

MAY 19 2006

U.S. BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA**

7	In re:)	
8	JOE PAUL GEORGE and)	Chapter 7
9	NANCY KOMASSA GEORGE,)	
10	Debtors.)	Case No 0-05-01144-JMM
11	_____)	
12	CINDY L. GEORGE,)	Adv. No. 05-00052
13	Plaintiff,)	
14	v.)	MEMORANDUM DECISION
15	JOE PAUL GEORGE,)	(Opinion to Post)
16	Defendant.)	
17	_____)	

I. INTRODUCTION

Pending before the court is Plaintiff's Complaint under 11 U.S.C. § 523(a)(15)¹ to have Joe Paul George's ("George") indemnification obligation under a marital settlement agreement declared non-dischargeable. George failed to prove that he is unable to pay that obligation and support himself and his dependents or that the detriment to him of

¹ Absent contrary indication, all "Code," chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, prior to its amendment by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23, as the case from which this decision arises was filed before its effective date (generally 17 October 2005).

1 honoring the obligation, outweighs the detriment to Plaintiff if the obligation is
2 discharged. Accordingly, Judgment will be entered for Plaintiff.
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5 **II. FACTUAL AND PROCEDURAL HISTORY**

6 George, who filed a joint Chapter 7 petition with Nancy George (“Current Wife”)
7 in August 2005, previously entered into a marital settlement agreement on December 13,
8 2004 (“Marital Settlement Agreement”) with Cindy George (“Plaintiff”), resulting in his
9 divorce from Plaintiff. Prior to the divorce, in April 2004, George moved to Oregon with
10 the Current Wife to visit his mother and start a new life. George testified that he had
11 problems obtaining regular employment in Oregon that would provide him with steady
12 income to pay his expenses. The Debtors moved to three different places in Oregon
13 looking for permanent employment. George testified that he experienced challenges in
14 finding a job due to his poor health, including severe diabetes coupled with many adverse
15 side effects, such as poor memory.
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19 In December 2004, George returned to Wisconsin to appear at a hearing finalizing
20 his divorce from Plaintiff. At that time, George and Plaintiff entered into the Marital
21 Settlement Agreement. Section V, titled Debts and Financial Obligations, states that:
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23 [E]ach party shall be solely responsible for payment of any and all debts and
24 liabilities incurred in his or her name after the date of filing this action, namely,
25 May 5, 2004. Each party shall be responsible for the following debts and liabilities
26 and shall hold the other harmless on the payment thereof...
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1 (Tr. Exhibit D-1, pg. 4). The obligations (“Marital Debt”) assigned to George were as
2 follows:

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4	- American Express	\$ 2,967
5	- Chase	\$ 7,444
6	- Kunda loan (Plaintiff’s parents)	\$ 2,300
7	- GM Card	\$ 4,728
8	- Atty fees (for Phillips-unrelated case)	\$ 3,350
	- St. Joe’s Hospital	\$ 136
		<u>\$20,925</u>

9 In December 2004, George found an opportunity for a husband and wife team to
10 work as co-managers at Desert Rose, an assisted-living facility in Yuma, Arizona. The
11 Debtors moved to Yuma to start work in February 2005.

12
13 On August 15, 2005, the Debtors filed a petition for Chapter 7 relief. On
14 August 22, 2005, Plaintiff filed this adversary proceeding pro se. At the trial held on
15 March 10, 2006, the only witnesses were the Debtors and Plaintiff.

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17 **A. DEBTORS’ INCOME AND EXPENSES**

18 The Debtors’ net monthly take-home pay is \$2,904 per month as listed on
19 Schedule I.

20
21 The Debtors testified at trial about their monthly expenses. That testimony is
22 summarized below:

23 1. Medical expenses

24 The Debtors listed George’s monthly medical expenses as \$1,051 on his pre-trial
25 statement and \$1,000 on Schedule J. On cross-examination, George admitted that the
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1 medical expense figure was overstated by approximately \$350, because once the
2 insurance deductible was met in the first month or two of the year, George's insurance
3 paid 80 to 100 percent of most of his medical expenses. Therefore, the monthly amount
4 for out-of-pocket medical expenses due to prescriptions and other items for George's
5 diabetic condition is \$697.
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8 2. Telephone expenses

9 The amount of \$150 for telephone expenses was comprised of calling cards
10 purchased to call family and friends in Wisconsin each month. George attributed this
11 expense primarily for calls to the Current Wife's mother, who lives in Wisconsin.
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13 3. Food

14 George testified that the Debtors spent \$300 a month on food and \$100 on dining
15 out. Plaintiff questioned these amounts since the Debtors' meals are paid for by their
16 employer. George responded that the Debtors had to go out to eat at least once per month
17 to get away from the pressures placed on them by the residents of the retirement
18 community where they lived and worked.
19

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21 4. Storage fees

22 The Debtors pay \$38 per month to store personal and household goods which they
23 had brought with them when they moved to Yuma, but do not fit into their employer-
24 provided 584-foot apartment.
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1 9. Transportation

2 The Debtors listed \$400 for transportation, not including car payments, on their
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4 Schedule J. On cross-examination, George testified that the Debtors spent \$50 a week, or
5 \$400 a month, on gas because they had to get away from the retirement facility where
6 they lived and worked, taking weekend drives or trips.

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8 **B. PLAINTIFF'S INCOME AND EXPENSES**

9 Plaintiff is employed as an office manager, and her monthly take home pay is
10 \$2,830 per month. Plaintiff detailed her monthly expenses in Plaintiff's Exhibit E.
11 Expenses listed include a \$1,200 mortgage payment and approximately \$430 for property
12 taxes, utilities, and other associated costs for upkeep of the house she formerly shared
13 with George. Plaintiff testified she owns a 1999 Dodge ,which she uses to get to work.
14 She testified that the car is in dire need of maintenance. She listed a monthly expense of
15 \$150 for car maintenance and fuel.
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18 Plaintiff also pays approximately \$730 a month on the various debts assigned to
19 her in the Marital Settlement Agreement. On cross-examination, Plaintiff acknowledged
20 that she has not paid any of the Marital Debt. However, Plaintiff testified that her parents
21 have threatened to sue her for the entire amount due them, and attorney Phillips has
22 threatened to send his matter to collection.
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1 disposable income test outlined in § 1325(b) provides “an excellent starting point for
2 measuring a debtor’s ability to pay under § 523 (a)(15)(B).” Id. Further, the Jodoin court
3 held that in order to properly apply the disposable income test, the court should consider
4 the debtor’s future income earning ability and the debtor’s reasonable expenses. Id. As
5 noted by the court in In re Dressler, 194 B.R. 290, 304 (Bank. D. R.I. 1996):

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7 [s]ection 523(a)15(A)’s language ‘essentially mirrors’ that of § 1325(b)(2),
8 and the disposable income test enables the court to determine what funds
9 are available to the debtor to pay the obligation after deducting ‘reasonably
10 necessary expenses’.

11 In the present case, George was not able to show an inability to pay the Marital
12 Debt. Although George argued that, overall his expenses are reasonable and generally
13 fall within the Chapter 13 Trustee Guidelines for Monthly Expenses (“Chapter 13
14 Guidelines”),² upon closer examination, the evidence shows the opposite - some expenses
15 are not reasonable. For instance, the Debtors’ telephone expense of \$150 per month is
16 not reasonable, given George’s testimony that his employer provides local telephone
17 service free of charge. The Debtors’ telephone expense of \$150 per month was
18 specifically for long-distance charges to call family and friends out of state. Such an
19 expense is not reasonably necessary for the Debtors’ support. The Debtors’ food expense
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24 ² Chapter 13 Trustee Guidelines form Monthly Expenses (November 2003),
25 <http://www.dianedrain.com/Bankruptcy/BankruptcyForms/TE%20Guidelines%2011-03.pdf>
26 (last visited May 19, 2006).

1 of \$400 is also not reasonable since their employer provides their meals. While the stress
2 and burdens of the Debtors' employment may be the explanation for eating out each week
3 and taking frequent overnight trips out of town, a "stress reduction" expense should not
4 be a factor in determining the ability to pay under § 523(a)(15)(A).
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6 George's assertion that his health problems are mounting and, therefore, the costs
7 of what he has to pay for medicine and supplies will make it impossible for him to pay the
8 Marital Debt, was not persuasive. George testified that his employer provides health
9 insurance. Plaintiff established that George had overstated his average monthly medical
10 expenses both on Schedule J and the Pretrial Statement. On cross-examination, he agreed
11 the correct number was approximately \$697 a month, not \$1,000. Vague assertions that
12 his medical costs may increase in the future, are insufficient to carry George's burden of
13 proof that he does not have the ability to pay the Marital Debt.
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17 When analyzing a debtor's ability to pay, the court may also take into account a
18 debtor's past payment history of marital debt and support obligations as well as a debtor's
19 future income stream. In re Myrvang, 232 F.2d 1116, 1120 (9th Cir. 2000). A debtor's
20 income should be measured by his realistic earning potential, not by lifestyle or other
21 choices which restrict a debtor's income. In re Slygh, 244 B.R. 410, 416 (Bank. N.D.
22 Ohio 2002).
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25 The Debtors have made choices with their monthly expenses which seem to restrict
26 their income, similar to the choices made by the debtor in Slygh. In the Slygh case, the
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1 debtor's job was secure, there was no reason to conclude he would earn less in the future,
2 and he had chosen to lease a new vehicle resulting in an additional \$150 month expense.

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4 The Slygh court found the debtor had an ability to pay his marital debt. Id. at 416.

5 Likewise in this case, the Debtors have made a choice to support the Current Wife's
6 mother, by regularly sending her \$250 a month which otherwise could be available
7 disposable income. George testified at trial that his mother-in-law was not a legal
8 dependent. Therefore, any expense to support her cannot be considered a reasonable
9 expense to support a debtor or his dependents under § 523(a)(15)(A). The evidence
10 indicates George does have the ability to pay the Marital Debt and pay the expenses
11 reasonably necessary to support himself and the Current Wife. Accordingly, he has not
12 met his burden of proof under the first prong of § 523(a)(15).
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16 B. Balancing of the Hardships

17 Even though George has the ability to pay the Marital Debt, that debt may still be
18 discharged if the benefit to him outweighs the detriment to Plaintiff if the debt is
19 discharged. § 523(a)(15)(B). The Jodoin court considered the balancing test under
20 § 523(a)(15)(B), and stated that "the relevant inquiry into benefit and
21 detriment...primarily focuses upon the total economic situation of the parties in their new
22 lives." Jodoin, 209 B.R. at 143.
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25 In this case, George did not meet his burden of demonstrating that his economic
26 situation is significantly worse than Plaintiff's. Although Plaintiff's income, as a single
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1 person, is within \$100 of the Debtors' combined income, Plaintiff pays several expenses
2 that the Debtors do not have to pay. Significantly, Plaintiff pays approximately \$700 a
3 month on the debts assigned to her under the Marital Settlement Agreement. Plaintiff's
4 lifestyle is certainly not extravagant. Her monthly expenses include only \$179 for food
5 and \$150 for auto expenses. Plaintiff testified she rarely buys new clothes, does not go
6 out to eat nor does she go on overnight trips out of town. She further testified that she
7 often is \$500 short in meeting her monthly obligations.
8

10 George argues that Plaintiff's mortgage payment of \$1,200 is unreasonable for a
11 family of one and that Plaintiff is building up equity in the former marital home while he
12 is living in a small apartment and, therefore, he should prevail under a balancing of the
13 hardships analysis. This argument is flawed because as part of the Marital Settlement
14 Agreement, Plaintiff was required to consolidate a first mortgage of \$156,000 together
15 with a home equity line of \$25,000, at a higher interest rate, to remove George, as a joint
16 tenant and obligor on the mortgage. Furthermore, equity in Plaintiff's house is not
17 presently available to her to assist in meeting her monthly bills. Furthermore, George also
18 failed to offer any evidence that Plaintiff could realize the equity value from her house or
19 find a cheaper place to live. Since George has the burden of proof, his failure to proffer
20 such evidence is fatal to his claim that he should prevail under the second prong of
21 § 523(a)(15).
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1 C. Section § 523(a)(15) and the Hold Harmless Clause

2 It is well settled that a non-dischargeable hold harmless obligation means that “the
3 obligor-spouse indemnifies the obligee-spouse in the event that the obligee is required to
4 pay.” See In re Beggs, 314 B.R. 401, 416 (Bank. E.D. Ark. 2004) (emphasis added); See
5 also In re Dollaga, 260 B.R. 493, 496 (9th Cir. BAP 2001) (“It is only the obligation
6 owed to the spouse or former spouse - an obligation to hold the spouse or former spouse
7 harmless - which is within the scope of this section [523(a)(15)].”).

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10 While George did not meet his burden to show either an inability to pay the
11 Marital Debt or that the detriment to him of paying the Marital Debt was greater than it
12 would be to Plaintiff if the debt is discharged, he is only required to pay debts Plaintiff
13 has to pay. George argues that because Plaintiff has not paid any of the Marital Debt,
14 there is no non-dischargeable obligation. However, that argument ignores the fact that as
15 long as the Marital Debt is unpaid, Plaintiff is still at risk of being required to pay it, at
16 least until the statute of limitations runs on the various obligations. The argument also
17 ignores Plaintiff’s evidence that two of the Marital Debt creditors have communicated to
18 Plaintiff their intention to initiate collection activities. Under § 523(a)(15), the hold
19 harmless clause of the Marital Settlement Agreement is non-dischargeable, to the extent
20 that Plaintiff is required to pay any of the Marital Debt. Since the evidence indicated that
21 there had been no demand on Plaintiff to pay any of the credit card debt or the hospital
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1 debt, George is not obligated to indemnify her for those debts, unless and until, Plaintiff is
2 subjected to a demand for payment.
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5 **VI. CONCLUSION**

6 George did not carry his burden of proof under either of the prongs of
7 § 523(a)(15). To the extent that creditors of the Marital Debt pursue Plaintiff for
8 payment, George must hold Plaintiff harmless from those obligations.
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10 The foregoing constitutes the court's findings of fact and conclusions of law under
11 Fed. R. Bankr. P. 7052. A judgment in favor of Plaintiff will be entered this date.
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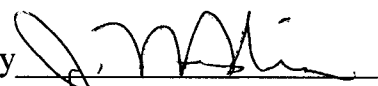
13 Dated this 19th day of May 2006.

14 
15 _____
16 EILEEN W. HOLLOWELL
17 UNITED STATES BANKRUPTCY JUDGE

18 Copy of the foregoing mailed
19 this 19th day of May, 2006, to:

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