UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO
Honorable Howard R. Tallman

In re:	)	
	)	
SHANNON DUCA,	)	**Case No. 03-29237 ABC**
	)	
Debtor.	)	**Chapter 7**
	)	
	)	
TIMOTHY DUCA,	)	
	)	
Plaintiff,	)	
	)	**Adversary No. 03-2161 HRT**
v.	)	
	)	
SHANNON DUCA	)	
	)	
Defendant.	)	

ORDER

This case comes before the Court on Plaintiff's Complaint Objecting to Dischargeability of Indebtedness and to Discharge of Debtor.

Prior to presentation of evidence, Plaintiff's counsel expressed the belief that the scope of the trial would include evidence and argument as to § 523(a)(15) as well as § 523(a)(5). Even though the Complaint stated causes of action under §§ 523(a)(2), 523(a)(5) and 523(a)(15), the Pretrial Statement only states that the trial will address §523(a)(5). At trial, no evidence was presented going to fraud under § 523(a)(2). None the evidence presented could be said to include the kind of detailed income and expense information and comparative financial analysis that is necessary for the Court to make the required determinations under §§ 523(a)(15)(A) and 523(a)(15)(B). The financial condition of the parties was inquired into only superficially.

The function of the Pretrial Statement is to set the scope of trial and to put all parties, including the Court, on notice of the issues to be addressed. Counsel for both parties reviewed and signed the Pretrial Statement. Under § 523(a)(15), the Debtor bears the burden to prove the exceptions to nondischargeability. *In re Hammond*, 236 B.R. 751, 766-67 (Bankr. D. Utah 1998). To include the §523(a)(15) issue at trial would constitute unfair surprise to the Debtor with no notice that she would be required to present the detailed financial evidence necessary to carry that burden. As a consequence, the Court finds that Plaintiff has waived any claim to relief under § 523(a)(2) or § 523(a)(15).

This matter involves an examination of the Decree of Dissolution of Marriage [the "Decree"] entered by the Broomfield County District Court on August 9, 2002, incorporating the parties' Separation Agreement [the "Agreement"]. The Agreement includes a provision awarding a Toyota Sequoia SUV [the "SUV"] to the Mrs. Duca, the Debtor and Defendant in this matter. It further provides that Mrs. Duca will pay all of the lease payments on the SUV. Since Mr. Duca is the party who is liable on that lease, the Agreement also provides that Mrs. Duca will hold Mr. Duca harmless with respect to that obligation.

The issue that the Court must decide is whether Mrs. Duca's hold harmless obligation to Mr. Duca is dischargeable under 11 U.S.C. § 523(a)(5).

Section 523(a)(5) provides, in relevant part, that

> [a] discharge under section 727 . . . does not discharge an individual debtor from any debt – 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) (emphasis added).

Thus, the first order of business is to examine the Decree to determine if the obligation that Mr. Duca seeks for this Court to find nondischargeable is "actually in the nature of alimony, maintenance, or support." *Id*.; *Goin v. Rives (In re Goin)*, 808 F.2d 1391, 1392 (10th Cir. 1987) ("[A] bankruptcy court must look beyond the language of the decree to the intent of the parties and the substance of the obligation"). "[T]he critical inquiry is the shared intent of the parties at the time the obligation arose. 'A written agreement between the parties is persuasive evidence of intent.'" *Sampson v. Sampson (In re Sampson)*, 997 F.2d 717, 723 (10th Cir. 1993) (citation omitted) (quoting *Yeats v. Yeats (In re Yeats)*, 807 F.2d 874, 878 (10th Cir. 1986). The intention of the parties at the time the Agreement was executed is the threshold determination. The Court must also determine if the award is, in substance, support. *Sampson*, 997 F2d. at 725. "The critical question in determining whether the obligation is, in substance, support is 'the function served by the obligation at the time of the divorce. *Id*. (quoting *Gianakas v. Gianakas (In re Gianakas)*, 917 F.2d 759, 763 (3rd Cir. 1990). This may be determined by considering the relative financial circumstances of the parties at the time of the divorce. *Sampson*, 997 F2d. at 726.

The Agreement contains internal contradictions with respect the parties' intent. Nonetheless, the Court must view the Agreement in its entirety. In doing so, the Court does find the intent of the parties clearly evident from the language and structure of the Agreement. Mr. Duca would like the Court to focus on ¶8.5 of the Agreement which states:

> The parties hereto agree that as between them, all debts which are the subject of this agreement, whether specifically mentioned or not are in the nature of family support within the meaning of Title 11, U.S.C. and may not be discharged in bankruptcy.

This statement appears in a section with a heading of "Creditors" which contains provisions generally pertaining to the treatment of existing debts.

But that statement is not consistent with ¶2.3 which states:

> Both parties waive any and all right to spousal maintenance now and forever. This waiver is irrevocable.

That statement appears in a section with the heading of "Child Support and Maintenance." As one might imagine, that section deals comprehensively with issues surrounding spousal maintenance and child support. In addition to the waiver of spousal support, this section provides for the payment of child support and continuation of health and medical insurance on the children.

As to the parties' intentions with respect to support obligations, the Court finds that ¶2.3 of the Agreement sufficiently states those intentions. That paragraph is contained in a section of the Agreement that comprehensively deals with support issues. By contrast, ¶8.5 is boilerplate language that, contrary to settled law, seeks to innoculate the support and property settlement provisions in the Decree from any examination in the bankruptcy court.

That the hold harmless provision, as it relates to the SUV lease, was intended by the parties to be in the nature of a property division is further evidenced by the fact that ¶3.1(e) of the Agreement, containing the provision relating to the SUV and Mrs. Duca's obligation to hold Mr. Duca harmless, is contained in the section labeled "Property."

Nor does the hold harmless provision serve the function of a real support obligation. The hold harmless provision that Mr. Duca would have this Court find to be nondischargeable is nothing more than a contractual provision which seeks to insure compliance with the property division provisions of the Decree. If that provision served the function of providing support for Mr. Duca, the Court would expect to see evidence that Mrs. Duca's income was disproportionately greater than Mr. Duca's. If the obligation were to serve the function of support, the court would expect to see something like periodic payments that would cease upon Mr. Duca's remarriage. The hold harmless provision bears no indicia of an obligation that serves

the function of supporting Mr. Duca. Furthermore, the Court has seen no evidence that Mr. Duca is in need of support from Mrs. Duca. Mr. Duca's income significantly exceeded his wife's at the time of the divorce. And, both parties testified that they did not understand the SUV provisions to be a maintenance or support obligation.

Mr. Duca argues that the sanctity of contract prevails. He argues that ¶8.5 is a straightforward negotiated contract provision that contemplates the possible filing of a bankruptcy and waives the discharge of any obligations created by the Agreement or the Decree.

The Court's initial problem with that line of argument is that the Court cannot read the language in ¶8.5 as expressing an intent to waive discharge. What it does say, in straightforward terms, is that it is the intent of the parties that any debts that are subject to the Agreement should be considered to be support obligations under the Bankruptcy Code. But, the Bankruptcy Code says that it doesn't matter what the parties, or a state court, may label an obligation, the obligation is not subject to § 523(a)(5) unless it is "*actually in the nature of alimony, maintenance, or support*." 11 U.S.C. § 523(a)(5)(B). Thus, the Code contemplates that parties to divorce actions will frequently try to bring obligations which serve no support function whatever under the purview of § 523(a)(5) by labeling it as something it clearly is not. As a consequence, § 523(a)(5)(B) commands the Court to examine the *actual nature* of the obligation and prohibits the Court from relying solely on the label given the obligation during the course of the divorce proceedings.

Furthermore, even if the language in ¶8.5 did express an intent to waive discharge, the Code sets out very narrow and specific circumstances under which such waiver may be accomplished. Section 727(b) states unequivocally that a discharge is effective to discharge a debtor from all obligations that arise prior to the order for relief under the Code. 11 U.S.C. 727(b). The Code further provides a mechanism to waive the discharge, 11 U.S.C. 727(a)(10), or to waive discharge as to certain debts. 11 U.S.C. § 524(c). With respect to agreements to make a pre-petition obligation enforceable post-petition, § 524(c) sets out very specific requirements for reaffirmation of debts. There was clearly no attempt to conform anything in the Agreement or the Decree to the requirements of that section.

The Court in *Airlines Reporting Corp. v. Mascoll (In re Mascoll)*, stated:

> Congress has provided only two methods for a Chapter 7 debtor to waive the dischargeability of specific debts: (1) by executing a postbankruptcy written agreement, waiving a discharge of all debts, that is approved by the bankruptcy court pursuant to 11 U.S.C. § 727(a)(10); or (2) by executing a waiver that satisfies the reaffirmation agreement requirements of 11 U.S.C. § 524(c). Any other waiver is contrary to the Bankruptcy Code.

246 B.R. 697, 706 (Bankr. D. D.C., 2000) (citing *Hayhoe v. Cole (In re Cole)*, 226 B.R. 647, 653 (B.A.P. 9th Cir. 1998)).

In accordance with the above discussion, it is

ORDERED that Plaintiff's Complaint Objecting to Dischargeability of Indebtedness and to Discharge of Debtor is hereby DENIED.

Dated this 9th day of August, 2004.

BY THE COURT:

/s/ Howard R. Tallman
Howard R. Tallman, Judge
United States Bankruptcy Court