

**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

IN RE:	)	CHAPTER 7
	)	
	)	
MERRILL GOINS,	)	CASE NO. 05-61001
	)	
Debtor.	)	Adv. No. 05-6051
	)	
<hr style="width: 30%; margin-left: 0;"/>	)	JUDGE RUSS KENDIG
ROSE M. GOINS,	)	
	)	
Plaintiff,	)	<b>MEMORANDUM OF DECISION</b>
	)	
v.	)	
	)	
MERRILL GOINS,	)	
	)	
Defendant.	)	
	)	

This matter is before the court upon cross-motions for summary judgment filed by Rose Goins (“Plaintiff”) and Merrill Goins (“Defendant”). For reasons that follow, Plaintiff’s motion is **GRANTED** and Defendant’s motion is **DENIED**.

**I. JURISDICTION AND VENUE**

The court has jurisdiction of this matter pursuant to 28 U.S.C. § 1334(b) and the General Order of Reference entered in this district on July 16, 1984. This is a core proceeding over which the court has jurisdiction pursuant to 28 U.S.C. § 157(b)(2)(I). Venue is proper in this judicial district pursuant to 28 U.S.C. § 1408.

**II. BACKGROUND**

Defendant filed his chapter 7 petition on March 3, 2005, disclosing total property of \$7,570 and total liabilities of \$21,230. He identified an unsecured nonpriority debt owed to Plaintiff, but did not disclose the amount of the debt.

On April 13, 2005, Plaintiff filed an adversary proceeding to determine the dischargeability of the debt owed to her. The complaint alleges that Plaintiff and Defendant were divorced by way of judgment entry decree of divorce in Wayne County, Ohio in November 2003, and that amounts owed to Plaintiff by Defendant as a result of that judgment entry are nondischargeable as spousal support or in the alternative, as an order of a state court made pursuant to a divorce proceeding. Defendant answered the complaint on May 9, 2005 and denied the allegations of nondischargeability. Following a pretrial on June 22, 2005, the court issued a scheduling order and the parties filed motions for summary judgment.

### III. SUMMARY JUDGMENT STANDARD

The Bankruptcy Code<sup>1</sup> provides for summary judgment through Federal Rule of Bankruptcy Procedure 7056, which adopts Federal Rule of Civil Procedure 56 and provides, in pertinent part:

The judgment sought shall be rendered forthwith if the 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.

Civ. R. 56(c).

In evaluating a motion for summary judgment, “the inquiry performed is the threshold inquiry of determining whether there is the need for trial – whether, in other words, there are any genuine factual issues to be resolved in favor or either party.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 259 (1986). This determination requires an evaluation of the moving party’s basis for his motion, because a party seeking summary judgment always the responsibility of informing the court of the basis for its motion, and must identify those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). In order to prevail, the movant must demonstrate all elements of the cause of action. R.E. Cruise v. Bruggeman, 508 F.2d 415, 416 (6<sup>th</sup> Cir. 1975). Thereafter, the nonmoving 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. The mere existence of some alleged factual dispute will not defeat an otherwise properly supported motion for summary judgment. Id. at 247-8.

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<sup>1</sup> Unless otherwise stated, references to “the Code” or “the Bankruptcy Code” are to Title 11 of the United States Code. Unless otherwise stated, a reference to a “Section” is a reference to a section within the Bankruptcy Code.

#### IV. SUBSTANTIVE FACTS

Plaintiff and Defendant entered into a Separation Agreement (“Agreement”) on October 22, 2003. Paragraph Five of the Agreement bears the heading “Real Property” and includes the following provision regarding the parties’ marital residence:

[Defendant] shall immediately convey forthwith, by sufficient deed, all his right, title and interest in and to said parcel of real estate. [Defendant] further agrees to pay for the entire installation of a new private septic system, including connection to [Plaintiff’s] mobile home, on said real estate. Said septic system and connection shall meet all applicable building codes and regulations. Said private septic system shall be installed and in working order within sixty (60) days of the journalized Decree of Divorce.

(Defendant’s Motion, hereafter “Def. Motion” at Ex. A). Paragraph Eight of the Agreement states, “[e]ach party hereby waives his or her right to receive spousal support from the other.” On November 23, 2005, the Wayne County Court of Common Pleas entered an agreed judgment entry decree of divorce which approved the Agreement and made it an order of the court. (Def. Motion at Ex. A). Defendant did not install the septic system as ordered, and in 2004 Plaintiff sought to enforce the order by way of a motion for contempt. Defendant appeared and testified at the hearing on the motion for contempt, and admitted that he had the money to pay the \$3,500 cost of the septic installation, but lost those funds in part because he co-signed a loan so that his son could purchase a truck. (Plaintiff’s Affidavit at Ex. D).

Plaintiff, aged forty-nine, receives Supplemental Security Income (SSI) of \$579 monthly and is physically unable to maintain employment. She lives alone in her mobile home which is located on the parties’ former marital residence, but claims she must use facilities elsewhere because the lack of a properly working septic system prevents her from running water.<sup>2</sup> Plaintiff also receives \$139 in food stamps each month and partial assistance for her heating expenses.<sup>3</sup>

Defendant, aged fifty-one, earns \$1,760 monthly as a machine operator. His monthly expenses total \$1,575 and include \$460 for housing, \$50 for charitable contributions, \$80 for recreation, and \$100 for an installment payment on a motorcycle. Defendant earned \$26,950 in 2004. He received a 2004 federal income tax refund of \$723 and a state of Ohio income tax refund of \$129.<sup>4</sup> (Def. Motion at Ex. B-1). Defendant attached pay stubs to his motion for

<sup>2</sup> Defendant alleges that Plaintiff does not live at the former marital residence, a fact which Plaintiff disputes. However, given that lack of a septic system renders the property uninhabitable, *see* Section VI b. *infra*, the court does not find this dispute concerning residence to be a material fact that would foreclose granting either party’s motion for summary judgment.

<sup>3</sup> Using these figures, Plaintiff’s total annual cash income is \$6,948, and total food stamp assistance is \$1,668.

<sup>4</sup> Defendant filed an Affidavit in support of his motion for summary judgment which included copies of his tax returns for 2003 and 2004. Defendant’s 2003 tax return was filed on July 11, 2005, and disclosed adjusted gross income of \$4,948, for which he received a refund of \$1,984. Defendant’s State of Ohio tax return, prepared the same day, entitled him to a refund of \$82. In the Statement of Financial Affairs accompanying his petition,

summary judgment which reveal income of \$11,904 through June 25, 2005, and this equals approximately \$23,808 on an annualized basis. Defendant lives with his girlfriend, who earns approximately \$10,000 per year. (Def. Motion at Ex. E).

## V. PARTIES' ARGUMENTS

Plaintiff alleges that Defendant's obligation to install the septic system is nondischargeable pursuant to 11 U.S.C. § 523(a)(5) as a debt owed to a former spouse for alimony, maintenance, or support in connection with a separation agreement or divorce decree. In the alternative, Plaintiff argues that the debt is nondischargeable pursuant to Section 523(a)(15) because discharging the debt would result in a benefit to Defendant that outweighs the detrimental consequences to his former spouse.

Defendant contends that the agreement to install the septic system was not support. Defendant points to Paragraph Eight of the Agreement and its apparent mutual waiver of the right to receive support as evidence that Plaintiff's claim is not support. Defendant's alternative argument is that the agreement to install the septic system exceeds the amount he is reasonably able to pay.<sup>5</sup>

## VI. CASE LAW AND ANALYSIS

### A. Dischargeability of Marital Debts

A marital debt may be excepted from discharge if the debt is owed to a former spouse or child for alimony to, maintenance for, or support of such spouse in connection with a separation agreement, divorce decree, or other order of a court of record. See 11 U.S.C. § 523(a)(5). Plaintiff is Defendant's former wife, and the debt at issue is part of the Agreement that was incorporated into the decree of divorce and which was attached to Defendant's motion for summary judgment. Accordingly, the only remaining issue is whether the obligation to install the septic system is in the nature of alimony, maintenance, or support.

There are two cases in the Sixth Circuit that provide primary guidance for determining when an obligation is in the nature of support pursuant to Section 523(a)(5). In Long v. Calhoun (In re Calhoun), 715 F.2d 1103 (6<sup>th</sup> Cir. 1983), the court was faced with the issue of whether an assumption of a joint debt that had been labeled as alimony but included under a caption heading

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Defendant disclosed that he had \$0 income for 2003. Defendant's Order of Discharge was entered on June 15, 2005, and he filed his 2003 tax returns on July 11, 2005.

<sup>5</sup> In his motion for summary judgment, Defendant juxtaposes, in quotes, language that appears to be from 11 U.S.C. § 523(a)(15)(B), but he cites that language to 11 U.S.C. § 523(a)(5)(B). The court will assume the existence of a typographical error and treat Defendant's statements concerning ability to pay as an argument for dischargeability under (a)(15)(B).

titled “Division of Property” was in the nature of support. The court developed a framework to be used in determining whether a marital obligation could be excepted from discharge. The first step is for the court to determine whether the parties intended to create an obligation in the nature of support. Calhoun, 715 F.2d at 1109. Second, the court should determine whether the obligation has the effect of providing the support necessary to ensure that the daily needs of the former spouse are satisfied. Id. Third, if the first two conditions are satisfied, the court must determine whether the obligation is so excessive that it is unreasonable under traditional concepts of support. Calhoun, 715 F.3d at 1110. Finally, if the amount of the obligation is unreasonable, it is dischargeable to the extent necessary to serve the purposes of bankruptcy law. Id. The court is to evaluate the debt and the parties’ respective financial positions at the time the debt was assumed, unless the circumstances of the debtor have changed from the time the obligation was created. Id. The plaintiff has the burden of proving nondischargeability. Calhoun, 715 F.3d at 1111.<sup>6</sup>

In Sorah v. Sorah (In re Sorah), 163 F.3d 397 (6<sup>th</sup> Cir. 1998), the bankruptcy court discharged an award that was clearly labeled as maintenance by the state court. The Sixth Circuit reversed because it determined that the lower court had improperly engaged in an independent inquiry into whether the award was actually in the nature of support. Sorah, 163 F.3d at 401. This inquiry failed to give proper deference to state court divorce court decrees, and also improperly applied the “present needs” test to an award of support, clearly violating the holding of Fitzgerald. See fn. 6, *supra*. Sorah emphasized the importance of using traditional state law indicia to determine whether something that “quacks like support” is actually a support obligation, specifically, whether: 1) there is a label such as alimony, support, or maintenance in the decree or agreement; 2) the obligation is a direct payment to the former spouse as opposed to the assumption of third-party debt; or 3) the payments are contingent upon death, remarriage, or eligibility for Social Security benefits. Sorah, 163 F.3d at 401. Once the non-debtor spouse has demonstrated that indicia of support are present, she has met her burden of proving that the obligation is support within the meaning of Section 523 and is thus nondischargeable. See id. The burden then shifts to the debtor spouse to demonstrate that the amount is unreasonable in light of the debtor spouse’s financial circumstances. See id.

Read together, these cases stand for the proposition that assumptions of debt not clearly labeled as support must be analyzed under the Calhoun framework. Obligations labeled as maintenance or support should be conclusively presumed to be support obligations and may be discharged only to the extent that the debtor can prove the benefit to him would outweigh the detrimental consequences to the former spouse.

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<sup>6</sup> Later, the Sixth Circuit reaffirmed the applicability of the Calhoun framework, but cautioned that it had not suggested that alimony or support payments be reduced to necessary support. See Fitzgerald v. Fitzgerald (In re Fitzgerald), 9 F.3d 517, 521 (6<sup>th</sup> Cir. 1993). The Calhoun framework was developed within the context of assumption of a joint loan obligation, and the Fitzgerald court emphasized that application of the “present needs” determination in step two should not be extended to a situation where the obligation is clearly labeled as support. The present case deals with the issue of whether an obligation to incur expenses for a private septic system is in the nature of support, and therefore the Calhoun framework may be applied without extending it beyond its intended use.

## **B. Nature of the Obligation**

The disputed obligation is not identified as support in the decree of divorce. It appears in a paragraph titled "Real Property" and requires to Defendant to provide for alterations to the property that will benefit Plaintiff. Therefore, the agreement to install the private septic system is an assumed obligation that must be analyzed under the Calhoun framework. The threshold question under Calhoun is whether the parties intended to create an obligation in the nature of support, even though it may not be labeled as such. The court will look to the facts presented by the parties and, if necessary, the factors set forth in Sorah to determine the nature of the obligation.

In her affidavit, Plaintiff states: "I was married to [Defendant] for 27 years but didn't get direct alimony because [Defendant] told me he would never pay it. I did get him to agree to put in the septic system instead of direct alimony." (Plaintiff's Affidavit at para. 9.) Defendant does not dispute this statement, either by way of reply to Plaintiff's motion for summary judgment and accompanying affidavit, or through statements in his own affidavit. The court must accept Plaintiff's allegation because Defendant has not demonstrated that there is any genuine issue as to this material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The first element of the Calhoun framework has been satisfied.

The second issue to be determined is whether the obligation has the effect of providing support necessary to ensure that the daily needs of the former spouse are satisfied. With regard to this factor, the court is forced to state the obvious. Plaintiff cannot be expected to live in her mobile home without the benefit of a system for collecting and removing wastewater from its sinks, toilets, and laundry facilities. Running water and an appropriate mechanism for disposing of it after household use are not luxuries in the twenty-first century. They are essential elements of daily living, critical to a habitable and sanitary abode. The second element of Calhoun has been met.

Third, the court must look to whether Defendant's obligation to install the septic system is so excessive as to be unreasonable under traditional concepts of support. "If, at the time the debts were assumed, the assumption substantially exceeded a spouse's present and foreseeable ability to pay, the amount of the assumption which exceeded that ability should be not characterized as in the nature of support." Calhoun, 715 F.2d 1110. In order to determine Defendant's ability to pay at the time he undertook the obligation, the court will examine the separation agreement and Defendant's financial circumstances surrounding the time of the divorce.

Defendant earned \$4,948 in 2003. He received a federal income tax refund of \$1,984 and a state of Ohio income tax refund of \$82.<sup>7</sup> (Def. Motion at Ex. B-1, B-2). Pursuant to the decree

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<sup>7</sup> It is obvious that Defendant's employment prospects improved substantially immediately after the divorce, as he earned \$26,950 in 2004. (Def. Motion at Ex. B-1). It is also obvious that Defendant understated his 2003 income in the Statement of Financial Affairs filed with his petition, and that he waited to file his 2003 tax return until the

of divorce, Defendant retained a 3.52 acre parcel of land subject to an \$11,500 mortgage, a 1988 Chevrolet truck, a 1991 Plymouth Horizon, and a 1983 Yamaha motorcycle. One half of Defendant's interest in his retirement savings plan was assigned to Plaintiff by way of a qualified domestic relations order; Defendant withdrew and spent the remaining \$7,000. Defendant was to pay the \$11,500 mortgage on the property he retained and pay for his insurance and cellular phone bill. (Def. Motion at Ex. A). During a contempt hearing at which Plaintiff sought to enforce the agreement to install the septic system, Defendant admitted that he had the money to pay for the estimated \$3,500 cost of the system at the time he entered into the agreement, but lost "some" of the funds because he co-signed for his son's truck. (Plaintiff's Affidavit at Ex. D).

As stated earlier, Plaintiff receives a monthly benefit from SSI that equates to \$6,948 annually. Plaintiff has not worked since January 2001. (Plaintiff's Affidavit at Ex. C). Plaintiff retained an 11.29 acre parcel of real estate and the mobile home located on it. The real estate was subject to a \$31,500 mortgage. Plaintiff also received two of the couple's five cars – a Chevrolet Celebrity and a Dodge Prospector. Plaintiff was to pay the mortgage on the real estate and certain medical debts. (Def. Motion at Ex. A).

## VII. CONCLUSION

After reviewing Defendant's financial circumstances at the time of the divorce, the court finds that his agreement to install the septic system within sixty days of the judgment entry did not exceed his ability to pay at the time he undertook the obligation. By his own admission, Defendant had the funds to pay for the septic system but lost "some" of them because he voluntarily co-signed for his son's debt. Defendant earned substantially more money in 2004 and yet made no attempt to meet his obligations within a reasonable time. Having concluded that Defendant was able to pay at the time he agreed to do so, the court does not reach the fourth element of the Calhoun framework. Defendant's agreement to pay for the installation of a septic system on the parcel of real estate owned by Plaintiff is nondischargeable pursuant to 11 U.S.C. § 523(a)(5). Therefore, the court declines to address Defendant's argument that the debt is dischargeable pursuant to Section 523(a)(15). In reaching this conclusion, the court has considered all of the evidence, affidavits, exhibits, and pleadings, regardless of whether or not they are specifically referred to in this decision.

Plaintiff's motion for summary judgment is hereby **GRANTED**. Defendant's motion for summary judgment is **DENIED**. An appropriate order shall enter.

/s/ Russ Kendig

United States Bankruptcy Judge  
Russ Kendig

MAR 30 2006

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discharge had been entered in his Chapter 7 case. See fn. 4, *supra*.

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