UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:	)	Case No. 02-30441
	)	
Jason Scott Mansur,	)	Chapter 7
	)	
Debtor.	)	Adv. Pro. No. 02-3116
	)	
Sherry Ann Mansur	)	Hon. Mary Ann Whipple
(n.k.a. Sherry Ann Book),	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
Jason Scott Mansur,	)	
	)	
Defendant.	)	

MEMORANDUM OF DECISION AND ORDER RE: CROSS- MOTIONS FOR SUMMARY JUDGMENT

This adversary proceeding is before the court upon cross-motions for summary judgment in response to the court's Adversary Proceeding Scheduling Order [Doc. #7]. Plaintiff Sherry Ann Mansur n.k.a. Sherry Ann Book ("Plaintiff" or "Ms. Book") asserts claims under both 11 U.S.C. § 523(a)(5) & (a)(15). [Doc. #1: Complaint to Determine Nondischargeability of Debts]. The parties and the court agreed to address the § 523(a)(5) claim through summary judgment proceedings before proceeding to discovery and, if necessary, to trial on either claim.[1] Plaintiff filed a Motion for Summary Judgment ("Motion") [Doc. # 8], her own affidavit [Doc. # 9], and a Response to the Opposition to her Motion ("Response") [Doc. # 12]. Defendant-Debtor Jason Scott Mansur ("Defendant" or "Mr. Mansur") has also filed a Motion in Opposition to Plaintiff and for Summary Judgment ("Opposition") [Doc. # 11] and a reply to Plaintiff's Response. [Doc.# 13].

The court has jurisdiction over this adversary proceeding under 28 U.S.C. § 1334 and General Order 84-1, the general order of reference in this district. This is a core proceeding in which the court may enter final judgment pursuant to 28 U.S.C. § 157(b)(2)(F). This memorandum constitutes the court's findings

[1] If the debts in issue are within the discharge exception created by § 523(a)(5), then the § 523(a)(15) claim is moot, as the two sections are by their terms mutually exclusive.

of fact and conclusions of law on the Motion and Opposition under Fed. R. Civ. P. 52, made applicable to this adversary proceeding by Fed. R. Bankr. P. 7052. The court has reviewed the submitted materials and the entire record of the case. Based upon that review, and for the following reasons, the court finds that Plaintiff's Motion for Summary Judgment should be DENIED; that Defendant's Motion for Summary Judgment should be GRANTED; and that this matter should be set for trial only on Plaintiff's § 523(a)(15) claim.

I. Facts

Plaintiff and Defendant were married on July 19, 1997. They separated on November 17, 1999. The parties entered into a Property Settlement Agreement ("Property Settlement") [Doc.# 8, Ex. A; also, Ex. A to Doc. #1 (Complaint; ¶2) and Doc. #5(Answer, ¶1, admitting execution of agreement)] filed with the State of Indiana, Steuben County Superior Court, on July 25, 2000. A Decree of Dissolution of Marriage ("Divorce Decree") was signed by Judge William C. Fee of the Steuben County Superior Court on August 21, 2000. The Divorce Decree established child support and granted Ms. Book sole custody of the parties' two children: Jacob Alexander Mansur, born January 20, 1998, and Stephanie Rene Mansur, born April 28, 1999. The Divorce Decree otherwise fully incorporates the Property Settlement.

The preamble to the Property Settlement states that "...Husband and Wife have negotiated the provisions of a Property Settlement Agreement , in order to make full, final and complete settlement of all of their respective rights, obligations, claims and issues which may exist between them, arising out of or related to or connected with their marriage, save and except the issues of **child custody, support and visitation, and attorney fees.**" (Emphasis original). The Agreement is then divided into sections, some of which are headed Subject Matter, Property Settlement, Indebtedness, Child Custody, Income Tax Dependants, Indemnification, Additional Documents, Mutual Releases, and Covenants. The final section of the Property Settlement provides, however, that none of the captions are intended to be used in the construction or interpretation of the agreement. [Property Settlement, ¶27 at p.7].

There are two sections of the Property Settlement at issue in this case. The first section in issue is paragraph seven of the Property Settlement, which awarded Ms. Book "as her sole property the marital residence located in Steuben County, Indiana." Ms. Book was thereafter responsible for all debts associated with the real estate. Further, Mr. Mansur was required to quit-claim his interest in the property to Ms. Book. [Property Settlement, ¶8]. Prior to his execution of a quit-claim deed, however, judgment liens associated with his debts attached to the home. [Doc. #1, Complaint, ¶¶5-11, Ex. B, C and D thereto, admitted in Doc. #5, Answer, ¶2]. Ms. Book then sold the home, and settled the judgment liens for $1900.00, for which she was later awarded judgment by the Steuben County Superior Court. [*Id.*]. This is one of the debts Ms.

Book asserts as being nondischargeable.

The second section in issue is paragraphs eight, nine and ten of the Property Settlement. Paragraph eight of the Property Settlement provides that "Wife shall assume and pay" a list of ten debts. Ms. Book's affidavit itemizes these debts as totaling $37,119.44, including the home mortgage of $33,649.23. [Doc. #9]. Paragraph nine of the Property Settlement provides that "Husband shall assume and pay" a list of seven debts. Ms. Book's affidavit itemizes these debts as totaling $1,461.43. [Doc. #9]. Paragraph ten of the Property Settlement provides that a list twenty seven debts "shall be split equally between the parties." Ms. Book's affidavit itemizes the total amount of these debts as $6712.63, with each party responsible for $3,356.32. [Doc. #9]. Ms. Book asserts that Mr. Mansur's obligations in paragraphs nine and ten are also nondischargeable.

Paragraphs eight, nine and ten in the Property Settlement are prefaced with the following language: **"C. INDEBTEDNESS.** As part of the marital settlement and alimony, the parties agree to assume the following obligations:." (Emphasis original). This language appears in different typeface than the rest of the document, with such language then being initialed in handwriting. It does not, however, appear within any of the numbered paragraphs of the agreement.[2] This language in the Property Settlement forms the entire basis for Ms. Book's Motion and argument in support of her position that Mr. Mansur's obligations in paragraphs nine and ten, as well as the $1900.00 judgment arising out of paragraphs seven and eight, are nondischargeable alimony, maintenance or support debts within the meaning of § 523(a)(5). Plaintiff conversely argues that this language is not determinative, and that other factors must be evaluated by the court.

On January 28, 2002, Mr. Mansur filed with this court a voluntary petition for relief under Chapter 7 of the Bankruptcy Code. Mr. Mansur received a Chapter 7 discharge on May 29, 2002. [Doc. #6; Case No. 02-30441]. Ms. Book had previously commenced this adversary proceeding with her Complaint to Determine Nondischargeability of Debts [Doc. #1]. Mr. Mansur has admitted all of the factual allegations of the complaint in his answer, contesting, however, the legal conclusions flowing from those factual admissions. [Doc. #5: Answer]. The parties contend in their respective motion filings that there is no factual dispute, only a legal dispute as to whether the obligations outlined in the Property Settlement are debts which fall under § 523(a)(5).

II. Law and Analysis

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[2] The court notes that two other additions to the Property Settlement appear in different typeface. [Property Settlement, ¶¶ 11 and 12]. They are also initialed by the parties in handwriting, but they also appear within specific numbered paragraphs.

A. Summary Judgment Standard

This case is before the court upon the parties' cross-motions for summary judgment. Under Fed. R. Civ. P. 56, made applicable to this proceeding by Fed. R. Bankr. P. 7056, a party will prevail on a motion for summary judgment when "[t]he pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); Fed.R.Civ.P. 56(c). In order to prevail, the movant must prove all elements of the cause of action or affirmative defense. *Taft Broadcasting Co. v. United States*, 929 F.2d 240, 248 (6th Cir. 1991). Once that burden is met, however, the opposing party must set forth specific facts showing there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-51 (1986); *60 Ivy St. Corp. v. Alexander*, 822 F.2d 1432, 1435 (6th Cir. 1987). Inferences drawn from the underlying facts must be viewed in a light most favorable to the party opposing the motion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-88 (1986).

In cases such as this, where the parties have filed cross-motions for summary judgment, the court must consider each motion separately on its merits, since each party, as a movant for summary judgment, bears the burden to establish both the nonexistence of genuine issues of material fact and that party's entitlement to judgment as a matter of law. *Lansing Dairy v. Espy*, 39 F.3d 1339, 1347 (6th Cir. 1994); *Markowitz v. Campbell* (*In re Markowitz*), 190 F.3d 455, 463 n.6 (6th Cir. 1999). The fact that both parties simultaneously argue that there are no genuine factual issues does not necessarily establish that a trial is unnecessary, and the fact that one party has failed to sustain its burden under Fed.R.Civ.P. 56 does not automatically entitle the opposing party to summary judgment. *See* 10A Charles Alan Wright, Arthur R. Miller, and Mary Kay Kane, *Federal Practice and Procedure: Civil 3d* § 2720 (1998).

B. 11 U.S.C. § 523(a)(5) Standards

The parties' cross-motions raise the issue whether the specific debts identified above are within the exception to discharge set forth in § 523(a)(5) for alimony, maintenance or support obligations. Section 523(a)(5) states in pertinent part:

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt–
>
> > (5) to a spouse, former spouse, or a child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of court record, determination made in accordance with State or territorial law by a

> governmental unit, or property settlement agreement, but not to the extent that– ***
>
> > (B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support.

The court must thus decide whether Mr. Mansur's obligations outlined in the Property Settlement are in the nature of alimony, maintenance, or support for Ms. Book and the parties' two children, within the meaning of § 523(a)(5). The Sixth Circuit has addressed bankruptcy court interpretation of state court divorce decrees under § 523(a)(5) several times, starting with *Long v. Calhoun (In re Calhoun)*, 715 F.2d 1103 (6th Cir. 1983), and most recently in in *Sorah v. Sorah (In re Sorah)*, 163 F.3d 397 (6th Cir. 1998).

In *Calhoun*, the Sixth Circuit had to determine whether an assumption of debt not labeled as alimony, but contained in a section of the decree addressing property division, was really support. The Sixth Circuit developed a four part test focusing on: (1) whether the parties intended the obligation to be support; (2) whether the obligation in fact provides support; (3) whether the support award is unreasonable; and (4) if unreasonable, the amount of the debt to be discharged to carry out the provisions of the Bankruptcy Code. *Calhoun*, 715 F.2d at 1109. Significantly for this case, the Sixth Circuit in *Calhoun* also imposed the burden of persuasion that an obligation is in the nature of support on the non-debtor party. *Id.* at 1111 and n.15. In this case, then, Ms. Book has the burden of proving that the obligations are alimony or support; Mr. Mansur does not have the burden of proving that they are *not* alimony or support. As noted in a subsequent decision, *Calhoun* provides a framework for analysis when obligations are not designated as alimony, maintenance or support in the divorce decree. *Fitzgerald v. Fitzgerald (In re Fitzgerald)*, 9 F.3d 517, 520 (6th Cir. 1993).

Subsequently, in *Fitzgerald*, the Sixth Circuit addressed the converse of the situation in *Calhoun*, in that the debtor--spouse in *Fitzgerald* argued that an obligation denominated as alimony was not actually in the nature of support. In particular, the Sixth Circuit held that the second factor above, which has been referred to as the present needs inquiry, is not relevant where an obligation is specifically labeled as alimony. Arising from a concern that bankruptcy courts were applying the present needs factor in a manner that improperly intruded into state court domestic relations authority, "*Fitzgerald* stands for the proposition that a state court's award of alimony is entitled to deference when labeled and structured as such." *Sorah*,

163 F.3d at 401. (Emphasis original).

Most recently, in *Sorah*, the Sixth Circuit refined its analysis by directing bankruptcy courts to analyze the obligation in light of "traditional state law indicia" of a support award, including: (1) how the obligation is labeled; (2) whether the payment is direct to the spouse, as opposed to the assumption of a debt to a third party; and (3) whether the payments are contingent upon such future events as death, remarriage or eligibility for Social Security. *Sorah*, 163 F. 3d at 401. *Sorah* involved an award of $750.00 monthly payments directly to the non-debtor spouse labeled as "maintenance," but discharged by the bankruptcy court as not actually in the nature of support. In a frequently quoted passage, the Sixth Circuit counseled deference to state court decrees and noted with respect to support awards that "if something looks like a duck, walks like a duck, and quacks like a duck, then it is probably a duck." *Id*. Stated differently, if an obligation is designated as support and has the indicia of support, the intent to create a support award is conclusively presumed and the bankruptcy court is not to challenge that intent by probing the award. While the Sixth Circuit expressly identified three key indicia of support, its list is not intended to be exhaustive or exclusive. *Id*. The Sixth Circuit specifically directed bankruptcy courts to consider any other indicia of support set forth by applicable state law, as follows:

> An award that is designated as support by the state court and that has the above indicia of a support obligation *(along with any others that the state support statute considers)* [emphasis added] should be conclusively presumed to be a support obligation by the bankruptcy court....Once the non-debtor spouse has established that the obligation in question has all of the indicia of support, the debtor spouse may not introduce evidence to the contrary. In particular, a debtor spouse may not ask the bankruptcy court to assume the role of psychological examiner, probing the state court's decision for linguistic evidence of ulterior motives. Nor may the debtor spouse introduce evidence regarding the resources, earning potential, and daily needs of the non-debtor spouse, either at the time the obligation arose or at the time of the bankruptcy proceeding. This portion of the *Calhoun* analysis is inappropriate when the state court has clearly structured the obligation as support.

Id., at 401, 402. In this case, the Divorce Decree was entered by an Indiana court. So it is Indiana law that this court is directed to in looking to other applicable indicia of support.[3]

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[3] Other courts have identified other traditional state law indicia, such as: (1)the disparity of earning power between the parties; (2)the need for economic support and stability; (3)the presence of minor children; (4) marital fault; and (5) the adequacy of support absent the debt assumption. *See, e.g., Hammermeister v. Hammermeister (In re Hammermeister)*, 270 B.R. 863, 874 (Bankr. S.D. Ohio 2001); *Jones v. Jones (In re Jones)*, 265 B.R. 746, 751-752 (Bankr. N.D. Ohio 2001); *Bailey v. Bailey (In re Bailey)*, 254 B.R. 901 (B.A.P. 6th Cir. 2000). While these indicia are effectively, if not

In this case, there are two different types of debt in issue. Although the parties' arguments do not separately address the obligations, the court will apply the foregoing legal principles separately to the two different types of obligations Mr. Mansur owes to Ms. Book.

C. Application of Standards to Judgment Against Mr. Mansur

The first obligation is issue is the $1900.00 judgment amount awarded Ms. Book in the October 2, 2001, Order of the Steuben County Superior Court. [Doc. #1, Complaint, Exs. C and D; Doc. #5, Answer, admitting facts and authenticity of documents]. This debt and its amount are not explicitly set forth in either the Divorce Decree or the Property Settlement. But it clearly arises out of the obligations incurred by Mr. Mansur in paragraphs six and seven of the Property Settlement. Also, the subsequent order awarding the judgment arose in the context of the divorce case and a contempt citation resulting from Mr. Mansur's breach of his obligation under the Property Settlement. So it does meet the threshold requirement to fall within § 523(a)(5), namely that the debt is "in connection with a separation agreement, divorce decree or other order of a court of record...or property settlement..." The real issue is whether it is actually alimony, maintenance or support.

Ms. Book's argument is focused wholly on the added language in the "Indebtedness" section of the Property Settlement, which states that "[a]s part of the marital settlement and alimony..." But the $1900.00 obligation does not arise out of this section of the Property Settlement. It arises from the preceding section, labeled "Property Settlement," a fact the court nevertheless declines to rely upon because of the parties' clearly expressed intent that the headings "are not to be used in any manner whatsoever in the construction or interpretation of this Agreement or any provisions hereof." [Property Settlement, ¶ 27]. There is no other language anywhere in the agreement or in the contempt order that says anything one way or another about spousal support. Child support for the parties' minor children (about which there is no dispute that it is within the scope of § 523(a)(5)) is separately addressed in both the Property Settlement and the Divorce Decree. And while one might argue that the language "as part of" in the introduction to the Indebtedness section following implies that all other sections also involve "alimony," that is an interpretive stretch the court will not make. The added language appears in and was added to one specific section of the document, and cannot be fairly construed as modifying the preceding section. Therefore, the court finds that the $1900.00 is not in fact labeled as alimony or support, which is the first factor identified in *Sorah*.

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explicitly, woven into the Indiana case law and statute, taken together, the court will look to the indicia identified and as phrased under Indiana law, as discussed below.

Looking to the second *Sorah* factor, the $1900.00 payment is to be made directly to Ms. Book. So the second factor in the analysis favors her position.

Looking to the third *Sorah* factor, Ms. Book has been awarded a judgment for the $1900.00 amount. None of the documents or information in the record indicates that the Mr. Mansur's obligation to make this payment will terminate on the happening of a subsequent life event for Ms. Book, such as her remarriage or death. The third *Sorah* factor therefore favors Mr. Mansur's position.

Next , the court turns to Indiana law and what it identifies as indicia of support. Under the applicable Indiana statutes, the concept of spousal support is now called maintenance, and not alimony or support. Burns Ind. Code Ann. §§ 31-15-7-1 and 2 (2002). As one court notes, the concept of "alimony" ceased to be part of Indiana divorce law in 1973, well before the marriage and divorce of Ms. Book and Mr. Mansur. *Savage v. Savage*, 374 N.E.2d 536, 537-38 (Ind. Ct. App. 1978). Maintenance may only be awarded under the very limited circumstances identified in § 31-15-7-2 (spouse incapacitated, spouse lacks property to provide for spouse's needs, spouse is custodian of a child whose incapacity requires spouse to forego employment or rehabilitative maintenance) or by agreement of the parties incorporated in a divorce decree. *Thomas v. Abel*, 688 N.E.2d 197, 200 (Indiana Ct. App. 1997).

A number of Indiana cases have addressed the question of when an award, whether by agreement of the parties or by court directive, constitutes maintenance or a property settlement. In the case *Coster v. Coster*, 452 N.E.2d 397, 403 (Indiana Ct. App. 1983), the trial court had awarded wife a lump sum payment of $10,000 and monthly payments of $500.00 per month for 121 months. The issue the court of appeals addressed was whether these payments were maintenance or in furtherance of the property settlement. The factors the court identified as relevant were: (1)whether the award had an interest component (property settlement); (2)whether the payment(s) terminated at death of either spouse or upon some other future event (maintenance); (3)whether the amount of the award exceeds the value of the marital assets (maintenance); and (4)whether the payments were to be made from future income (maintenance). Other courts have added the characterization of the award as but one factor to be considered. *Cox v. Cox*, 580 N.E.2d 344, 347 (Ind. Ct. App. 1991). The *Cox* court also looked to whether the payments are for an indefinite period (maintenance) or for a sum certain payable over a definite period of time (property settlement), and whether they survived death or remarriage (property settlement). As summarized by the court in *Frazier v. Frazier*, 737 N.E.2d 1220, 1223-24 (Ind. Ct. App. 2000), in the context of deciding whether an obligation awarded in a dissolution judgment was a debt within the meaning of 11 U.S.C. § 523(a)(5):

> Generally, if an obligation was created to provide for the daily needs of the former spouse, it is in the nature of alimony, maintenance or support. On the other hand, an obligation to be paid in a lump sum or over a short period of time is more likely to be considered a property settlement...[A] mere disparity in earnings does not convert an obligation to one of support or maintenance where each party is self-sufficient.
> [Citations omitted].

These factors are very similar to the three factors identified as indicia by the Sixth Circuit in *Sorah.* It does not appear that there is any interest component to the $1900.00 award, although it is in the form of a judgment and may have an automatic interest component under state law, a fact unknown on this record. As already specified above, the award is not labeled as maintenance and it does not terminate upon any future event. There is no evidence in the record to show whether the award does or does not exceed the value of marital assets, but it would appear that the payment will have to be made from the future income of Mr. Mansur. It is, however, for a definite sum and not one to be made in installments. Moreover, there is nothing in the record to show that the obligation was created to provide for Ms. Book's daily needs, as opposed to protecting her interest in the real property that she was awarded. Lastly, although this obligation arose by agreement of the parties and not by court directive, there is no evidence in the record to show that any of the factors are present here that would have otherwise resulted in a court award of maintenance for Ms. Book under Burns Ind. Code Ann § 31-15-7-2. Indeed, the only evidence of income in the record shows that there is a disparity in favor of Ms Book. The child support worksheet, part of Exhibit A to the complaint, shows that Ms. Book's earnings were greater than Mr. Mansur's, with her percentage share of their combined weekly adjusted income at 61.8902%; Mr. Mansur' weekly adjusted income was $250.00 and Ms. Book's weekly adjusted income was $406.00. The line item marked "maintenance paid" shows "0" for both parties.

On the whole, the factors for which there is evidence in the record favors a determination that the obligation is not structured as alimony, maintenance or support, but in furtherance of the parties' division of property. The only factors of those identified above that tend to indicate the $1900.00 is maintenance are that it is to be paid directly to Ms. Book, and that it will be made out of Mr. Mansur's future income, by garnishment or otherwise. All of the other factors–the payment is not labeled as support or maintenance, the payment is for a definite sum, there is no circumstance under which the obligation to make the payment terminates, the payment is connected with clearing title to property she received and Ms. Book had greater income than Mr. Mansur–show that the obligation was structured in furtherance of the parties' division of marital property, not as support for her and the children.

With the $1900.00 judgment obligation neither labeled or structured as maintenance or

support, the *Sorah* analysis seems complete. But there is some conflict in the case law under circumstances such as this as to whether any further analysis is necessary. One of the judges of this court has taken the position that, when the obligation is not labeled as alimony, maintenance or support, the bankruptcy court should then return to the first and second factor of the *Calhoun* analysis and pursue the intent and present needs inquiries therein. Under such circumstances, the *Jones* court reasoned that the Sixth Circuit's admonition in *Sorah* that bankruptcy courts should not play super divorce courts and second guess the clear directives of state courts as to such debts does not come into play, because the debt neither walks like a support duck nor talks like a support duck. *Jones*, 265 B.R. at 750, n. 2. But another of the judges of this court adopted the converse of the *Sorah* position, namely that the absence of both an appropriate label and the traditional indicia of support forecloses further bankruptcy court review of the state court decree. *Phelps v. Cordia (In re Cordia)*, 280 B.R. 138, 145 (Bankr. N.D. Ohio 2001).

This judge need not decide here which approach is the correct one. If the *Cordia* approach is correct, then no further analysis is necessary and Mr. Mansur prevails on his motion for summary judgment. If the *Jones* approach is correct, there is no evidence in the record from which the court could pursue an inquiry as to intent and present needs, beyond what has already been described above. Ms. Book has the ultimate burden of persuasion. *Calhoun*, 715 F.2d at 1111 and n.15; *Sorah*, 163 F.3d at 401. In determining motions for summary judgment, the court is required to consider the burden of persuasion at trial in determining the strength of the material submitted with the motion. *Liberty Lobby*, 477 U.S. at 252.

Evaluated from the perspective of Ms. Book's motion, she must establish a prima facie case for summary judgment in her favor, by demonstrating (1) the apparent absence of any dispute of material fact and (2) entitlement to judgment as a matter of law on the basis of undisputed facts in the record. Where a movant has a burden of proof on an issue, "the movant must make a stronger claim for summary judgment by introducing supporting evidence that would conclusively establish movant's right to a judgment after trial should nonmovant fail to rebut the evidence." 11-56 *Moore's Federal Practice-Civil* § 56.13[1]. For the foregoing reasons, the record Ms. Book has presented on summary judgment does not establish that the $1900.00 judgment amount is actually an alimony, maintenance or support obligation as a matter of law. Her entire argument is based on the alleged characterization of the debt as "alimony" in a different section of the Property Settlement. To the contrary, the $1900.00 debt was not labeled as alimony, maintenance or support. From the perspective of Ms. Book's motion, she has failed to establish her prima facie entitlement to summary judgment in her favor under § 523(a)(5) as to the $1900.00 debt. There is no evidence in the record Ms. Book has presented on summary judgment from which the court could pursue the intent and present needs inquiry

even if appropriate as under *Jones*, and since she has the burden of proof it was her obligation to present such evidence to make her case. Ms. Mansur is not entitled to summary judgment on her § 523(a)(5) claim as to the $1900.00 judgment.

Mr. Mansur has also moved for summary judgment. [Doc. #13]. As explained above, the two motions must be independently evaluated. Where a movant is defending the claim at issue, the initial summary judgment burden is met if the movant establishes that the claimant lacks adequate proof of an essential element of the claim. *Celotex Corp.*, 477 U.S. at 322-323 (circuit court erroneously required movant to submit affidavits and to affirmatively negate element of plaintiff's claim when defendant needed only to illustrate by reference to record plaintiff's failure to introduce evidence in support of essential element of claim). Mr. Mansur's motion for summary judgment met his burden of going forward to raise the dischargeability issue and establish his entitlement to judgment as a matter of law, in the absence of an adequate response by Ms. Book, based on the pleadings, which include his admissions as to the Divorce Decree itself, the Property Settlement, the subsequent order and all of the facts plead in the complaint. Then, where the nonmoving party bears the burden of proof at trial, the court must evaluate "the evidence presented through the prism of the substantive evidentiary burden." *Liberty Lobby*, 477 U.S. at 254. Ms. Book has the obligation to establish in response that she is entitled to prevail as a matter of law on her claim that the $1900.00 debt is actually alimony, maintenance or support, or otherwise set forth specific facts showing that there is a genuine issue of material fact for trial. She has not done either, as explained above. Her entire legal and factual argument is premised on the erroneous factual averment that the debt is labeled as alimony. And while the record lacks evidence of all of the legal indicia discussed above, the court cannot find that Ms. Book has pointed to any genuine issues of material fact in the record with respect to the $1900.00 debt. The absence of evidence as to a particular factor or set of factors is not the same as a genuine issue of material fact, where the time for coming forward is in opposition to a defendant's properly supported and advanced motion for summary judgment. Mr. Mansur is entitled to summary judgment in his favor on Ms. Book's claim that the $1900.00 debt is excepted from his bankruptcy discharge under § 523(a)(5).

D. Application of Standards to Mr. Mansur's Third Party Debt Payments

The court must apply the same analysis to the other debts Mr. Mansur owes to Ms. Book under paragraphs nine and ten of the Property Settlement. As to the first *Sorah* factor, unlike the $1900.00 debt, the word "alimony" is actually used in the heading of the section in which these debts appear, with the statement that "[a]s part of the marital settlement and alimony, the parties agree to assume" the obligations now at issue. These words are in different typeface and were initialed by the parties. However, it also appears

to the court that, in terms of the structure of the agreement, these words could be construed as part of the heading to the subsequent substantive paragraphs and not the subsequent paragraphs themselves. Every other part of the Property Settlement after the initial "WHEREAS" clauses is within a numbered paragraph, while the language in issue is not. The other two similar, separate additions were also made within numbered paragraphs. As explained above, the Property Settlement expressly states at paragraph 27 that headings are not to be used in any manner whatsoever in the interpretation of the document.

Moreover, as already noted above, the concept of "alimony" is no longer in use under Indiana divorce law. *Savage*, 374 N.E.2d at 537-538. And when it was, "some cases held that alimony included both property settlement and maintenance or support" while "other cases have held that alimony embraces only a property settlement." *Id*.

Under the circumstances, then, the appearance of the term "alimony" in the Property Settlement is at best ambiguous and at worst something that cannot even be considered by this court. Analysis of the first prong of *Sorah* as to the label attached to the obligations is inconclusive, and not determinative as argued by Ms. Book.

Looking to the second prong of *Sorah*, the obligations at issue are clearly payments that Mr. Mansur is to make to third party creditors and not directly to Ms. Book. [4] This is an indicia of a property settlement arrangement and not of maintenance or support.

Looking to the third prong of *Sorah*, Mr. Mansur's obligations do not terminate upon life-changing events such as Ms. Book's remarriage, death, or eligibility for Social Security benefits. There is no indication that the obligations incurred by Mr. Mansur were meant to be a support bridge for Ms. Book to one of these other events.

Turning to indicia of support under Indiana law, the results also show that Mr. Mansur's payments of debt were in furtherance of a property settlement arrangement and not maintenance or support

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Ms. Book may point to the indemnification provision of the Property Settlement to argue that there is in fact a direct payment obligation to her for these debts. In the court's view, however, that provision is essential to making the obligation one owing to Ms. Book, and the predicate for bringing it within the ambit of either § 523(a)(5) or (a)(15) in the first instance. *See Calhoun*, 715 F.2d at 1106-07. In the absence of such assumption and/or hold harmless provisions, some courts have held that such obligations are debts owed to a spouse within either § 523(a)(5) or (a)(15). *Belcher v. Owens (In re Owens)*, 191 B.R. 669, 674 (Bankr. E.D. Ky. 1996); *but see Gibson v. Gibson (In re Gibson)*, 219 B.R. 195 (B.A.P. 6th Cir. 1998). It does not in this court's views convert the obligation to make payments to third party creditors into direct payments to the spouse akin to alimony, maintenance or support under *Sorah*.

for Ms. Book and the two children. The first factor is whether the obligations are identified as "maintenance," which is the applicable concept under Indiana law. *Thomas*, 688 N.E.2d at 199-200. As explained above, the debt payments are not referred to as maintenance or support, but called alimony. Even assuming that Indiana courts would consider the use of the word "alimony" as a proxy for maintenance, Indiana courts have clearly and repeatedly held that the mere titling of the obligation as such is not determinative, as Ms. Book argues. In *Frazier*, the trial court's order included a provision stating that the award constituted maintenance and support as "an exception from bankruptcy discharge pursuant to 11 U.S.C. § 523(a)(5)." 737 N.E.2d at 1223. Notwithstanding the trial court label, the court of appeals reversed the trial court's order characterizing its $394,018.00 award as nondischargeable maintenance or support. *See also Millar v. Millar*, 581 N.E.2d 986, 987, n.1 (Ind. Ct. App. 1991)(trial court similarly described obligation as nondischargeable under § 523(a)(5), but the court of appeals reversed the decision and noted that the substance and function of the debt will control, rather than its that form or appellation). Similarly, in *Cox* the court of appeals characterized the husband's arguments as erroneously "premised on the assumption that the [trial] court's use of the term 'maintenance' is determinative of the issue." 580 N.E.2d at 346-347. Again notwithstanding the label, the court of appeals held that the award in issue was a property settlement and not maintenance. The label was just one factor, not the only factor. Under Indiana law, then, even if the parties' label connotes maintenance or support, that label is not determinative. [5]

The majority, but not all, of the other factors Indiana courts apply to decide whether an obligation is maintenance or in the nature of a property settlement slightly favor Mr. Mansur's position. There is no interest component to the debt payments and they will have to be paid from Mr. Mansur's future income, factors that favor maintenance. But the obligations do not ever terminate, there is no evidence that the value of the payments exceeds the value of the assets and there is no evidence of the other factors that would lead to an award of maintenance under the statute. To the extent there is evidence of income in the record, it favors Mr. Mansur's position, as the court cannot say that Ms. Book has established that the payments are

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[5] Ms. Book argues that under Indiana law the parties are bound by their agreements. That appears to be true as to domestic relations law, with the courts and statutes encouraging settlement. In *Thomas*, the court held that the parties were bound by an award of maintenance arising out of an agreement, unless they mutually agreed to modify the agreement. That was so even if the trial court did not make the findings that would be otherwise required under the statute for the court to order maintenance. But the *Thomas* court still examined the label attached to the provision by the trial court under the *Coster* factors, and determined that the award was in fact maintenance, before finding that the parties were bound by their agreement.

alimony, maintenance or support by a preponderance of the evidence. The balance as to these third party debt obligations, under both the *Sorah* factors and the indicia that Indiana law looks to, tips slightly in favor of Mr. Mansur on the basis of the record before the court. Even to the extent the third party debt payment obligation is labeled alimony, it is not structured as alimony, maintenance or support. The court's analysis as to the parties' relative entitlement to summary judgment with respect to these payments is the same as set forth above with respect to Mr. Mansur's $1900.00 obligation. Namely, Ms. Book is not entitled to summary judgment in her favor on her claim that the third party debt obligations assumed by Mr. Mansur are nondischargeable under § 523(a)(5). Likewise, she has not overcome Mr. Mansur's prima facie entitlement to summary judgment in his favor on that claim. His motion for summary judgment will be granted.

III. Conclusion:

Based upon the foregoing reasons and authorities, the court will deny Ms. Book's motion for summary judgment and grant Mr. Mansur's motion for summary judgment, treating it as a motion for partial summary judgment because Ms. Book's claims under § 523(a)(15) remain for further proceedings and trial.

Therefore, for cause shown,

IT IS ORDERED that Plaintiff Sherry Ann Mansur n.k.a. Sherry Ann Book's Motion for Summary Judgment [Doc. # 8] is **DENIED**; and,

IT IS FURTHER ORDERED that Defendant Jason Scott Mansur's Motion for Summary Judgment [Doc. # 11] is **GRANTED,** but is hereby clarified as a motion for partial summary judgment on Plaintiff's claims under 11 U.S.C. § 523(a)(5) only; and

IT IS FINALLY ORDERED that a **further pretrial scheduling conference,** pursuant to Fed. R. Bankr. P. 7016 and Fed. R. Civ. P. 16, will be held on **April 3, 2003, at 9:45 o'clock a.m,** in Courtroom No. 2, Room 103, United States Courthouse, 1716 Spielbusch Avenue, Toledo, Ohio. Counsel may appear by telephone with 24 hours advance notice to the court, and shall either have means to contact their respective clients during the pretrial conference or have available information as to their clients' schedules through September, 2003, to facilitate the scheduling of this case for trial on Plaintiff's claim under 11 U.S.C. § 523(a)(15).

Dated:

/s/ Mary Ann Whipple
Mary Ann Whipple
United States Bankruptcy Judge