

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK**

In re:

KEVIN J. GALLAGHER,

Debtor.

CASE NO. 98-23847

DECISION & ORDER

JACQUELYN GALLAGHER,

Plaintiff,

V.

KEVIN J. GALLAGHER,

Defendant.

AP #99-2002

CYNTHIA L. SNODGRASS,

Plaintiff,

V.

KEVIN J. GALLAGHER,

Defendant.

AP #99-2003

BACKGROUND

On October 14, 1999, Kevin J. Gallagher (the “Debtor”) filed a petition initiating a Chapter 7 case. On the Schedules and Statements required to be filed by Section 521 and Rule 1007, the Debtor indicated that: (1) he was indebted to Cynthia L. Snodgrass, Esq. (“Attorney Snodgrass”) in the amount of \$3,000.00 for “Legal Fees 1997.”

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On January 19, 1999, Attorney Snodgrass and Jacquelyn Gallagher, the Debtor's former spouse, commenced Adversary Proceedings against the Debtor. The Complaints in the Adversary Proceedings alleged that: (1) the Debtor and Jacquelyn Gallagher were divorced by an order (the "Divorce Decree") dated February 6, 1998; (2) on April 29, 1997 an Order had been entered in the state court matrimonial proceeding which directed the Debtor to pay \$1,500.00 in attorney fees incurred by Jacquelyn Gallagher with Attorney Snodgrass, her matrimonial attorney, and on October, 1997, an Order had been entered which directed the Debtor to pay an additional \$1,500.00 in attorney fees incurred by Jacquelyn Gallagher with Attorney Snodgrass; (3) the prior orders (the "Payment Orders") which directed the Debtor to pay attorney fees were incorporated into the Divorce Decree; (4) the debt for the attorney fees due from the Debtor pursuant to the Payment Orders, as incorporated into the Divorce Decree, (the "Snodgrass Fees"), was a nondischargeable obligation pursuant to Section 523(a)(5), because it was a debt that was in the nature of support; (5) alternatively, the debt for the Snodgrass Fees was a nondischargeable obligation pursuant to Section 523(a)(15)¹, because: (a) the Debtor had the ability to pay the debt; and (b) discharging the debt

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—

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would not result in a benefit to the Debtor that outweighed the detrimental consequences to Jacquelyn Gallagher and the Debtor's three children who she had primary custody of.

The Debtor interposed an Answer to the Complaints which alleged that: (1) the Snodgrass Fees were not in the nature of support; and (2) because of his personal expenses and the support payments and child support payments that he was required to pay to Jacquelyn Gallagher, he did not have the ability to pay the Snodgrass Fees.

As the result of several pre-trial conferences conducted by the Court in connection with the Adversary Proceedings, it was determined that: (1) the debt for the Snodgrass Fees was not in the nature of support pursuant to Section 523(a)(5), because a letter was obtained by counsel for the Debtor from the State Court Judge who issued the Payment Orders and the Divorce Decree which indicated that he did not consider them when made to have been in the nature of support for Jacquelyn Gallagher; (2) since the only remaining cause of action which could result in a

(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) (1999).

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determination of nondischargeability was the cause of action pursuant to Section 523(a)(15), only the Jacquelyn Gallagher Adversary Proceeding would go forward; and (3) if the Debtor could not meet his burden under Section 523(a)(15)(A) to demonstrate that he did not have an ability to pay the Snodgrass Fees, the debt would be nondischargeable, since the parties agreed that the Debtor could not meet his burden on the balancing test under Section 523(a)(15)(B).

On July 7, 1999, the Court conducted a trial to determine whether the Debtor had the ability to pay the Snodgrass Fees, at which the only witness who testified was the Debtor.

The Debtor's own testimony at the trial and his Schedules of Income and Expenses (the "Schedules") indicated that his monthly personal living expenses were \$1,545.54, broken down as follows:

| | |
|---|-------------------|
| Rent/Utilities/ Household Supplies shared with two other individuals | \$ 425.00 |
| Food | \$ 350.00 |
| Clothing | \$ 50.00 |
| Medical/Dental, including extraordinary dental expenses anticipated over the next two years | \$ 84.00 |
| Transportation | \$ 200.00 |
| Automobile Insurance | \$ 60.00 |
| Car Payment | \$ 276.54 |
| Recreation | \$ 100.00 |
| TOTAL | <u>\$1,545.54</u> |

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However, the Debtor was only able to produce evidence of car maintenance and repair expenses for his 1984 Ford Pick-up which indicated a total monthly expense of \$65.00 which, when added to what he testified to was his monthly gas and oil expense of \$100.00, results in a total monthly transportation cost of \$165.00. In addition, the Debtor's revised expenses included a car payment for a 1996 Pick-up, which he had recently purchased and which was to be delivered after trial. This replacement vehicle should not require as much of a monthly maintenance and repair expense and certainly not an expense of more than \$65.00 per month. This results in a revised monthly personal living expenses amount of \$1,510.54.

In addition to these personal living expenses, the Debtor's testimony and Schedules indicated that he had an additional \$1,598.95 deducted from his pay on a monthly basis, which represented \$300.00 per month for health insurance and \$1,298.95 per month for child support and spousal maintenance as required by the Divorce Decree.

However, Defendant's Exhibit A at Trial ("Exhibit A"), a copy of a current pay stub, indicated that other than withholding for federal and state income taxes and deductions of \$1,298.95 for child support and spousal maintenance pursuant to the Divorce Decree, the actual deductions from the Debtor's weekly pay were as follows:

| | |
|----------------------|----------|
| Social Security Tax | \$ 52.20 |
| Medicare Tax | \$ 12.21 |
| New York SUI/SDI Tax | \$.60 |
| Pretax Dental | \$ 8.09 |
| Pretax Health | \$ 23.71 |

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| | |
|----------------------|-----------------------|
| Long Term Disability | \$ 4.87 |
| TOTAL | \$101.68 ² |

Therefore, based upon the Schedules, the Debtor's testimony at trial and Exhibit A, the Debtor had total monthly personal living expenses and payroll deductions, other than deductions for withholding of federal and state income taxes, of \$3,250.10 [\$1,510.54 (personal expenses) + \$1,298.95 (support) + \$440.61 (other deductions) = \$3,250.10].

At the time of trial, the evidence presented on behalf of the Debtor to establish his current gross income, Exhibit A, which showed no earnings for overtime, and his oral testimony, was deemed by the Court to be insufficient to establish the Debtor's actual current gross and after tax income because it was established that the Debtor in past years had significant overtime earnings and he testified that in 1999, prior to the pay period represented by Exhibit A, he had overtime earnings. Therefore, the Court directed the Debtor to provide it with a copy of his 1998 Federal and New York State income tax returns, as well as a projection, prepared by his accountant, of his 1999 income and potential tax liability with a filing status of single, the same as his 1998 filing status.

On July 27, 1999, the Debtor filed copies of his 1998 Federal and New York State income tax returns with the Court that showed:

² \$101.68 per week x 52 weeks = \$5,287.36 ÷ 12 = \$440.61 per month.

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| | |
|---|-------------|
| Gross Income for 1998 | \$44,566.00 |
| Total Federal Income Taxes due, with a filing status of single | \$ 5,560.00 |
| New York State Income Taxes due, with a filing status of single | \$ 1,732.00 |

On August 3, 1999, the Debtor filed: (1) a Statement of Projected Income, prepared by Affordable Accounting and Tax Service, which indicated that his 1999 projected income, with no additional overtime included, was \$47,832.00;³ and (2) a letter from his employer (the “Employer Letter”) which stated that: “Kevin is not scheduled to work overtime in the foreseeable future.” Therefore, because of the Employer Letter, the Debtor’s certain projected future annual income at his current pay rate based upon Exhibit A is \$45,448.00 (\$874.00 per week x 52 weeks).

DISCUSSION

Based upon: (1) the Debtor’s own testimony as to his personal living expenses; (2) the Debtor’s payroll deductions other than withholding of income taxes, as set forth on Exhibit A; and (3) the Court’s finding regarding transportation expenses, it is clear that the Debtor does not

³ This projection included approximately \$2,384.00 in overtime earned in 1999 before the trial.

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currently have any disposable income with which to pay the Snodgrass Fees.⁴ This can be very simply mathematically demonstrated, as follows:

| | |
|---|-------------------|
| Gross Income for 1998 | \$44,566.00 |
| Less: 1998 Federal Income Tax Liability as a single taxpayer | <u>- 5,560.00</u> |
| Remainder | \$39,006.00 |
| Less: 1998 New York State Income Tax Liability as a single taxpayer | <u>- 1,732.00</u> |
| 1998 Income net of Federal and State tax liability | \$37,274.00 |
| 1998 monthly income after income tax liability (\$37,274 ÷ 12 = \$3,106.17) | \$ 3,106.17 |
| Projected 1999 income without overtime or pay increases | \$45,448.00 |
| Less: 1998 actual income | <u>-44,566.00</u> |
| Increased 1999 gross annual income over 1998 actual income | \$ 882.00 |

⁴ Although some of the Debtor's claimed personal living expenses may be somewhat high, they are sufficiently within the range of reasonably necessary that the Court will not reduce them for purposes of determining the ability to pay.

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Less: Projected additional taxes on the increased 1999 income at the rate of 16% (the actual 1998 Federal and State income taxes on the Debtor's actual 1998 income was at the rate of 16%)

- 141.12

Increased 1999 income after withholding taxes

\$ 740.88

Increased 1999 monthly income after taxes ($\$2,612.80 \div 12 = 217.73$)

\$ 61.74

1999 and future projected monthly income after taxes (\$3,106.17, 1998 monthly income after taxes, plus \$61.74, additional 1999 monthly income after taxes)

\$ 3,167.91

Debtor's projected 1999 excess disposable monthly income (\$3,167.91) less monthly living expenses (\$1,545.54) and less payroll deductions for dental, medical and disability insurance, child support and spousal maintenance, social security, medicare and other deductions (\$1,739.56)

\$ (82.19)

However, because of: (1) the Debtor's extraordinary medical expenses which are only projected for the next two years; and (2) the fact that the Debtor has historically had significant

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overtime earnings and probably has the ability to have them in the future at his election, the inquiry into the ability to pay cannot end with just a determination of the Debtor's current disposable income. If the Court looks at a five- to ten- year period, the range of the terms of individual Chapter 11 plans traditionally confirmed by this Court, in years three and beyond, the Debtor will have an additional \$84.00 per month in disposable income because he will no longer have his projected extraordinary dental expenses. Assuming that he will continue to receive pay raises equal to or greater than inflation, this will leave him at essentially a breakeven disposable income position.

Although Section 523(a) does not set forth over what period of time a debtor's ability to pay is to be measured, this Court, as do most other courts, believes that it should be measured over a reasonable period of time when all of the facts and circumstances of the particular case presented are considered. In this case, based upon all of the facts and circumstances presented, a ten-year repayment period would certainly be reasonable.

Throughout the Jacquelyn Gallagher Adversary Proceeding the parties have argued over the Debtor's ability to obtain overtime. The Employer Letter only indicated that he was not currently scheduled for overtime. It failed to state whether, if he requested it, the Debtor could get overtime in the future as he had in the past. I believe that the Debtor has the ability to obtain overtime earnings. However, I am not prepared to impute overtime income to him for purposes of determining the ability to pay under Section 523(a)(15)(A). In Chapter 13 cases, where it is probable but not certain that a debtor will have increased disposable income over the life of the plan, rather than impute income, this Court has a policy of requiring the debtor to file copies of tax returns annually and to pay any excess actual disposable income into the plan. Here, because it appears from

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the evidence at trial and in the Jacquelyn Gallagher Adversary Proceeding that there is a high probability that the Debtor has the ability to obtain overtime earnings at his present employment, if the Debtor does have overtime income over the next ten years, he will have demonstrated the ability to pay, and he must devote it to the payment of the Snodgrass Fees: (1) for the period from June 26, 1999 to June 25, 2001 only to the extent that it is over \$83.00 per month net of related payroll deductions and actual income taxes; and (2) for the period from June 26, 2001 to June 25, 2009, or until the Snodgrass Fees are paid in full without interest, net of payroll deductions and actual taxes.

Within ten days of the date each of his tax returns are filed, the Debtor shall file with Attorney Snodgrass copies of his Federal and State income tax returns and a statement with the computation of any overtime income earned for the above periods, and at the same time pay over against the Snodgrass Fees the amounts, if any, required to be paid by the preceding paragraph.

CONCLUSION

The debt due to Attorney Snodgrass in the amount of \$3,000.00, which the Debtor was ordered to pay by the Payment Orders made by the New York State Supreme Court in connection with his divorce from Jacquelyn Gallagher, is determined by this Court to be nondischargeable pursuant to Section 523(a)(15) only to the extent of any overtime income payable as set forth in this Decision & Order.

IT IS SO ORDERED.

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

Dated: September 13, 1999