthia Mello Moore (hereinafter referred to as
12 "Cynthia"). Although Moore's first marriage was formally
13 terminated in 1991, a variety of issues remained unresolved. Two
14 years later, in August 1993, these issues were tried in the Santa
15 Cruz County Superior Court. Judge Agliano found that Moore's
16 monthly income before taxes was approximately \$7,000. Based on
17 this income he ordered Moore to pay child support of \$700 per month
18 and spousal support of \$1,500 per month, commencing September 1,
19 1993. He also found that Moore was then delinquent on past child
20 and spousal support in the amount of \$21,663. Judge Agliano
21 further ordered Moore to pay Zenger \$13,175 to equalize the
22 division of community property between the parties. Finally, he
23 ordered Moore to pay Zenger \$15,000 as and for attorney's fees.
24 Based on these rulings, Moore's financial obligation to Zenger as
25 of August 31, 1993 totaled \$49,838.

26 Moore apparently did not like the approach taken by Judge
27 Agliano. The trial had taken place in August 1993, but Judge
28 Agliano did not file his written ruling until January 1994. In the

1 interim, November 1993, Moore transferred the business real
2 property to Cynthia. His tax returns confirm that at the end of
3 1996 he transferred his business, Moore and Sons Mercury Outboard
4 Motors, to Cynthia although he has continued to work there until
5 the present time. Following the transfer, his salary was reduced
6 to \$902 per month. Moore testified that this amount was set by the
7 new owner of the business, his wife Cynthia. Moore lives in a
8 home that is also owned by Cynthia. In essence he has made himself
9 judgment-proof through the transfers.

10 The battle over Moore's obligations continued with Zenger
11 attempting to collect and Moore doing his best to avoid payment.
12 By August 1998, five years later, Moore's obligation to Zenger had
13 grown from \$49,838 to \$145,125. He still owed the equalizing
14 payment which was then \$15,750 and attorney's fees which then
15 amounted to \$22,500. His child support arrearage had grown to
16 \$24,340 and spousal support to \$82,535. His determination not to
17 pay Zenger is further evidenced by the Superior Court having found
18 Moore guilty of 13 counts of contempt and sentenced him to serve
19 65 days in jail which it appears he served. A 1998 hearing added
20 another \$2,000 to Moore's obligation, bringing the total to
21 \$147,125.

22 The amount owed by Moore appears to have been reduced by only
23 one payment in the amount of \$31,691. However, this was really an
24 involuntary payment. When Moore transferred the business real
25 property to Cynthia, it already had a judgment lien on it in favor
26 of Zenger which had been recorded before the transfer. Five years
27 later, the payment was made to remove this lien.

28 **III. ISSUES PRESENTED**

1 The parties have stipulated that the portion of Moore's
2 obligation which is labeled support is nondischargeable pursuant
3 to 11 U.S.C. § 523(a)(5). This action involves the remainder of
4 the obligation.

5 The issue presented is whether the equalizing payment and
6 attorney's fees can be discharged pursuant to 11 U.S.C. section
7 523(a)(15) when the debtor is alleged to have voluntarily and
8 fraudulently deprived himself of potential income so that he lacks
9 the ability to pay the debt.¹

10 **IV. DISCUSSION**

11 The dischargeability of marital obligations other than
12 alimony, maintenance or support is governed by 523(a)(15) under
13 which the debt will be discharged if *either* one of the following
14 conditions is met:

15 (A) The debtor does not have the ability to pay such debt
16 from income or property of the debtor not reasonably
17 necessary to be expended for the maintenance or support
18 of the debtor or a dependent of the debtor... or

19 (B) discharging such debt would result in a benefit to
20 the debtor that outweighs the detrimental consequences to
21 a spouse, former spouse, of child of the debtor.

22 11. U.S.C. § 523(a)(15)(A)& (B) (1994).

23 **A. The Defendant Has The Ability To Pay**

24 Relying on *In re Jodoin*, 196 B.R. 845 (Bankr. E.D. Cal. 1996)
25 which discussed an allocation of support from a former husband who
26 engaged in sub-rational or self-destructive economic behavior,
27 Zenger argues that Moore has not met the burden of showing his

28 ¹Plaintiff also raised a second issue of whether the portion of the obligation
labeled attorney's fees is, in fact, an award of support and therefore
nondischargeable under § 523(a)(5). Since this Court holds that the subject fee
is nondischargeable under §523(a)(15), this issue is moot and need not be addressed.

1 inability to pay due to similar behavior. Based on defendant's
2 continuous failure to modify support, the dismissal of his previous
3 Chapter 13 petition, and the State Court's finding of Moore's
4 earning capacity to be \$7,000 per month as of 1993, plaintiff
5 argues that Moore has fraudulently deprived himself of any valuable
6 asset and income so as to render himself unable to pay the debt.
7 In essence, plaintiff argues that the defendant has acted in bad
8 faith.

9 Moore counters with an argument based on present income and
10 expense figures. He argues that based on his net income of \$902
11 per month and his current wife's income of \$3,800 per month and
12 monthly expenses of \$5,571, he does not have the ability to pay the
13 equalizing payment and attorney's fees under the widely used
14 "disposable income" test set forth in 11 U.S.C. § 1325(b).² Most
15 courts have used the "disposable income" standard to assess the
16 ability to pay. Disposable income means "income which is received
17 by the debtor and which is not reasonably necessary to be expended
18 (A) for the maintenance or support of the debtor or a dependent
19 of the debtor . . ." 11 U.S.C. § 1325(b)(2) (1994). Under this
20 test and based on the figures submitted by defendant, defendant
21 suffers a shortfall of \$869 per month and therefore arguably has
22 no ability to pay.

23 Plaintiff argues that "factors relating to 'ability to pay'
24 under § 523(a)(15)(A) [should be construed] more flexibly than the
25 same factors under § 1325(b) . . ." *In re Jodoin*, 196 B.R. at 854.

27 ² Defendant concedes that the ability to pay is determined at the time of trial. See
28 *In re Haines*, 210 B.R. 586, 591 (Bankr. S.D. Cal. 1997) and *In re Jodoin*, 209 B.R. 132, 142 (9th
Cir. B.A.P. 1997).

1 This is because "the chapter 13 requirement that the plan has been
2 '*proposed in good faith*' does not have an explicit chapter 7
3 analogue that is designed to *police abuse*." *Id.* at 855. (quoting
4 Johnson, 501 U.S. at 87-88) (emphasis added).

5 The Bankruptcy Appellate Panel of the Ninth Circuit, in
6 hearing the appeal of *In re Jodoin*, agreed that the disposable
7 income test is the appropriate test even though some courts have
8 been unwilling to use this "in the divorce situation where parties
9 have been known to sacrifice their own financial well-being to
10 spite their ex-spouse." *In re Jodoin*, 209 B.R. at 142. The
11 disposable income test continues to be appropriate because "a
12 proper application of the test should take into account the
13 prospective income that the debtor *should earn* and the debtor's
14 reasonable expenses." *Id.* (emphasis added). In this regard, there
15 is no reason to believe the defendant could not have continued his
16 \$7,000 per month income through the present time. His testimony
17 to the contrary is simply not credible.

18 Although "good faith" is not explicitly stated in the statute,
19 a consideration of the true intent of the statute supports the
20 proposition that "good faith" be implied. As the Supreme Court put
21 it, "a central purpose of the Code. . . is to [let] insolvent
22 debtors reorder their affairs, make peace with their creditors, and
23 enjoy 'a new opportunity in life . . .'" but courts should limit
24 "the opportunity for a completely unencumbered new beginning to the
25 '*honest but unfortunate debtor*.'" *Grogan v. Garner*, 498 U.S. 279,
26 286-87 (1991) (emphasis added). Indeed, to disregard the element
27 of "good faith" may thwart the true intent of the Code. "The plain
28 meaning of legislation should be conclusive, except in the 'rare

1 case [in which] the literal application of a statute will produce
2 a result demonstrably at odds with the intentions of its
3 drafters.'" *In re Huddelston*, 194 B.R. 681, n.13 (Bankr. N.D. Ga.
4 1996) (quoting *Griffin v. Oceanic Contractors Inc.*, 458 U.S. 564,
5 571 (1982)).

6 Courts in other circuits have concluded that § 523(a)(15)(A)
7 calls for an expanded scope of inquiry and, as such, courts must
8 give attention to a panoply of relevant considerations, including
9 but not limited to:

- 10 (1) debtor's "disposable income" as measured at the time
11 of trial;
- 12 (2) the presence of more lucrative employment
13 opportunities which might enable the debtor fully to
14 satisfy his divorce-related obligations;
- 15 (3) the extent to which the debtor's burden of debt will
16 be lessened in the near term; and
- 17 (4) the extent to which the debtor previously has made
18 a *good faith* effort to fully employ towards
19 satisfying the debt in question.

20 *Matter of Cleveland*, 198 B.R. 394, 398 (Bankr. N.D. Ga. 1996)
21 (quoting *In re Huddelston*, 194 B.R. 681, 688 (Bankr. N.D. Ga.
22 1996). "[I]f surveying these broader considerations reveals an
23 actual ability to perform, the debtor cannot avail himself of
24 section 523(a)(15)(A)'s safe harbor." *Id.*

25 One Court distinguished the concept of "ability to pay" from
26 "earning capacity" by stating that the question of "earning
27 capacity" must be answered before the question of the "ability to
28 pay". See *In re Florio*, 187 B.R. 654, 657 (Bankr. W.D. Mo. 1995).
If the debtor "voluntarily reduced her income postpetition and now
asks the Court to find that she does not have the ability to pay

1 a debt, [t]he Court cannot sanction such behavior." *Id.*

2 If such voluntary conduct were allowed to become successful,
3 the purpose of the statute could be frustrated on the mere whim of
4 a debtor. Considering all of these factors, the Court finds that
5 the defendant has failed to meet his burden of proof in
6 demonstrating he does not have the ability to pay plaintiff the
7 subject obligations.

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**B. The Benefit To Plaintiff Outweighs The Detriment To
Defendant**

10 Even if the Court finds that the debtor has the ability to pay
11 under § 523(a)(15)(A), the debt can still be discharged if the
12 debtor meets the test set forth in § 523(a)(15)(B) by demonstrating
13 that the discharge will be more beneficial to the debtor than
14 detrimental to plaintiff.

15 In determining whether the benefit outweighs the detriment,
16 courts have normally examined the totality of the circumstances and
17 considered factors including:

- 18 (1) the income and expenses of both parties;
- 19 (2) whether the nondebtor spouse is jointly liable on the
20 debts;
- 21 (3) the number of dependents;
- 22 (4) the nature of the debts;
- 23 (5) the reaffirmation of any debts; and
- 24 (6) the nondebtor spouse's ability to pay.

25 *See e.g. In re Morris*, 193 B.R. 949, 954, n.8 (Bankr. S.D. Cal.
26 1996), *In re Haines*, 210 B.R. 586, 594 (Bankr. S.D. Cal. 1997), *In*
27 *re Florio*, 187 B.R. 654, 658 (Bankr W.D. Mo. 1995), *In re Hill*, 184
28 B.R. 750, 756 (Bankr. N.D. Ill. 1995), and *In re Carroll*, 187 B.R.

1 197, 201 (Bankr. S.D. Ohio 1995).

2 Defendant testified that he is currently working for Moore and
3 Son Outboard Motors, the business that he voluntarily transferred
4 to his current wife, and has a monthly income of \$902. His current
5 spouse's income is \$3,800 and their joint expenses are \$5,571,
6 leaving them with a monthly shortfall of \$869. Conversely,
7 plaintiff is presently a mortgage loan processor. She has a monthly
8 income of \$2,600 and monthly expenses of \$1,470, leaving her with
9 a monthly disposable income of \$1,130. Undoubtedly, a literal
10 application of the above figures would be favorable to the
11 defendant.

12 Some courts, however, have used a more detailed analysis such
13 as that set forth in *In re Smither* where the cases involved debtors
14 artificially diminishing their ability to repay obligations. These
15 courts have included an inquiry of "[w]hether the parties have
16 acted in *good faith* in the filing of the bankruptcy and the
17 litigation of the 11 U.S.C. § 523(a)(15) issues." See e.g. *In re*
18 *Smither*, 194 B.R. 102, 111, (Bankr. W.D. Ky. 1996), *In re Molino*,
19 225 B.R. 904, 909 (6th Cir. B.A.P. 1998), and *In re Asbill*, 236 B.R.
20 192, 197 (Bankr. D.S. C. 1999).

21 Since the dissolution between plaintiff and defendant in 1991,
22 defendant has been delinquent on spousal and child support which
23 now approximates \$106,875. He also owes plaintiff an equalizing
24 payment of \$15,750 and attorney's fees which are now \$24,500. The
25 large accumulation of debt is the result of defendant's
26 determination not to pay and is due to his voluntary transfer of
27 assets to his current wife and the monthly salary of \$902 which was
28 set by her.

1 Given that the defendant is underemployed for the sole purpose
2 of avoiding his obligations to plaintiff, the Court will take the
3 debtor's underemployment into consideration for the purpose of
4 523(a)(15)(B). Where the debtor has voluntarily chosen to be
5 underemployed, or transferred his valuable property, the court must
6 look at what the debtor could have earned instead of his
7 artificially created income. See *In re Florio*, 187 B.R. at 658
8 (using debtor's income as surgical technician rather than the zero
9 income that she gets from the grooming business that she
10 voluntarily enters into); *In re Asbill*, 236 B.R. at 198 (adopting
11 family Court's finding of earning capacity of \$3,600 per month when
12 debtor voluntarily lowers his income from \$43,000 per year to
13 \$25,500 per year and transfers his business to his current wife);
14 *In re Huddelston*, 194 B.R. at 690 (holding debtor's actual income
15 of \$65 per month while having a capacity to earn more from other
16 lucrative opportunities makes him fail the 523(a)(15)(B) test); *In*
17 *re Smither*, 194 B.R. at 111 (holding that voluntary reduction
18 should still be considered by the Court in making the 523
19 (a)(15)(B) balancing test); and *In re Greenwalt*, 200 B.R. 909, 913
20 (using the income from the job that debtor left voluntarily days
21 before the trial on 523(a)(15)).

22 This approach is mandated because "[d]ischarging this
23 obligation would simply provide Debtor with additional disposable
24 income to 'use at his discretion' [and] [t]his is not the type of
25 benefit that § 523(a)(15)(B) ought to protect." *In re Carroll*, 197
26 B.R. at 201. Therefore, utilizing the monthly income of \$7,000
27 found by the State Court, the Court concludes that Moore has a
28

1 monthly disposable income of \$5,229³, an amount considerably larger
2 than Zenger's.

3 In light of the totality of the circumstances, including the
4 State Court's finding of a monthly salary of \$7,000, bad faith in
5 defendant's underemployment, the transfer of assets and refusal to
6 pay support for over ten years, the Court finds that the defendant
7 has failed to meet his burden under 523(a)(15)(B) of proving that
8 the benefit to him of discharging the obligations outweigh the
9 detriment to plaintiff.

10 **IV. CONCLUSION**

11 For the above reasons, the equalizing payment and attorney's
12 fees owed to Zenger by Moore cannot be discharged pursuant to 11
13 U.S.C. section 523(a)(15). The foregoing shall constitute the
14 Court's findings of fact and conclusions of law pursuant to
15 Bankruptcy Rule 7052 and Federal Rule 52. Counsel for plaintiff
16 shall lodge a proposed form of judgment with the Court within 15
17 days. It need not contain the findings of fact and conclusions of
18 law which the Court has made in this Memorandum Decision.

19 DATED: _____

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JAMES R. GRUBE
UNITED STATES BANKRUPTCY JUDGE

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28 ³\$7,000 (debtor's income) plus \$3,800 (income of debtor's spouse) minus \$5,571
(monthly expenses) equals \$5,229 (disposable income).

1 Adversary No. 98-5388

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5 UNITED STATES BANKRUPTCY COURT
6 FOR THE NORTHERN DISTRICT OF CALIFORNIA

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7 CERTIFICATE OF SERVICE

7

8 I, the undersigned, a regularly appointed and qualified
9 Judicial Assistant in the office of the Bankruptcy Judges of the
10 United States Bankruptcy Court for the Northern District of
11 California, San Jose, California hereby certify:

10

11 That I, in the performance of my duties as such Judicial
12 Assistant, served a copy of the Court's **MEMORANDUM DECISION** the
13 United States Mail, First Class, postage prepaid, at San Jose,
14 California on the date shown below, in a sealed envelope addressed
15 as listed below.

13

14 I declare under penalty of perjury under the laws of the
15 United States of America that the foregoing is true and correct.

14

15

16 Executed on _____ at San Jose, California.

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18 _____
LISA OLSEN

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