UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In Re:

Arthur D. Zazzaro, **CASE #96-22956**

Debtor.

Carol L. Zazzaro,

Plaintiff, **A.P. #96-2327**

vs.

Arthur D. Zazzaro, **DECISION & ORDER**

Defendant.

BACKGROUND

On October 8, 1996, Arthur D. Zazzaro (the "Debtor") filed a petition initiating a Chapter 7 case. On the same day that he filed his petition, the Debtor filed the lists, schedules, and statements required by Bankruptcy Rule 1007. On his Schedule F, the Debtor listed as creditors holding unsecured nonpriority claims: (1) Carol Lee Zazzaro ("Carol Zazzaro"), as having a claim of $13,080.00 incurred in connection with the parties' divorce; and (2) Betty Arnone, as having a claim of $34,896.49 by reason of an "unsecured old revised mortgage" (the "Arnone Mortgage").

The Debtor's schedules of income and expenses showed: (1) net monthly take-home pay of $3,160.00; (2) monthly expenses of $2,605.00, including food of $450.00 and recreation, clubs and entertainment of $150.00; and (3) a resulting excess monthly income over expenses of $555.00.

On December 23, 1996, Carol Zazzaro filed an Adversary Proceeding (the "Adversary Proceeding") to have the Court determine that the $13,080.00 due her as well as the amounts due on the Arnone Mortgage were nondischargeable under the exception to discharge set forth in Section 523(a)(15).[1]

The Complaint in the Adversary Proceeding alleged that: (1) on February 28, 1996, the Debtor and Carol Zazzaro entered into a "Separation Agreement" which was incorporated into a May 24, 1996 Judgment of Absolute Divorce (the "Divorce Decree"); (2) in Article VII of the Separation

---

[1] Section 523(a)(15) provides that:

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title 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 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.

Agreement, labeled "Maintenance of the Parties", the parties: (a) agreed that neither would pay maintenance to the other; (b) accepted the provisions of the Agreement in lieu of and in full settlement and satisfaction of any and all claims and rights to support or maintenance; and (c) acknowledged that they were each self-supporting and that the Debtor earned approximately $59,000.00 per year and Carol Zazzaro earned approximately $26,000.00 per year; (3) in Article III of the Separation Agreement, labeled "Personal Property", which provided that the parties made the following division and settlement of their personal property, the Debtor agreed to pay Carol Zazzaro the sum of $436.00 per month for a period of three years as an equitable distribution of her interest in a Bachelor's Degree and a Master's Degree in Public Administration which he earned during the 28-year marriage (the "Equitable Distribution Obligation"); (4) there remained $13,080.00 due on the Equitable Distribution Obligation; (5) in Article X of the Separation Agreement, labeled "Debts and Obligations of the Parties", the Debtor agreed to assume and be solely liable for the amounts due on the Arnone Mortgage, and to indemnify Carol Zazzaro and hold her harmless in connection with the amounts due on the Mortgage; (6) there remained $34,896.49 due on the Arnone Mortgage; (7) the Debtor had the ability to pay the Equitable Distribution Obligation and the Arnone Mortgage from income or property of the Debtor not reasonably necessary for his support; and (8) the detrimental consequences to Carol Zazzaro of his nonpayment outweighed any benefit to the Debtor from allowing him to discharge these obligations.

After the Debtor interposed an Answer which: (1) denied that he had the ability to pay the Equitable Distribution Obligation and the Arnone Mortgage; (2) denied that discharging him from

such obligations would result in a benefit to him that was outweighed by the detrimental consequences to Carol Zazzaro; and (3) emphasized that he and Carol Zazzaro had specifically waived maintenance, alimony and support in the Separation Agreement, by a written Stipulation the parties agreed that Carol Zazzaro could amend her Complaint to include a request that the Court determine that the Debtor's obligation under the Separation Agreement to pay the Equitable Distribution Obligation and the Arnone Mortgage was nondischargeable under the exception to discharge set forth in Section 523(a)(5).[2] Thereafter, an Amended Complaint and an Amended

---

[2] Section 523(a)(5) provides that:

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from 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 402(a)(26) of the Social Security Act, or any such

Answer were filed, and on May 28, 1997, the Court conducted a trial in this Adversary Proceeding, at which the following witnesses testified: (1) Timothy Ingersoll, Esq. ("Attorney Ingersoll"), Carol Zazzaro's matrimonial attorney; (2) Lawrence Baker, Esq. ("Attorney Baker"), the Debtor's matrimonial attorney; (3) Carol Zazzaro; and (4) the Debtor.

DISCUSSION

I. SECTION 523(a)(5)

From the decision of the United States Court of Appeals for the Second Circuit in *In re Brody*, 3 F.3d 35 (2d Cir. 1993), and the cases cited therein, we know that: (1) the intent of the parties at the time a separation agreement was executed determines whether a payment pursuant to the agreement is alimony, support or maintenance within the meaning of Section 523(a)(5); (2) all

---

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.

evidence, direct or circumstantial, which tends to illuminate the subjective intent of the parties, is relative to this determination; (3) courts have looked to a variety of factors ("523(a)(5) Factors") in seeking to ascertain the mutual intent of the parties, including the following non-exclusive list: (a) the length of the marriage; (b) whether the obligation is subject to such contingencies as death or remarriage; (c) whether there are minor children; (d) whether the obligation appears to balance disparate incomes; (e) whether the obligation is payable periodically or in a lump sum; (f) whether there is an actual need for support; (g) whether the award is modifiable; (h) the section of the order or agreement where the award is found; (i) whether the obligation imposed was designed to rehabilitate or assist the spouse's rehabilitation after the divorce; (j) the structure of the terms of the final decree; (k) whether there was a division of property and debts; (l) whether the former spouse was shown to have suffered in the job market, or was otherwise disadvantaged because of any dependent position held in relation to the debtor during the marriage; (m) the age and health of the former spouse; (n) the nature of the obligations assumed; (o) the relative earning power of the spouses; and (p) the parties' negotiations and understandings of the provisions; (4) although a written manifestation of agreement is persuasive evidence of intent, the labels that the parties attach to a payment are not dispositive; (5) the court must look to the substance, and not merely the form, of the payment; (6) the Parol Evidence Rule does not apply in a case under Section 523(a)(5), since a factual inquiry is never limited to the four corners of a separation agreement or divorce decree; and (7) whether a payment is alimony, support or maintenance within the meaning of Section 523(a)(5) is a question of federal bankruptcy law, not of state law, and although the status of a payment under

state law is relevant to the determination, it is not dispositive.

A. **Equitable Distribution Awards for Enhanced Earnings in New York State**

Carol Zazzaro has cited the decision of Judge Howard Schwartzberg in *In re Raff*, 93 B.R. 41 (Bankr. E.D.N.Y. 1988) for the proposition that equitable distribution awards of a percentage of the present value of a degree earned by one spouse during a marriage, often referred to in New York State as an award of “Enhanced Earnings”, whether the award is made by a state court or as a provision in a separation or settlement agreement which is then incorporated into a divorce decree, is always in the nature of alimony, support or maintenance for purposes of Section 523(a)(5). If the holding in *Raff* can be read to extend beyond the actual facts in that case to all awards of Enhanced Earnings, or even just awards made by a New York State court, I respectfully disagree.

In New York State, the existence of a claim to a distributive award of Enhanced Earnings as part of equitable distribution can be likened to a wild card or a thousand bonus points in the hands of one spouse and their attorney when the parties are negotiating a settlement. Since many New York State courts now make these awards almost mechanically, because they consider them to be the division of a property interest, parties and their attorneys must factor this wild card into their negotiations when they attempt to arrive at an economic package which will induce both parties to settle the marital action and finally legally end the marriage. As has been said so often, how these economic packages are finally structured in a settlement agreement is often more dependent upon income tax considerations, whether payments will end on death, remarriage or cohabitation, economic pressures from the mounting costs of the matrimonial action, the fact that one party may

not have good "grounds" in fault states like New York, and thus not have the ability to obtain a divorce for certain if the other party does not consent, some items that for one of the spouses are non-negotiable deal-breakers, often for emotional rather than economic reasons, and an infinite number of other factors. As a result, the intention of the parties regarding some of the provisions in the settlement agreement is often unrelated to the actual labels placed upon them, and sometimes, there is no actual intention because the parties simply follow the advice of their attorneys in structuring the agreement. Nevertheless, these intentions are the very thing that the bankruptcy court must determine under Section 523(a)(5), and, if they exist, they are often completely hidden or unclear. The Enhanced Earnings wild card often serves to further confuse the mix and obfuscate the intention of the parties to a settlement agreement.

There are many factual situations where an award of Enhanced Earnings, whether by a state court or as part of a settlement agreement, would not be in the nature of alimony, support and maintenance, and either the expressed intention of the parties or an evaluation of the applicable 523(a)(5) Factors would support such a conclusion in that particular set of facts and circumstances.[3] Therefore, a rule of law that every equitable distribution award in New York State for Enhanced Earnings is always in the nature of alimony, support or maintenance for purposes of Section 523(a)(5) would be inappropriate.

---

[3] Assume: (1) two teachers with no children each with a Masters Degree and earning between $50,000 and $55,000 per year; and (2) one earned their Masters Degree during the marriage. Any award of Enhanced Earnings would clearly not be in the nature of alimony, support or maintenance, yet an award of Enhanced Earnings should be made under New York State law.

From the testimony at trial it appears that: (1) the Debtor moved out of the marital residence in September, 1993; (2) Carol Zazzaro moved out of the marital residence in 1994; (3) at some point in 1994 or 1995, before the Separation Agreement was entered into, the parties sold the marital residence to their daughter for what appeared to be below market price, which resulted in the parties incurring a substantial capital gains tax liability which was not covered in whole or in part by the sale proceeds (neither subsequently purchased a new home); (4) before the Separation Agreement was entered into, and while the parties were separated, the Debtor may have paid all or some of the monthly payments due on one or both of the joint obligations which Carol Zazzaro ultimately assumed as part of the Separation Agreement; (5) for the year prior to, and at the time when the parties entered into the Separation Agreement, Carol Zazzaro had the ability to be, and was in fact, self-supporting, although her annual salary was only approximately half of the annual salary earned by the Debtor; (6) neither the Debtor nor Carol Zazzaro testified to any discussions or negotiations in connection with the Separation Agreement from which the Court could conclude that the Equitable Distribution Obligation was needed for or intended to be for the support of Carol Zazzaro; (7) the potential present value and likely percentage of Enhanced Earnings to be awarded were appraised by each party, settled and dealt with in the Settlement Agreement by the attorneys as part of an overall economic package; (8) although in October, 1995, during the course of the attorneys' negotiations, Attorney Baker proposed that there be no Enhanced Earnings award of $500.00 per month, which was rejected by Attorney Ingersoll, it is clear that tax-deductibility was what the attorneys were primarily focused upon, not whether it was appropriate to pay support to Carol

Zazzaro; (9) a December, 1994 motion by Carol Zazzaro for temporary maintenance and support, which was reserved upon, indicated a request based primarily on her loss of a fairly comfortable lifestyle over the last several years when the parties' children had become emancipated, rather than upon any demonstrated need for day-to-day assistance in meeting expenses; and (10) by the time of the execution of the Separation Agreement, Carol Zazzaro was cohabitating with an individual in his condominium, where she still resided at the time of trial.

Based on all of the facts and circumstances presented, I find that the distributive award of $436.00 per month for three years was not in the nature of alimony, maintenance or support, within the meaning and intent of Section 523(a)(5) for the following reasons: (1) Carol Zazzaro had no need for support during the course of the matrimonial action, at the time of the Separation Agreement, or thereafter; (2) the parties had formed no clear intent that the Equitable Distribution award in the nature of Enhanced Earnings was for the support of Carol Zazzaro; (3) the award was made in the Separation Agreement as a property settlement, and not as maintenance or support, which the parties had specifically waived and, based upon the facts and circumstances existing at the time of the Agreement, this appears to have been a knowing and appropriate waiver; (4) the parties were able to sell their former marital residence to their daughter for a below market price and absorb the resulting capital gains taxes, which further indicated that their statement in the Separation Agreement that each was self-supporting and not in need of maintenance was more than just boilerplate; and (5) Carol Zazzaro had no dependent children and was cohabitating at the time of the execution of the Separation Agreement.

B. **Arnone Mortgage**

There is nothing in the record which indicates that the Debtor or Carol Zazzaro ever intended the requirement in the Separation Agreement that the Debtor pay the Arnone Mortgage and indemnify and hold Carol Zazzaro harmless be in the nature of alimony, support or maintenance for Carol Zazzaro. There were no discussions among the parties or their attorneys which indicated that this was intended to be support. Further, after an evaluation of the 523(a)(5) Factors, I conclude that it was in the nature of property settlement. As such, I find that language of the Separation Agreement controls and the obligation was not in the nature of alimony, support or maintenance for purposes of Section 523(a)(5).

II. SECTION 523(a)(15)

There have now been a number of published decisions since the 1994 Amendments when Congress added Section 523(a)(15) as an additional exception to discharge. As of this date, however, there still have been no published District Court or Circuit Court decisions. From the published decisions, we know that courts are split on many of the unresolved issues under Section 523(a)(15), which have resulted, in part, because of a statute which many believe could have and should have been more comprehensive and detailed. A review of the published decisions indicates that: (1) although there is still some difference of opinion, the majority of the bankruptcy courts: (a) place the burden on the debtor to show either an inability to pay or that the benefit to the debtor of discharging the obligation is greater than any detriment to the former spouse, once it had been established that the debt was one specifically provided for under Section 523(a)(15); (b) ability to

pay is determined as of the date of trial, not an earlier date; and (c) ability to pay should be determined by the utilization of the Section 1325 disposable income test; (2) cases continue to be in disagreement over: (a) the time frame for measuring the debtor's ability to pay (for example, three to five years, ten years, the debtor's working life); and (b) whether there must be an ability to pay the obligation in full or whether a bankruptcy court can require the debtor to pay a portion of the obligation, because either: (i) the debtor has an ability to pay only a part of the obligation over a reasonable period of time; or (ii) a partial payment of the obligation would be required as a result of some ability to pay and with an analysis of the totality of the circumstances under the balancing test of Section 523(a)(15)(B); and (3) in performing the balancing test required by Section 523(a)(15)B), most courts utilize a totality of the circumstances test and a list of non-exclusive factors.

A. <u>The Equitable Distribution Obligation</u>

______Section 523(a)(15)(A) requires the Court to determine whether the debtor has an ability to pay a property settlement obligation from income not reasonably necessary to be expended for the maintenance or support of the debtor. A review of the Debtor's current expenses, as revised at trial, indicates that he has an ability to pay the Equitable Distribution Obligation at the rate of $436.00 per month until the remaining balance of $13,080.00 is paid in full (a period of 30 months). When the Debtor's projected expenses for food, recreation, transportation, vacations, a cellular phone and gifts are reduced to reasonable levels, there is more than sufficient excess disposable income on a monthly basis to pay the Equitable Distribution Obligation without the need to further scrutinize those expenses.

B. The Arnone Mortgage

The Debtor and Carol Zazzaro are jointly and severally liable on the Arnone Mortgage. The Debtor is obligated to pay the Mortgage because he signed the Mortgage and the Promissory Note which it secures, and because he agreed to pay it under the Separation Agreement and to indemnify and hold Carol Zazzaro harmless. If the Debtor in his bankruptcy proceeding is discharged from his obligations to pay the Mortgage, Betty Arnone would have the legal right to proceed against Carol Zazzaro to collect the amounts due. However, from the evidence presented at trial, it appears that Betty Arnone: (1) is Carol Zazzaro's mother; (2) is 73 years old; (3) resides in a fully paid for condominium in Florida; (4) receives Social Security and a retirement pension; and (5) at the time of trial, had certificates of deposit and an annuity with an aggregate value of in excess of $125,000.00. It also appears that, even though the Arnone Mortgage, which covered the Debtor's former marital residence, was not recorded, allegedly because of inadvertence on the part of Arnone's attorney, Betty Arnone did not insist that the residence be sold for an amount which would have paid her something on the Mortgage.

Most courts agree that Section 523(a)(15)(B) requires the Court to employ a totality of circumstances approach and weigh the benefit to the Debtor of a discharge of a property settlement obligation against the detriment to the former spouse. In this case, since the Court finds that there is no detriment which would realistically be suffered by Carol Zazzaro in the event that the Debtor is discharged from his obligation to pay the Arnone Mortgage, except that possibility her inheritance might be reduced because Betty Arnone's assets would not be enhanced by the repayment of the

Mortgage, the Court believes that the fundamental policy of the Bankruptcy Code to afford an honest debtor a fresh start outweighs any possible detriment to Carol Zazzaro on the facts and circumstances of this case.

There is no reason for the Court to believe that if the Debtor is discharged from his obligations to pay the Arnone Mortgage, Betty Arnone will legally pursue Carol Zazzaro to collect the Mortgage. Carol Zazzaro is a joint owner of Betty Arnone's condominium in Florida, and is a joint holder of her certificates of deposit. Even if this is only for convenience purposes, it indicates a trust and a level of relationship between mother and daughter that is incompatible with a conclusion that Betty Arnone would sue for the amounts due on the Arnone Mortgage and then attempt to collect any resulting judgment by any and all means available under New York State law.[4]

Because I have found that the Debtor has met his burden under Section 523(a)(15)(B), it is

---

[4] Although the legislative history to Section 523(a)(15) is sparse, it does provide in part that:

> "For example, if a nondebtor spouse would suffer little detriment from the debtor's nonpayment of an obligation required to be paid under a hold harmless agreement (perhaps because it could not be collected from the nondebtor spouse or because the nondebtor spouse could easily pay it) the obligation would be discharged. The benefits of the debtor's discharge should be sacrificed only if there would be substantial detriment to the nondebtor spouse that outweighs the debtor's need for a fresh start."

not necessary for me to decide many of the issues which are otherwise presented, such as partial ability to pay and over what time frame ability to pay should be measured.

CONCLUSION

The $13,080.00 due from the Debtor to Carol Zazzaro under the Separation Agreement entered into by the parties is determined to be nondischargeable under Section 523(a)(15). The Debtor has the ability to pay this obligation, and the detriment to Carol Zazzaro from not receiving the money due her exceeds the benefit which the Debtor would obtain from the discharge of the obligation. However, the Debtor's obligation to pay the Arnone Mortgage is discharged because: (1) it is not in the nature of alimony, support or maintenance; and (2) under Section 523(a)(15)(B), the detriment to Carol Zazzaro from discharging the obligation does not outweigh the benefit to the Debtor of receiving a discharge.

The parties shall have thirty (30) days to submit to the Court a consent order providing for: (1) the payment of interest on the Equitable Distribution Obligation at the New York State judgment rate for the period from the time the Debtor first defaulted on the Obligation to the date of the first payment made by the Debtor as a result of this Decision & Order; and (2) the payment by the Debtor of reasonable attorney's fee to Carol Zazzaro in connection with the Adversary Proceeding, which shall recognize that only the Equitable Distribution Obligation has been found to be nondischargeable. If the parties cannot arrive at an agreed upon figure for a reasonable attorney's fee within thirty (30) days, the Court will determine the same.

IT IS SO ORDERED.

____________/s/_____________
HON. JOHN C. NINFO, II
U.S. BANKRUPTCY JUDGE

Dated: September 12, 1997