

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE: *
*
JANETTE BROWN, *
*
Debtor. * CASE NUMBER 04-46202
*

*
MICHAEL D. BUZULENCIA, TRUSTEE, *
* ADVERSARY NUMBER 05-4152
*
Plaintiff, *
*
vs. *
*
JANETTE BROWN, *
* THE HONORABLE KAY WOODS
*
Defendant. *
*

M E M O R A N D U M O P I N I O N

This matter is before the Court on an unopposed Motion for Summary Judgment of Plaintiff/Trustee Michael Buzulencia ("Trustee") filed on March 30, 2006. The issue set forth in the Motion for Summary Judgment is whether Debtor's discharge should be denied for her failure to abide by this Court's May 25, 2006 Order Directing Turnover of Property (the "Turnover Order"). Debtor/Defendant Janette Brown ("Debtor") did not file a brief in opposition to the Motion for Summary Judgment.

This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334(b). This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(J). The following constitutes the Court's findings of fact and conclusions of law pursuant to FED. R. BANKR. P. 7052.

I. STANDARD OF REVIEW

The procedure for granting summary judgment is found in FED. R. CIV. P. 56(c), made applicable to this proceeding through FED. R. BANKR. P. 7056, which provides in part that:

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. BANKR. P. 7056(c).

Summary judgment is proper if 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); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). A fact is material if it could affect the determination of the underlying action. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Tennessee Department of Mental Health & Retardation v. Paul B.*, 88 F.3d 1466, 1472 (6th Cir. 1996). An issue of material fact is genuine if a rational fact-finder could find in favor of either party on the issue. *Anderson*, 477 U.S. at 248-49; *SPC Plastics Corp. v. Griffith (In re Structurlite Plastics Corp.)*, 224 B.R. 27 (B.A.P. 6th Cir. 1998). Thus, summary judgment is inappropriate "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. 242, 248 (1986). In a motion for summary judgment, the movant bears the initial burden to establish an absence of evidence to support the

nonmoving party's case. *Celotex*, 477 U.S. at 322; *Gibson v. Gibson (In re Gibson)*, 219 B.R. 195, 198 (B.A.P. 6th Cir. 1998). The burden then shifts to the nonmoving party to demonstrate the existence of a genuine dispute. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 590 (1992). 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). However, 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 v. J.C. Bradford & Co.*, 886 F.2d 1472, 1476 (6th Cir. 1989) (quoting *Anderson*, 477 U.S. at 257). 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. *Street*, 886 F.2d at 1479.

II. FACTS

On December 22, 2004, Debtor petitioned for relief under Chapter 7 of the Bankruptcy Code. Debtor did not list her 2004 tax refund on Schedule B (Personal Property) nor did she claim an exemption under Schedule C (Property Claimed as Exempt). However, based upon Debtor's statements at the meeting of creditors on February 15, 2005, Trustee formed the belief that Debtor might be entitled to a federal tax refund for 2004. As a consequence, on April 25, 2005,

Trustee filed a Motion for Turnover of Debtor's 2004 federal, state and local tax returns and tax refunds ("Motion for Turnover"). On May 18, 2005, Debtor submitted her 2004 Federal Income Tax Return (the "Tax Return") to the Trustee. The Tax Return showed that Debtor was entitled to receive a federal income tax refund of \$3,225.00 (the "Tax Refund"). The Motion for Turnover covered the Tax Refund, as well as copies of the Debtor's tax returns. Debtor failed to file a response to the Motion for Turnover or turn over the Tax Refund. As a consequence, this Court, on May 26, 2005, signed the Turnover Order requiring Debtor to turn over her tax returns and refunds. The Turnover Order was served on Samuel Altier, Esq. (Debtor's Attorney) and Debtor on May 28, 2005. Subsequent to issuance of the Turnover Order, Debtor failed to turn over the required items, including the Tax Refund. As a result of Debtor's failure to abide by the Turnover Order, Trustee initiated an adversary proceeding seeking to deny Debtor's discharge. The Complaint states that, in spite of the Turnover Order, Debtor has not turned over the Tax Refund. (Compl. ¶ 5-6.)

Debtor answered the Complaint on January 27, 2006, stating that, due to extreme financial duress, she is unable to comply with the request of the Trustee and Turnover Order.¹ The Answer specifically states:

¹Initially, Debtor incorrectly filed her Answer in the main bankruptcy case (Case No. 04-46202) on August 29, 2005. After receiving a Notice of Filing Deficiency, Debtor re-filed the Answer in the Adversary Proceeding on January 27, 2006.

Debtor/Defendant Janette Brown states that due to extreme financial duress she has been unable to comply with the request of the Trustee and the Courts [sic] Order directing turnover of property, to wit, her Tax Refund. Further Debtor states that the IRS has notified her that the bulk of her refund was improperly paid her [sic] and she now owes the IRS more than \$2,000.00 for her 2004 Income Tax Liability. It would therefore be inequitable for Debtor/Defendant to pay the same sums both to the Trustee and to the IRS.

(Answer ¶ 3.)

On March 30, 2006, the Trustee filed the Motion for Summary Judgment on the basis that there is no genuine issue of material fact that Debtor had not turned over the 2004 Tax Refund. Debtor failed to respond to the Motion for Summary Judgment.

III. LEGAL ANALYSIS

Based on all of the evidence before the Court, there are no genuine issues of material fact (*i.e.*, Debtor has failed to comply with the Turnover Order by turning over the Tax Refund to the Plaintiff.). In applying the law to these facts, as set forth below, Trustee has established all of the necessary elements of his cause of action.

The Tax Refund is property of the estate pursuant to 11 U.S.C. § 541. At issue is whether Debtor's failure to turn over the Tax Refund should result in a denial of discharge. In pertinent part, 11 U.S.C. § 727 states:

(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[.]

A bankruptcy court in the Northern District of Ohio in a similar case previously held that "in order to protect the integrity of the Bankruptcy process, § 727(a)(6)(A) provides that a debtor who refuses to obey any lawful order of the court, must be denied a discharge in bankruptcy." *Yoppolo v. Meyers (In re Meyers)*, 293 B.R. 417, 419 (Bankr. N.D. Ohio 2002). The Court went on to state that:

[A] debtor will be found to have 'refused' to obey a court order under § 727(a)(6)(A), when the debtor's inaction would give rise to a charge of civil contempt. [*citations omitted.*]

For purposes of federal law, a person will be found in civil contempt when all of the following three elements are met by clear and convincing evidence:

- (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.

Id. [*Internal Citations Omitted.*]

On May 26, 2005 this Court signed the Turnover Order directing Debtor to turn over her 2004 tax returns and 2004 tax refunds. The Notice of the Order was provided to Debtor and Debtor's Attorney on May 28, 2005. Based on the docket in this case and the acknowledgement of the Turnover Order in Paragraph 3 of Debtor's

Answer, (i.e., "[debtor] has been unable to comply with the request of the Trustee and Courts [sic] Order directing turnover of property."), it is evident that Debtor had knowledge of the Turnover Order. Thus, the first prong of the *Meyers* test is met.

As set forth above, Debtor did not turn over the Tax Refund – thereby violating the Turnover Order. As a result, prong two of the *Meyers* test is met. (Answer ¶ 3.)

The text of the Turnover Order expressly provides that it is: "ORDERED, ADJUDGED, AND DECREED that debtor JANETTE BROWN deliver forthwith to Michael D. Buzulencia, Trustee, the Federal, State and Local 2004 Tax Returns and 2004 Tax Refunds requested by Trustee in his Motion." (Turnover Order.) There is no ambiguity in the Turnover Order; it is "clear and definite" as required by prong three of *Meyers*. As a consequence, all that stands in the way of denial² of Debtor's discharge is Debtor's affirmative defense of inability to comply.

In a contempt proceedings, the basic proposition is that all orders and judgments of the court must be complied with promptly. *N.L.R.B. v. Cincinnati Bronze, Inc.*, 829 F.2d 585, 590 (6th Cir. 1987). Nevertheless, impossibility or an inability to comply with a judicial order is a valid defense to a charge of civil contempt. *United States v. Bryan*, 339 U.S. 323, 330-334, 70 S.Ct. 724, 730-732, 94 L.Ed. 884 (1950). Such a defense is, however, only effective where after using due diligence the person, through no fault

²In the Motion for Summary Judgment, Trustee states that a "Complaint for Revocation of Discharge was filed on August 2, 2005." (Motion for Summary Judgment p. 3.) Trustee actually filed a Complaint for Objection to Discharge. Since Debtor's debt has not yet been discharged, the Complaint is properly pled as a denial of discharge.

of their own, is still unable to comply with the order. To satisfy this burden, the contemnor may not merely assert a present inability to comply, but must also introduce supportive evidence showing that all reasonable efforts to comply have been undertaken. *Harrison v. Metropolitan Gov't of Nashville & Davidson County, Tenn.*, 80 F.3d 1107, 1112 (6th Cir. 1996), cert. denied, 519 U.S. 863, 117 S.Ct. 169, 136 L.Ed.2d 111 (1996). In other words, the contemnor must establish that he has been reasonably diligent and energetic in attempting to comply with the court's mandate by taking all reasonable steps within his power to ensure compliance. See *Palmigiano v. DiPrete*, 710 F.Supp. 875, 882 (D.R.I.1989) (crux of impossibility defense is a lack of power to carry out the orders of a court due to circumstances beyond's one [sic] control).

Hunter v. Magack (In re Magack), 247 B.R. 406, 410-411 (Bankr. N.D. Ohio 1999). (*Emphasis added.*)

As set forth above, Debtor provided her 2004 federal tax return to Trustee, which shows her entitlement to the Tax Refund. Debtor has never denied receiving the Tax Refund – she merely alleges in her Answer that she cannot comply with the Turnover Order because of extreme financial duress. (Answer ¶ 3.) However, this is an unsupported allegation. Debtor failed to put forth any evidence regarding (i) her financial hardship, (ii) her tax liability for 2004, and/or (iii) the IRS demand for return of a portion of the Tax Refund. Moreover, Debtor failed to oppose the Motion for Summary Judgment. As stated in FED. R. BANKR. P. 7056(e), Debtor may not rest on the allegations in her Answer alone. Due to the Debtor's failure to (i) comply with the Turnover Order, and (ii) respond to the Motion

for Summary Judgment, this Court grants the Motion for Summary Judgment.³

IV. CONCLUSION

Trustee has demonstrated that Debtor has failed to obey a Court order, (*i.e.*, the Turnover Order). Debtor has knowingly refused or failed to turn over property of the estate in contravention of a lawful order of the Court. As a result of the foregoing, this Court finds that Debtor's discharge should be denied pursuant to 11 U.S.C. § 727.

An appropriate Order will follow.

HONORABLE KAY WOODS
UNITED STATES BANKRUPTCY JUDGE

³Even if Debtor could establish, through evidence, her argument that she is required to pay back more than \$2,000.00 to the IRS, there remains a non-exempt portion of the Tax Refund to be turned over to Trustee.

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE: *
*
JANETTE BROWN, *
*
Debtor. * CASE NUMBER 04-46202
*

*
MICHAEL D. BUZULENCIA, TRUSTEE, *
* ADVERSARY NUMBER 05-4152
Plaintiff, *
*
vs. *
*
JANETTE BROWN, *
* THE HONORABLE KAY WOODS
Defendant. *
*

O R D E R

For the reasons set forth in this Court's Memorandum Opinion entered this date, the Motion for Summary Judgment filed by Michael Buzulencia is granted.

IT IS SO ORDERED.

HONORABLE KAY WOODS
UNITED STATES BANKRUPTCY JUDGE