UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re
DAVID A. SIEGEL,
Debtor.

Case No. 97-27911-L
Chapter 7

LAW OFFICES OF FRIEDMAN,
SISSMAN & HEATON, P.C.,
Plaintiff,

v.

Adv. Proc. No. 97-0984

DAVID A. SIEGEL,
Defendant.

OPINION AND ORDER

BEFORE THE COURT is the motion for summary judgment filed by the plaintiff, Law Offices of Friedman, Sissman & Heaton, P.C. ("FSH"). FSH seeks a declaration that fees awarded to it in the amount of $25,000 in connection with the divorce of the defendant, David A. Siegel, from his former wife, Kimberley Diane Snyder Siegel, are not dischargeable pursuant to 11 U.S.C. § 523(a)(5). For the reasons set forth below, the motion will be denied.

I.

The defendant, David A. Siegel, filed a voluntary Chapter 7 petition on June 3, 1997. FSH filed its complaint commencing the instant adversary proceeding on August 27, 1997, and filed its motion for summary judgment on December 29, 1999. Attached to the motion as Exhibit A is a single type-written page which appears to be a portion of a final decree of divorce. It contains no

identifying marks, and is not accompanied by an affidavit or certificate of the issuing court, if any. It does provide as follows:

> 20. The Defendant, David A. Siegel, shall pay to Plaintiff's counsel of record , the Law Offices of Friedman, Sissman, and Heaton, P.C. and Robert M. Friedman, an attorney fee in the amount of Twenty-Five Thousand ($25,000.00) Dollars, said sum being hereby reduced to judgment, for professional services rendered to the Plaintiff and the parties' minor children, such sum being payable in installment payments.

The body of FSH's motion contains the statement that the final decree was affirmed on appeal, but no evidence of that fact is before this Court.

The defendant filed a timely objection to the motion for summary judgment on January 27, 2000, together with a transcript of a hearing before Bankruptcy Judge William Houston Brown and certain exhibits consisting of copies of letters apparently obtained in discovery of the files of FSH, although the exhibits are not accompanied by any authenticating affidavit. The defendant's response does not admit the authenticity of the document attached to the plaintiff's motion, although the response does contain a brief description of the final decree which is not inconsistent with the document. Specifically, the response notes that the final decree does not label the obligation to pay attorneys fees as alimony, and that the obligation is payable directly to FSH, not to Mrs. Siegel. The response points out that in proceedings before Judge Brown, Mr. Ben G. Sissman, an attorney and "Managing Partner" appearing on behalf of FSH, indicated that it was not FSH's intention to pursue Mrs. Siegel for recovery of the attorney fees. The response further points out that correspondence

produced by FSH indicates that Mrs. Siegel's parents had at least verbally agreed to guarantee payment to FSH.

II.

On a motion for summary judgment, the movant has the initial burden of showing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 2554, 91 L. Ed. 2d 265 (1986) ("[T]he burden on the moving party may be discharged by 'showing' . . . that there is an absence of evidence to support the non-moving party's case."). Under Rule 56(e) of the Federal Rules of Civil Procedure, the burden shifts to the non-movant to "go beyond the pleadings and by . . . affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'". *Celotex Corp.*, 477 U.S. at 324. That burden is not discharged by "mere allegations or denials." FED. R. CIV. P. 56(e). All legitimate factual inferences must be made in favor of the non-movant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 2513, 91 L. Ed. 2d 202 (1986). Rule 56(c) mandates the entry of summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp.*, 477 U.S. at 322. Before finding that no genuine issue for trial exists, the court must first be satisfied that no reasonable trier of fact could

find for the non-movant. *Matsushita Elec. Indus. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986).

III.

FSH, as movant, has the initial burden of proving there is no genuine issue for trial by relying upon affidavits, depositions, answers to interrogatories, and admissions on file. FSH has failed to do so. It relies upon an excerpt from a document that has not been properly authenticated. Even if the document were properly before the court, the language relied upon by FSH creates an obligation on the part of the defendant to assume an obligation owed by Mrs. Siegel. That obligation was not designated at the trial level as alimony. Thus, pursuant to *In re Calhoun*, 715 F.2d 1103 (6th Cir. 1983), this Court must undertake a particularly fact-driven inquiry into the following factors:

> (1) whether there was an intent to create a support obligation;
>
> (2) whether the obligation has the effect of providing necessary support;
>
> (3) if the first two steps are satisfied, whether the amount of the support represented by the obligation is not excessive; and if the amount is unreasonable, the obligation is dischargeable to the extent necessary to serve the purpose of federal bankruptcy law.

Id. at 1109-10; *see also* 11 U.S.C. § 523(a)(5). The response of the defendant, accompanied as it is with a transcript and copies of correspondence, raises genuine issues of fact concerning each of these elements.

Accordingly, the motion for summary judgment is **DENIED**.

BY THE COURT,

_____
JENNIE D. LATTA
United States Bankruptcy Judge

Date:_____

cc: Ben G. Sissman, Attorney for Plaintiff
Russell W. Savory, Attorney for Defendant