

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

FILED

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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
AKRON

IN RE:)	CASE NO. 03-54008
)	
JAMES M. HARRIS)	CHAPTER 7
LOUISE E. HARRIS,)	[Converted from Chapter 13]
)	
DEBTOR(S))	JUDGE MARILYN SHEA-STONUM
)	
)	ORDER DENYING TRUSTEE'S
)	MOTION FOR TURNOVER
)	[DOCKET #47]

Debtors initiated the within bankruptcy case under chapter 13 of the Bankruptcy Code by filing a voluntary petition, through counsel, on August 4, 2003. Debtors converted their case to one under chapter 7 of the Bankruptcy Code on March 16, 2004. On May 20, 2004 the chapter 7 trustee assigned to administer this case filed a "Motion for Turnover Order and Notice" [docket #47] (the "Turnover Motion"). Through the Turnover Motion the trustee is requesting entry of an order requiring debtors to turnover \$5,110.00 as the sum due the estate for debtors' 2002 Chrysler after allowance of debtors' exemptions in that vehicle. The Turnover Motion also requests that any order granting it contain the following provisions:

1. [Payment of] [t]he sum of . . . (\$5,110.00).
2. Payments will be made at the rate of . . . (\$1,000.00) per month due on the 15th day of each month commencing June 15th, 2004, and continuing each month thereafter until the entire principal and interest has been paid in full.
3. [I]n the event the Debtors fails [sic] to make payment in accordance with the order, then the Trustee shall serve an Affidavit of default upon the Debtors and their counsel, giving the Debtors ten (10) days to cure the default. Upon failure of the Debtors to cure the default, and upon submission of the Affidavit to the Court, this court without further hearing will enter an Order revoking the discharge of the Debtors.

The certificate of service attached to the Turnover Motion indicates that it was served *only* upon the Office of the U.S. Trustee and debtors' counsel. Notwithstanding the absence of any objections to the Turnover Motion, the Court cannot grant such motion on a default basis.

A debtor is required to, *inter alia*, "surrender to the trustee all property of the estate." 11 U.S.C. § 521(4). The trustee is required to, *inter alia*, "collect and reduce to money the property of the estate for which the trustee serves, and close such estate as expeditiously as is compatible with the best interests of the parties in interest." 11 U.S.C. § 704(1). The trustee is given wide latitude to administer an estate as he or she deems fit based upon the particular circumstances of each case. In this case, it appears that the trustee saw fit to accept payments over time from the debtors in lieu of liquidating the 2002 Chrysler.

The trustee does not set forth in the Turnover Motion any explanation of how she arrived at \$5,110.00 for the value owing to the estate for debtors' 2002 Chrysler. In their Schedule B - Personal Property, debtors set forth the value of that automobile at \$12,000;00. One creditor is listed on Schedule D - Creditors Holding Secured Claims as holding a lien in the 2002 Chrysler and the amount of that creditor's claim is listed at \$4,000.00. On their Schedule C debtors claim exemptions in the vehicle in the amount of \$1,800.00¹ and no objections to that claimed exemption have been filed. Therefore, based upon the only information before the Court regarding the value of the 2002 Chrysler, the lien thereon and the

¹ Debtors' exemption was claimed pursuant to Ohio Revised Code §§ 2329.66(A)(2) and 2329.66(A)(18).

exemption claimed thereto,² it appears that the estate is entitled to receive approximately \$6,200.00 on account of that asset.

Aside from a cursory reference to 11 U.S.C. § 521(4) and Local Bankruptcy Rule 9013-3,³ the Turnover Motion contains no legal authority for the trustee's request that debtors' discharge be revoked upon the submission of an affidavit of default and without a hearing. Such request is procedurally improper as Rule 7001(4) of the Federal Rules of Bankruptcy Procedure specifically provides that "a proceeding to object to or revoke a discharge" is an adversary proceeding. FED. R. BANKR. P. 7001(4). An adversary proceeding can only be commenced by the filing of a complaint which, along with a summons, must be served upon the debtors. FED. R. BANKR. P. 7003, 7004.

In addition to the procedurally defective manner in which the trustee is seeking to have debtors' discharge potentially revoked, the Turnover Motion does not reference which provision of the Bankruptcy Code the trustee is relying upon for the requested relief. Section

² Local Bankruptcy Rule 9013-2 sets forth the following regarding evidence in support of a motion:

(b) Supporting Evidence. If a motion . . . requires the consideration of facts not appearing of record, a party shall serve and file copies of all documentary evidence and photographs that it intends to rely upon in addition to the affidavits required or permitted by the Federal Rules of Bankruptcy Procedure. In those instances where a party deems it necessary, or the Federal Rules of Bankruptcy Procedure otherwise require that evidence, by way of deposition, be submitted with and/or incorporated into a motion, only those pages of the deposition which contain the pertinent testimony shall be attached to the motion. The party shall not file the entire deposition in support of the motion, as long as certain pages or portions thereof will suffice to establish the party's position.

³ The Turnover Motion requests relief "without a hearing pursuant to Local Bankruptcy Rule 9013-3" unless a response is timely filed. Local Bankruptcy Rule 9013-3 addresses the requirement of and information needed in a certificate evidencing the service of motions. It is Local Bankruptcy Rule 9013-1(a) which addresses the authority of the Court to grant requested relief without further notice unless a timely objection is filed.

727(d) of the Bankruptcy Code provides that a chapter 7 debtor's discharge may be revoked only if one of the following occurs:

- (1) the discharge was obtained through debtor's fraud and the party seeking revocation of the discharge did not know of such fraud until after the discharge was granted;
- (2) the debtor acquired or became entitled to acquire property that is or would be property of the estate and knowingly and fraudulently failed to report and/or turnover such property to the trustee; or
- (3) the debtor:
 - (a) refused to obey any lawful order of the court, other than an order to respond to a material question or to testify;
 - (b) refused to respond to a material question approved by the court after being granted immunity; or
 - (c) refused to respond to a material question approved by the court or to testify on grounds other than a properly invoked privilege against self-incrimination.

11 U.S.C. §§ 727(d), 727(a)(6). Revocation of a debtor's discharge is an extraordinary remedy. Accordingly, § 727 of the Bankruptcy Code is to be liberally construed in favor of the debtor and strictly construed against the party seeking revocation. *See Buckeye Retirement Co., LLC v. Heil (In re Heil)*, 289 B.R. 897, 903 (Bankr. E.D. Tenn. 2003).

Because the Turnover Motion seeks to condition the revocation of these debtors' discharge upon compliance with payment terms that the trustee seeks to have journalized in the order granting the Turnover Motion, it appears that the trustee could only be relying upon the provision of § 727 which addresses a debtor's refusal to obey a lawful order of the court. *See* 11 U.S.C. §§ 727(d), 727(a)(6)(A). A revocation of the discharge under this provision is within the Court's discretion and courts having considered the matter have noted that:

[T]he word “refused,” as used in § 727(a)(6)(A), must be distinguished from the word “failed” which is used elsewhere in § 727(a). See 11 U.S.C. § 727(a)(5). As a consequence, the mere failure of a debtor to obey a court’s order, without more, is insufficient to deny or revoke a debtor’s bankruptcy discharge.

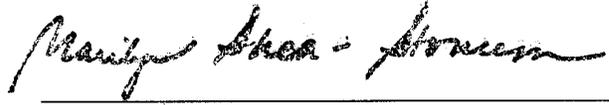
Yoppolo v. Walter (In re Walter), 265 B.R. 753, 758 (Bankr. N.D. Ohio 2001). To warrant the revocation of the discharge for debtor’s refusal to obey terms of a court order, it must be shown that such refusal was willful and intentional. See e.g., *The Provident Bank v. Sharpe (In re Sharpe)*, 305 B.R. 571, 578 (Bankr. M.D. Fla. 2003); *D’Agnese v. Cotsibas (In re Cotsibas)*, 262 B.R. 182, 185 (Bankr. D.N.H. 2001); *In re Barman*, 237 B.R. 342, 350 (Bankr. E.D. Mich. 1999).⁴ By seeking to have these debtors’ discharge revoked merely upon the filing of an affidavit reciting debtors’ failure to make periodic payments to the estate, the trustee is ignoring the affirmative proofs she is required to make.

The Court is not trying to discourage trustees from administering an estate whereby a debtor is permitted to retain possession of an estate asset in exchange for periodic payments to reimburse the estate for the non-exempt value of the retained asset. However, the Court cannot, on a default basis, grant a trustee’s request to revoke the debtor’s discharge upon the filing of an affidavit of default because to do so would be to allow the trustee to circumvent

⁴ Some courts have held that an action to revoke the discharge for debtor’s refusal to obey a court order is akin to a proceeding for civil contempt so that the party seeking revocation is required to demonstrate by clear and convincing evidence that (1) the debtor had knowledge of the order which she is said to have violated; (2) the debtor did in fact violate the order; and (3) the order violated was specific and definite. See *Hunter v. Magack (in re Magack)*, 247 B.R. 406, 410 (Bankr. N.D. Ohio 1999). Impossibility or an inability to comply with a court order may constitute a valid defense to a charge of civil contempt. *Id.*

the requirements of specific provisions in the Bankruptcy Code and Rules.⁵ Accordingly, the Turnover Motion is hereby denied.

IT IS SO ORDERED.



MARILYN SHEA-STONUM
U.S. Bankruptcy Judge *MS*

⁵ If the trustee specifically bargained with the debtors for revocation of the discharge should the debtors fail to fully compensate the estate for a retained asset then it might be appropriate to permit such revocation upon simply the filing of an affidavit of default. *See* § 727(a)(10) (addressing debtor's written waiver of discharge). However, the Court would, at a minimum, want it demonstrated by clear and convincing evidence that the purported waiver was a fully-informed and voluntary act of the debtors which was appropriate under the circumstances of that particular case. *Cf. In re Martin*, 211 B.R. 23 (Bankr. E.D. Ark. 1997); *In re Rul-Lan*, 186 B.R. 938 (Bankr. W.D. Mo. 1995).

CERTIFICATE OF SERVICE

The undersigned hereby certifies that in the 27th day of SEPTEMBER 2004, the foregoing **ORDER DENYING TRUSTEE'S MOTION FOR TURNOVER [DOCKET #47]** was sent via regular U.S. Mail to the following:

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