

IN THE UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI

U.S. BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI
FILED

JUL 02 1998

CHARLENE J. PENNINGTON, CLERK
BY _____ DEPUTY

IN RE:
CLYDE DAVIS YOAKUM, III
A/K/A DAVID YOAKUM

CHAPTER 7

BANKRUPTCY CASE NO. 9706070JEE

MALISSA LYNN YOAKUM

VS.

ADVERSARY CASE NO. 980046JEE

CLYDE DAVIS YOAKUM, III
A/K/A DAVID YOAKUM

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Chapter 7 Trustee

MEMORANDUM OPINION

This matter is before the Court on the *Motion for Summary Judgment* filed by Malissa Lynn Yoakum ("Mrs. Yoakum") and the *Motion for Summary Judgment* filed by the Debtor, Clyde Davis Yoakum (the "Debtor"). Because these motions involve the same factual and legal issues, the Court will address both motions in this Memorandum Opinion. After considering the motions, the memorandum briefs in support of the motions, and the responses thereto along with the other pleadings filed in this adversary proceeding, the Court holds that the *Motion for Summary Judgment*

of the Debtor is well taken and should be granted. The Court further holds that the *Motion for Summary Judgment* of Mrs. Yoakum is not well taken and should be denied. In so holding, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

The Debtor and Mrs. Yoakum were divorced by order of the Chancery Court of the First Judicial District of Hinds County, Mississippi, on August 17, 1994. On that date, the Chancery Court entered a Final Order of Divorce and Property Settlement Agreement which provided that the Debtor would pay child support each month in the amount of \$250.00. The Property Settlement Agreement further provided:

DEBTS

Husband shall be solely and completely responsible for the following debts and shall hold Wife harmless and indemnify her from the same:

1. IRS with current, approximate balance of \$4,000.00 for 1992 taxes.
2. IRS with current, approximate balance of \$1,000.00 for 1993 taxes.

Property Settlement Agreement, ¶ IV. The Debtor failed to fulfill this obligation and Mrs. Yoakum was required by the IRS to pay these delinquent taxes. As a result of the Debtor's failure to pay the delinquent taxes and his failure to pay child support, Mrs. Yoakum filed a *Motion for Contempt* with the Chancery Court. Prior to a hearing on the contempt motion, the Debtor filed a Chapter 7 bankruptcy petition on November 5, 1997.

On March 6, 1998, Mrs. Yoakum filed a *Complaint Objecting to Discharge*, in which she argued that the Debtor should be denied a discharge pursuant to 11 U.S.C. § 727(a)(5).¹ After the Debtor timely responded to the *Complaint*, Mrs. Yoakum and the Debtor each filed motions for summary judgment. Mrs. Yoakum contends in her *Motion for Summary Judgment* that the provision for payment of the delinquent taxes should be treated as maintenance, alimony and support and, pursuant to § 523(a)(5), should be nondischargeable. In his response and in his own *Motion for Summary Judgment*, the Debtor argues that Mrs. Yoakum failed to raise the issue of dischargeability in her *Complaint* based upon § 523(a)(5) and instead pled § 727(a)(5) in support of her position. He argues that summary judgment in his favor is warranted because Mrs. Yoakum has failed to present any argument or evidence supporting a claim for relief under § 727(a)(5).

CONCLUSIONS OF LAW

I.

This Court has jurisdiction of the subject matter and of the parties to this proceeding pursuant to 28 U.S.C. § 1334 and 28 U.S.C. § 157. This is a core proceeding as defined in 28 U.S.C. § 157(b)(2)(B), (I) and (J).

II.

Rule 56 of the Federal Rules of Civil Procedure as made applicable by Rule 7056(e) of the Federal Rules of Bankruptcy Procedure provides that in order for a court to sustain a motion for summary judgment, the court must find that "[t]he pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to

¹ Hereafter, all code sections refer to the United States Bankruptcy Code found at Title 11 of the United States Code unless otherwise noted.

any material fact and that the moving party is entitled to a judgment as a matter of law." See also Celotex Corp. v. Catrett, 477 U.S. 317, 322-34, 106 S.Ct. 2548, 2552-58, 91 L.Ed.2d 265 (1986). Additionally, the court must view the available evidence in the light most favorable to the nonmoving party. Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587-88, 106 S.Ct. 1348, 1356-57, 89 L.Ed.2d 538, 553 (1986).

In his *Motion for Summary Judgment* and in his response to Mrs. Yoakum's motion, the Debtor argues that summary judgment in his favor is warranted because there exists no evidence to support judgment in Mrs. Yoakum's favor under § 727(a)(5). In the *Complaint Objecting to Discharge*, Mrs. Yoakum states that "[p]ursuant to 11 U.S.C. § 727(a)(5), this Honorable Court should deny Clyde Davis Yoakum, III discharge since Yoakum is still indebted to Plaintiff, Malissa Yoakum, for an amount of \$6,286.69." *Complaint* at ¶ 6. Section 727(a)(5), the Bankruptcy Code section pled in the *Complaint Objecting to Discharge*, provides as follows:

11 USC § 727. Discharge

(a) The court shall grant the debtor a discharge, unless --

(5) the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities;

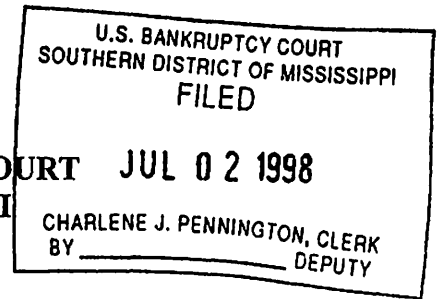
Id. The Debtor's assertion that Mrs. Yoakum has failed to present any evidence which would support a finding in her favor pursuant to § 727(a)(5) is correct. Mrs. Yoakum's *Complaint*, her *Motion for Summary Judgment*, and her response to the Debtor's *Motion for Summary Judgment* do not establish that she is entitled to relief under § 727(a)(5). Mrs. Yoakum has not offered the Court any evidence that the Debtor has failed to satisfactorily explain any loss of assets or deficiency of assets.

In her *Motion for Summary Judgment*, Mrs. Yoakum argues that the Debtor is not entitled to discharge the tax debt pursuant to § 523(a)(5). However, Mrs. Yoakum filed a complaint seeking to deny the Debtor a complete discharge. There is a distinct difference between seeking to deny a discharge pursuant to § 727(a)(5) and seeking a determination that a certain debt is nondischargeable pursuant to § 523(a)(5). For these reasons, the Court finds that the *Complaint* is not well taken and that the Debtor's *Motion for Summary Judgment* should be granted and the *Motion for Summary Judgment* of Mrs. Yoakum should be denied. The Court finds that the Debtor is entitled to a discharge at the appropriate time by separate order. Accordingly, the *Complaint Objecting to Discharge* should be dismissed with prejudice.

A separate final judgment consistent with this opinion will be entered in accordance with Rules 7054 and 9021 of the Federal Rules of Bankruptcy Procedure.

This the 2nd day of July, 1998.


UNITED STATES BANKRUPTCY JUDGE



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JUDGMENT

Consistent with the Court's opinion dated contemporaneously herewith, it is hereby ordered and adjudged that the *Motion for Summary Judgment* of Malissa Lynn Yoakum is not well taken and is denied. It is further ordered and adjudged that the *Motion for Summary Judgment* of the Debtor is granted and that the Debtor is entitled to a discharge at the appropriate time by separate order. It is also ordered that the *Complaint Objecting to Discharge* be, and hereby is, dismissed with prejudice.

SO ORDERED this the 2nd day of July, 1998.


UNITED STATES BANKRUPTCY JUDGE