

The court incorporates by reference in this paragraph and adopts as the findings and orders 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: June 12 2006

Mary Ann Whipple
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:)	Case No.: 05-30939
)	
Eugene Romulo Trejo,)	Chapter 7
Kristi Lynn Trejo,)	
)	Adv. Pro. No. 06-3222
Debtors.)	
)	Hon. Mary Ann Whipple
Ericka S. Parker, Trustee,)	
)	
Plaintiff,)	
v.)	
)	
Eugene Romulo Trejo, et al.,)	
)	
Defendants.)	

MEMORANDUM OF DECISION AND ORDER
REGARDING MOTION FOR SUMMARY JUDGMENT

This adversary proceeding is before the court on the Chapter 7 Trustee’s Motion for Summary Judgment [Doc. # 8] and Defendant/Debtor Kristi Lynn Trejo’s response [Doc. # 11]. In her complaint, the Trustee alleges that Defendants Chapter 7 discharge should be revoked under 11 U.S.C. § 727(d)(2), (d)(3) and (a)(6)(A). 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). After reviewing the motion, the supporting brief and the response thereto, and for the following reasons, the court will grant the Trustee's motion.

FACTUAL BACKGROUND

The following facts are undisputed. Defendants filed a petition for relief under Chapter 7 of the Bankruptcy Code on February 14, 2005. In her affidavit submitted in support of the Motion for Summary Judgment, the Trustee states that, at the first meeting of creditors held on March 28, 2005, Defendants testified that they had a house fire shortly before the meeting, that they had received a tax refund in February 2005 in the amount of \$3,200, and that they had received money in October 2004 as a result of a personal injury claim. The Trustee requested, among other things, documents concerning Defendants' tax returns and the personal injury claim and proceeds. After not receiving the requested documents, the Trustee filed a Motion for Turnover. On April 27, 2005, the court granted the Trustee's unopposed motion and ordered Debtors to turnover to the Trustee the following on or before May 18, 2005: their 2004 State of Ohio and Federal Income Tax Returns and the refunds with all attachments; copies of pay stubs with current year to date total income; a copy of the receipts and canceled checks evidencing how the refunds were spent; and a copy of their bank statements and check register for October 1, 2004 through February 28, 2005. [Case No. 05-30939, Doc. # 11]. Debtors have failed to provide any of the documents described in the order for turnover. [Doc. # 8, Motion for Summary Judgment, Parker Aff.]. On June 7, 2005, the court entered an order granting Defendants a discharge under § 727, and the Trustee timely filed a Complaint to Revoke Discharge on April 13, 2006. *See* 11 U.S.C. § 727(e)(2).

LAW AND ANALYSIS

I. Summary Judgment Standard

Under Fed. R. Civ. P. 56, made applicable to this proceeding by Fed. R. Bankr. P. 7056, summary judgment is proper only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In reviewing a motion for summary judgment, however, all evidence "must be viewed in the light most favorable to the party opposing the motion." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-88 (1986). The party moving for summary judgment always bears the initial responsibility of informing the court of the basis for its motion, "and

identifying those portions of ‘the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits if any’ which it believes demonstrate the absence of a genuine issue of material fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Where the moving party has met its initial burden, “Rule 56 . . . requires the nonmoving party to go beyond the pleadings and by [his or] her own affidavits, or by the ‘depositions, answers to interrogatories, and admissions on file,’ designate ‘specific facts showing that there is a genuine issue for trial.’” *Id.* at 324. A genuine issue for trial exists if the evidence is such that a reasonable factfinder could find in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

II. 11 U.S.C. § 727(d)

The Trustee argues that Defendant’s discharge should be revoked under 11 U.S.C. § 727(d)(2) and (d)(3), which provides as follows:

(d) On request of the trustee . . . the court shall revoke a discharge granted under subsection (a) of this section if--

.....

(2) 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;

(3) the debtor committed an act specified in subsection (a)(6) of this section.

In order to prevail on her claim for revocation of discharge under § 727(d)(2), the Trustee must prove that Defendants acted with intent to defraud in failing to surrender property of the estate. *See Wyss v. Fobber (In re Fobber)*, 256 B.R. 258, 272 (Bankr. E.D. Tenn. 2000). However, the Trustee submits no evidence of fraudulent intent, nor does she even allege in her complaint that Defendants acted with fraudulent intent. Consequently, the Trustee is not entitled to summary judgment under § 727(d)(2).

With respect to the Trustee’s § 727(d)(3) claim, she relies on the act specified in § 727(a)(6) (A), that “debtor has refused, in the case . . . 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). The evidence is undisputed that Defendants have not provided any of the documents described in the court’s order for turnover. “Noncompliance with a court order is, however, insufficient by itself to warrant revoking a debtor’s bankruptcy discharge.” *Hunter v. Magack (In re Magack)*, 247 B.R. 406,409 (Bankr. N.D. Ohio). A debtor must have “refused” to obey a lawful order of the court. *Id.*; 11 U.S.C. § 727(a)(6)(A). Courts have determined that the

showing necessary to revoke a debtor's discharge for refusing to obey an order is the same as that for determining whether to hold a party liable for civil contempt. *Id.* at 409-10; *Hazlett v. Gorshe (In re Gorshe)*, 269 B.R. 744, 747 (Bankr. S.D. Ohio 2001); *United States v. Richardson (In re Richardson)*, 85 B.R. 1008, 1011 (Bankr. W.D. Mo. 1988). In a civil contempt proceeding, three elements must be established: “(1) the alleged contemnor had knowledge of the order which he is said to have violated; (2) the alleged contemnor did in fact violate the order; and (3) the order violated must have been specific and definite.” *Magack*, 247 B.R. at 410.

In this case, it is undisputed that Defendants violated the court’s order for turnover, which the court finds was specific and definite. The court’s order was served on both Defendants and on their counsel. [*See* Doc. # 12, Notice of Order].¹ Thus, there is no dispute that the Trustee has met her burden with respect to each of these elements. Nevertheless, Defendant Kristi Trejo asserts in her unsworn letter in response to the Trustee’s motion that Defendants are unable to comply with the court’s order as a result of a fire in their home. While impossibility or an inability to comply with a court order is a defense to a civil contempt proceeding, and thus, a defense to a claim under § 727(a)(6)(A) and (d)(3), as explained above, “Rule 56 . . . requires the nonmoving party to go beyond the pleadings and by [his or] her own affidavits, or by the ‘depositions, answers to interrogatories, and admissions on file,’ designate ‘specific facts showing that there is a genuine issue for trial.’” Defendants have presented no evidence at all in this case. Ms. Trejo’s statements in her letter, which are not under oath, are not competent evidence in opposition to summary judgment under the applicable rules of procedure. Moreover, copies of certain of the documents subject to the court’s turnover order, such as the tax returns, pay stubs, bank statements and cancelled checks, would also be available from third party sources for purposes of compliance with the court’s order. It is the debtors’ responsibility to locate and provide such records from available sources, *see* 11 U.S.C. § 521(4), not the Trustee’s duty to go find them as Ms. Trejo seems to indicate in her response. Because the undisputed evidence before the court establishes that Defendants refused to obey the court’s known, specific and lawful order for turnover, the Trustee is entitled to summary judgment revoking Defendants’ discharge.

CONCLUSION

Finding that the Trustee has failed to establish her claim under 11 U.S.C. § 727(d)(2) but also finding

¹ The court takes judicial notice of the contents of its case docket. Fed. R. Bankr. P. 9017; Fed. R. Evid. 201(b)(2); *In re Calder*, 907 F.2d 953, 955 n.2 (10th Cir. 1990).

that no genuine issue for trial exists with respect to her claim under 11 U.S.C. § 727(d)(3), the Trustee's Motion for Summary Judgment will be granted and Defendants' discharge will be revoked under 11 U.S.C. § 727(d)(3). A separate judgment in accordance with this memorandum of decision will be entered by the court.

For good cause shown,

IT IS ORDERED that Plaintiff's Motion for Summary Judgment [Doc. #8] is **GRANTED**.