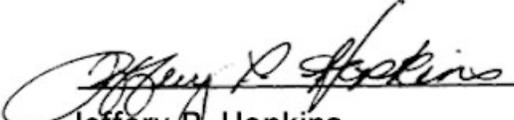


This document has been electronically entered in the records of the United States Bankruptcy Court for the Southern District of Ohio.

IT IS SO ORDERED.

Dated: May 02, 2007


Jeffery D. Hopkins
United States Bankruptcy Judge

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

In Re :
:
RICHARD G. SHERWOOD : Case No. 05-18001
TERI B. SHERWOOD : Chapter 7
: Judge Hopkins
:
_____ Debtors :

SUSAN E. SHERWOOD : Adversary Case No. 06-1071
:
:
Plaintiff :
:
vs. :
:
RICHARD G. SHERWOOD :
:
:
_____ Defendant :

**MEMORANDUM OF DECISION ON ORDER
GRANTING MOTION TO WITHDRAW ADMISSIONS
AND DENYING MOTION FOR SUMMARY JUDGMENT**

The Plaintiff, Susan E. Sherwood, commenced this adversary proceeding seeking a determination that certain debts are nondischargeable pursuant to 11 U.S.C. § 523(a)(5) and/or (15). Presently before the Court are two motions. The Plaintiff has filed a summary judgment motion. See Doc. 20. The Defendant, Richard G. Sherwood, has filed a motion to withdraw admissions. See Doc. 21.

MOTION TO WITHDRAW ADMISSIONS

In support of her summary judgment motion, the Plaintiff relies upon certain requests for admission that the Defendant did not timely deny. The Defendant now seeks to withdraw the admissions pursuant to Fed. R. Civ. P. 36(b).¹

Rule 36(b) sets forth a two-prong test. The first prong looks to whether disposition on the merits will be served by allowing the withdrawal or amendment. This prong “is satisfied ‘when upholding the admission would practically eliminate any presentation on the merits of the case.’” *Riley v. Kurtz*, No. 98-1077, 1999 WL 801560, at *3 (6th Cir. Sept. 28, 1999) (quoting *Hadley v. United States*, 45 F.3d 1345, 1348 (9th Cir. 1995)). The second prong of the test, whether the party who obtained the admission has satisfied the court that withdrawal or amendment will prejudice that party, “‘relates to special difficulties a party may face caused by a sudden need to obtain evidence upon withdrawal or amendment[.]’” *Kerry Steel, Inc. v. Paragon Indus., Inc.*, 106 F.3d 147, 154 (6th Cir. 1997) (quoting *American Auto Ass’n v. AAA Legal Clinic of Jefferson Crooke, P.C.*, 930 F.2d 1117, 1120 (5th Cir. 1991)). “[T]he prejudice contemplated by Rule 36(b) is not simply that the party who initially obtained the admission will now have to convince the fact finder of its truth.” *Kerry Steel*, 106 F.3d at 154 (quoting *Brook Village North Assoc. v. General Elec. Co.*, 686

¹ Rule 36(b) provides in relevant part:

Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Rule 16 governing amendment of a pre-trial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining the action or defense on the merits.

F.2d 66, 70 (1st Cir. 1982)). Under the second prong, the non-movant bears the burden of proof. *Riley*, 1999 WL 801560, at *3. When deciding whether to permit withdrawal or amendment of admissions, trial courts are vested with considerable discretion. *See Kerry Steel*, 106 F.3d at 154.

In this case, the Plaintiff asked the Defendant to admit that: (1) certain of the debts at issue "are nondischargeable obligations covered by Section 523(a)(5)"; (2) the Defendant has the ability to pay the debts; and (3) discharge of the debts "will not result in a benefit to [Defendant] that outweighs the detrimental consequences to the Plaintiff."

The first prong under Rule 36(b) is satisfied because upholding the admissions would eliminate any presentation of the merits of the case. The first of the foregoing admissions would render certain debts nondischargeable under § 523(a)(5). The latter admissions would render the remaining debts nondischargeable under § 523(a)(15). The second prong under Rule 36(b) is satisfied because the Plaintiff has not identified any prejudice she would suffer if the admissions were withdrawn. Accordingly, the motion to withdraw is well-taken.

MOTION FOR SUMMARY JUDGMENT

Summary judgment is appropriate when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *See Fed. R. Civ. P. 56(c)*. When reviewing the record on summary judgment, the evidence of the non-movant is to be taken as true and all justifiable inferences are to be drawn in favor of the non-movant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986).

To resolve the Plaintiff's summary judgment motion, the Court must first determine whether the debts at issue constitute alimony, maintenance or support under § 523(a)(5).

When a debt assumption is not expressly designated as alimony, maintenance or support, as is the case in this proceeding, courts within the Sixth Circuit must apply a four-part test set forth in *Long v. Calhoun (In re Calhoun)*, 715 F.2d 1103 (6th Cir. 1983) to determine whether the debt constitutes alimony, maintenance or support. The first prong of the *Calhoun* test requires a determination of whether the parties or the state court issuing the divorce decree intended to create an alimony, maintenance

or support obligation. *Id.* at 1109. When making this determination, courts often look to factors considered by state courts. *Id.* at 1109. Such factors include: (1) the nature of the obligation; (2) the structure and language of the divorce decree; (3) whether lump sum or periodic payments were also provided; (4) the length of the marriage; (5) the existence of children from the marriage; (6) the relative earning powers of the parties; (7) the age, health and work skills of the parties; (8) the adequacy of support absent the debt; and (9) evidence of negotiation or other understandings as to the intended purpose of the assumption. *Id.* at 1108 n.7.

Given the withdrawal of the Defendant's admissions, the only remaining evidence in the record is the divorce decree and the Plaintiff's affidavit. The divorce decree sheds light on the second, third, fourth and fifth *Calhoun* factors referenced above. However, the affidavit does not address any of the remaining factors. Therefore, the Court finds that a genuine issue of material fact exists, particularly in relation to the sixth, seventh, eighth and ninth *Calhoun* factors. *See Goans v. Goans (In re Goans)*, 271 B.R. 528 (Bankr. E.D. Mich. 2001)(finding genuine issue of material fact under first prong of *Calhoun* notwithstanding more complete record of state law factors).

CONCLUSION

Based upon the foregoing, the Defendant's motion to withdraw (Doc. 21) will be **GRANTED** and the Plaintiff's summary judgment motion (Doc. 20) will be **DENIED**. An order to this effect will be entered.

If the Plaintiff needs additional discovery to prepare for trial, given the late withdrawal of the admissions, the Court will entertain a motion by the Plaintiff to continue the trial and grant a reasonable extension of discovery.

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