UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:	)	CHAPTER 7
	)	
LEE E. BASS,	)	CASE NO. 01-64983
	)	
Debtor.	)	JUDGE RUSS KENDIG
JOSIAH L. MASON, Trustee,	)	
	)	ADV. NO. 03-6006
Plaintiff,	)	
	)	
v.	)	
	)	**MEMORANDUM OF DECISION**
LEE E. BASS,	)	
	)	
Defendant.	)	
	)	
	)	

This matter is before the court on the motion for summary judgment of plaintiff Josiah L. Mason, trustee, (hereafter "Plaintiff") against defendant Lee E. Bass (hereafter "Defendant") filed on April 11, 2003 pertaining to Plaintiff's complaint. Defendant did not respond to the motion for summary judgment but did file an answer and counterclaim to Plaintiff's complaint on April 8, 2003 to which Plaintiff replied on June 10, 2003, albeit untimely and without leave. Defendant responded on June 16, 2003. Although the parties have not filed briefs addressing the merits of Defendant's counterclaim, the court will conduct a sua sponte analysis of Defendant's counterclaim because it is intertwined with the matter presently before the court.

JURISDICTION

The court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334(a) and the general order of reference entered in this district on July 16, 1984. This is a core proceeding under 28 U.S.C. § 157(b)(2). The following constitutes the court's findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052.

FACTS AND ARGUMENTS

Defendant filed a Chapter 7 bankruptcy proceeding on November 16, 2001. Subsequently, Plaintiff discovered the existence of two non-exempt assets, Defendant's 2001 income tax refund and Defendant's interest in a 1995 Dodge Neon automobile. On September 16, 2002, a consent judgment entry was entered wherein Defendant agreed to turn over to Plaintiff the sum of $2,541.81 representing the nonexempt equity in the assets. This money was

to be paid as follows: 1. one hundred dollars by August 15, 2002; and 2. the balance at the rate of two hundred dollars per month commencing September 15, 2002, until paid in full. Further, any 2002 tax refund Defendant received was to be turned over and applied to the balance. Defendant received a discharge of his debts on December 13, 2002.

On January 15, 2003, Plaintiff filed a complaint to revoke Defendant's discharge alleging that Defendant had committed fraud by only paying one hundred dollars of the money agreed upon and that Plaintiff had only become aware of this fraud after the granting of Defendant's discharge. Plaintiff requested that Defendant's discharge be revoked and that he be reimbursed for the costs of filing the complaint. On April 8, 2003, with leave, Defendant answered the complaint, denying its allegations, raising several affirmative defenses, and lodging a counterclaim against the estate for his exemptions. On April 11, 2003, Plaintiff filed a motion for summary judgment essentially reiterating the argument in his complaint. Defendant had until April 24, 2003 in which to respond to the motion for summary judgment but failed to do so. Plaintiff replied to the counterclaim on June 10, 2003. Defendant responded to Plaintiff's reply to the counterclaim on June 16, 2003.

ANALYSIS

I. Standard of review

The procedure for granting summary judgment is found in Federal Rule of Civil Procedure 56(c), made applicable to this proceeding through Federal Rule of Bankruptcy Procedure 7056, which provides in part:

> [t]he 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).

The evidence must be viewed in the light most favorable to the nonmoving party. Adickes v. S.H.Kress & Co., 398 U.S. 144, 158-59 (1970). Summary judgment is not appropriate if a material dispute exists over the facts, "that is, if evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Summary judgment is appropriate, however, if the opposing 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 Corp. v. Catrett, 477 U.S. 317, 322 (1986). *See also* Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986).

The Sixth Circuit Court of Appeals has recognized that Liberty Lobby, Celotex, and Matsushita effected "a decided change in summary judgment practice," ushering in a "new era" in summary judgments. Street v. J.C. Bradford & Co., 886 F.2d 1472, 1476 (6th Cir. 1989). In responding to a proper motion for summary judgment, the nonmoving party "cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must 'present affirmative evidence in order to defeat a properly supported motion for summary judgment.'" Street, 886 F.2d at 1479 (quoting Liberty Lobby, 477 U.S. at 257). The nonmoving party must introduce more than a scintilla of evidence to overcome the summary judgment motion. Street, 886 F.2d at 1479. It is also not sufficient for the nonmoving party merely to "show that there is some metaphysical doubt as to the material facts." Matsushita, 475 U.S. at 586. Moreover, "[t]he trial court no longer has the duty to search the entire record to establish that it is bereft of a genuine issue of material fact." Street, 886 F.2d at 1479. That is, the nonmoving party has an affirmative duty to direct the court's attention to those specific portions of the record upon which it seeks to rely to create a genuine issue of material fact.

This line of cases emphasizes the point that when one party moves for summary judgment, the nonmoving party must take affirmative steps to rebut the application of summary judgment. Courts have stated that:

> Under *Liberty Lobby* and *Celotex*, a party may move for summary judgment asserting that the opposing party will not be able to produce sufficient evidence at trial to withstand a directed verdict, and if the opposing party is thereafter unable to demonstrate that he can do so, summary judgment is appropriate. "In other words, the movant could challenge the opposing party to 'put up or shut up' on a critical issue [and] . . . if the respondent did not 'put up,' summary judgment was proper."

Fulson v. City of Columbus, 801 F. Supp. 1, 4 (S.D. Ohio 1992) (citations omitted) (quoting Street, 886 F.2d at 1478).

II. Revocation of discharge

Subsections (a)(6)(A), (d)(3), and (e)(2) of section 727 of the Bankruptcy Code, read in conjunction, provide that a trustee may request, after notice and a hearing, that the court revoke a debtor's discharge for failing "to obey any lawful order of the court" if the request is made within one year after the granting of the discharge. 11 U.S.C. § 727(a)(6)(A), (d)(3), and (e)(2).

In the case at bar, Defendant entered into an agreement with Plaintiff wherein he agreed to pay the nonexempt portion of two assets, his 2001 tax refund and a 1995 Dodge Neon, to Plaintiff, which was memorialized in an agreed judgment entry and approved and entered by this court on September 16, 2002. In the affidavit attached to Plaintiff's motion for summary judgment, Plaintiff avers that Defendant made one payment of $100.00 on August 28, 2002

toward the settlement amount memorialized in the September 16, 2002 entry and avers that the Defendant has not provided him with any information as to his 2002 income tax refund. Defendant has failed to rebut Plaintiff's allegations. Consequently, no genuine issue of material fact exists that Defendant failed to obey a court order, the order of September 16, 2002, and Defendant's discharge should be revoked pursuant to 11 U.S.C. § 727(d)(3).

III. Exemptions

Defendant asserts a counterclaim to Plaintiff's complaint for his exemptions in his 2001 tax refund and a 1995 Dodge Neon. Presumably, Defendant arranged for a deduction of these exemptions when negotiating the September 16, 2002 agreed judgment entry. That would have been the time at which to worry about his exemptions. A deduction of his exemptions cannot now be taken into account to excuse his compliance with the September 16, 2002 entry and consequently bar a revocation of his discharge. Defendant's counterclaim is hereby denied.

CONCLUSION

An order consistent with this memorandum of decision shall enter forthwith.

_____

RUSS KENDIG
U.S. BANKRUPTCY JUDGE

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of this Memorandum of Decision and accompanying Order was mailed, via regular U.S. mail, to Plaintiff and counsel for Defendant on the _____day of June 2003.

Josiah L. Mason
P.O. Box 345
Ashland, Ohio 44805

JoAnn P Hoard
13 Park Ave W
#309
Mansfield, OH 44902

_____
Deputy Clerk

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LEE E. BASS,	)	CASE NO. 01-64983
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Debtor.	)	JUDGE RUSS KENDIG
JOSIAH L. MASON, Trustee,	)	
	)	ADV. NO. 03-6006
Plaintiff,	)	
	)	
v.	)	
	)	**ORDER**
LEE E. BASS,	)	
	)	
Defendant.	)	
	)	
	)	

This matter came before the court on the motion for summary judgment filed by Plaintiff against Defendant pertaining to Plaintiff's complaint. Defendant did not respond to the motion for summary judgment but did file a counterclaim to Plaintiff's complaint. Plaintiff replied, and Defendant responded to Plaintiff's reply. For the reasons stated in the Memorandum of Decision, Plaintiff's motion for summary judgment is **GRANTED**. Further, Defendant's counterclaim is **DENIED**, and Plaintiff is **GRANTED** judgment on his complaint for the costs of this action.

It is further **ORDERED** that Defendant's discharge granted December 15, 2002 is hereby **REVOKED**.

It is so ordered.

_____
RUSS KENDIG
U.S. BANKRUPTCY JUDGE