

**IN THE UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
Eastern Division**

In Re:

In Proceedings Under Chapter 7

KEITH D. LURIE,

Case No.: 08-18353

Debtor.

STEVEN S. DAVIS, TRUSTEE

Adv. Proc. No. 09-1155

Plaintiff,

JUDGE RANDOLPH BAXTER

v.

KEITH D. LURIE,

Defendant.

MEMORANDUM OF OPINION AND ORDER

The Debtor filed a voluntary Chapter 7 petition on October 28, 2008. The Trustee filed a Complaint to Revoke Debtor's Discharge, objecting to discharge pursuant to 11 U.S.C. §§ 727(a)(6) and (d)(3) and now moves for summary judgment on the complaint allegations. The Debtor opposes the Motion. This adversary proceeding is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(J), with jurisdiction further conferred under 28 U.S.C. § 1334 and General Order No. 84 of the District. After conducting a hearing on the Motion and considering the parties' respective pleadings, the Court rules as follows:

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On March 12, 2009, the Court ordered the Debtor to turnover the sum of \$2,502.46 to the Trustee. In his affidavit in support of the Motion, the Trustee alleges that Debtor has failed to

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U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
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turnover the funds. The Debtor failed to file an affidavit in support of his opposition, but Debtor's counsel indicates that "the circumstances in which Debtor has been unable to comply with the prior Order of the Court. . . . Further, Debtor's attorney state that due to Debtor's unstable living situation, Debtor and his attorney have not had any meaningful discussions regarding these pending issues." The Debtor does not dispute that he has failed to comply with this Court's turnover Order.

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The dispositive issue is whether there exists a genuine issue of material fact in dispute and whether summary judgment should be granted as a matter of law.

The Trustee seeks to revoke the Debtor's discharge pursuant to 11 U.S.C. §§ 727(a)(6) and (d)(3).

Section 727(d)(3) states in pertinent part:

(d)On request of the trustee . . . the court shall revoke a discharge granted . . . if--
(3)the debtor committed an act specified in subsection (a)(6) of this section.

Section 727(a)(6)(A) provides in pertinent part:

(a)The court shall grant the debtor a discharge, unless--
(6) the debtor has refused, in the case--
(A) to obey any lawful order of the court, other than an order to respond to a material question or to testify; ...

11 U.S.C. § 727(a)(6)(A); *See e.g. In re Faber*, 330 B.R. 235, 240 (Bankr. N.D. Ind.

2005)(opining that it is constrained by the law with respect to a debtor-defendant's failure to appear at a default judgment hearing and that the Trustee/plaintiff has established a *prima facie* basis for the revocation of the debtor's/defendant's discharge pursuant to 11 U.S.C. § 727(a)(6)(A)); *In re Magack*, 247 B.R. 406 (Bankr. N.D. Ohio 1999)(where the debtor fails to comply with valid court orders, the trustee may seek revocation of the discharge).

The Trustee bears the burden of proof to demonstrate, by a preponderance of the evidence, that the debtor has violated one of the subsections of § 727. *Beaubouef v. Beaubouef* (*In re Beaubouef*), 966 F.2d 174, 178 (5th Cir. 1992), *citing Grogan v. Garner*, 498 U.S. 279, 287, 111 S.Ct. 654, 659-60, 112 L.Ed.2d 755 (1991). Rule 56, made applicable to this proceeding under Bankruptcy Rule 7056, provides in relevant part:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed.R.Civ.P. 56(c), Fed. R. Bankr. P. 7056(c).

Rule 56(e) describes the burden of the nonmoving party. That subsection provides in pertinent part:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Fed.R.Civ.P. 56(e), Fed R. Bankr.P. 7056(e).

Summary judgment is appropriate whenever the non-moving party 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*, 477 U.S. at 322, 106 S.Ct. 2548. The non-movant “must do more than simply show that there is some metaphysical doubt as to the material facts” by “com[ing] forward with ‘specific facts showing that there is a genuine issue for trial.’” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87. The non-movant’s bare assertions, standing alone, are insufficient to create a material issue of fact and defeat a motion for summary judgment. *Id.* at 247-48. Further, a “mere scintilla of evidence in support of the non-moving party will not be sufficient.” *Nye v. CSX Transportation*, 437 F.3d 556, 563 (6th Cir. 2006).

Pursuant to Bankruptcy Rule 4005, the Trustee, as plaintiff, bears the burden of proving the objection to the Debtor’s discharge by a preponderance of the evidence. *L.B. Cleveland, Inc. v. Bluestone (In re Bluestone)*, 102 B.R. 103, 106 (Bankr. N.D. Ohio 1989). The burden shifts to the Debtor to make a credible explanation of his actions if the Trustee establishes a *prima facie* case. *Id.*

Herein, on March 12, 2009, this Court ordered the Debtor to turnover funds in the amount of \$2,502.46. The Trustee alleges, through affidavit, that the Debtor has failed to comply with this Court’s Order. Accordingly, the Trustee has satisfied his burden of proving that the Debtor should be denied a discharge pursuant to 11 U.S.C. §§ 727(a)(6) and (d)(3).

The Debtor, therefore, has the burden of setting forth specific facts demonstrating that a genuine issue of material fact exists. Herein, the Debtor failed to attach an affidavit or present other evidence explaining his failure to comply with this Court's turnover Order. Debtor's counsel merely asserts that the Debtor has had unstable living conditions and that this contributed to the Debtor's inability to comply with the Order. Counsel's mere assertions on the Debtor's behalf are insufficient to rebut the *prima facie* case established by the Trustee. *Matsushita Elec. Indus. Co.*, 475 U.S. at 247-48. Furthermore, the Debtor fails to cite to any statutory authority or other exception that would excuse his compliance with the Order because of "unstable living conditions."

It is undisputed that the Debtor failed to comply with this Court's Order. Accordingly, the Trustee's Motion for Summary Judgment is hereby granted and judgment is entered in favor of the Trustee on his Complaint. The Debtor's objection thereto is overruled and the Debtor's discharge is hereby revoked. Each party is to bear its respective costs.

IT IS SO ORDERED.



JUDGE RANDOLPH BAXTER

UNITED STATES BANKRUPTCY COURT

Dated, this 5th day of
October, 2009.