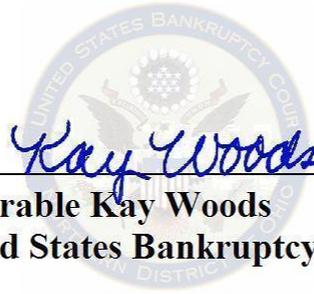


IT IS SO ORDERED.



Dated: March 27, 2007
06:11:59 PM

Honorable Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

ROBERT JAMES ALDORASI

Debtor.

CASE NUMBER 05-40509

ELAINE B. GREAVES,

Plaintiff,

vs.

ROBERT JAMES ALDORASI,

Defendant.

ADVERSARY NUMBER 06-4105

THE HONORABLE KAY WOODS

M E M O R A N D U M O P I N I O N
(NOT INTENDED FOR NATIONAL PUBLICATION)

The following opinion is not intended for national publication and carries limited precedential value. The availability of this opinion by any source other than www.ohnb.uscourts.gov is not the result of direct submission by this Court. The opinion is

available for electronic citation at www.ohnb.uscourts.gov pursuant to the E-Government Act of 2002 (Pub. L. No. 107-347).

This cause came before the Court for a bench trial on March 22, 2007. Plaintiff Elaine B. Greaves, Esq., Trustee ("Trustee") appeared on her own behalf. Debtor/Defendant Robert James Aldorasi ("Debtor") did not appear, but was represented by Robert A. Ciotola, Esq.

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334. Venue in this Court is proper pursuant to 28 U.S.C. §§ 1391(b), 1408, and 1409. 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.

Debtor filed his Chapter 7 petition on February 4, 2005. In his Statement of Financial Affairs, Debtor disclosed income in the amount of \$35,000.00 for 2003 and 2004, and income in the amount of \$2,000.00 for 2005. On Schedule I, Debtor listed his total combined monthly income as \$2,030.00.

At the § 341 meeting of creditors conducted on March 28, 2005, Debtor informed Trustee that he had not filed federal or state income tax returns for 2003 or 2004. Additional information revealed that Debtor was divorced and had no dependents. Trustee instructed Debtor to file federal and state income tax returns for 2003 and 2004 and to provide copies of the returns to his counsel. Trustee advised Debtor that she would direct the Internal Revenue Service to pay any refund(s) to her on behalf of the estate, but, in the event a refund was paid to Debtor, he was obligated to turn

over the non-exempt portion of his federal and/or state income tax refund(s) to Trustee.¹ The Order of discharge was entered on August 1, 2005.

On October 28, 2005, Trustee filed a Motion for Turnover of Debtor's 2004 federal and state income tax returns. In the motion, Trustee indicated that, despite her best efforts to obtain the requested information, Debtor and his attorney had refused or neglected to comply with Trustee's request. At the hearing on the motion, Debtor's counsel stated that he had communicated to Debtor that he was obligated to file federal and state income tax returns for 2004.

In an Order dated December 5, 2005, the Court granted the motion and ordered Debtor "to turn over to Trustee a copy of his 2004 Federal and State tax returns" ("Turnover Order"). There is no notation on the docket that the Order was returned to the Court as undeliverable. However, Debtor did not turn over his 2004 federal and state income tax returns. As a consequence, on May 24, 2006, Trustee filed her Adversary Complaint seeking revocation of Debtor's discharge pursuant to 11 U.S.C. § 727(d)(3).

The principal purpose of the Bankruptcy Code is to grant a "fresh start" to the "honest but unfortunate debtor." *Marrama v. Citizens Bank of Massachusetts*, __ U.S. __, 127 S.Ct. 1105, 1107

¹R.C. § 2329.66(b)(4)(a), captioned "Property that person domiciled in this state may hold exempt" reads, in pertinent part:

(A) Every person who is domiciled in this state may hold property exempt from execution, garnishment, attachment, or sale to satisfy a judgment or order, as follows: . . .

(4)(a) The person's interest, not to exceed four hundred dollars, in. . .tax refunds. . . .

See OHIO REV. CODE ANN. § 2329.66 (West 2005).

(2007)(quoting *Grogan v. Garner*, 498 U.S. 279, 286-287, 111 S.Ct. 654 (1991)). Section 727(a) of the Bankruptcy Code provides that a debtor is entitled to a discharge in bankruptcy unless one or more of a series of conditions listed in subsections (a)(1) through (a)(10) applies.

Section 727(d)(1) provides, in pertinent part, "On request of the trustee. . .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 (West 2005). Section 727(a)(6) reads, in pertinent part, "The court shall grant the debtor a discharge, unless - (6) the debtor had 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." *Id.* Trustee contends that Debtor's noncompliance with the Turnover Order is proper grounds for the revocation of his discharge.

The party seeking revocation bears the burden of proof by a preponderance of the evidence. *Keeney v. Smith (In re Keeney)*, 227 F.3d 679, 683 (6th Cir. 2000). Section 727(d) is liberally construed in favor of the debtor and strictly construed against the party seeking revocation." *Id.* At the same time, courts recognize that "a discharge in bankruptcy is a privilege, not a right, and should only inure to the benefit of the honest debtor." *In re Juzwiak*, 89 F.3d 424, 427 (7th Cir. 1996).

Because Congress requires that a debtor refuse to obey any lawful order of the court in § 727(a)(6), rather than simply fail to obey such an order, bankruptcy courts have concluded that simple

noncompliance with a court order is insufficient to warrant revoking a debtor's discharge. *Parker v. Hudson (In re Hudson)*, ___ B.R. ___, 2007 WL 709812 (Bankr. N.D. Ohio (March 5, 2007))(quoting *Hunter v. Magack (In re Magack)*, 247 B.R. 406, 409 (Bankr. N.D. Ohio 1999)).

Instead, courts have agreed that, in addition to noncompliance, a trustee seeking revocation of a debtor's discharge based upon § 727(a)(6) must demonstrate that: (i) the debtor had knowledge of the order which he is said to have violated; (ii) the debtor did, in fact, violate the order; and (iii) the order violated must have been specific and definite. *Hudson* 2007 WL 709812 at *2, *Magack*, 247 B.R. at 410.

At trial, counsel for Debtor advanced two arguments: First, he argued that Debtor did not have knowledge of the Turnover Order.² Second, he asserted that the Court should consider entering judgment in favor of Trustee for an amount to be determined in the future (based upon amount of any potential income tax refund(s) minus Debtor's exemption) in lieu of the ultimate sanction of revoking Debtor's discharge.

According to Debtor's counsel, his last contact with Debtor was at the § 341 meeting in March 2005. Counsel for Debtor explained that Debtor and a group of his co-workers had won the "Mega Millions" lottery jackpot sometime in March 2005. As a result of the substantial jackpot, Debtor became an instant multi-millionaire. Counsel for Debtor surmised that Debtor left

²Because counsel for Debtor did not challenge the second and third parts of the *Magack* test, the Court will assume that Debtor concedes that he did, in fact, violate the Turnover Order and that the Turnover Order was specific and definite.

Ashtabula, Ohio immediately following his reversal of fortune, and, as a consequence, never received a copy of the Motion for Turnover or the Turnover Order. Debtor's counsel concluded that Debtor did not have knowledge of the Turnover Order and, therefore, could not have "refused" to comply with said order.

In contrast, Trustee represented that she served Debtor with the Motion for Turnover at 2631 Eureka Road, Ashtabula, Ohio, which is the address Debtor listed in his petition ("residential address") and that the Motion was not returned as undeliverable. Therefore, neither the Motion for Turnover, which was sent to Debtor's residential address, nor the Turnover Order, which was sent to Debtor's P.O. Box address³ listed on the docket, was ever returned.

When an item is properly mailed there is a presumption that the item was received by the addressee. *Hagner v. United States*, 285 U.S. 427, 52 S. Ct. 417 (1932). While testimony of non-receipt, standing alone, may be sufficient to rebut the presumption, see *Bratton v. Yoder (In re Yoder)*, 758 F.2d 1114, 1119 (6th Cir. 1985), counsel for Debtor's supposition that Debtor left Ashtabula at some unidentified time after winning the lottery is insufficient to convince the Court that Debtor did not receive the Turnover Order.

Furthermore, assuming, *arguendo*, that Debtor left Ashtabula prior to the issuance of the Turnover Order, his noncompliance with the Order is the result of a willful violation of the Bankruptcy Rules. In addition to his duty to comply with orders of the Court,

³Although the P.O. Box address does not appear in the petition, such address was supplied by Debtor's counsel.

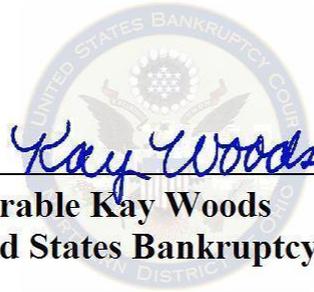
Bankruptcy Rule 4002, captioned "Duties of Debtor," reads, in pertinent part, "[T]he debtor shall. . .(5) file a statement of any change of the debtor's address." FED. R. BANKR. P. 4002 (West 2005).

Here, Debtor has not merely "failed" to comply with the Turnover Order through inadvertence or error. Instead, Debtor has either (i) willfully failed to comply with the Turnover Order, or (ii) made himself willfully ignorant of the Order by leaving the jurisdiction without informing the Court or his attorney of his new address. Simply stated, a debtor may not enjoy the protections of the Bankruptcy Code and, at the same time, avoid the responsibilities of the Code by absenting himself from the jurisdiction of the Court.

Finally, the Court finds that Debtor's counsel's alternative sanction places too much uncertainty and, as a consequence, too great a burden on Trustee to execute the proposed judgment on Debtor. Debtor was informed at the § 341 meeting by both Trustee and his counsel of the essential nature of filing his income tax returns. Debtor either received the Motion for Turnover and the Turnover Order, or did not receive them as a result of his entirely voluntary disappearance. Therefore, the Court finds that (i) Debtor either refused to comply with the Turnover Order or willfully blinded himself to it, (ii) Debtor did, in fact, violate the Turnover Order, and (iii) the Turnover Order was specific and definite. Accordingly, Debtor's discharge is revoked pursuant to § 727(d)(3). An appropriate order will follow.

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IT IS SO ORDERED.



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THE HONORABLE KAY WOODS

O R D E R

For the reasons stated in the Memorandum Opinion entered on this date, Debtor, Robert James Aldorasi's discharge is revoked pursuant to 11 U.S.C. § 727(d)(3).

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