

Dated: April 07, 2008
The following is ORDERED:



Jennie D. Latta

Jennie D. Latta
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re

MARY ANN HALEY,

Debtor.

Case No. 05-38301-L
Chapter 7

Robert W. Haley,
Plaintiff,
v.
Mary Ann Haley,
Defendant.

Adv. Proc. No. 06-00132

ORDER DENYING MOTION FOR SUMMARY JUDGMENT

BEFORE THE COURT is the motion for summary judgment filed by the Plaintiff, Robert W. Haley. The complaint alleges that certain debts owed by the Debtor to the Plaintiff are not dischargeable pursuant to sections 523(a)(2)(A), (a)(5) and (a)(15) of the Bankruptcy Code. The Court has reviewed the pleadings, answers to interrogatories and affidavits filed in this case and

determined that there remain genuine issues for trial. This is a core proceeding. 28 U.S.C. § 157(b)(2)(I).

STANDARD FOR GRANTING SUMMARY JUDGMENT

A motion for summary judgment should be granted when the pleadings, depositions, answers to interrogatories, and admissions, together with the affidavits, if any, establish that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Bankr. P. 7056; Fed. R. Civ. P. 56. A fact is “material” for purposes of a motion for summary judgment “where proof of that fact would have [the] effect of establishing or refuting one of [the] essential elements of a cause of action or defense asserted by the parties” *Kendall v. Hoover Co.*, 751 F.2d 171, 174 (6th Cir. 1984). The court is to view the evidence and draw all factual inferences in favor of the nonmoving party. *Matsushita Electric Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348; *U.S. v. Sanders*, 314 F.3d 236, 238 (6th Cir. 2002).

On a motion for summary judgment, the movant has the initial burden to establish the absence of a genuine issue of material fact. *Celotex v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 2554 (1986). The burden then shifts to the non-movant to produce evidence sufficient to show that there is a genuine issue for trial, failing which, the movant is entitled to a judgment as a matter of law. *Id.* at 324. If the movant’s initial burden is not met, however, the opposing party is under no obligation to offer evidence in support of its opposition. See, *Investors Credit Corp. v. Batie (In re Batie)*, 995 F. 2d 85, 90 (6th Cir. 1993), *In re Rogstad*, 126 F.3d 1224, 1227 (9th Cir. 1997), *Hibernia Nat. Bank v. Admin. Cent. Sociedad*, 776 F.2d 1277, 1279 (5th Cir. 1985).

FACTS

Certain facts are not in dispute. The parties were married to each other on December 3, 1994, and divorced on April 18, 2005. No children were born of the marriage. Mary Ann Haley filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code on October 14, 2005. Pursuant to the terms of their Marital Dissolution Agreement (“MDA”), dated April 15, 2005, the parties agreed that their marital debts would be paid through the sale of marital property. The marital property included a residence in Collierville, Tennessee, and a farm in McMinnville, Tennessee. Title to both of these properties was held by Mrs. Haley and she was solely responsible for the indebtedness secured by them. Aff. of Mary Ann Haley. Mr. Haley was given a period of sixty days after the filing of the MDA to decide whether he wanted to purchase the marital residence in Collierville for \$425,000.00 and/or the farm property located in McMinnville for \$250,000.00. Mr. Haley was to refinance the debts upon purchase of the properties and indemnify and hold Mrs. Haley harmless for any liability upon purchase of the property.

In the event Mr. Haley failed to exercise his option to purchase one or the other of the properties, the farm was to be auctioned and the house sold. The parties agreed that assets of their business, Dibrell Automotive, and certain personal property would be sold as well. The parties agreed that from the sale of assets, their indebtedness would be paid in the following order: mortgage debt from sale of specific property; debts including taxes arising from Dibrell Automotive; credit card debt existing as of April 13, 2005; and 2002, 2003, and 2004 taxes. Mrs. Haley specifically agreed to pay \$15,000.00 to Mr. Haley “out of her share of the asset sale proceeds” to reimburse him for attorney fees. Other than this, the parties agreed that if any indebtedness remained unpaid after the sale of assets, each would be responsible for one half and would

indemnify and hold the other harmless for the other's half. Each agreed to pay half of their court costs.

In the MDA, both Mrs. Haley and Mr. Haley waived any claim to alimony, but stipulated that obligations arising under the MDA for indemnification and payment of court costs were in the nature of support and would not be dischargeable in bankruptcy.

Following the entry of the Final Decree of Divorce and before the filing of the bankruptcy petition, neither the marital residence nor the McMinnville farm was sold. The parties continued their disputes with each other as evidenced by the filing of a Petition for Injunctive and Other Relief on August 19, 2005, by Mrs. Haley, and a Counter-Petition for Civil Contempt of Court, to Enforce Marital Dissolution Agreement and for Fraud on May 31, 2006, by Mr. Haley.

The parties give very different accounts for why the agreements in the MDA were not carried out. Mr. Haley asserts that Mrs. Haley failed to cooperate in carrying out the terms of the MDA. He says that she abandoned the marital residence in August of 2005, and failed to make needed repairs. Further, he says that she removed the "For Sale" sign from the yard and allowed the listing contract to lapse. With respect to the McMinnville property, Mr. Haley says that he timely indicated his intention to purchase the farm and that he was prepared to purchase the property on October 26, 2005, but that Mrs. Haley refused at the last minute. Mr. Haley also submitted the affidavit of S. Denise McCrary, who was the attorney for Mr. Haley in the divorce case. Among other things, Ms. McCrary states that Mrs. Haley expressed concerns as early as the filing of her original complaint for divorce on September 8, 2004, that the parties would become insolvent. Ms. McCrary also states that her client, Mr. Haley, advised her that he had timely informed Mrs. Haley of his intention to purchase the McMinnville property. She states that she attended a meeting on

October 26, 2005, in the office of Mrs. Haley's counsel for the purpose of carrying out the terms of the MDA, including the sale of the McMinnville farm, but that Mrs. Haley refused to sign proper paperwork. The court notes that this meeting would have taken place after the filing of the bankruptcy petition by Mrs. Haley.

In response to the motion for summary judgment, Mrs. Haley submitted her own affidavit, which for purposes of this motion is to be taken as true. Among other things, Mrs. Haley states that although Mr. Haley had the option to purchase the farm and marital residence, he did not despite her many requests and inquiries. She further states that she was anxious to sell both properties because she was not able to afford to pay the mortgage notes which were in default as of July 2005. She says that she made known her willingness to auction the McMinnville farm. Mrs. Haley submitted the affidavit of her brother, Frank Menacho, who states that Mr. Haley had told him that he intended to force Mrs. Haley into bankruptcy. Mrs. Haley also submitted the affidavit of Bruce Smith, her attorney, which among other things states that Mrs. Haley listed the marital residence with a real estate agent and offered to put the McMinnville farm up for auction.

DISCUSSION

Mr. Haley argues that the debts owed to him by Mrs. Haley should be declared non-dischargeable pursuant to sections 523(a)(2)(A), a debt arising from false pretenses, a false representation, or actual fraud; 523(a)(5), for alimony, maintenance or support; or 523(a)(15), for a debt arising from a property settlement.

THE SECTION 523(a)(2)(A) CLAIM

Mr. Haley alleges that the filing of the bankruptcy petition was fraudulent because Mrs. Haley represented to Mr. Haley that she would not attempt to discharge certain debts; because the

filing of the petition prevented Mr. Haley from receiving funds that he would have received from the sale of marital assets; and because the filing of the petition resulted in Mr. Haley being deprived of assets that he otherwise would have received.

Section 523(a)(2)(A) of the Bankruptcy Code excepts from discharge any debt

(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition.

In order to prevail on a section 523(a)(2)(A) claim, the plaintiff must show each of the following factors: “(1) the debtor obtained money through a material misrepresentation that, at the time, the debtor knew was false or made with gross recklessness as to its truth; (2) the debtor intended to deceive the creditor; (3) the creditor justifiably relied on the false representation; and (4) its reliance was the proximate cause of loss.” *In re Rembert*, 141 F.3d 277, 280-81 (6th Cir. 1998). The plaintiff must prove each of these factors by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 288, 111 S. Ct. 654, 660 (1991).

Although the dischargeability of marital debts is more typically the subject of actions pursuant to sections 523(a)(5) and/or (15), it is not the case that a cause of action for fraud cannot result from entering into a marital dissolution agreement. Thus in a previous decision arising from this district, Bankruptcy Judge William B. Leffler found that joint debts which a debtor agreed to assume in a property settlement agreement were not dischargeable where a bankruptcy petition was filed twenty days after entry of the divorce decree. *Brasher v. Brasher (In re Brasher)*, 20 B.R. 408 (Bankr. W.D. Tenn. 1982). Where no substantial change of circumstances was shown, the court concluded that the debtor had induced the plaintiff to waive alimony in return for his assumption of

indebtedness that he intended to discharge in bankruptcy. The court found the facts analogous to those of *In re Arterburn*, 15 B.R. 189 (Bankr. W.D. Okla. 1981), in which the court held that “when a party to a divorce decree agrees to assume full responsibility for the parties’ joint debts while he has no intention to keep the promise but instead intends to file bankruptcy soon after the entry of the final decree, the debts are rendered nondischargeable under § 523(a)(2)(A).” *Id.* at 192. In accord is *Woodward v. Bethel (In re Bethel)*, 302 B.R. 205, 206 (Bankr. N.D. Ohio, 2003), which states, “[A]s long as its conditions are met, a debt is not excluded from the scope of § 523(a)(2)(A) merely because it constitutes a marital obligation.” *Bethel*, 302 B.R. at 206. Although the Bankruptcy Appellate Panel for the Eighth Circuit has said that “under normal circumstances, marital dissolutions are more appropriately addressed under either § 523(a)(5) or § 523(a)(15),” it nevertheless acknowledged the possibility that a marital obligation might be excepted from discharge under section 523(a)(2)(A). *Guske v. Guske (In re Guske)*, 243 B.R. 359, 364 (8th Cir. BAP 2000).

In support of his claim under section 523(a)(2)(A), Mr. Haley states that he “relied on the representations by Ms. Haley at the time of the execution of the Marital Dissolution Agreement that both he and Ms. Haley agreed that all duties undertaken by each of them in the settlement of the terms of the Marital Dissolution Agreement were non-dischargeable to either of the parties.” Plaintiff’s Motion and Accompanying Memorandum in Support of Motion for Summary Judgment, p. 5. Mr. Haley notes that Mrs. Haley expressed her fear that the parties would inevitably become insolvent, but signed the MDA anyway. *Id.* Mr. Haley argues that the timing of the filing of the bankruptcy case by Mrs. Haley and her questionable intentions in filing provide evidence of her fraud. *Id.* at p. 8. Mr. Haley questions the need for Mrs. Haley to file a bankruptcy case, arguing

that all of her debts could have been paid in full had she complied with the terms of the MDA. *Id.*

Mrs. Haley counters that she did not immediately file bankruptcy after the divorce or within Mr. Haley's 60-day option period, but waited six months after the divorce and just prior to changes in the bankruptcy law to file. She further states that prior statements expressing concern about insolvency proved well-founded when she was unable to pay the mortgage notes on either the marital residence or the farm after the divorce. Based upon the statement of her brother, Mrs. Haley asserts that Mr. Haley deliberately delayed taking action on the properties in order to force her into bankruptcy or in the hopes that he could purchase the farm for less than \$250,000.00. In response to Mr. Haley's assertion that all of Mrs. Haley's debts could have been paid had she adhered to the MDA, Mrs. Haley points to her bankruptcy schedules which show secured debts of \$611,333.74 with underlying collateral valued at \$572,300.00, and unsecured debts of \$114,361.58. Mrs. Haley says that she filed her bankruptcy petition when she did because she feared that her properties would be foreclosed and she would face large deficiency balances. Defendant's Response to Plaintiff's Motion for Summary Judgment and Memorandum in Support Thereof, pp.3-5.

Each of the obligations undertaken by the Debtor in the MDA was specifically conditioned upon or assumed the prior sale of assets. There is substantial factual dispute between the parties as to why sales did not occur prior to the filing of the bankruptcy case, with each accusing the other of failing to cooperate. Summary judgment cannot be granted with respect to the section 523(a)(2)(A) claim.

THE SECTION 523(a)(5) CLAIM

Although the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8 (“BAPCPA”) amended sections 523(a)(5) and 523(a)(15) of the Bankruptcy Code, Mrs. Haley’s case was filed before October 17, 2005, the effective date of the amendments. Prior to amendment, section 523(a)(5) excepted from discharge any debt–

(5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that–

(A) such debt is assigned to another entity, voluntarily, by operation of law, or otherwise (other than debts assigned pursuant to section 408(a)(3) of the Social Security Act or any such debt which has been assigned to the Federal Government or to a State or any political subdivision of such State); or

(B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support.

11 U.S.C. § 523(a)(5)(pre-BAPCPA).

An obligation to hold harmless may be nondischargeable as support even though payments are not made directly to a former spouse. *Long v. Calhoun (In re Calhoun)*, 715 F.2d 1103 (6th Cir. 1983). In order to be excepted from discharge under section 523(a)(5), the payments have to be actually in the nature of support as opposed to a division of property. *Id.* The Sixth Circuit has adopted a four-part test for determining when an obligation not designated as alimony or support is actually in the nature of alimony and support:

First, the obligation constitutes support only if the state court or parties intended to create a support obligation. Second, the obligation must have the actual effect of providing necessary support. Third, if the first two conditions are satisfied, the court must determine if the obligation is so excessive as to be unreasonable under traditional concepts of support. Fourth, if the amount is unreasonable, the obligation is discharged to the extent necessary to serve the purposes of federal bankruptcy law.

Fitzgerald v. Fitzgerald (In re Fitzgerald), 9 F.3d 517, 520 (6th Cir. 1993), summarizing *Calhoun*, 715 F.2d at 1109-10. The burden of establishing that an obligation is in the nature of support is on the non-debtor. *Fitzgerald*, 9 F.3d at 520; *Calhoun*, 715 F.2d at 1111.

The Debtor's obligations under the MDA are as follows: (1) to pay \$15,000.00 in attorney fees directly to Mr. Haley from the asset sale proceeds (MDA, ¶ 13); (2) to pay one-half of the parties' court costs (MDA, ¶ 12); and (3) to be responsible for one half of any remaining indebtedness after liquidation of the marital assets and to indemnify and hold Mr. Haley harmless for payment of that half (MDA, ¶ 23). Mr. Haley has not specified and the court cannot determine from the record the amount of the Debtor's obligation under paragraph 12 or 23.

The MDA in this case contains seemingly contradictory provisions concerning the provision of support. The MDA specifies that, "Both Husband and Wife waive claim to alimony in this cause." MDA, ¶ 22. At the same time, the MDA contains a lengthy paragraph which attempts to establish the non-dischargeability of debts arising under the MDA. That paragraph provides:

4. Non-Dischargeability. The parties acknowledge and agree that all obligations in this Marital Dissolution Agreement for indemnification and for payment of court costs are acknowledged by the parties to be obligation [sic] for the support and maintenance of the party to whose benefit the indemnification and obligation for payment of court costs extends and is reasonable and necessary to meet that party's expenses of daily living. All obligations outlined in this Agreement for indemnification and for payment of court costs shall be a charge against resources otherwise available to the party

for the purpose of daily living, and, as such, the same are not dischargeable in Bankruptcy under either [sic] 11 U.S.C. § 523(a)(5) or § 523(a)(15), whichever, or both, may apply. Husband and Wife agree that the incorporation of this agreement into any Final Decree of Divorce hereinafter entered in the above captioned cause evidences a Stipulation by the parties to all facts necessary to a Finding that any obligation for indemnification and for payment of court costs created herein is an obligation in the nature of support, nondischargeable in Bankruptcy pursuant to 11 U.S.C. § 523. Husband and Wife further agree that the entry of a Final Decree of Divorce in this cause shall constitute a Finding and Adjudication by a court of competent jurisdiction of the obligation's characterization as support and shall constitute res judicata and collateral estoppel as to the question of nondischargeability of the obligation in Bankruptcy. Further, the parties agree that no payments made by either party to discharge any obligation or for indemnification shall be deemed, for income tax purposes, deductible to the payor or taxable income to the non-payor party.

MDA, ¶ 4. Mr. Haley does not argue that this paragraph, without more, renders the obligations to him nondischargeable. Without this paragraph, the MDA clearly contemplates the division of property and indebtedness, but not the provision of spousal support. No obligations are labeled support. There are no stipulations of fact contained in the MDA from which the court can determine whether either of the parties was in need of or entitled to support at the time of the execution of the MDA. Neither res judicata nor collateral estoppel apply as the issues which are the subject of this paragraph were not actually litigated between the parties. *See Massengill v. Scott*, 738 S.W.2d 629, 631 (Tenn. 1987).

The enforceability of boilerplate language intended to declare certain mutual marital obligations non-dischargeable support is questionable. *See In re Adkins*, 151 B.R. 458 (Bankr. M.D. Tenn. 1992). In *Adkins*, the court considered two marital dissolution agreements that contained stipulations that mutual obligations to pay certain debts and hold the other spouse harmless were non-dischargeable in bankruptcy. The court gave six reasons why these clauses should not be given

effect. Of special note is the court's point that, "[a]limony and support payments, by their very nature, flow from one spouse to the other; they are not mutual obligations." *Adkins*, 151 B.R. at 462. The court agrees, and holds that the stipulations contained in the MDA do not determine this court's decision with respect to the dischargeability of the mutual obligations for indemnification and payment of court costs.

The court is to look to certain factors to determine whether an obligation for assumption of indebtedness is in the nature of support. They include:

the nature of the obligations assumed (the provision of daily necessities indicates support); the structure and language of the parties' agreement or the court's decree; whether other lump sum or periodic payments were also provided; length of the marriage; the existence of children from the marriage; relative earning powers of the parties; age, health and work skills of the parties; the adequacy of support absent the debt assumption; and evidence of negotiation or other understandings as to the intended purpose of the assumption.

Calhoun, 715 F.2d at 1108 n. 7. The court has information concerning some, but not all of these factors. Mr. Haley bears the burden of proving that the obligation owed to him as the result of Mrs. Haley's agreement to pay half of any remaining indebtedness after the sale of marital assets is actually in the nature of support. Of special importance will be the relative earning powers of the parties at the time of their agreement. Militating against a finding of support will be the mutual nature of the obligation which tends to show that the parties enjoyed relatively equal economic strength at the time of the divorce.

The obligation of Mrs. Haley to reimburse Mr. Haley \$15,000.00 for attorney fees is somewhat different. It is a direct obligation from one spouse to the other, but is not labeled support. It was to be paid from a specific source – the sale of marital assets. With respect to the award of attorney fees, the Affidavit of Ms. McCrary states:

[I]t is my recollection that Ms. Haley specifically agreed to reimburse Mr. Haley in the sum of \$15,000 for attorney fees paid by Mr. Haley, as support for Mr. Haley, in that these fees were incurred due to Ms. Haley's conduct during the divorce proceedings and her perjury in the case, and that Mr. Haley needed reimbursement of these funds for his living expenses.

Aff. of Denise McCrary, ¶ 18. Ms. McCrary does not mention that the fees were to be paid from the sale of assets. Mrs. Haley states:

The attorney fee of \$15,000.00 payable to husband was to reimburse him for attorney's fees and was to be paid only from the proceeds of the sale of the "assets" which did include the farm in McMinnville, Tennessee, the marital residence, personal property on the farm, the Hummer vehicle, etc. It was set up in that manner because I had no other assets and insufficient income to pay the \$15,000 to Mr. Haley.

Aff. of Mary Ann Haley.

In general, an obligation to pay attorney fees will be nondischargeable when the fees are ancillary to an underlying obligation that is nondischargeable. *See, e.g., Matter of Coleman*, 37 B.R. 120 (Bankr. W.D. Wis. 1984); *In re Sposa*, 31 B.R. 307, 310 (Bankr. E.D. Va. 1983); William Houston Brown, *Bankruptcy and Domestic Relations Manual*, § 6:11, p. 208 (West 2007). The attorney fees awarded in this case are ancillary to the underlying action for divorce, but the parties specifically waived any claim to alimony. The Debtor argues that pursuant to the terms of the MDA, the provision for payment of attorney fees should be considered a division of property since it was to be paid from the sale of marital assets. She argues further that this makes the obligation contingent. Whether the obligation to pay attorney fees is in the nature of support will depend upon whether any obligation arising under the MDA may be found to be in the nature of support. As stated previously, the court has insufficient information to make that determination. Summary judgment cannot be granted on the section 523(a)(5) claims.

THE SECTION 523(a)(15) CLAIM

Section 523(a)(15), added by the Bankruptcy Reform Act of 1994, provided an exception to discharge for marital debts not intended for support. Prior to amendment in 2005, this subsection excepted from discharge 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.

11 U.S.C. § 523(a)(15)(pre-BAPCPA). As the result of the addition of this subsection, all divorce-related obligations were rendered presumptively non-dischargeable. *Armstrong v. Armstrong (In re Armstrong)*, 205 B.R. 386, 391 (Bankr. W.D. Tenn 1996). The initial burden is on the creditor spouse to show that the debt is of the type excepted from discharge under section 523(a)(15). *Hart v. Molino (In re Molino)*, 225 B.R. 904, 907 (6th Cir. BAP 1998). The burden then shifts to the debtor to establish one of the affirmative defenses provided in subsections (A) and (B). *Id.* citing *In re Crosswhite*, 148 F.3d 879, 884-85 (7th Cir 1998); *Gamble v. Gamble (In re Gamble)*, 143 F.3d 223, 226 (5th Cir. 1998); *Moeder v. Moeder (In re Moeder)*, 220 B.R. 52, 56 (8th Cir. BAP 1998).

The debtor must establish these defenses by a preponderance of the evidence. *Molino*, 225 B.R. at 907, citing *Grogan v. Garner*, 498 U.S. 279, 291, 111 S. Ct 654, 661, 112 L. Ed.2d 755 (1991). Although the debtor carries the ultimate burden of proof, both the debtor and the creditor must present evidence of the consequences of discharge under section 523(a)(15)(B). *Armstrong*, 205 B.R. at 391.

Section 523(a)(15)(A)

To the extent that the obligations owed to Mr. Haley under the MDA are not excepted from discharge as support, they are of the type that would be excepted from discharge under section 523(a)(15). Mr. Haley has satisfied his burden.

In response, Mrs. Haley states that her obligation to reimburse Mr. Haley for attorney fees was to be paid from the proceeds of the sale of assets “because [she] had no other assets and insufficient income to pay the \$15,000 to Mr. Haley.” Aff. of Mary Ann Haley. In addition, she has stated that the reason that she filed her bankruptcy petition was that she could not afford to pay the notes on the house and farm from her income. While Mrs. Haley certainly could have provided more complete information in response to Mr. Haley’s motion, the court believes that she has put her ability to pay the obligations owed to Mr. Haley into question. This is especially the case in that the court does not know the extent of the obligations owed to Mr. Haley.

The determination of the ability to pay is to be made at the time of trial, taking into consideration the debtor’s future earning capacity. *Molino*, 225 B.R at 908; *In re Smither*, 194 B.R. 102, 108 (Bankr. W.D. Ky. 1996). Factors that the court may consider in determining the debtor’s ability to pay include:

1. The debtor’s “disposable income” as measured at the time of trial;

2. The presence of more lucrative employment opportunities which might enable the debtor fully to satisfy his divorce-related obligation;
3. The extent to which the debtor's burden of debt will be lessened in the near term;
4. The extent to which the debtor previously has made a good faith effort towards satisfying the debt in question;
5. The amount of the debts which a creditor is seeking to have held nondischargeable and the repayment terms and condition of those debts;
6. The value and nature of any property the debtor retained after his bankruptcy filing;
7. The amount of reasonable and necessary expenses which the debtor must incur for the support of the debtor, the debtor's dependents and the continuation, preservation and operation of the debtor's business, if any;
8. The income of the debtor's new spouse as such income should be included in the calculation of the debtor's disposable income;
9. Any evidence of probable changes in the debtor's expenses.

Armstrong, 205 B.R. at 392, citing *Smither*, 194 B.R at 108-09; and *Cleveland v. Cleveland (In re Cleveland)*, 198 B.R. 394, 398 (Bankr. N.D. Ga. 1996). "A debtor has the ability to pay an obligation, for purposes of § 523(a)(15)(A), if the debtor has sufficient disposable income to pay all or a material part of a debt within a reasonable amount of time." *Armstrong*, 205 B.R. at 392 (indicating that partial discharge of section 523(a)(15) debt is appropriate under the right circumstances).

Again, the court has insufficient information from which to make any conclusions about Mrs. Haley's ability to pay the obligations owed to Mr. Haley, in part because of information Mr. Haley has failed to provide, but also because of information Mrs. Haley has failed to provide. Some indication of Mrs. Haley's ability to pay is provided by her bankruptcy schedules. At the time of

the filing of her bankruptcy case, Mrs. Haley reported monthly net income of \$3,254.72, and monthly expenses of \$3,132.50, leaving net income of \$122.22.¹ This information is not conclusive, however, because the determination is to be made at the time of trial taking into account changes in circumstances that have occurred since the filing of the bankruptcy case and the impact of the debtor's discharge upon her ability to pay.

Section 523(a)(15)(B)

Even if Mrs. Haley has the ability to pay the obligations owed to Mr. Haley, she may be entitled to discharge these debts if she is able to demonstrate that the benefit to her of discharge outweighs the detrimental consequences to Mr. Haley. In order to make this determination, “[t]he court must compare the evidence of the debtor’s standard of living as opposed to the plaintiff’s standard of living” *Armstrong*, 205 B.R. at 392. If the debtor’s standard of living will be equal to or greater than the creditor’s if the debt is discharged, then the debt is non-dischargeable. *Id.* Factors that the court may consider in making this comparison include the following:

1. The amount of debt involved, including all payment terms;
2. The current income of the debtor, objecting creditor and their respective spouses;
3. The current expenses of the debtor, objecting creditor and their respective spouses;
4. The current assets, including exempt assets of the debtor, objecting creditor and their respective spouses;
5. The current liabilities, excluding those discharged in the debtor’s bankruptcy, of the debtor, objecting creditor and their respective spouses;

¹ The bankruptcy court may take judicial notice of a debtor’s sworn schedules as admissions under Fed. R. Evid. 801(d). *In re Anderson*, 130 B.R. 497 (Bankr. W.D. Mich. 1991).

6. The health, job skills, training, age, and education of the debtor, objecting creditor and their respective spouses;
7. The dependents of the debtor, objecting creditor and their respective spouses, their ages and any special needs which they may have;
8. Any changes in the financial conditions of the debtor and the objecting creditor which may have occurred since the entry of the divorce decree;
9. The amount of debt which has been or will be discharged in the debtor's bankruptcy;
10. Whether the objecting creditor is eligible for relief under the Bankruptcy Code; and
11. Whether the parties have acted in good faith in the filing of the bankruptcy and the litigation of the § 523(a)(15) issues.

Smither, 194 B.R at 111. Neither party presented information from which the court may make a determination of the applicability of section 523(a)(15)(B).

Although Mrs. Haley will ultimately carry the burden of proof with respect to the defenses provided by section 523(a)(15)(A) and (B), the court finds that she has raised sufficient factual questions to avoid summary judgment on these issues. Summary judgment will not be granted with respect to the section 523(a)(15) claims.

CONCLUSION

For the foregoing reasons, the motion for summary judgment is **DENIED**.

cc: Debtor/Defendant
Attorney for Debtor/Defendant
Plaintiff
Attorney for Plaintiff
Case Trustee (if any)