This opinion is not intended for publication

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

In re:	)	Case No. 00-18972
	)	
DANNY E. ATWATER,	)	Chapter 7
Debtor.	)	
	)	Adversary Proceeding No. 01-1090
MICHELE ATWATER,	)	
Plaintiff,	)	Judge Arthur I. Harris
	)	
v.	)	
	)	
DANNY E. ATWATER,	)	
Defendant.	)	

MEMORANDUM OF DECISION

Pending before the Court is a motion for summary judgment (Docket #29) filed by Plaintiff Michele Atwater. Plaintiff has brought this adversary complaint pursuant to 11 U.S.C. § 523(a)(5) and (15) to determine the dischargeability of a $13,000 debt that Defendant/Debtor owes her in connection with their divorce. Apparently in response to the plaintiff's motion for summary judgment, the pro-se debtor filed a copy of a Petition for a Writ of Prohibition that had evidently been filed with the Court of Appeals for the Eighth Judicial District of Ohio on February 3, 2003. For the reasons that follow, Plaintiff's motion for summary judgment is granted.

FACTS

The following facts and procedural history are undisputed: the Cuyahoga County Court of Common Pleas granted the parties a divorce on December 1, 1999. As part of the divorce decree, the Common Pleas Court adopted and incorporated a Memorandum of Understanding between the parties which, in pertinent part, required the debtor to pay $13,000 to the plaintiff for attorney fees and other equitable property division. On October 10, 2000, the debtor was found in contempt for failing to pay the $13,000. The debtor filed his Chapter 7 petition on November 24, 2000, and listed the plaintiff as an unsecured creditor for the $13,000 debt.

In January of 2001, the plaintiff moved the Court of Common Pleas for relief from the judgment contained in the December 1, 1999, divorce decree, but Magistrate John R. Homolak denied that motion in a written decision dated September 6, 2002. In addition to denying the plaintiff's motion, Magistrate Homolak clarified the nature of the $13,000 obligation from the 1999 divorce decree. After examining the circumstances of the parties and the various documents accompanying the decree, Magistrate Homolak found that

based upon the nature of the case, length of proceedings and the factors set

> forth herein, [Danny E. Atwater's] entire obligation of $13,000 shall be considered as payment in lieu of periodic spousal support and also as additional spousal support towards the Defendant's attorney fees; it is therefore entirely in the nature of spousal support.

Common Pleas Judge Anthony J. Russo later adopted the decision of Magistrate Homolak in a written order and reiterated that the $13,000 debt "shall be considered in the nature of support as it was awarded in lieu of periodic spousal support and also as and for attorney fees."

On February 3, 2003, the debtor filed a Petition for a Writ of Prohibition to the Court of Appeals for the Eighth Judicial District of Ohio requesting, in essence, that Judge Russo's order be vacated. The docket for that case, *State ex rel Danny E. Atwater v. Judge Anthony Russo*, CA-03-082421, indicates that the debtor's motion was dismissed on April 10, 2003.[1]

DISCUSSION

The Court has jurisdiction in this adversary proceeding pursuant to 28 U.S.C. § 1334(b) and Local General Order No.84, entered on July 16, 1984, by

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[1]Although neither party introduced evidence regarding the dismissal of the debtor's motion, the Court takes judicial notice of that fact because the docket of the Eighth Judicial Circuit of Ohio is available via the internet. This Court considers the dismissal of the debtor's motion to be a fact "capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned." FED. R. EVID. 201(b).

the United States District Court for the Northern District of Ohio. This is a "core" proceeding pursuant to 28 U.S.C. § 157(b)(2)(I).

The standards for a court to award summary judgment are contained in Federal Rule of Civil Procedure 56(c), as made applicable to bankruptcy proceedings by Rule 7056 of the Bankruptcy Rules. According to Civil Procedure Rule 56(c), a court shall render summary judgment

> if the pleadings, depositions, answers to interrogatories, and admissions on file, together with 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.

The party moving the court for summary judgment bears the burden of showing 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." *Jones v. Union County*, 296 F.3d 417, 423 (6th Cir. 2002). *See generally Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Once the moving party has met that burden, the nonmoving party "must identify specific facts supported by affidavits, or by depositions, answers to interrogatories, and admissions on file that show there is a genuine issue for trial." *Hall v. Tollett*, 128 F.3d 418, 422 (6th Cir. 1997). *See, e.g.*, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986) ("The mere

existence of a scintilla of evidence in support of plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff."). In determining the existence or nonexistence of a material fact, a court will view the evidence in a light most favorable to the nonmoving party. *See Tennessee Department of Mental Health & Mental Retardation v. Paul B.*, 88 F.3d 1466, 1472 (6th Cir. 1996).

Pursuant to 11 U.S.C. § 523(a)(5),[2] a debt will be deemed nondischargeable if it is a debt

> to a spouse, former spouse, or 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 a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that—
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> (A) such debt is assigned to another entity, voluntarily, by operation of law, or otherwise (other than debts assigned pursuant to section 408(a)(3) of the Social Security Act, or any such debt which has been assigned to the Federal Government or to a State or any political subdivision of such State); or
>
> (B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony,

[2]Because the Court deems nondischargeable the full amount requested under 11 U.S.C. § 523(a)(5), the Court need not address the plaintiff's alternate theories (or claims) for relief in Counts II and III.

> maintenance, or support . . . .

Much of the litigation regarding this section, including the case at hand, focuses on whether a given debt is "actually in the nature of alimony, maintenance, or support."

The Sixth Circuit has identified several indicia which, when present, create a conclusive presumption in favor of deeming a given award a support obligation. *See In re Sorah*, 163 F.3d 397, 401 (6th Cir. 1998). *See also In re Fitzgerald*, 9 F.3d 517 (6th Cir. 1993); *In re Calhoun*, 715 F.2d 1103 (6th Cir. 1983). In *Sorah*, the Sixth Circuit held that a court should look to the traditional state law indicia that are consistent with a support obligation, including

> (1) a label such as alimony, support, or maintenance in the decree or agreement, (2) a direct payment to the former spouse, as opposed to the assumption of a third-party debt, and (3) payments that are contingent upon such events as death, remarriage, or eligibility for Social Security benefits.

163 F.3d at 401. An award bearing these indicia, "along with any others that the state support statute considers," should be "conclusively presumed to be a support obligation by the bankruptcy court." *Id.* Thus, in deciding whether an award is actually in the nature of support, a bankruptcy court will match these criteria to the facts of the individual case.

The facts of this case, when juxtaposed with the *Sorah* indicia, lead this Court to conclude that the $13,000 award is a nondischargeable support obligation. For example, the $13,000 award was expressly labeled as spousal support by both Magistrate Homolak and Judge Russo in their clarifying orders. Magistrate Homolak described the obligation as being "entirely in the nature of spousal support," and Judge Russo stated that the debt "shall be considered in the nature of support as it was awarded in lieu of periodic spousal support and also as and for attorney fees." In this way, the clarifying orders of the Court of Common Pleas unequivocally identify the award as a support obligation.

Furthermore, the second *Sorah* indicium (direct payment to former spouse) is present in the instant case because the $13,000 was payable directly from the defendant to his former wife. The separation agreement provides that "Husband shall pay *to Wife* the sum of $13,000 . . . ." (emphasis added). Clearly, then, the entire amount was to be paid the former spouse, even though part of the award was designated as attorney fees.

The third *Sorah* indicium (payment contingent upon future events) does not apply directly to the case at hand. For the most part, this indicium is probative only in cases where an award is payable over time. *Cf.* OHIO REV. CODE

ANN. § 3105.18(C)(1) (Anderson 2002) (permitting spousal support to be payable either in gross or in installments). The $13,000 award in this case became due and owing at the time the divorce order was entered and, thus, could not have been contingent upon a future event. *See, e.g.*, *In re Bailey*, 254 B.R. 901, 905 (B.A.P. 6th Cir. 2000) (holding that the third *Sorah* indicium was "not applicable because [the husband's $20,000 lump-sum support] obligation was a current obligation").

Moreover, an Ohio divorce order need not include language regarding a contingency such as death because state law already provides for such contingency. Ohio law states that an award of spousal support "shall terminate upon the death of either party . . . ." OHIO REV. CODE ANN. § 3105.18(B). For a court to include language regarding death as a contingency would be surplusage, and the absence of such contingency language may or may not be probative as to the nature of the underlying obligation.

In addition to the three enumerated indicia, the *Sorah* court held that a bankruptcy court should consider other indicia from applicable state support statutes when determining whether an obligation is actually in the nature of support. Ohio law provides for 14 different factors that a court may consider when deciding whether to award spousal support. *See* OHIO REV. CODE

ANN. § 3105.18(C) (Anderson 2002) (income, relative earning ability, age and condition, retirement benefits, duration of the marriage, custody of minor children, standard of living during marriage, parties' education levels, relative assets, contribution to education or training, effort necessary to obtain appropriate employment, tax consequences, lost income production, any other relevant and equitable factor).

Other courts in the Sixth Circuit have considered similar factors. *See, e.g.*, *In re Bailey*, 254 B.R. 901, 906 (B.A.P. 6th Cir. 2000) (disparity of earning power, need for economic support and stability, the presence of minor children, marital fault); *In re Jones*, 265 B.R. 746, 752 (Bankr. N.D. Ohio 2001) (identifying 11 factors).

Magistrate Homolak, in his written decision, determined that the factors identified in the Ohio Revised Code weighed in favor of finding the $13,000 to be in the nature of spousal support:

> The Magistrate further finds the parties were married for 17.5 years at the time of their divorce. Mr. Atwater had significantly greater income during their marriage; he also had vested retirement assets. Husband was 44 years of age and Wife was 41 years of age. Each appeared to be in good health. There was no evidence of the standard of living during the marriage. Neither party had income producing property.
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> *The Magistrate further finds that based upon the factors set forth in*

> *Ohio Revised Code § 3105.18(C), [Wife] would have been entitled to an award of spousal support*. [Wife] testified that rather than accept periodic payments over 4 to 5 years which may have exceeded $20,000, she agreed to accept a lump sum payment of $13,000, including attorney fees.

(emphasis added). Given this balancing of the parties' respective incomes, property, future earning potential, and the long-term nature of the marriage, the $13,000 obligation was most likely meant as a means of providing spousal support rather than dividing marital property.

Once the nondebtor spouse shows that a given award has the indicia of a support obligation, the debtor spouse cannot ask the bankruptcy court to reassess the state court's decision to award support. In other words, a bankruptcy court should not "second-guess the state court support award" nor "assume the role of a psychological examiner, probing the state court's decision for linguistic evidence of ulterior motives." *Sorah*, 163 F.3d at 402. Given this deference that must be afforded to the state court's decision, this Court is hard pressed to rehash the same issues with which the state court has already dealt.

When faced with an award that bears the indicia of a support obligation, a court may affect the dischargeability of the award only upon a showing that the award has become excessive to the debtor spouse. A debtor spouse has the burden

of demonstrating that "although the obligation is of the *type* that [bears the indicia of a support obligation], its *amount* is unreasonable in light of the debtor spouse's financial circumstances." *Id*. at 401 (emphasis in original). If the financial circumstances of the debtor spouse indicate that the award exceeds what the debtor can be reasonably expected to pay, a bankruptcy court may discharge only that portion of the award that is excessively burdensome.

In the case at hand, the debtor has not presented the Court with any information to suggest that the $13,000 is excessive or unreasonable in light of his present financial circumstances. Absent such evidence from the non-moving party in a motion for summary judgment, the Court need not excavate the entire record to determine if any of the available evidence could be construed in such a light. Simply put, the debtor has an "affirmative duty to point out specific facts in the record as it has been established which create a genuine issue of material fact." *United States v. LTV Steel Co., Inc.*, 118 F.Supp.2d 827, 832 (N.D. Ohio 2000). *See In re Morris*, 260 F.3d 654, 666 (6th Cir. 2001) (holding that the "trial court no longer has the duty to search the entire record to establish that it is bereft of a genuine issue of material fact"); *Barnhart v. Pickrel, Schaeffer & Ebeling Co., L.P.A.*, 12 F.3d 1382, 1389 (6th Cir. 1993) (same language). Thus, the debtor has

failed to establish the existence of a material fact with respect to the reasonableness or excessiveness of the $13,000 obligation.

ATTORNEY FEES AS SUPPORT OBLIGATIONS

Although the $13,000 obligation is styled as at least partially for the payment of the wife's attorney's fees and not directly for her sustenance, the Court finds that the award nonetheless qualifies as an award for spousal support. For one matter, the Ohio statute regarding spousal support expressly provides for attorneys fees to be awarded in divorce or legal separation proceedings if the requesting party would be "prevented from fully litigating that party's rights and adequately protecting that party's interests if [the court] does not award reasonable attorney's fees." OHIO REV. CODE ANN. § 3105.18(H) (Anderson 2002). Accordingly, an award of attorneys fees in an Ohio divorce proceeding necessarily entails a judicial finding that one spouse had an actual need for the award in order to pursue his or her legal rights.[3] The award, then, provides for the specific financial need of the former spouse.

[3]In the case at hand, Magistrate Homolak specifically found that the wife "would not have had the ability to pay her own attorney fees, nor would she have been able to adequately support herself, without a financial contribution from Mr. Atwater in the form or spousal support."

Moreover, courts generally agree that awards of attorneys fees in connection with a divorce or separation proceeding constitute nondischargeable support obligations. *See, e.g.*, *In re McNamara*, 275 B.R. 832, 835 n.2 (E.D. Mich. 2002) (noting that the majority view is that "a debtor's obligation to pay attorneys' fees is nondischargeable support regardless of whether the debt is payable directly by the debtor"); *In re Goans*, 271 B.R. 528, 534 (Bankr. E.D. Mich. 2001) ("The award of attorney fees in a divorce judgment is usually found to be in the nature of support and thus nondischargeable."). *Cf. In re Perlin*, 30 F.3d 39 (6th Cir. 1994) (attorney has no independent standing to argue nondischargeability of award of attorney fees). The debtor has not identified any reason why this Court should not follow the majority view regarding attorneys fees.

EFFECT OF STATE COURT CLARIFYING TERMS OF DIVORCE ORDER

This Court is mindful of the fact that the state court's interpretation of the nature of the $13,000 obligation may have changed over time, but that fact does not necessarily diminish the deference that this Court should pay under *Sorah* to the state court's final determination, particularly if (1) the final determination contains indicia that are consistent with a support obligation, and (2) the state court has justified any changes from its prior rulings with a reasoned analysis.

This situation is analogous to the deference given to an agency's interpretation of a statute, even if that interpretation changes over time, provided an explanation is given for the changes. *Cf. Rust v. Sullivan*, 500 U.S. 173, 186 (1991) (noting that a revised interpretation deserves deference because "an initial agency interpretation is not instantly carved in stone" and "the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis"); *Motor Vehicle Mfrs. Assn. of United States, Inc. V. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 42 (1983) (noting that an agency is not required to "establish rules of conduct to last forever").

In the present case, as noted above, the state court's final determination does indeed contain indicia that are consistent with a support obligation. Moreover, the clarifying orders from Magistrate Homolak and Judge Russo provide a reasoned analysis for designating the $13,000 obligation as being in the nature of spousal support, even though the original divorce decree denoted the $13,000 as a "property division" and stated that neither party shall be entitled to spousal support. For example, in his September 6, 2002, decision, Magistrate Homolak noted that Judge Russo's handwritten notes at the time of the original divorce decree indicated that the wife was to receive a lump sum payment of $13,000 "in

lieu of alimony." This suggests that, while the $13,000 was to be paid in a lump sum rather than over time, the payment itself has always been in the nature of spousal support. Thus, notwithstanding the variations of language surrounding the $13,000 obligation, this Court defers to the judgment and reasoning of the state court that the obligation is entirely in the nature of spousal support. *See In re Sorah*, 163 F.3d at 401 (holding that award designated as support by the state that has indicia of a support obligation "should be conclusively presumed to be a support obligation by the bankruptcy court").

Plaintiff's motion for summary judgment will be GRANTED.

IT IS SO ORDERED.

/s/ Arthur I. Harris 05/19/2003
Arthur I. Harris
United States Bankruptcy Judge