

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION



| | | |
|--------------------------|---|-------------------------------------|
| In re: |) | Case No. 06-10113 |
| |) | |
| KYLEY COLE, |) | Chapter 7 |
| |) | |
| Debtor. |) | Judge Pat E. Morgenstern-Clarren |
| _____ |) | |
| |) | |
| MARY ANN RABIN, TRUSTEE, |) | Adversary Proceeding No. 06-1551 |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | |
| |) | |
| KYLEY COLE, |) | <u>MEMORANDUM OF OPINION</u> |
| |) | |
| Defendant. |) | |

The chapter 7 trustee Mary Ann Rabin filed this adversary proceeding seeking under bankruptcy code § 727(a)(6)(A) to revoke the debtor’s discharge on the ground that the debtor failed to comply with a court order to turn over property of the estate to the trustee. The trustee now moves for summary judgment on the ground that there is no genuine issue of material fact and she is entitled to judgment as a matter of law¹. The debtor did not respond to the motion and the time for doing so has expired. For the reasons stated below, the motion is denied without prejudice and the trustee is granted leave to file an amended complaint.

¹ Docket 15.

JURISDICTION

Jurisdiction exists under 28 U.S.C. § 1334 and General Order No. 84 entered by the United States District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C. §§ 157(b)(2)(A) and (J).

FACTS

These are the undisputed facts based on the docket:

The debtor filed her chapter 7 case on January 17, 2006. On June 9, 2006, this court entered an order requiring the debtor to turn over to the trustee \$5,043.22.² The debtor has failed to comply with the order.

The trustee filed a “Complaint to revoke discharge and dismiss case” citing bankruptcy code § 727(a)(6)(A) as the legal basis. The complaint asked that the debtor’s discharge be revoked. There is, however, no indication on the docket that the debtor has received a discharge.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate only where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See* FED. R. CIV. P. 56(c) (made applicable by FED. R. BANKR. P. 7056); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). The movant must initially demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. at 323. Summary judgment “shall be rendered . . . if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact[.]” FED. R. CIV. P. 56(c).

² Docket 37.

Once a movant has met its burden, the burden shifts to the nonmoving party to show the existence of a material fact which must be tried. *Id.* The nonmoving party must oppose a proper summary judgment motion “by any of the kinds of evidentiary material listed in Rule 56(c), except the mere pleadings themselves” *Celotex Corp. v. Catrett*, 477 U.S. at 324. All reasonable inferences drawn from the evidence must be viewed in the light most favorable to the party opposing the motion. *Hanover Ins. Co. v. Am. Eng’g Co.*, 33 F.3d 727, 730 (6th Cir. 1994). The issue at this stage is whether there is evidence on which a trier of fact could reasonably find for the nonmoving party. *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1477 (6th Cir. 1989).

DISCUSSION

Bankruptcy code § 727(d)(3) provides that:

(d) On request of the trustee, a creditor, or the United States trustee, and after notice and a hearing, the court shall revoke a discharge granted under subsection (a) of this section if –

* * *

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

11 U.S.C. § 727(d)(3).

Subsection (a)(6) provides that a debtor is not entitled to a discharge if:

* * *

(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;


11 U.S.C. § 727(a)(6)(A).

The procedural difficulty in this case is that the trustee filed a complaint to revoke the debtor’s discharge, but the debtor has not received a discharge. The trustee is not, therefore,

entitled to summary judgment at this point. Additionally, the court notes that the trustee did not support her motion with an affidavit addressing the alleged failure to pay the money at issue.

CONCLUSION

The trustee's motion for summary judgment is denied. A separate order will be entered denying the trustee's motion for summary judgment without prejudice and granting the trustee leave to file an amended complaint by **November 15, 2006** addressing the bankruptcy code section applicable to the facts of this case.



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

THIS OPINION NOT INTENDED FOR PUBLICATION

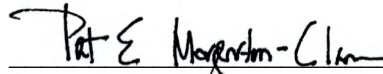
UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION



| | | |
|--------------------------|---|----------------------------------|
| In re: |) | Case No. 06-10113 |
| |) | |
| KYLEY COLE, |) | Chapter 7 |
| |) | |
| Debtor. |) | Judge Pat E. Morgenstern-Clarren |
| _____ |) | |
| |) | |
| MARY ANN RABIN, TRUSTEE, |) | Adversary Proceeding No. 06-1551 |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | <u>ORDER</u> |
| |) | |
| KYLEY COLE, |) | |
| |) | |
| Defendant. |) | |

For the reasons stated in the memorandum of opinion issued this same date, the trustee's motion for summary judgment is denied without prejudice. The trustee is granted leave to file an amended complaint by **November 15, 2006** addressing the bankruptcy code section applicable to the facts of this case.

IT IS SO ORDERED.



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge