

This opinion is not intended for publication

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

In re:)	Case No. 01-21451
)	
VALERIE ANN PUCHMAJER,)	Chapter 7
Debtor.)	
)	Adversary Proceeding No. 02-1186
MARY ANN RABIN,)	
CHAPTER 7 TRUSTEE,)	Judge Arthur I. Harris
Plaintiff,)	
)	
v.)	
)	
VALERIE ANN PUCHMAJER,)	
Defendant.)	

MEMORANDUM OF DECISION

Pending before the Court is a Motion for Summary Judgment (Docket #9) filed by Mary Ann Rabin, the Chapter 7 Trustee. Plaintiff has brought this adversary complaint to revoke and deny Defendant's discharge, pursuant to 11 U.S.C. § 727(d). On January 9, 2003, Ms. Puchmajer filed a pro-se response to Plaintiff's motion (Docket #11). For the reasons that follow, Plaintiff's Motion for Summary Judgment is DENIED, and **both parties are directed to appear for a further status conference on March 18, 2003, at 2:45 p.m.**

BACKGROUND

On November 20, 2001, Ms. Puchmajer filed a petition under Chapter 7 of the Bankruptcy Code. Ms. Puchmajer was granted a discharge on March 12, 2002,

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pursuant to 11 U.S.C. § 727. On May 16, 2002, then-Trustee Saul Eisen filed this adversary proceeding alleging that Ms. Puchmajer's discharge should be revoked and denied because she allegedly failed to provide him with required information regarding the bankruptcy estate and to appear for examination under Bankruptcy Rule 2004. Ms. Puchmajer disputes those allegations, stating that she provided the Trustee with information that she believed complied with his requests and that she had been informed by her attorney that she did not need to appear for examination on the given date.

DISCUSSION

The Court has jurisdiction in this adversary proceeding pursuant to 28 U.S.C. § 1334(b) and Local General Order No.84, entered on July 16, 1984, by the United States District Court for the Northern District of Ohio. This is a “core” proceeding pursuant to 28 U.S.C. § 157(b)(2)(J).

Under subsection 727(d) of the Bankruptcy Code, the only grounds for revocation of a debtor's discharge are for fraud,¹ which the trustee does not allege in this proceeding, or for committing an act specified in subsection 727(a)(6).²

¹ See 28 U.S.C. § 727(d)(1) and (d)(2).

² See 28 U.S.C. § 727(d)(3).

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The only act allegedly committed by the debtor in this proceeding that is specified in subsection 727(a)(6) is the debtor's alleged refusal to appear for a court-ordered examination under Rule 2004. Although the trustee also seeks revocation of Ms. Puchmajer's discharge because Ms. Puchmajer allegedly failed to provide requested information to the trustee in contravention of § 727(a)(2) - (a)(5), such conduct cannot be the basis for revocation of a discharge under § 727(a)(6).

Therefore, the only issue currently before the Court is whether the trustee is entitled to summary judgment on her claim that the debtor refused to appear for a court-ordered examination in contravention of subsections 727(a)(6) and (d)(3).³

Unfortunately, the trustee's materials filed in support of summary judgment and the debtor's materials filed in opposition are both procedurally flawed. Under Rule 56(c) of the Federal Rules of Civil Procedure, made applicable to this matter pursuant to Bankruptcy Rule 7056, a court shall render summary judgment

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

³ Under Sixth Circuit case law, the objecting party must establish the facts warranting the revocation of the discharge by a preponderance of the evidence. See *In re Adams*, 31 F.3d 389, 394 (6th Cir. 1994), *cert. denied*, 513 U.S. 1111 (1995). Accord *In re Keeney*, 227 F.3d 679, 683 (6th Cir. 2000).

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In the present case, however, the pleadings are in dispute as to whether the debtor refused to comply with the order that she appear for an examination,⁴ and there are no depositions, answers to interrogatories, or admissions on file. The trustee has submitted an affidavit, but the affidavit itself fails to include any of the facts described in her memorandum or incorporate any of the exhibits accompanying her memorandum. Meanwhile, the debtor, who did not even seek to file an answer until the trustee moved for default, did not respond to the summary judgment motion with her own affidavit or declaration under penalty of perjury.⁵ And even though pro se pleadings are to be liberally construed, *see Haines v. Kerner*, 404 U.S. 519 (1972), "in the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." *Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980). Therefore, the Court is left with a summary judgment motion that does not demonstrate the absence of a genuine issue of material fact, even in the

⁴ Compare Complaint at ¶ 8 ("Debtor failed to appear at said examination") with Answer at ¶ 8 (denying allegations in paragraph 8 "in that the examination was continued pending defendant providing the trustee with additional information").

⁵ Under 28 U.S.C. § 1746, an unsworn declaration under penalty of perjury has the same force and effect as an affidavit in any federal court proceeding.

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absence of an affidavit or declaration under penalty of perjury from the debtor.

Given the requirement of subsection 727(a)(6) that the movant demonstrate that the debtor has *refused* to obey a lawful order of the court,⁶ it is unclear whether the trustee can meet her burden in this adversary proceeding, absent further evidence of noncompliance by the debtor. The Court is certainly mindful of the position of the current trustee, who has inherited this matter from the initial trustee and who must routinely deal with debtors who are less than fully-cooperative, as may be the case in this proceeding. Nevertheless, the trustee has further options available to her to determine what assets should be turned over and to effect such turnover from the debtor (*e.g.*, scheduling another examination under Rule 2004 or filing a motion for turnover under Section 542). Moreover, the debtor is forewarned that any revocation of her discharge under subsection 727(d) does not eliminate any requirement that she still turn over to the trustee all non-exempt assets, such as a pre-petition tax refund or equity in an automobile.

⁶ *See, e.g., In re Cotsibas*, 262 B.R. 182, 186 (Bankr. D.N.H. 2001) ("The word 'refuse' in § 727(a)(6)(a) requires the Court to go further than to simply find that a debtor failed to comply with a discovery request."); *In re Barman*, 237 B.R. 342, 349-52 (Bankr. E.D. Mich. 1999) (discussing case law and noting: "Failure to comply with a court order, standing alone, is not the equivalent of 'refusal' under § 727(a)(6).").

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Accordingly, plaintiff's motion for summary judgment is DENIED, and
**both parties are directed to appear for a further status conference on March
18, 2003, at 2:45 p.m.**

IT IS SO ORDERED.

/s/ Arthur I. Harris 01/29/2003
Arthur I. Harris
United States Bankruptcy Judge