UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

In re:	)	Case No. 03-15361
	)	
JEFFREY M. TIPPIE,	)	Chapter 7
Debtor.	)	
	)	Adversary Proceeding No. 03-1199
CAROLYN K. TIPPIE,	)	
Plaintiff,	)	Judge Arthur I. Harris
	)	
v.	)	
	)	
JEFFREY M. TIPPIE,	)	
Defendant.	)	

MEMORANDUM OF OPINION

On June 18, 2003, plaintiff Carolyn Tippie filed an adversary proceeding seeking a determination that certain obligations of debtor-defendant Jeffrey Tippie are non-dischargeable under 11 U.S.C. § 523(a)(5) and (a)(15). The case is currently before the Court on Carolyn Tippie's Motion for Summary Judgment. For the reasons that follow, Carolyn Tippie's Motion for Summary Judgment is granted. The debts alleged in Counts I, II, and VII of her Amended Complaint are nondischargeable pursuant to 11 U.S.C. § 523(a)(5), and the debts alleged in Counts III, IV, V, VI, and VIII are nondischargeable pursuant to 11 U.S.C. § 523(a)(15).

FACTS

The following facts and procedural history are undisputed, since the

defendant's Answer to the Amended Complaint admits to the validity of the divorce decree, separation agreement, and other factual allegations. On October 12, 2000, the Cuyahoga County Court of Common Pleas (Cuyahoga Court) granted the parties a divorce. As part of the divorce decree, the Cuyahoga Court adopted and incorporated the Separation and Property Settlement Agreement (Separation Agreement) between the parties which, in pertinent part, required debtor to pay:

> (1) as and for child support, the monthly mortgage payments and unpaid balance on the first mortgage of property located at 38200 Strumbly Place, Willoughby, Ohio, including property taxes and insurance;
>
> (2) all taxes, current and delinquent, general and special, assessed against the residence;
>
> (3) the cost of and to maintain homeowner's insurance on the residence at least to the extent necessary to pay in full the existing mortgage on the parcel;
>
> (4) all of the payments due and payable on the 1999 Chevrolet Venture van until the loan is paid in full;
>
> (5) as and for child support, the sum of seventy-five dollars per month per child plus a processing fee, which in total represents a deviation from the child support guidelines based upon Jeffrey Tippie's obligation to make the monthly mortgage, tax, and insurance payments on the residence;
>
> (6) fifty-percent of the cost of any medical, dental, or optical expense incurred on behalf of the minor children, which is not covered by insurance;
>
> (7) one-half of the tuition and transportation expenses of private or parochial school, except that Jeffrey Tippie shall be responsible for all tuition for all

children until Steven, the parties' youngest child, has entered the first grade;

(8) to maintain a two hundred and fifty thousand dollar graded premium life insurance policy on his life with First Colony until his obligations under the Support Agreement have terminated; and

(9) all expenses, including reasonable attorney fees, incurred as a result of enforcement proceedings initiated by Jeffrey Tippie's non-performance.

On July 10, 2002, Carolyn Tippie filed a Motion to Show Cause and for Attorney Fees in the Cuyahoga Court, alleging debtor's failure to pay:

(1) the mortgage payments on the residence;

(2) all taxes, current and delinquent, general and special, assessed against the residence;

(3) the cost of maintaining home owner's insurance on the residence;

(4) the monthly installment loan payments on the 1999 Chevrolet Venture van;

(5) his fifty-percent share of the medical, dental, and optical payments of the minor children;

(6) his fifty-percent share of the tuition expenses for the minor children; and
(7) life insurance payments.

On April 24, 2003, Magistrate Garlandine Jones Grant issued an opinion (Docket #4, Exhibit B) finding that Jeffrey Tippie owed $11,198.21 in past due mortgage payments, $3,882.96 in payments on the 1999 Chevrolet Venture van, $244.80 in life insurance payments, and $1,250.00 in school tuition payments for

the minor children. Magistrate Grant also found Jeffrey Tippie in contempt for arbitrarily stopping payment of all debts and responsibilities under that court's previous order. A day later, on April 25, 2003, Jeffrey Tippie filed Chapter 7 proceedings with this Court, and he filed a Suggestion of Bankruptcy and Stay of Proceedings with the Cuyahoga Court. On May 21, 2003, Carolyn Tippie filed a second Motion to Show Cause and for Attorney Fees in the Cuyahoga Court, alleging further non-compliance with the Separation Agreement.

On June 18, 2003, Carolyn Tippie initiated an adversary proceeding to determine the dischargeability of debts originating from her Separation Agreement. Specifically, Carolyn Tippie's Amended Complaint alleges that the following debts are nondischargeable under 11 U.S.C. § 523(a)(5) and (a)(15):

> Count I - mortgage, tax, and insurance payments, as of October 20, 2002;
> Count II - mortgage, tax, and insurance payments, since October 20, 2002;
> Count III - installment loan payments on the 1999 Chevrolet Venture van;
> Count IV - life insurance premium payments as of October 20, 2002;
> Count V - life insurance premium payments since October 20, 2002;
> Count VI - school tuition payments for the minor children;
> Count VII - medical expenses for the minor children; and
> Count VIII - enforcement expenses.

On March 17, 2005, Carolyn Tippie filed a Motion for Summary Judgment. Jeffrey Tippie did not file a response.

DISCUSSION

Jurisdiction

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 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).

Summary Judgment Standard

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, Tenn.*, 296 F.3d 417, 423 (6th Cir. 2002). *See generally Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (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 the 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 Tenn. Dept. of Mental Health & Mental Retardation v. Paul B.*, 88 F.3d 1466, 1472 (6th Cir. 1996).

Dischargeability of Jeffrey Tippie's Debts to Carolyn Tippie

As explained more fully below, plaintiff Carolyn Tippie is entitled to summary judgment on Counts I, II, and VII of her Amended Complaint because these debts are nondischargeable support obligations pursuant to 11 U.S.C. § 523(a)(5). Additionally, plaintiff is entitled to summary judgment on Counts III, IV, V, VI, and VIII of her Amended Complaint because these debts were incurred through the Separation Agreement and are nondischargeable pursuant to 11 U.S.C. § 523(a)(15).

I. Plaintiff Is Entitled to Summary Judgment on Counts I, II, and VII Pursuant to 11 U.S.C. § 523(a)(5).

Pursuant to 11 U.S.C. § 523(a)(5), 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—
> . . . .
> (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 . . . .

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 three indicia which, when present, create a conclusive presumption in favor of deeming a given award a support obligation. *See Sorah v. Sorah (In re Sorah)*, 163 F.3d 397, 401 (6th Cir. 1998). *See also Fitzgerald v. Fitzgerald (In re Fitzgerald)*, 9 F.3d 517, 520-21 (6th Cir. 1993); *Long v. Calhoun (In re Calhoun)*, 715 F.2d 1103, 1111 (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.
>
> 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) should be conclusively presumed to be a support obligation by the bankruptcy court. A non-debtor spouse who demonstrates that these indicia are present has satisfied his or her burden of proving that the obligation constitutes support within the meaning of § 523, and is thus nondischargeable.

In re Sorah, 163 F.3d at 401. *Accord Van Aken v. Van Aken (In re Van Aken)*, 320 B.R. 620, 626 (B.A.P. 6th Cir. 2005). Thus, in deciding whether an award is actually in the nature of support, a bankruptcy court will match these three criteria to the facts of the individual case.

Once the conclusive presumption is established, the debtor spouse may not introduce evidence to the contrary. *In re Sorah*, 163 F.3d at 401-02. Instead, the burden shifts to the debtor spouse to "demonstrate that although the obligation is of the *type* that [bears the indicia of a support obligation] and may not be discharged in bankruptcy, its *amount* is unreasonable in light of the debtor spouse's financial circumstances." *Id.* at 401.

> [T]he bankruptcy court does not sit as a super-divorce court to determine the *most* reasonable level of support. Rather, it may consider evidence that the obligation is unreasonable and discharge it *to the extent* that it exceeds what the debtor can reasonably be expected to pay. Section 523 obviously places no limitation upon a state court's ability to award alimony, maintenance, or support *(see Fitzgerald*, 9 F.3d at 521), and the bankruptcy

> court should not second-guess the state court support award absent evidence that the burden on the debtor spouse is excessive.

Id. at 402.

A. Counts I and II: Dischargeability of Mortgage, Tax, and Insurance Payments

The undisputed facts in this case lead this Court to conclude that the debts for the mortgage, tax, and insurance payments as of and since October 20, 2002, are nondischargeable support obligations pursuant to 11 U.S.C. § 523(a)(5). Each of *Sorah*'s three traditional indicia of support is present in this case.

First, the mortgage, tax, and insurance payments were labeled child support. Article II, Section 2.1(c) of the Separation Agreement (Docket #4, Exhibit A), signed by the parties, labels the mortgage, tax, and insurance payments on the residence to "be as and for child support." The Separation Agreement further recognizes that the child support payments are reduced because of Jeffrey Tippie's obligations to make the mortgage, tax, and insurance payments. Additionally, in the order finding contempt (Docket #4, Exhibit B), Magistrate Grant recognized that Jeffrey Tippie's child support obligation was significantly less than the basic Ohio Child Support Schedule because the support obligation was supplemented with Jeffrey Tippie's obligation to pay the mortgage, tax, and insurance on the residence.

Second, although the mortgage, tax, and insurance payments are not paid directly to Carolyn Tippie, the Separation Agreement specifically states that the payments to Chevy Chase Bank are "as and for child support." Third, the payments are contingent upon future events. The Separation Agreement states that the mortgage, tax, and insurance payments only "continue until the note and mortgage are paid in full or until Steven Charles turns (18) eighteen and is no longer a full-time student at an accredited high school, whichever happens last."

Defendant Jeffrey Tippie admitted to the above terms of the Separation Agreement in his Answer (Docket #5, ¶ 3). Therefore, because the mortgage, tax, and insurance payments have all the traditional state law indicia of a support obligation, Carolyn Tippie has met her burden for establishing a conclusive presumption of a nondischargeable support obligation.

Jeffrey Tippie has not met his burden; he has not presented the Court with any information to suggest that his obligation to pay the mortgage, tax, and insurance payments on the residence is excessive or unreasonable in light of his present financial circumstances. Absent such evidence from the nonmoving 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. *See Poss v. Morris (In re Morris)*, 260 F.3d 654, 665 (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).

In sum, viewing these undisputed facts in the light most favorable to the nonmoving party, the Court concludes that the debts for the mortgage, tax, and insurance payments on the residence are nondischargeable support obligations pursuant to 11 U.S.C. § 523(a)(5).

B. Count VII: Dischargeability of Medical Expenses

Similarly, the facts of this case, when compared to the three *Sorah* indicia, lead this Court to conclude that the debt for medical expenses is a nondischargeable support obligation pursuant to 11 U.S.C. § 523(a)(5).

First, Article IV, Section 4.2 of the Separation Agreement is labeled "Child Support and Insurance" and requires Jeffrey Tippie to pay "for fifty percent (50%) of the cost of any medical, dental, or optical expense incurred on behalf of the minor children which is not covered by insurance." Second, Section 4.2 also provides for these payments to be paid directly to Carolyn Tippie. Third, again under Section 4.2, Jeffrey Tippie is only obligated to pay the medical expenses for the minor children until each child reaches the age of majority.

Defendant Jeffrey Tippie admitted to the above terms of the Separation

Agreement in his Answer (Docket #5, ¶ 3). Therefore, Carolyn Tippie has shown that the obligation to pay the medical expenses for the minor children has the indicia of a support obligation and has established the conclusive presumption that the obligation is for support.

Again, Jeffrey Tippie has not met his burden; he has not presented the Court with any information to suggest that his obligation to pay the medical expenses of the minor children is excessive or unreasonable in light of his present financial circumstances. Thus, the debtor has failed to establish the existence of a material fact with respect to the reasonableness or excessiveness of the obligation. Viewing these undisputed facts in the light most favorable to the nonmoving party, this Court concludes that the debt for the medical expenses of the minor children is a nondischargeable support payment under 11 U.S.C. § 523(a)(5).

II. Plaintiff Is Entitled to Summary Judgment on Counts III, IV, V, VI, and VIII Pursuant to 11 U.S.C. § 523(a)(15).

The nondischargeability of property settlements from divorce or separation agreements is specified at 11 U.S.C. § 523(a)(15), which provides:

> (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—
>
> > (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.

In determining dischargeability under section 523(a)(15), the former spouse bears the initial burden of showing that the debt was incurred 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. *See Ramey v. Barton (In re Barton)*, 321 B.R. 869, 874 (Bankr. N.D. Ohio 2004) (citing *Hart v. Molino (In re Molino)*, 225 B.R. 904, 907 (B.A.P. 6th Cir. 1998)); *Phelps v. Cordia (In re Cordia)*, 280 B.R. 138, 146 (Bankr. N.D. Ohio 2001). Once the former spouse meets the initial burden, the burden shifts to the debtor to show that the debtor does not have the ability to pay the debt or that discharging the debt would result in a benefit to the debtor that outweighs the detrimental consequences to the former spouse. *See In re Barton*, 321 B.R. at 874; *In re Cordia*, 280 B.R. at 146. The court considers the parties' circumstances as of the trial date, rather than the date of the divorce or the date of

the filing of the bankruptcy petition, in order to account for the benefits of the "fresh start" to the debtor, any change in circumstances in employment, and other good or bad fortune of either party. *See Dressler v. Dressler (In re Dressler)*, 194 B.R. 290, 300-01 (Bankr. D.R.I. 1996); *Taylor v. Taylor (In re Taylor)*, 191 B.R. 760, 765 (Bankr. N.D. Ill. 1996).

Carolyn Tippie has met her initial burden, under 11 U.S.C. § 523(a)(15), to show that the debt was incurred in the course of a separation agreement. The Amended Complaint and debtor's Answer establish the validity of the Separation Agreement. The Separation Agreement details Jeffrey Tippie's obligation to pay the debts at issue: Article II, Section 2.2 – installment loan payments on the van; Article IV, Section 4.3(A) – school tuition payments; Article VI, Section 6.2 – life insurance premium payments; Article VI, Section 6.7 – enforcement expenses.

The burden then shifts to Jeffrey Tippie to prove either that he is presently unable to pay or that discharge of these debts would result in a benefit to him greater than the detriment to plaintiff. Jeffrey Tippie has failed to produce any evidence in favor of either exception. In fact, after an extensive financial evaluation, Magistrate Grant determined, in the contempt order (Docket #4, Exhibit B) of April 24, 2003, that Jeffrey Tippie had not experienced any changed circumstances which would make him unable to pay the support obligation as originally agreed. Jeffrey

Tippie has not met his burden.

Therefore, viewing the undisputed facts in the light most favorable to the nonmoving party, the Court concludes that Jeffrey Tippie's obligations to pay installment loan payments on the 1999 Chevrolet Venture van, life insurance premium payments, school tuition payments, and enforcement expenses are all nondischargeable debts incurred in connection with a separation agreement pursuant to 11 U.S.C. § 523(a)(15).

CONCLUSION

For the foregoing reasons, plaintiff Carolyn Tippie's Motion for Summary Judgment is granted. The debts alleged in Counts I, II, and VII of her Amended Complaint are nondischargeable pursuant to 11 U.S.C. § 523(a)(5), and the debts alleged in Counts III, IV, V, VI, and VIII are nondischargeable pursuant to 11 U.S.C. § 523(a)(15).

IT IS SO ORDERED.

/s/ Arthur I. Harris 7/20/2005
Arthur I. Harris
United States Bankruptcy Judge