

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF)	
)	
RICHARD ALAN BURT,)	CASE NO. 01-30097 HCD
)	CHAPTER 7
DEBTOR.)	
)	
)	
JENNI BURT,)	
PLAINTIFF,)	
vs.)	PROC. NO. 07-3065
)	
RICHARD ALAN BURT,)	
DEFENDANT.)	

Appearances:

Kristina L. Lynn, Esq., attorney for plaintiff, Lynn and Stein, P.C., 102 South Wabash Street, Wabash, Indiana 46992;

Steven J. Glaser, Esq., attorney for defendant, Lincoln Tower, 116 East Berry Street, Suite 1900, Fort Wayne, Indiana 46802; and

Anita K. Gloyeski, Esq., attorney for defendant, Glaser and Ebbs, Lincoln Tower, 116 East Berry Street, Fort Wayne, Indiana 46802.

MEMORANDUM OF DECISION

At South Bend, Indiana, on March 27, 2008.

Before the court is the Complaint filed by the plaintiff Jenni Burt (“plaintiff” or “Jenni”) against the defendant Richard Alan Burt, a chapter 7 debtor (“defendant” or “Richard”). The issue is whether a marital debt, including the hold harmless obligation associated with that debt, arising out of a divorce proceeding, is nondischargeable in the defendant’s bankruptcy pursuant to 11 U.S.C. § 523(a)(5) or § 523(a)(15). After the defendant filed his Answer to the Complaint, the court held a trial on the dischargeability of the obligation and took the matter under advisement. For the reasons that follow, the court determines that the marital debt owed by the defendant under the dissolution decree is excepted from his discharge pursuant to 11 U.S.C. § 523(a)(15).

Jurisdiction

Pursuant to 28 U.S.C. § 157(a) and Northern District of Indiana Local Rule 200.1, the United States District Court for the Northern District of Indiana has referred this case to this court for hearing and determination. After reviewing the record, the court determines that the matter before it is a core proceeding within the meaning of § 157(b)(2)(I) over which the court has jurisdiction pursuant to 28 U.S.C. §§ 157(b)(1) and 1334. This entry shall serve as findings of fact and conclusions of law as required by Federal Rule of Civil Procedure 52, made applicable in this proceeding by Federal Rules of Bankruptcy Procedure 7052 and 9014. Any conclusion of law more properly classified as a factual finding shall be deemed a fact, and any finding of fact more properly classified as a legal conclusion shall be deemed a conclusion of law.

Background

Jenni Burt and Richard A. Burt were married on September 9, 1994. Their daughter Morgan was born in 1995. Jenni and Richard separated in June 1999, and on September 14, 1999, their marriage was dissolved in the Wabash Circuit Court, Wabash, Indiana. *See* Pl. Ex. B, Final Decree of Dissolution of Marriage. Under the Marital Property Settlement Agreement (“Agreement”), signed by both parties, the terms of which were approved by the state court and incorporated by reference into the divorce decree, Jenni was awarded custody of their daughter and Richard was ordered to pay support and medical insurance for her. The Agreement also provided that the parties would share the costs of any of the child’s uninsured medical expenses. *See* Pl. Ex. A, ¶ B, “Custody, Support and Visitation.” Under the “Personal Property Settlement” sections, the parties divided their household assets, and each one kept his or her own vehicle. *See id.* ¶¶ C, D. The defendant was awarded possession of the marital residence in Roann, Indiana, and was allocated the debt secured by that property, namely the first and second mortgages. *See id.* ¶¶ E, F. In paragraph F, the Agreement’s “Assumption of Indebtedness” section, the parties agreed that the “Husband shall be held responsible for and pay and hold Wife harmless on”

three debts: the two mortgages on the marital residence and the debt on his vehicle. In addition, the Agreement contained an indemnification provision:

Each party agreed to indemnify, save and hold the other harmless from all damages, losses, expenses (including attorney fees), costs and other fees incurred by reason of other violation or breach of any of the terms and conditions hereof. Each party expressly waives the right to claim voluntary bankruptcy as a defense to this Agreement to indemnify.

Id. ¶ H. The final section of the Agreement forbade modification unless it was approved by the court:

No modification or waiver of any of the terms or conditions of this Agreement shall be effective unless executed in writing with the same formality as this Agreement and duly filed with the Court, or by further Order of the Court.

Id. ¶ K.

Sometime after Richard's divorce from Jenni and before he filed bankruptcy, Richard sold the marital home at issue herein and married Alisha. On January 10, 2001, he filed a voluntary petition for relief under chapter 7. The Trustee determined it to be a no-asset chapter 7 case, and Richard was granted an order of discharge on April 11, 2001. The case was closed on April 16, 2001. However, Richard had failed to include Jenni as a creditor in his bankruptcy schedules, and she was not notified of the bankruptcy filing.¹

Unaware of Richard's bankruptcy case, Jenni had pursued post-dissolution actions against Richard in state court concerning his failure to make payments on the second mortgage or to hold her harmless on that debt.² On February 3, 2003, in an Agreed Order on Contempt Citation, Richard stipulated that he had failed to pay and hold Jenni harmless on the second mortgage. *See* Pl. Ex. C at 1. He was declared to be in contempt of the court's prior order and was ordered to make timely payments on the second mortgage owed to Real Time

¹ Richard also did not include in the schedules or on the matrix Real Time Resolutions, Inc., the creditor holding the second mortgage on his marital residence.

² The defendant does not assert that Jenni's actions violated the automatic stay order under § 362 or the discharge injunction under § 524(a)(2). The court finds that Jenni's continued filings in state court are evidence of her lack of actual knowledge of the defendant's bankruptcy case. Moreover, the court does not view the state court's orders and contempt citations against the defendant-debtor "as an 'end run' around the discharge injunction." *Henderson v. Henderson (In re Henderson)*, 324 B.R. 302, 305 (Bankr. W.D. Ky. 2005) (finding that debtor's hold harmless obligation to ex-spouse, who was not listed as creditor in his bankruptcy schedules, was not discharged in his bankruptcy and remained in effect).

Resolutions, Inc. (“Real Time”) and to “make arrangements to refinance said debt or have [Jenni’s] name removed from said debt as soon as possible.” *Id.* The Chronological Case Summary of the family docket in Wabash Circuit Court describes the proceedings supplemental to that Agreed Order.³ However, despite the contempt findings by the Wabash Circuit Court, Richard did not pay the mortgage obligation. On January 19, 2007, Real Time filed a state court complaint against Jenni, demanding payment of \$24,834.06, the balance on that mortgage. *See* Pl. Ex. E. Richard then filed a motion to reopen his bankruptcy case in order to include his former spouse on an amended Schedule F and on the matrix. An order reopening the case was entered, and the plaintiff commenced this adversary proceeding against the defendant under 11 U.S.C. § 523(a)(5) and (a)(15).

The plaintiff’s Complaint sought a determination that a debt arising out of the dissolution decree was nondischargeable. According to the Complaint, Richard was ordered by that decree to pay the second mortgage and to hold Jenni harmless on the debt. Those obligations, the Complaint alleged, were in the nature of a support and/or maintenance obligation and therefore were nondischargeable under 11 U.S.C. § 523(a)(5) and/or (a)(15). In his Answer, the defendant denied the essential allegations of the Complaint. He challenged the plaintiff’s claim that the debt was a support obligation. He further argued that the Complaint was untimely and that the harm to him of having to pay the debt outweighed any benefit to the plaintiff.

³ The Chronological Case Summary includes these proceedings:

- Agreed Order for income withholding (March 5, 2003);
- Agreed Order for support modification (December 3, 2003);
- Contempt Citation (May 12, 2005);
- Stipulation: Richard’s child visitation rights and support were terminated (August 2, 2005);
- Verified Information in Contempt (February 15, 2007);
- Hearing on contempt (March 23, 2007): Richard found in contempt, ordered to pay attorney fees to Jenni’s attorney; additional sanctions taken under advisement.
- Hearing on sanctions (June 8, 2007): Court will determine contempt after bankruptcy court determination on dischargeability is made. Parties agreed that Richard would pay \$50.00 per week on the amounts owed until paid in full.

Pl. Ex. D, pp. 7-8.

At trial the plaintiff, Jenni Burt, testified that she lives with her daughter Morgan (the child of Richard) and an infant son (the child of a non-party to this proceeding). She testified that she has no defense against Real Time's state court complaint against her, which attempts to collect Richard's debt; however, she is unable to pay that debt. She argued that the debt owed should not be dischargeable in Richard's bankruptcy.

Jenni stated that she has worked for Walmart for 16 years. In 2001, when the defendant filed bankruptcy, her gross income from her employer and from child support was \$29,000. Her expenses included a monthly rent of \$745, utilities of \$300-400, renters insurance of \$200, auto insurance of \$1,000 a year, health insurance of \$70 each month, credit card debt of about \$10,000, for which she paid the minimum payment of about \$300 each month, \$420 monthly for day care, and groceries and daily living expenses.

In 2006, her gross income was \$40,633.00. *See* Pl. Ex. F, G. In 2007, it should total \$41,000.00, she testified. She no longer receives child support from Richard, she said, and he waived visitation privileges with their daughter. In addition, no other adult lives with her or helps her with her expenses. Jenni's income as of September 1, 2007, was \$27,416.22. *See* Pl. Ex. H. Her 2007 bills still due and owing, collected in Plaintiff's Exhibit I, include the following monthly debts:

<u>Bills</u>	<u>monthly amount</u>	<u>total bill</u>
Computer from Best Buy	\$ 60.42	\$ 1,968.61
Personal loan & car loan, Wells Fargo Bank	636.20	8,554.34
Sewer service	33.55	
Mortgage, Countrywide Bank	1,024.53	138,000.00
Water bill	40.14	
Gas bill	65.03	
A T&T	220.22	
Duke Energy electric bill	100.00 (average monthly payment)	
Columbus Insurance (daughter's life insurance)	7.00	
Erie Insurance (car)	56.00	
Ray's Trash service	13.89	
Kohl's charge card (daughter's school clothes)	20.00	154.49
Capital One credit card	30.00	79.69
Financial Freedom (credit consolidation)	330.00	
Women's Health Partnership	248.03	641.03
Helvy & Associates (Irvington Radiologists)	94.04	
Med Shield, Inc. (Community Imaging Ctr.)	521.74	

NCO Financial Sys (Kokomo Anesthesiologists)	190.10	
Primary Care Partners LLC	210.28	435.72
Am. Health Network	78.54	
First Source Lab. Solutions	25.12	
Discover Card	59.00	2,203.89
Wal-Mart	20.00	641.32
Citi Card	59.00	2,832.75

Jenni testified that she is current on her mortgage payments for her present house and that she plans to complete her \$300-a-month payments for her 2000 Nissan in 2 1/2 years. She also had a 401K and stock options; however, she cashed in \$400 this year and now she has nothing. After describing all her monthly bills, she testified that she is having trouble meeting her own obligations and that, if she is required to pay the second mortgage, it may push her into bankruptcy. The plaintiff said that she and Richard both owned the house and that Richard got the house in the divorce. They incurred the second mortgage debt about a year before the divorce; the \$35,000 loan was used to pay off credit cards. The defendant then sold the property. He paid off the first mortgage but not the second, she stated. For that reason the debt to Real Time remains unpaid.

On cross-examination, Jenni stated that she lived with another man for three years, from 2000 until 2004. He worked at Indianapolis Marine Company about 25-30 hours a week, earning about \$12 an hour. He brought his pay into the household, she said, and together they purchased a house for \$148,000. However, he left in 2004 and has not contributed to the house payment since November or December 2005, even though his name is on the mortgage. She also testified that she does not get any other support from him. She told the court that she, daughter Morgan, and her two-month-old son now live together in the house. The father of the infant does not live with her and gives no support, either. According to Jenni, his income last year was \$26,000 but he is currently unemployed. She expects to receive about \$170 a week in child support whenever she files for it. She is considering moving back to Wabash, Indiana, she stated, and probably will file for it there.

Jenni explained that her medical bills (about \$2,600) were for the maternity bills, the baby's bills, and her daughter's care. She has a \$1,000 deductible and pays 20%, she said. She agreed that Richard Burt is not responsible for the medical bills or support of her newborn child. But she pointed out that the Kohl's bill was

for the back-to-school clothes for their daughter and that Richard does not pay Morgan's health bills. She pays for everything for their daughter, she said. She also pays for all costs for her son, including daycare, she added. Jenni explained that she earns about \$3,300 in gross monthly income and receives about \$2,400 net pay a month, approximately. At the end of Jenni's testimony, the plaintiff rested.

The defendant Richard Burt testified that he is a police dispatcher in Fort Wayne, Indiana. He acknowledged that, in the property settlement agreement, he was awarded the marital residence with two mortgages. He also agreed that he and Jenni took out the second mortgage in the fall of 1998 to consolidate their credit card debts. When he sold the house in 2000, he paid the first mortgage in full but paid only half of the second mortgage, reducing it to a balance of \$16,000, he said.

The defendant filed bankruptcy on January 10, 2001. He was then married to Alisha. His bankruptcy schedules presented his financial circumstances in 2001. Schedule I listed a total combined monthly income of \$2,764.67. That amount, when multiplied by 12 months, reflected an annual take-home income of about \$33,180.00 and gross income of about \$40,000.00. Richard suggested, however, that the income figures on Schedule I were high and that the more accurate income was reflected on his 2001 tax return, which showed that the adjusted gross income for himself and his second wife was only \$28,748.00. He also stated that the 2001 expenses on his Schedule J were too low. He had listed his payment of about \$95.00 a week (\$408.00 a month) in child support to Jenni; however, he testified that he had failed to list on Schedule J his Capital One debt of \$200.00 a month. Therefore, he said, his bankruptcy schedules estimated too high an income and too few expenses. The defendant added that Alisha's two children also lived with them and another one was expected. (They are now 12, 10, and 6, and all in school, he told the court.) He stated that, even after he filed bankruptcy, he had to incur more debt just to live. He insisted, nevertheless, that his expenses were reasonable.

The defendant's income as of September 2007 was \$35,604. His wife, a waitress at Outback Restaurant, earned \$8,606 net income as of September 2007, and her gross salary thus far was \$11,681.32. Richard stated that he worked overtime to earn more. He reported the following current monthly expenses:

rent	\$ 925.00
car loan for 2002 Dodge Intrepid	300.00
car loan for 2003 Chevrolet van	315.00
Personal loan for car repair	140.28
gasoline for cars	140.00-150.00
electric	150.00-200.00
extras (dance classes, etc.)	60.00

Richard testified that he had no credit card debt and no medical bills. They took no big vacations, he said; their vacation was a trip to Cedar Point last summer. He stated that he had no money left over after he paid his bills and that he had accumulated no savings.

On cross examination, the defendant made clear that he does not dispute the second mortgage debt or the requirement that he pay it under the divorce decree and the two post-dissolution orders from the state court. However, in his view, the second mortgage at issue was taken out to pay off joint debts of his and Jenni's before the divorce. He stated that his 2007 gross income, up to the month of September, was about \$35,600, and that he expected a gross income of \$40-42,000 for the entire year. He added that his wife's gross income totaled \$11,600 so far, and therefore that they had accumulated a gross income together of about \$47,200 to date. His wife works part-time, he explained, because of all the activities of their children.

The defendant admitted that his second wife received child support of about \$60 a week, but pointed out that he did not include it on Schedule I. Nor did he list his wife's children separately on his bankruptcy schedules, he said. The defense rested when the defendant concluded his testimony. In their closing arguments, each party asserted an inability to pay the debt and asked the court to weigh the consequences of the § 523(a)(15)(B) balancing test in his or her favor. The court then took the matter under advisement.

Discussion

The plaintiff asks the court to determine whether the defendant's marital obligation, memorialized in the Final Decree of Dissolution of Marriage and Marital Property Settlement Agreement, is excepted from his discharge under § 523(a)(5), which excepts a debt for support of a spouse or child, or under § 523(a)(15), which

excepts “any marital debt other than alimony, maintenance or support that is incurred in connection with a divorce or separation.”⁴ *In re Crosswhite*, 148 F.3d 879, 883 (7th Cir. 1998). Section 523(a)(5) provides that an individual debtor is not discharged from any debt “for a domestic support obligation.” Section 523(a)(15) states that an individual debtor is not discharged 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.

11 U.S.C. § 523(a)(15). The marital obligation assigned to Richard (by agreement of the parties and the approval of the state court) at issue has two components; it includes the second mortgage debt owed to Real Time and the hold harmless obligation to Jenni. Neither creditor was listed in Richard’s bankruptcy schedules.

As a preliminary matter, however, the court considers the defendant’s affirmative defense that the plaintiff “missed the deadline to file a Complaint for Dischargeability.” R. 7, p. 1. Without any explanation or citation to statutory or case law authority, the defendant simply asserted that the Complaint was untimely. The court does not agree. It allowed the reopening of the defendant’s bankruptcy case because the defendant had failed to list his former spouse Jenni in his bankruptcy schedules. She had had no actual notice of the bankruptcy proceeding, and thus no deadline for filing complaints was applicable. *See, e.g., Gagan v. American Cablevision, Inc.*, 77 F.3d 951, 968 (7th Cir. 1996) (holding that, when a creditor has no notice of a debtor’s bankruptcy until after the order of discharge, that order did not discharge the creditor’s debt under § 523(a)(3)); *Henderson v. Henderson (In re Henderson)*, 324 B.R. 302, 304 (Bankr. W.D. Ky. 2005) (allowing reopening of case for debtor

⁴ This chapter 7 case was filed in 2001, prior to the effective date of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. Accordingly, those amendments are not applicable in this case.

to file adversary); *see also In re Bartlett*, 326 B.R. 436, 441 (Bankr. N.D. Ind. 2005) (stating that the reopening of a bankruptcy case is a matter of the court’s discretion) (citing cases).⁵

In addition, the plaintiff’s Complaint alleged that a marital debt should be excepted from discharge under § 523(a)(5) and § 523(a)(15). The debt therefore was potentially nondischargeable for reasons other than the failure of the defendant-debtor to schedule it in his bankruptcy proceedings. A divorce-related debt for support of a spouse or child is never dischargeable, and thus a complaint to determine dischargeability of a § 523(a)(5) debt may be filed at any time. *See In re Skeen*, 359 B.R. 593, 598-99 (Bankr. W.D. Va. 2006) (citing Fed. R. Bankr P. 4007(b)). Moreover, “other types of divorce-related debts, such as property settlements, will be discharged if the debtor cannot afford to pay the debt or if the benefit to the debtor from discharging the debt outweighs the detriment to the other party,” and the bankruptcy court has exclusive jurisdiction to determine whether that § 523(a)(15) debt is dischargeable. *Id.* at 599. The Complaint was filed 30 days after the case was reopened to determine whether the marital obligation at issue under the divorce decree was a support or property settlement debt. The court finds that the defendant’s cursory allegation of a “missed deadline” is without merit.

Even though the Complaint asked that the obligation be found nondischargeable under either § 523(a)(5) or § 523(a)(15), and even though the defendant no longer pays the plaintiff domestic support for their daughter Morgan, at trial the plaintiff did not argue that the debt at issue was in the nature of support. The parties proceeded at trial exclusively under § 523(a)(15). The court thus turns to the arguments of the parties and to the evidence and testimony presented at the trial concerning the second mortgage debt and the hold harmless mandate contained in the Agreement.

⁵ The court acknowledges that there is much debate concerning the reopening of a chapter 7 no-asset no-bar-date bankruptcy. *See, e.g., White v. Nielsen (In re Nielsen)*, 383 F.3d 922, 926 (9th Cir. 2004) (holding that such a reopening is “a pointless exercise” because a “dischargeable debt would have been discharged, and a non-dischargeable debt would not have been discharged, regardless of scheduling”). However, the defendant never discussed the issue and thus waived it. Moreover, the *Nielsen* court, like others that discuss § 523(a)(3)(A) and (B), made clear that, “if the debt is nondischargeable for reasons other than failure to schedule it, then it was not discharged, and non-dischargeability can be litigated outside the normal time limits.” *Id.* at 927; *see also Zirnhelt v. Madaj (In re Madaj)*, 149 F.3d 467, 468 (6th Cir. 1998) (concluding that amending the schedule was pointless when the debt would be discharged whether or not the case was reopened and the debt scheduled).

The plaintiff has the initial burden of proving that she holds a subsection (15) claim against the debtor, and then the burden shifts to the debtor-defendant to prove that he falls within either of the two exceptions found in § 523(a)(15)(A) or (B). *See Crosswhite*, 148 F.3d at 884. “[T]he party claiming an exception to discharge usually bears the burden of proving by a preponderance of the evidence that the debt is not dischargeable.” *Id.* at 881 (citing *Grogan v. Garner*, 498 U.S. 279, 287, 111 S. Ct. 654, 112 L.Ed.2d 755 (1991)).

In this case, the second mortgage on the marital residence was clearly listed in the “property settlement” provisions of the “Marital Property Settlement Agreement.” Richard was “given as his sole property the marital residence,” and he was responsible for the two mortgage debts on that property. Pl. Ex. A, ¶¶ E, F. The defendant did not dispute that the plaintiff holds a claim under § 523(a)(15), and the parties focused their evidence and arguments at trial on § 523(a)(15) and its exceptions. The court finds that the claim at issue concerns the settlement of a specific property debt awarded to the defendant in the divorce proceeding and is not a debt for a domestic support obligation under § 523(a)(5). The plaintiff has met her initial burden.

The burden now shifts to the defendant to prove that the debt fell within either of the two exceptions listed under § 523(a)(15). Richard was required to demonstrate, under (A), that he cannot pay the debt out of his disposable income, or, under (B), that the benefit to him of discharging the debt is greater than the detrimental effect on his former spouse of discharging the debt. *See Crosswhite*, 148 F.3d at 883. The two subsections are alternatives. Thus, “a debtor ‘must meet the burden on only one of the two prongs of Section 523(a)(15) to prevent the debt from being excepted from discharge.’” *Turner v. McClain (In re McClain)*, 227 B.R. 881, 885 (Bankr. S.D. Ind. 1998) (quoting *In re Florez*, 191 B.R. 112, 115 (Bankr. N.D. Ill.1995)).

To meet his burden under § 523(a)(15)(A), Richard must show that he cannot pay the debt out of his disposable income. When determining a debtor’s ability to pay, a court applies a disposable income test. It assesses the defendant’s current income and expenses at the time of trial on the complaint and, if appropriate, considers his future earning prospects. *See Halverson v. Whitnall (In re Whitnall)*, 305 B.R. 854, 859 (Bankr. E.D. Wis. 2004); *see also, e.g., Hastings v. Konick (In re Konick)*, 236 B.R. 524, 529 (1st Cir. B.A.P. 1999);

Jodoin v. Samayoa (In re Jodoin), 209 B.R. 132, 142 (9th Cir. B.A.P. 1997). “[O]nce the court has taken into account a debtor’s ‘reasonably necessary’ personal and business expenses, the court must determine if the debtor has enough assets or income sufficient to pay the obligations at issue.” *Beggs v. Niewdach (In re Beggs)*, 314 B.R. 401, 417 (Bankr. E.D. Ark. 2004) (citations omitted). “In doing so, the court should consider the debtor’s entire economic circumstances.” *Id.* The incomes of both the defendant and his wife are assessed. *See Beasley v. Adams (In re Adams)*, 200 B.R. 630, 634 (N.D. Ill. 1996) (approving inclusion of spouse’s income as contribution under § 523(a)(15)(A)). “[T]he debt will remain dischargeable if paying the debt would reduce the debtor’s income below that necessary for the support of the debtor and the debtor’s dependents.” *Hill v. Hill (In re Hill)*, 184 B.R. 750, 754 (Bankr. N.D. Ill. 1995) (quoting 140 Cong. Rec. H. 10752-1 (daily ed. Oct. 4, 1994)).

The court determines from this record that Richard cannot meet the “inability to pay” test. The defendant did not produce evidence of his financial circumstances to prove that he could not pay the debt. He testified at trial that he works overtime to earn more money and that his wife works part-time because the children have such activities as dance lessons. In addition, Richard said that the two of them had a combined gross household income of about \$47,200 at the time of trial. He did not add up his monthly expenses; instead, he said that he had neither credit card nor medical debts and had the funds to take a family vacation to Cedar Point.

The court finds that, since the defendant’s income for three-quarters of the year (through mid-September 2007) was \$35,600, his end-of-year salary for the year 2007 would be about \$44,500. Likewise, his wife Alisha’s income as of September 2007 was \$11,680 and her end-of-year income would total about \$14,500. Their gross household income, therefore, was approximately \$59,000. Richard listed monthly expenses of \$2,030; annualized, his expenses were about \$24,360. He did not include such costs of daily life as food and clothing, information that would have made his “inability to pay” argument stronger. The court finds that the defendant, with an annual income of \$59,000 and expenses of \$24,360 in 2007, failed to demonstrate under § 523(a)(15)(A) that he was unable to pay the marital debt.

The court further determines that Richard's testimony concerning his financial circumstances in 2001 was in no way supportive of his argument that he was unable to pay the debt when he filed bankruptcy. The defendant testified that his income, as presented on Schedule I, was higher than it should have been and that his expenses listed on Schedule J were too low. A debtor's schedules of current income and expenses, however, must set forth the information accurately to reflect his or her true financial condition. See *Cohen v. Olbur (In re Olbur)*, 314 B.R. 732, 744-45 (Bankr. N.D. Ill. 2004) (stating that schedules and financial statements must be answered fully and honestly). A debtor must complete and review his bankruptcy petition and schedules; he then must sign the documents under penalty of perjury, attesting to the fair and truthful accuracy of the information provided therein. See *In re Rolland*, 317 B.R. 402, 414 (Bankr. C.D. Cal. 2004) (citing Fed. R. Bankr. P. 1008). This debtor-defendant signed his schedules in 2001 but testified in 2007 that the 2001 income was overstated and the expenses were understated. Based on these conflicting sworn statements, the court cannot be confident of the accuracy of the financial information presented to the court. See *Harden v. Harden (In re Harden)*, 351 B.R. 643, 649-50 (Bankr. C.D. Ill. 2006) (examining serious inaccuracies in debtor's affidavit, finding debtor failed in his burden under § 523(a)(15)(A)). The court determines, therefore, that the defendant has not succeeded in proving, under § 523(a)(15)(A), that he is unable to pay the second mortgage debt.

The court next considers whether the property settlement debt is dischargeable under § 523(a)(15)(B). The debtor bears the burden of proving that the benefit to him of receiving a discharge of the debt outweighs the detriment to the plaintiff. See *McClain*, 227 B.R. at 885. In weighing the benefit versus the detriment, "the Court should examine the 'totality of the circumstances.'" *Id.* (quoting *Crosswhite*, 148 F.3d at 883).

At trial, each party presented testimony concerning their income and expenses, and neither challenged the reasonableness of the other's bills or lifestyle. The plaintiff stated at trial that she was the sole support for her two children and was having difficulty with her financial obligations. Her gross income for 2007 was expected to be about \$41,000; her cumulative gross income, on September 1, 2007, was almost \$27,500, or about \$3,300 a month. She testified that she received no child support or other income. Her monthly expenses in 2007 totaled

almost \$4,100. Jenni acknowledged that Richard should not be responsible for the costs arising from her maternity and infant care. She pointed out, however, that she paid for the medical bills, clothing and school costs of their daughter without his financial support. She further stated that, if she would get child support for her son, the money would go entirely to his maintenance. Jenni insisted that she had a negative cash flow even when she excluded her medical bills for the birth of her son. The defendant did not challenge her testimony. The court finds that the plaintiff's testimony was credible; she presented un rebutted evidence of her income and expenses and demonstrated that her indebtedness exceeded her income.

To demonstrate that the marital debt should be discharged under § 523(a)(15)(B), Richard asserted that, in 2001, when he filed bankruptcy, Jenni made about \$29,000 (with one child and a boyfriend) and he and his wife made the same amount with a larger family. He further claimed that his current income, for a family of five, will be about \$47,000 in 2007 and that Jenni's income, for herself and two children, will be \$49,000 when she receives child support for her infant. In addition, he insisted that he, and not Jenni, lived frugally. Finally, he pointed out that he did pay half the loan when he sold the house. He urged the court to find that the benefit to him outweighs the harm to her.

After hearing Richard's testimony that his Schedules I and J were inaccurate, the court placed little confidence in the defendant's financial statements. The defendant submitted at trial only two exhibits reflecting actual monthly income information – the September 2007 earnings statements issued by employers for himself and his wife. Based on those statements, the court calculated that the annual 2007 incomes of Richard and his wife together came to about \$59,000.00, not \$47,000.00. (The parties seldom distinguished between gross and net income, however, and it is possible that the 2007 net income was about \$47,000.00.) The pay statements, for a two-week period, reflected Alisha's salary of \$436.61 and Richard's pay of \$1,567.74. The court calculated that Alisha's monthly income was \$967.00, Richard's was \$3,471.00, and their combined monthly income was approximately \$4,438.00.

In contrast, the plaintiff submitted copies of her September 2007 earning statement and her bills. Based on those exhibits, the admissibility and validity of which were not challenged, the court found that Jenni's accumulated income, as of September 20, 2007, was \$27,416.22. The court then calculated that her annual income for the year 2007, projected forward, was about \$34,270.00, and that she earned about \$2,855.83 a month.⁶ Her monthly expenses, when the court added all non-medical bills, totaled \$2,774.98.

When the court measured the monthly household income and expenses of the plaintiff (\$2,855.83 in income and \$2,774.98 in expenses) against the monthly household income and expenses of the defendant and his wife (\$4,438.00 in income and \$2,030.28 in expenses), it is clear that Jenni is barely covering her expenses each month and that Richard is using less than half his income to pay his bills. The court is aware that this method of setting forth the parties' relative financial situations is an inexact method of comparing their financial capabilities. Nevertheless, the burden was on the defendant Richard to produce reliable, complete evidence of his inability to pay the marital debt or of the greater detriment to him if he is required to pay the debt. *See Pierce v. Pierce (In re Pierce)*, 323 B.R. 21, 31 (Bankr. D. Conn. 2005) (finding many gaps in evidence in trial record, concluding that debtor did not prove § 523(a)(15)(A) or (B) by a preponderance of the evidence). The court finds that the defendant failed in that burden. It is clear, from the figures shown above, which were taken from the few trial documents produced by the defendant, that the defendant is in a better position to pay the second mortgage debt than the plaintiff. Accordingly, the court finds that the defendant has failed to demonstrate under § 523(a)(15)(B) that the benefit to him from not having to pay the debt at issue is greater than the detrimental effects on the plaintiff of discharging the debt. Following the statutory language, the court determines that discharging the marital debt would not result in a benefit to the debtor Richard that outweighs the detrimental consequences to his former spouse Jenni. Therefore, the court concludes that the second mortgage debt at issue in this adversary proceeding is nondischargeable under § 523(a)(15).

⁶ The court does not include in this calculation any conjectural or potential future child support income Jenni might receive, just as it does not include the child support Alisha receives for her two children.

Two more matters should be raised. First, Richard and Jenni both testified that they took out the second mortgage to pay off joint credit card debts. When he sold the marital residence, Richard paid only half of the second mortgage obligation out of the proceeds from the sale. He implied, in his testimony, that Jenni should be held responsible for the other half. He also intimated that he chose not to pay the entire obligation instead of being incapable of paying it. However, the Agreement between the parties, when they obtained their divorce, clearly provides that Richard received the house and the mortgages attached to it in the property settlement division. Richard did not challenge the Agreement, appeal the decree, or seek a modification of any provision in the decree of dissolution or Agreement through the state court system. He simply modified the decree unilaterally by paying only half of the second mortgage obligation. Without properly modifying the Agreement or seeking review of it in the state court appellate process, Richard is still responsible for the remaining second mortgage debt under the terms of the divorce decree. *Cf. In re Henderson*, 324 B.R. at 305 (separating the state's traditional authority over domestic relations issues from the bankruptcy court's authority over dischargeability issues, refusing to review the propriety of the state court's order). Neither the defendant's bankruptcy filing in 2001 (in which he failed to list Jenni or Real Time as creditors) nor his § 523(a)(15) defense in this adversary proceeding (in which he failed to prove that the debt was dischargeable under subsection (A) or (B)) has been successful as an "end run" around his obligations under the Agreement.

Second, the court focuses on the two-pronged nature of this marital debt. The second mortgage debt actually is payable to the mortgage holder Real Time, and the hold harmless provision indemnifies the plaintiff from that obligation. As was noted above, neither creditor was listed in the defendant's bankruptcy schedules and therefore neither debt was actually discharged. This case therefore is distinguishable from *In re Henderson*, 324 B.R. at 305, for in that case the debtor's discharge included the discharge of the debt to the third party but did not include the discharge of the hold harmless obligation to his ex-wife. In light of the record herein and in consideration of the totality of the circumstances, the court has reviewed the dischargeability of the entire marital debt to Real Time and to Jenni.

This court has determined that a provision in a property settlement agreement, decree of dissolution, or separation agreement “requiring one spouse to pay what was formerly a joint debt creates a debt that is enforceable by the non-paying spouse against the paying spouse.” *In re McClain*, 227 B.R. at 885 (adopting the analysis in *In re Gibson*, 219 B.R. 195 (6th Cir. B.A.P. 1998)). It is now clear in this circuit that a hold harmless obligation to an ex-spouse also is a debt that is covered by § 523(a)(15). *See Higgins v. Harn (In re Harn)*, 2008 WL 130914 at *3 (Bankr. C.D. Ill. 2008) (stating that “it is now beyond peradventure” that a hold harmless obligation to an ex-spouse is covered by § 523(a)(15)) (listing cases); *see also Anderson v. Walden (In re Walden)*, 312 B.R. 187, 190-91 (Bankr. C.D. Ill. 2004) (finding that the obligation to make mortgage payments and to hold ex-spouse harmless would be nondischargeable under § 523(a)(5) or (a)(15)).

The court now finds that Richard’s obligation, under the Final Decree of Dissolution and Marital Property Settlement Agreement, to hold his ex-spouse Jenni harmless from liability for the debts allocated to him, including specifically the second mortgage debt, is itself a debt that is excepted from this defendant’s discharge under § 523(a)(15). In addition, it finds that the second mortgage, formerly a joint debt of Richard and Jenni, now is a debt that only Richard is required to pay and a debt that Jenni can enforce. The defendant Richard owes Real Time the remaining balance on the second mortgage and must hold the plaintiff Jenni harmless from liability for that debt to Real Time.

Conclusion

For the reasons presented above, the relief sought in the Complaint filed by the plaintiff Jenni Burt in this adversary proceeding is granted. The marital debt, which is comprised of the second mortgage obligation on the marital residence and the obligation to hold the plaintiff harmless, is excepted from the discharge of the defendant Richard Alan Burt pursuant to 11 U.S.C. § 523(a)(15).

SO ORDERED.

/s/ Harry C. Dees, Jr.
HARRY C. DEES, JR., CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT