

A08-688

STATE OF MINNESOTA
IN COURT OF APPEALS

In re the Marriage of:

Jason Paul Fast, Respondent,

vs.

Yvette Francis Fast, Appellant.

APPELLANT'S BRIEF AND APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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STATEMENT OF THE CASE

This appeal is from an Order of Steele County District Judge Joseph A. Bueltel filed on February 8, 2008. The Order denied in part and granted in part the motion by Appellant, Yvette Fast, for enforcement of portions of the parties' Dissolution Judgment that was entered on February 6, 2007. Among the requests for relief, Appellant moved the District Court to enforce paragraph 14 of the Conclusions of Law in the Judgment that required Respondent, Jason Fast, to assume full responsibility for and hold Appellant harmless from a marital debt owed to Wells Fargo bank. Appellant appeals from the portion of the February 8, 2008, Order, and Memorandum, that denies enforcement of paragraph 14 of the Judgment.

LEGAL ISSUES

- I. Did the trial court err in concluding that Respondent's discharge in bankruptcy of his debt to Wells Fargo also discharged Respondent's obligation in the Dissolution Judgment to assume full responsibility for and hold Appellant harmless from this marital debt?

The Trial Court Held: Payment of this debt was not ordered for the support or maintenance of appellant. Respondent listed this debt in the bankruptcy proceedings. Appellant was provided notice and could have taken part in the

bankruptcy to protect her from any subsequent issues regarding Respondent's discharge of this debt.

Appellant did not take such action. The Court will not order Respondent to pay any sum to Appellant for such a debt discharged in bankruptcy. (Appendix A-10).

Most Apposite Authorities: 11 U.S.C. § 523(a)(15) (2008 Thompson Reuters/West, WESTLAW through 5-13-08); *In re Douglas*, 369 B.R. 462, 464 (Bkrcty. E.D.Ark. 2007).

II. Did the trial court's refusal to enforce Respondent's obligation to hold Appellant harmless from the Wells Fargo debt improperly modify the Dissolution Judgment?

The Trial Court Held: The Trial Court did not rule that the Judgment should be reopened or modified.

Most Apposite Authorities: Minn. Stat. § 518.145, subd. 2 (2007); *Kerr v. Kerr*, 309 Minn. 124, 243 N.W.2d 313 (1976).

STATEMENT OF FACTS

The parties were divorced by a Judgment and Decree entered on February 6, 2007, reproduced in the Appendix at A-36 to A-51. Paragraph 14 of the Conclusions of Law in the Judgment and Decree provides as follows:

14. Business Known as Fast Wireless. The Petitioner, Jason Paul Fast, is awarded all interest and equity in and to the business known as Fast

Wireless, located in Owatonna, MN and Faribault, MN. The Petitioner shall also assume full responsibility for all business debt, holding Respondent harmless thereon.

A-47. The dissolution petitioner Jason Fast – who is the respondent in this appeal – pursued a bankruptcy proceeding, listing this debt owed to Wells Fargo, and listing the dissolution respondent Yvette Fast – Appellant in this appeal – as a creditor. A-31. Appellant did not participate in the bankruptcy proceeding. On August 8, 2007, the U.S. Bankruptcy Court for the District of Minnesota issued to respondent a notice of discharge of debtor. A-33.

Appellant moved the trial court in October, 2007, for relief to enforce portions of the Judgment requiring respondent to pay for and assume responsibility for certain debts. Specific to this appeal, appellant moved the trial court to “order Petitioner to pay the Wells Fargo debt including interest and late fees and penalties.” A-11. Appellant’s affidavit explained the history of the debt, A-17, and showed that the creditor was demanding full payment from her. A-20. Respondent submitted responsive pleadings, moving the trial court to deny the relief and dismiss the motion. A-23. Respondent’s affidavit explained the bankruptcy and listed the debts that were included: “I included the attorney fees, my own and the Respondent’s, as well as the Wells Fargo Loan in the bankruptcy.” A-25. Respondent’s claim to the trial court was that the debts were discharged and that having to pay the debts “would financially ruin me”. A-26.

Appellant’s legal argument to the trial court was that the plain language of 11

U.S.C. § 523(a)(15) (2008 Thompson Reuters/West, WESTLAW through 5-13-08) provides that respondent's Judgment obligation to pay the Wells Fargo debt was not discharged by the bankruptcy. A-15. Respondent argued that the debt did not automatically survive the discharge, that a creditor must file a complaint in an adversary proceeding in bankruptcy court to contest discharge of a debt, so that because appellant did not do so, the "domestic support obligations" were not preserved. A-28.

The trial court denied appellant's motion to order respondent to pay the Wells Fargo debt. A-4. The trial court's memorandum explained the court's reasoning, that respondent had discharged the debt in bankruptcy because appellant had not taken any action "to protect her from any subsequent issues regarding [Respondent's] discharge of this debt". A-10. The trial court refused to order respondent to pay any sum to appellant "for such a debt discharged in bankruptcy". A-10.

Appellant timely appealed to this court from the trial court's order.

STANDARD OF REVIEW

This court reviews legal questions de novo. *Kampf v. Kampf*, 732 N.W.2d 630, 633 (Minn. App. 2007), citing *Modrow v. JP Food Service, Inc.*, 656 N.W.2d 389, 393 (Minn. 2003). "No deference is given to a lower court on questions of law." *Id.*

There are no substantial disputes of fact in this case. The issue of the effect of respondent's bankruptcy discharge on the marital Judgment debts is a question of law.

ARGUMENT

I. Respondent's obligation to hold Appellant harmless from the Wells Fargo debt was not discharged by the bankruptcy court.

The trial court erred in this case in concluding that respondent's bankruptcy discharge of the Wells Fargo debt also eliminated his obligation under the Judgment to hold appellant harmless on this debt. The trial court's refusal to enforce this obligation must be reversed by this court.

A. The plain language of the 11 U.S.C. § 523(a)(15) excludes this marital obligation from discharge.

Respondent Jason Fast applied for a bankruptcy discharge, and the U.S. Bankruptcy Court issued the following order: "The debtor(s) are granted a discharge under section 727 of title 11, United States Code, (the Bankruptcy Code)." A-33. There is no dispute that respondent had listed both Wells Fargo and appellant as creditors in his bankruptcy filings. See A-31 (docket entry for 6/11/2007, adding Yvette Fast to the creditor matrix).

Both parties were jointly liable on the marital debt owed to Wells Fargo. The Dissolution Judgment, as part of the property division, allocated the Fast Wireless business, and the associated debt, to respondent. Respondent is required to bear full responsibility for the Wells Fargo debt and to hold appellant harmless. This provision did not change the parties' liability to Wells Fargo, but did provide that as between these

parties, as a result of the dissolution, appellant would not have to pay this debt. The meaning of the “hold harmless” provision is that if respondent failed to bear full responsibility for the Wells Fargo debt, appellant has a claim against respondent for any damage caused to her by respondent’s failure or refusal to meet that obligation of the Dissolution Judgment.

By obtaining a discharge in bankruptcy, respondent has been relieved of his liability to Wells Fargo.¹ The question in this case is whether respondent has also been relieved of his obligation to appellant under the hold harmless provision to protect her from the consequences of his non-payment of the Wells Fargo debt.²

The statutory authority cited for the bankruptcy discharge provides that “*Except as provided in section 523 of this title*, a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter ...”. 11 U.S.C. § 727(b) (2008 Thompson Reuters/West, WESTLAW through 5-13-08) (Emphasis supplied). Since the debt to Wells Fargo, and the hold harmless

¹ Federal statute explains what a “discharge” in bankruptcy means. As relevant in this case, “A discharge in a case under this title – (2) operates as an injunction against the commencement or continuation of an action, the employment of a process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived; * * *.” 11 U.S.C. § 524(a)(2) (2008 Thompson Reuters/West, WESTLAW through 5-13-08).

² The record and exhibits show that appellant is the only debtor on the note to Wells Fargo and is still liable on the Wells Fargo debt. *See*, A–20, Exhibit 2 of appellant’s motion papers (the demand for appellant to pay in full). Appellant’s affidavit also alleged that her credit rating is being damaged by respondent’s non-payment. A–18, ¶ 18.

obligation to appellant both arose before the bankruptcy discharge order, § 523 is the key provision for analysis.

11 U.S.C. § 523(a)(15) (2008 Thompson Reuters/West, WESTLAW through 5-13-08) states as follows, in relevant part:

A discharge under section 727 * * * of this title does not discharge an individual debtor from any debt –

* * *

(15) to a spouse, former spouse, or child of the debtor and 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, or a determination made in accordance with State or territorial law by a governmental unit; * * *.

Respondent's obligation under ¶ 14 of the Judgment to assume full responsibility for the debt to Wells Fargo, "holding [appellant] harmless thereon", is clearly excluded from discharge by the plain language of this statute. First, the obligation established by the Judgment is a debt owed to respondent's former spouse – appellant. Second, this obligation was incurred by respondent in the course of a divorce and in connection with a divorce decree of a court of record, because the obligation is contained within the dissolution judgment issued by the Steele County District Court. A-47. There is no basis for disputing that these elements are met.

Third, respondent's obligation is "not of the kind described in paragraph 5", a reference to § 523(a)(5). Clause (5) excludes from discharge a "domestic support

obligation”, such as one for child support or spousal maintenance.³ Neither party in this case claims that respondent’s obligation to hold appellant harmless is in the nature of child support or spousal maintenance,⁴ nor did the trial court make such a finding. Rather, respondent’s obligation to hold appellant harmless on this debt is part of the parties’ property settlement under the dissolution decree, by which respondent also was awarded all interest and equity in the Fast Wireless business. A–47. Therefore, this obligation is squarely within the plain language of § 523(a)(15), so that respondent’s bankruptcy discharge under § 727 did not discharge his debt under the judgment to appellant. The trial court erred in ruling to the contrary.

B. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 changed prior bankruptcy law and practice: Marital property settlement obligations are no longer dischargeable.

The 2005 amendments to the bankruptcy code removed the balancing test

³ 11 U.S.C. § 101(14A) (2008 Thompson Reuters/West, WESTLAW through 5-13-08) defines the term “domestic support obligation” for purposes of title 11. Along with other elements, such an obligation must be “in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of such spouse, former spouse, or child of the debtor or such child's parent, without regard to whether such debt is expressly so designated”.

⁴ Respondent’s memorandum to the trial court refers to “domestic support obligations” as a label for appellant’s hold-harmless protection in the Judgment, A–27, 28, but respondent did not allege that the hold-harmless is in the nature of child support or spousal maintenance. The trial court found that respondent’s obligation to pay the Wells Fargo debt “was obviously not ordered for the support or maintenance of [Appellant].” A–10.

provisions that previously allowed a property settlement obligation to a former spouse, like the one involved in this case, to be discharged in some circumstances. 11 U.S.C. § 523(a)(15), before the 2005 amendment by Pub.L. 109-8, Title II, § 215(3), provided that an obligation to a former spouse incurred in the course of or in connection with a divorce or separation was not discharged, “unless” either of the exceptions in former subsections (A) or (B) were satisfied. Under subsection (A), the debtor could still discharge such an obligation if the debtor showed that he “does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for support or maintenance of the debtor” or if engaged in business, “for the payment of expenditures necessary for the continuation, preservation, and operation of such business”. Under subsection (B), the debtor could still discharge such an obligation to a former spouse if “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”.

These two balancing tests are gone, removed by the 2005 Bankruptcy Abuse Prevention and Consumer Protection Act. The new language of § 523(a)(15) states plainly and without exception that such an obligation is not discharged.⁵ The trial court

⁵ This is in accord with scholarly treatises on bankruptcy. “As part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, the balancing test governing the dischargeability of debts falling under section 523(a)(15) previously set forth in former subsections (A) and (B) of the provision was deleted. Section 523(a)(15) now provides, unqualifiedly, that a property settlement obligation encompassed by section 523(a)(15) is nondischargeable. Thus, in individual cases under chapters 7 and 11 and in cases under chapter 12, all of which base dischargeability on the subsections of section

committed clear legal error by ruling to the contrary.

Courts that have considered this question under the new bankruptcy law – applicable to petitions filed after October 15, 2005 – have reached this same result: marital debt obligations allocated in a divorce are not dischargeable. *In re Douglas*, 369 B.R. 462, 464 (Bkrctcy. E.D.Ark. 2007), is essentially on all fours with this case. The debtor was ordered by the state court in his divorce to pay various joint marital debts, and then he filed for bankruptcy. The bankruptcy court cited § 523(a)(15) to make this holding: “The plain language of the statute provides that all debts which do not qualify as domestic support obligations are also nondischargeable. In this case, it is stipulated that the joint debts of Plaintiff and Debtor were ordered to be paid by Debtor in a divorce decree, and accordingly, the debts are nondischargeable.”

In re Schweitzer, 370 B.R. 145, 148 (Bkrctcy. S.D.Ohio, 2007), ruled on a debtor’s obligation to a former spouse on their joint mortgage under the separation agreement: “Because Deborah’s hold harmless obligations are debts incurred in connection with a separation agreement within the meaning of § 523(a)(15), they are excepted from discharge. Vincent accordingly is entitled to summary judgment on his claims for relief based on § 523(a)(15).” *Rogers v. Rogers*, 51 Va.App. 261, 273, 656 S.E.2d 436, 442

523(a), the distinction between a domestic support obligation and other types of obligations arising out of a marital relationship is of no practical consequence in determining the dischargeability of the debt.” 4 *Collier on Bankruptcy* ¶ 523.21 (Alan N. Resnick & Henry J. Somner eds., 15th Ed., Rev. 2006).

(2008), discussed the effect of § 523(a)(15) and held that a trial court erred in presuming that husband's obligation to pay credit card debt would be discharged in his pending bankruptcy proceeding.

The plain language of the bankruptcy statute preserves appellant's hold harmless protection from being discharged through respondent's bankruptcy.

C. Appellant was not required to contest dischargeability in respondent's bankruptcy proceeding to preserve the "hold harmless" protection.

The trial court's ruling in this case noted that appellant "could have taken part in the bankruptcy process to protect her from any subsequent issues", (A-10), flowing from respondent's bankruptcy. There is no dispute that appellant did not participate in the bankruptcy, nor did she bring any action to dispute the dischargeability of the hold-harmless obligation. But the trial court erred in relying on this fact to refuse enforcement of respondent's obligation, because the obligation was not discharged, regardless of any action or inaction by appellant.

Prior to the 2005 amendments, 11 U.S.C. § 523(c)(1) (2004) provided that a debtor could be discharged from a § 523(a)(15) property settlement obligation "unless, on request of the creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge under paragraph (2), (4), (6), or (15)". Under this prior version of the statute, appellant would have had the onus of disputing respondent's claim for discharge of the marital debt obligation in the Judgment.

The 2005 amendments, Pub.L. 109-8, Title II, § 215(2), removed “(6), or (15)” and substituted “or (6)” in the above-quoted portion of § 523(c)(1). Deleting clause (15) from the list of the debts requiring action by the creditor to prevent discharge eliminates the prior requirement that a creditor, like appellant, had to obtain a bankruptcy court determination to preserve a marital property settlement obligation from discharge.⁶ The state court in *Rogers v. Rogers*, 51 Va.App. at 274 n. 8, 656 S.E.2d at 442 n.8 (2008), noted that according to a commentator “an objection to discharge under § 523(c)(1) does not even need to be made before the bankruptcy proceedings end”.

The trial court here clearly erred in ruling that the hold-harmless provision was discharged and not enforceable in state court because appellant did not contest the issue in the bankruptcy proceeding. This court must reverse the trial court’s ruling and remand for further proceedings.

II. The trial court’s refusal to enforce the Judgment improperly effects a modification of the marital property division without the necessary ruling that the elements for reopening under Minn. Stat. § 518.145 are satisfied.

“[P]roperty divisions are final and are not subject to modification except where they are the product of mistake or fraud.” *Kerr v. Kerr*, 309 Minn. 124, 126, 243 N.W.2d

⁶ This is the reading given the new statute by scholars in this field of law: “Therefore, debts falling under section 523(a)(15) are no longer included in the category of debts that are discharged automatically if a party does not obtain a determination of nondischargeability from the bankruptcy court.” 4 *Collier on Bankruptcy* ¶ 523.21 (Alan N. Resnick & Henry J. Somner eds., 15th Ed., Rev. 2006).

313, 314 (1976). “The sole relief from the judgment and decree lies in meeting the requirements of Minn. Stat. § 518.145, subd. 2.” *Shirk v. Shirk*, 561 N.W.2d 519, 522 (Minn. 1997). The trial court’s ruling in this case violates these long-standing legal principles because it relieves respondent from his obligation to hold appellant harmless on the Wells Fargo debt without any findings of fact that the required statutory elements were satisfied in order to reopen and modify the Judgment.

Minn. Stat. § 518.145, subd. 2 (2007), provides, in relevant part, as follows:

On motion and upon terms as are just, the court may relieve a party from a judgment and decree, order, or proceeding under this chapter, * * *, and may order a new trial or grant other relief as may be just for the following reasons:

- (1) mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under the Rules of Civil Procedure, rule 59.03;
- (3) fraud, whether denominated intrinsic or extrinsic, misrepresentation, or other misconduct of an adverse party;
- (4) the judgment and decree or order is void; or
- (5) the judgment has been satisfied, released, or discharged, or a prior judgment and decree or order upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment and decree or order should have prospective application.

At the motion hearing before the trial court on December 27, 2007, neither party had moved the trial court to reopen or modify the Judgment that was entered in February, 2007. Appellant had moved, *inter alia*, to enforce various portions of the Judgment, *see* A-11, 12, while respondent’s responsive motion sought only to deny appellant’s requests for relief and to dismiss her motion. A-23. It is clear from the record that the trial court

had not been requested to modify the marital property settlement provisions of the parties' Dissolution Judgment.

The trial court's order, refusing appellant's request to enforce the Judgment, does not cite to or rely on Minn. Stat. § 518.145, subd. 2. Moreover, the relief requested by appellant does not implicate any of the language in clauses (1) – (5). But the trial court's order refusing to enforce respondent's obligation to be responsible for the Wells Fargo debt has the effect of transferring \$14,333 of marital debt from respondent to appellant.

When a trial court acts to reopen a dissolution judgment under Minn. Stat. § 518.145, subd. 2, that decision is reviewed under an abuse of discretion standard. *Thompson v. Thompson*, 739 N.W.2d 424, 428 (Minn. App. 2007), citing *Kornberg v. Kornberg*, 542 N.W.2d 379, 386 (Minn. 1996). It is a clear abuse of discretion for the trial court to make such a substantial modification of the parties' marital property division, in the absence of a proper motion, in the absence of evidence under one of the clauses of § 518.145, subd. 2, and without making findings of fact and conclusions of law that are adequate for appellate review of such a decision. The trial court's refusal to enforce ¶ 14 of the conclusions of law in the Dissolution Judgment must be reversed.

CONCLUSION

Respondent's bankruptcy proceeding cannot as a matter of law release him from the marital property division obligations contained in the parties' Dissolution Judgment. Refusal to enforce the Judgment has the effect of modifying the marital property division, but neither party had moved the trial court for a modification. The trial court's refusal to enforce those obligations is based on an error of law and must be reversed.

Respectfully submitted,

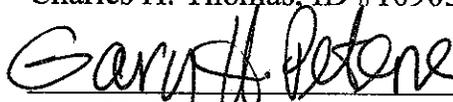
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