IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

IN RE:	)	
	)	
DAVID CHARLES ANDERSON,	)	**Case No. 99-13415**
	)	**Chapter 7**
Debtor.	)	
	)	
JEAN ANDERSON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Adversary No. 99-5345**
	)	
DAVID CHARLES ANDERSON,	)	
	)	
Defendant.	)	

ORDER DENYING DEFENDANT'S MOTION TO DISMISS COMPLAINT

David Anderson, defendant, moves for dismissal of Jean Anderson's complaint to determine dischargeability. In her complaint, Jean Anderson seeks to have the joint marital debt to Panhandle Credit Union which David Anderson undertook responsibility to pay pursuant to the divorce decree, declared nondischargeable under 11 U.S.C. § 523(a)(15).[1] David Anderson asserts that there is no debt to discharge under § 523(a)(15) and Jean's complaint should be dismissed. David Anderson appears by William S. Woolley. Jean Anderson appears by Martin J. Peck.

FACTS

[1]All statutory references are to the Bankruptcy Code, 11 U.S.C. § 101, et seq unless otherwise noted.

David and Jean Anderson were divorced on September 15, 1998 in Sumner County, Kansas. It appears that the parties used one attorney, Shawn R. DeJarnett, who prepared the pleadings and the divorce decree. The Decree of Divorce shows that Jean was represented by Shawn R. DeJarnett and David appeared pro se.

The decree provides, inter alia, that Jean should retain the parties' home and that David would be "held harmless" from any obligations secured by the homestead. "The Parties have agreed that the Petitioner [Jean] shall be awarded the real estate, subject to holding the Respondent harmless on the parties [sic] obligation to Nationsbank for the mortgage. The Petitioner shall use reasonable efforts to relieve the Respondent from said obligation. Respondent will execute documents necessary to relieve him of said obligation."[2] Later, in paragraph 7 of the decree, the court finds that "Jean shall be responsible..." for several debts of the parties. In paragraph 8, the court finds that David "shall be responsible for the following debts to-wit: A. Boeing Credit Union for the 1996 Toyota T100 Truck; B. Panhandle Credit Union VISA..." David was also to relieve Jean from the obligation on the 1996 Toyota truck to the Boeing Credit Union. The parties' pleadings in this Court suggest that both Jean and David were obligated on the Panhandle Credit Union debt. In his answer, David admits that he was to have been "responsible" for paying the debt to Panhandle Credit Union.

Jean filed this adversary proceeding to except from discharge David's obligation under the divorce decree concerning the Panhandle Credit Union debt upon which Jean has now been sued in district court in Sumner County, Kansas. Both parties agree that this debt is not one for support,

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[2]In the Matter of the Marriage of Wilma Jean Anderson, and David Charles Anderson, Decree of Divorce, ¶ 6, p. 2-3.

maintenance or alimony under § 523(a)(5), and that § 523(a)(15) provides the only basis for excepting this debt from David's discharge. David asserts in his motion that because the reference to his being "responsible" for the Panhandle debt does not invoke the talisman "hold harmless," he is not liable to Jean to protect her from the Panhandle debt and, therefore, there is no debt related to Panhandle Credit Union that should be excepted from discharge.

ANALYSIS

David Anderson's motion to dismiss is apparently based Jean Anderson's alleged failure to state a claim upon which relief can be granted under Fed. R. Civ. P. 12(b)(6), made applicable to adversary proceedings by Fed. R. Bankr. P. 7012. Because this motion references matters outside the pleadings, the Decree of Divorce, the Court shall treat the motion as one for summary judgment pursuant to Fed. R. Civ. P. 56. See Fed. R. Civ. P. 12(b).

Rule 56 of the Federal Rules of Civil Procedure governs summary judgment and is made applicable to adversary proceedings by Rule 7056 of the Federal Rules of Bankruptcy Procedure. In articulating the standard of review for summary judgment motions, Rule 56 provides that judgment shall be rendered if all pleadings, depositions, answers to interrogatories, and admissions and affidavits on file show that there are no genuine issues of any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Fed. R. Bankr. P. 7056. In determining whether any genuine issues of material fact exist, the Court must construe the record liberally in favor of the party opposing the summary judgment. McKibben v. Chubb, 840 F.2d 1525, 1528 (10th Cir. 1988) (citation omitted). An issue is "genuine" if sufficient evidence exists on each side "so that a rational trier of fact could resolve the issue either way" and "[a]n issue is 'material' if under the substantive law it is essential to the proper disposition of the

claim." Adler v. Wal-Mart Stores, Inc., 144 F.3d 664, 670 (10th Cir. 1998).

Construction of the record in this case requires the Court to discern from the divorce decree the intent of the parties when they agreed to its terms. David asserts that the presence of the "hold harmless" terms in the paragraph which disposes of the homestead, read with the absence of those terms in the paragraphs which assign debt, renders his "responsibility" something less than an obligation to Jean. Jean asserts that David became obligated to her upon the entry of the decree, irrespective of the use of the "hold harmless" language. The Court assumes that were this matter seen to trial and the parties permitted to offer parol evidence concerning this decree, David would argue that he had no intent to indemnify or hold Jean harmless from these debts. Jean will likely remember just the opposite. Deciding this motion therefore requires the Court to determine whether the language of this decree creates an obligation which rises to the dignity of a debt in bankruptcy.

David clearly agreed to be responsible to Jean to pay the Panhandle debt. That "responsibility" is indeed a debt, as that term is defined in the Bankruptcy Code. Debt is defined in § 101(12) as "liability on a claim," and a claim is a "right to payment." § 101(5)(A). A right to payment is very broadly defined as "nothing more or less than an enforceable obligation." Cohen v. de la Cruz, 523 U.S. 213, 218, 118 S. Ct. 1212 (1998).

Section 523(a)(15) excepts from discharge a debt which 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..." unless the debtor lacks the ability to pay the debt from income or property not reasonably necessary to support the debtor or his dependents, or discharge of the debt would be a benefit to the debtor which would outweigh the detriment of the discharge

to the non-debtor spouse. (Emphasis added.) David's obligation to be responsible for the Panhandle debt was incurred in connection with the divorce case. David's obligation runs to Jean, not to Panhandle.[3]

The Sixth Circuit Bankruptcy Appellate Panel recognized this obligation in In re Gibson, 219 B.R. 195 (6th Cir. B.A.P. 1998). In Gibson, debtor became responsible for a joint marital debt to his stepfather in the divorce decree. When debtor did not pay, his stepfather sued Ms. Gibson for payment. Ms. Gibson filed an adversary proceeding to determine the debtor's obligation on the debt to be nondischargeable under § 523(a)(5) and (a)(15). The bankruptcy court held the debt to be dischargeable pursuant to both § 523(a)(5) and (a)(15). The court noted that the debt was payable to "someone other than the Debtor's former spouse" and that as a matter of law, the absence of a "hold harmless" provision in the divorce decree rendered the joint debt owed to the third party dischargeable. The Sixth Circuit BAP reversed the bankruptcy court, holding the debt nondischargeable under § 523(a)(15).

Relying on the qualifying language of § 523(a)(15), the BAP framed the issue as whether in connection with the Dissolution Decree and Separation Agreement, the debtor incurred any enforceable obligation to Ms. Gibson which was not for alimony, maintenance, or support. The Court noted that the most common debts "incurred" in connection with a divorce or separation agreement are alimony, maintenance, and support, but that many times there remain debts incurred prior to the divorce whose repayment must be allocated between the parties. When one of the

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[3]There is no doubt that David's debt to Panhandle is dischargeable under § 727. This is a legal point discrete from the dischargeability of David's debt to Jean. Additionally, Jean's liability for the joint credit card debt was unaffected by the divorce decree. Both David and Jean remain liable on the credit card exactly as they had been prior to the divorce. This Court today is concerned with the new debt created between David and Jean in the divorce decree.

parties who has become responsible for the repayment of a marital debt files a petition for relief, the Court must determine if the debtor has "incurred" this debt under § 523(a)(15).

Many courts have found that a debtor's obligation under a divorce decree or separation agreement to pay a third party obligation directly to a spouse or to hold a spouse "harmless" on a third-party debt qualifies under § 523(a)(15). See Stegall v. Stegall (In re Stegall), 188 B.R. 597 (Bankr. W.D. Mo. 1995); Belcher v. Owens (In re Owens), 191 B.R. 669 (Bankr. E.D. Ky. 1996). In these cases, it was not enough for the parties to list in the decree which debts would be assumed by each party. The magic words "hold harmless" must be present to create a new obligation arising from the divorce; without this language relating to a specific debt, a new debt is not created in the divorce.

Other courts have not limited the determination of whether a debt falls under § 523(a)(15) to the use of "hold harmless" or other specific indemnification language as a debtor "may, and frequently does, incur such an obligation in accordance with applicable nonbankruptcy law." Gibson, 219 at 203; In re Carlisle v. Carlisle (In re Carlisle), 205 B.R. 812, 816 (Bankr. W.D. La. 1997)([T]he creation and enforceability of obligations in a divorce settlement are governed by state law); Johnston v. Henson (In re Henson), 197 B.R. 299 (Bankr. E.D. Ark 1996); Schmitt v. Eubanks (In re Schmitt), 197 B.R. 312 (Bankr. W.D. Ark. 1996). Although the bankruptcy court has exclusive jurisdiction to determine those § 523(a)(15) issues which federal law ultimately governs, the court may look to state law in deciding whether a debt qualifies under (a)(15). State law refers "to all nonbankruptcy law that creates substantive claims." Grogan v. Garner, 498 U.S. 279, 283-84, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991).

In determining whether David incurred a debt in connection with the Decree of Divorce,

the Court looks to Kansas law. David's obligation could, absent this bankruptcy's pendency, be enforced by Jean in domestic court in Kansas. Like bankruptcy courts, Kansas courts have drawn a distinction between the discharge of a debtor's obligation to a third party creditor and the debtor's indemnity obligation to the non-debtor spouse. See In the Matter of the Marriage of Ray, 21 Kan. App. 2d 615, 905 P.2d 692 (Kan. Ct. App. 1995). Because David's obligation to Jean could be enforced under state law, and was a debt incurred in a divorce decree or separation agreement, it is a debt which may be excepted from discharge under § 523(a)(15),[4] with or without the magic words "hold-harmless."

Finally, debtor asks the Court to rely on a canon of construction, *expressio unius est exclusio alterius*, essentially stating that the draftsman's omission of the hold harmless language in one paragraph while including it in another demonstrates that the allocation of these debts among Jean and David somehow did not arise to the level of obligating them to one another for their payment. Artful though this argument may be, this Court cannot, without further evidence than that in the record today, determine as a matter of law that this was indeed the parties intent. Viewing the record in Jean's best light, this Court suspects that the parties indeed intended that each go their own way and pay the debts assigned to them. Thus, genuine issues of fact remain and judgment as a matter of law cannot be granted to David Anderson.

David Anderson's motion to dismiss is DENIED. The Clerk is instructed to set this adversary proceeding for trial.

IT IS SO ORDERED.

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[4]Whether the debt is in fact excepted from discharge under § 523(a)(15) remains in issue.

Dated this 11th day of January, 2001.

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ROBERT E. NUGENT
UNITED STATES BANKRUPTCY JUDGE

CERTIFICATE OF SERVICE

The undersigned certifies that copies of the **ORDER DENYING DEFENDANT'S MOTION TO DISMISS COMPLAINT** were deposited in the United States mail, postage prepaid on this 11th day of January, 2001, to the following:

D. Michael Case
400 Commerce Bank
150 N. Main
Wichita, KS 67202

Edward J. Nazar
Ninth Floor
Olive Garvey Building
200 West Douglas
Wichita, KS 67202

N. M. Iverson
209 S. Summit
P.O. Box 1065
Arkansas City, KS 67005

David Charles Anderson
702 E. 19th
Winfield, KS 67156

William S. Woolley
Ninth Floor
Olive Garvey Building
200 W. Douglas
Wichita, KS 67202

Martin J. Peck
123 North Jefferson
P.O. Box 236
Wellington, KS 67152

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Janet Swonger,
Judicial Assistant