

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION

In re:

No. 02-10738
Chapter 7

JAMES FREDERICK BURNS
Debtor

JAMES FREDERICK BURNS

Plaintiff

v

Adversary Proceeding
No. 02-1045

JAN K. BURNS

Defendant

MEMORANDUM AND ORDER

This adversary proceeding was commenced by James F. Burns, debtor, to determine the dischargeability of a debt owed by him. The complaint cited 11 U.S.C. § 523(a)(5) and (15) as the statutory basis for the court to determine if this debt is dischargeable. On March 14, 2002, the defendant, Jan K. Burns, debtor's former wife, filed a Motion to Dismiss Complaint and Release Automatic Stay ("Motion"). The motion appears to be a narrative of the underlying divorce proceedings. Filed with the motion is a Final Decree of Divorce, a Report of the Special Master, a Memorandum Opinion, an appellate brief of James F. Burns filed with the Tennessee Court of

Appeals, an appellate brief of Jan K. Burns filed with the Tennessee Court of Appeals, and a portion of an opinion from the Tennessee Court of Appeals.¹

Because the motion contains matters outside the pleadings of this case, it shall be treated as one for summary judgment and disposed of as one under *Fed. R. Civ. P.* 56. The motion was signed only by the attorney for the defendant. There is no affidavit attesting to the truthfulness of the narrative contained in the motion. None of the state court proceedings have been properly authenticated. *Fed. R. Civ. P.* 44. Nevertheless, the plaintiff/debtor has not objected to any of these documents or the narrative.

Pursuant to *E.D. Tenn. LBR* 7007-1, the plaintiff/debtor has twenty (20) days after the filing of the motion to respond. The rule also provides: “A failure to respond shall be construed by the court to mean that the respondent does not oppose the relief requested by the motion.” By his failure to respond to the motion for summary judgment, the plaintiff/debtor does not oppose the relief requested by the motion. Furthermore, the court concludes that the defendant is entitled to the relief requested for the reasons hereinafter set forth.

With respect to his claim under 11 U.S.C. § 523(a)(5), the plaintiff/debtor alleges that although the debt is designated as alimony, maintenance or support, it is not actually in the nature of alimony, maintenance or support and is therefore dischargeable. If the state court pleadings are true, as admitted by the plaintiff/debtor by his failure to respond, the Circuit Court of Hamilton County in its Final Decree of Divorce required the debtor to pay past due alimony payments as well as *alimony in futuro*. As determined by the state court, *alimony pendente lite*, as well as *alimony in*

¹Only the first two pages of the Court of Appeals’ opinion was annexed to the motion. The syllabus indicates that the judgment of the trial court was affirmed.

futuro is non-dischargeable. *Long v. Calhoun (In re Calhoun)*, 715 F.2d 1103 (6th Cir. 1986); *Fitzgerald v. Fitzgerald (In re Fitzgerald)*, 9 F.3d 517 (6th Cir. 1993); *Sorah v. Sorah (In re Sorah)*, 163 F.3d 397 (6th Circ. 1998).

With respect to his claim under 11 U.S.C. § 523(a)(15), the debtor alleges “that in the event the Court determines that the indebtedness Debtor owes to Defendant is actually in the nature of alimony, maintenance or support, that discharging such debt would result in a benefit to the Debtor that outweighs the detrimental consequences to the Defendant and that therefore said debt is dischargeable.” While the plaintiff/debtor correctly states the test under 11 U.S.C. § 523(a)(15)(B), this obligation is not subject to that provision. Section 523(a)(15) is applicable only when the debt is “not of the kind described in paragraph (5)” of § 523(a). Therefore, because this obligation of the plaintiff/debtor to his former spouse is non-dischargeable pursuant to 11 U.S.C. § 523(a)(5), § 523(a)(15) is not applicable.

This Memorandum constitutes findings of fact and conclusions of law as required by *Fed. R. Bankr. P. 7052*.

Accordingly, it is ORDERED that this adversary proceeding is DISMISSED.

ENTER:

BY THE COURT

R. THOMAS STINNETT
UNITED STATES BANKRUPTCY JUDGE

[entered 4/8/02]