

The court incorporates by reference in this paragraph and adopts as the findings and analysis of this court the document set forth below. This document has been entered electronically in the record of the United States Bankruptcy Court for the Northern District of Ohio.



Dated: July 11 2005

Mary Ann Whipple
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:)	Case No.: 03-70476
)	
Charise Bryant Bey,)	Chapter 7
)	
Debtor.)	Adv. Pro. No. 05-3096
)	
Ericka S. Parker, Trustee,)	Hon. Mary Ann Whipple
)	
Plaintiff,)	
v.)	
)	
Charise Bryant Bey,)	
)	
Defendant.)	

MEMORANDUM OF DECISION

This adversary proceeding is before the court for decision after trial on a Complaint to Revoke Discharge filed by Plaintiff Ericka S. Parker, the Chapter 7 Trustee in Defendant’s underlying Chapter 7 bankruptcy case. The Trustee alleges that Defendant’s Chapter 7 discharge should be revoked under 11 U.S.C § 727(d)(2), (d)(3)

and (a)(6)(A).¹ The court has jurisdiction over this adversary proceeding under 28 U.S.C. §1334(b) and the general order of reference entered in this district. Proceedings to determine objections to discharge are core proceedings that this court may hear and determine. 28 U.S.C. § 157(b)(1) and (b)(2)(J).

This Memorandum of Decision constitutes the court's findings of fact and conclusions of law under to Fed. R. Civ. P. 52, made applicable to this adversary proceeding by Fed. R. Bankr. P. 7052. Regardless of whether specifically referred to in this Memorandum of Decision, the court has examined the submitted materials, weighed the credibility of the witnesses, considered all of the evidence, and reviewed the entire record of the case. Based upon that review, and for the reasons discussed below, the Trustee is entitled to judgment against Debtor in the amount of \$4,011 and Debtor's discharge entered in bankruptcy case no. 03-70476 will be revoked.

FINDINGS OF FACT

The following facts are undisputed. Defendant filed for relief under Chapter 7 of the Bankruptcy Code on December 31, 2003. She attended the § 341 meeting of creditors on February 26, 2004. Defendant testified that she told the Trustee at that meeting that she had not yet filed her income tax returns and that both the Trustee and her attorney instructed her that a significant portion of her tax refund was estate property that must be turned over to the Trustee. Defendant subsequently completed and filed her federal and state income tax returns. She received a federal income tax refund of \$4,619.00 and an Ohio income tax refund of \$157, both of which were received as direct deposits in her bank account in late June or early July, 2005. [See Plf. Ex. A]. Before receiving the refunds, Defendant received the Trustee's calculation that \$4,011 of her tax refund was due to the Trustee as nonexempt estate property. [Plf. Ex. B]. Defendant does not dispute the Trustee's calculation.

Defendant testified that she knew and understood that she was supposed to turnover a portion of her tax

¹ Although the Trustee's complaint alleges only that Defendant's discharge should be revoked pursuant to § 727(d)(3) and (a)(6)(A), "when issues not raised in the pleadings are raised by the express or implied consent of the parties, the court may treat the issues in all respects as if the parties had raised them in the pleadings." *Yellow Freight Sys. v. Martin*, 954 F.2d 353, 358 (6th Cir. 1992) (citing Fed. R. Civ. P. 15(b)). In applying Rule 15(b) and determining whether the requirement of due process has been satisfied, "[t]he test is one of fairness under the circumstances of each case—whether the [defendant] knew what conduct was in issue and had an opportunity to present his defense." *Id.* at 358 (quoting *Soule Glass and Glazing Co. V. NLRB*, 652 F.2d 1055, 1074 (1st Cir. 1981)). At trial, the Trustee clearly explained her claims under § 727(d)(2) and (d)(3) in her opening statement and presented evidence with respect to both claims. Defendant was thus aware that evidence was directed at both claims and had the opportunity to, and did, present to the court her defense by way of her own testimony. Thus, in accordance with Fed. R. Civ. P. 15(b), made applicable to this proceeding by Fed. R. Bankr. P. 7015, the complaint is amended to conform to the evidence so as to include a claim under § 727(d)(2). *See id.*; *Ale v. Tennessee Valley Authority*, 269 F.3d 680, 693 (6th Cir. 2001).

refunds to the Trustee; however, she did not do so. On September 29, 2004, the court entered an order granting the Trustee's motion for turnover and ordering Defendant to turn over her non-exempt 2003 income tax refunds.² [Plf. Exs. C and D]. Defendant testified that her attorney informed her of the court's order. Although she was working at the time she filed her petition, her employment was terminated on February 27, 2004, at about the same time as the first meeting of creditors. Defendant testified that because she was unable to meet her monthly expenses after becoming unemployed, she used the refund money to pay her rent, buy clothes for her children and pay other outstanding post-petition bills. The court does not doubt that Debtor used the refund money in the manner she testified. She eventually moved into her parents' home due to her inability to meet her expenses.

The court entered an order of discharge in the underlying Chapter 7 case on May 14, 2004. And on February 24, 2005, the Trustee filed a timely complaint to revoke Defendant's discharge.

LAW AND ANALYSIS

The Trustee argues that Defendant's discharge should be revoked under 11 U.S.C. § 727(d)(2) and (d)(3).³ Finding that § 727(d)(2) provides a basis for revoking Defendant's discharge, the court need not address the Trustee's claim under § 727(d)(3).

I. 11 U.S.C. § 727(d)(2)

Under § 727(d)(2), a debtor's bankruptcy discharge will be revoked if "the debtor acquired property that is property of the estate, or became entitled to acquire property that would be property of the estate, and knowingly and fraudulently failed to report the acquisition of or entitlement to such property, or to deliver or surrender such property to the trustee [.]" To prevail on her claim in this case, the Trustee must prove by a preponderance of the evidence that Defendant (1) acquired property of the estate and (2) knowingly and fraudulently failed to deliver or surrender such property to the Trustee. *See Wyss v. Fobber (In re Fobber)*, 256 B.R. 268, 272 (Bankr. E.D. Tenn. 2000). The court may infer the knowing and fraudulent nature of a debtors failure to turn over property of the estate from the debtor's course of conduct. *Hill v. Muniz (In re Muniz)*, 320 B.R. 697, 701 (Bankr. D. Colo.

² That order mistakenly indicates that the non-exempt income tax refunds total \$1,158.67 rather than the \$4,011.00 set forth in the Trustee's Motion for Turnover. [See Plf. Exs. C and D].

³ A debtor's discharge will be revoked under § 727(d)(3) if "the debtor committed an act specified in subsection (a)(6) of [§ 727]." Plaintiff relies on the act specified in § 727(a)(6)(A), that is, that Defendant has refused to obey a lawful order of the court.

2005).

In this case, the evidence is undisputed that Defendant received her 2004 income tax refunds and that \$4,011 of the amount received was property of the bankruptcy estate. It is also undisputed that Defendant failed to turn over any of the refunds that she received. As discussed above, Defendant knew well before she received the money that a large portion of her tax refund was property of the estate and that she had an obligation to surrender the non-exempt portion to the Trustee when she received the refund. Those funds simply never belonged to the Debtor, as they were property of the bankruptcy estate. She nevertheless chose to deprive the estate of those funds and to use the funds for her own purposes. On these facts, the court infers that Debtor knowingly and fraudulently failed to surrender the non-exempt portion of her income tax refund in the amount of \$4,011. Under such circumstances, the court is required to revoke the discharge granted under § 727(a). *See* 11 U.S.C. § 727(d)(2). While revocation of discharge is a harsh measure, Congress has expressed its clear intention in § 727 that a debtor who does not honor her obligation to turn over estate property is not entitled to a discharge. *Muniz*, 320 B.R. at 702.

II. Trustee's Request for Money Judgment

In her prayer for relief, the Trustee also requests that judgment be entered in her favor in the amount of the 2003 non-exempt tax refund received by Debtor. Notwithstanding that Debtor's discharge is revoked, her legal obligations "invoked upon the filing of her bankruptcy petition" still include the obligation to turn over to the Trustee all non-exempt property that she possessed or to which she was entitled as of the date of her petition was filed. *Id.* As discussed above, the evidence is undisputed that \$4,011 of Defendant's 2003 income tax refund constitutes non-exempt property of the bankruptcy estate – property that Defendant chose not to turn over to the Trustee. The Trustee is, therefore, also entitled to judgment in that amount.

Similar tax refund problems are routinely resolved in this court by the reimbursement of the estate out of a combination of post-petition income and a subsequent year's tax refunds. Here, however, Debtor was laid off from her job early in 2004 and has not since been able to earn income and to generate subsequent refunds with which to repay the estate. As another court has noted in a similar case, this amounts to the proverbial "perfect storm" of unfortunate, even sad, events and choices and bad consequences, *id.*: Debtor files for bankruptcy relief then loses her job shortly thereafter, she chooses to use her tax refund to replace her lost post-petition income,

her discharge is revoked, she still has a judgment against her for the value of the property she turned over and, arguably, she may not be able to discharge the unsecured debt listed in her schedules in a subsequent Chapter 7 case, *see* 11 U.S.C. § 523(a)(10). Nevertheless, Congress' directives in this regard are clear and the court can neither ignore nor deviate from them because this is the "perfect storm."

III. Trustee's Request for Attorney Fees

Generally, under the "American Rule," which applies to litigation in the bankruptcy courts, a prevailing litigant may not collect attorney's fee from his opponent unless authorized by federal statute or an enforceable contract between the parties. *In re Sheridan*, 105 F.3d 1164, 1166 (7th Cir. 1997). Plaintiff has identified no authority, and the court finds no basis, for an award of attorney fees in this case.

CONCLUSION

Having met her burden under 11 U.S.C. § 727(d)(2), judgment will be entered in favor of Plaintiff and against Defendant in the amount of \$4,011 and Defendant's discharge will be revoked under 11 U.S.C. § 727(d)(2). A separate judgment in accordance with this memorandum of decision will be entered by the court.