

NOT FOR COMMERCIAL PUBLICATION
UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION



In re:) Case No. 06-10443
RENEE D. WALKER,)
Debtor.) Chapter 7
) Judge Pat E. Morgenstern-Clarren
) **MEMORANDUM OF OPINION**
) (Not for commercial publication)

The debtor Renee Walker received a federal tax refund three weeks before she filed her chapter 7 case. This dispute centers on what the debtor did with that refund. The chapter 7 trustee, contending that the debtor had some of the money on hand at filing, filed a motion for the debtor to turn over those funds as property of the estate.¹ The debtor denies that she had any of the funds on the filing date and, therefore, opposes the motion.² For the reasons stated below, the motion is granted.

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)(E).³

FACTS

I.

The court held an evidentiary hearing on August 24, 2007. The trustee presented his case through cross-examination of the debtor and her counsel, together with exhibits. The debtor

¹ Docket 41.

² Docket 43.

³ In the court's view, the value of this opinion is solely to decide the dispute between the parties, rather than to add anything to the general bankruptcy jurisprudence. For that reason, the opinion is not intended for commercial publication.

presented her case through her own testimony and cross-examination of the trustee. The parties also stipulated to several facts.⁴

These findings of fact are based on that evidence and reflect the court's weighing of the evidence presented, including determining the credibility of the witnesses. "In doing so, the Court considered the witness's demeanor, the substance of the testimony, and the context in which the statements were made, recognizing that a transcript does not convey tone, attitude, body language or nuance of expression." *In re The V Companies*, 274 B.R. 721, 726 (Bankr. N.D. Ohio 2002). See FED. R. BANKR. P. 7052 (incorporating FED. R. CIV. P. 52 and applicable in contested matters under FED. R. BANKR. P. 9014). When the court finds that a witness's explanation was satisfactory or unsatisfactory, it is using this definition:

The word satisfactory may mean reasonable, or it may mean that the Court, after having heard the excuse, the explanation, has that mental attitude which finds contentment in saying that he believes the explanation—he believes what the [witness] says with reference to the [issue at hand]. He is satisfied. He no longer wonders. He is contented.

United States v. Trogdon (In re Trogdon), 111 B.R. 655, 659 (Bankr. N.D. Ohio 1990) (internal citation and quotation omitted).

II.

On January 31, 2006, H&R Block prepared the debtor's 2005 federal income tax return which showed that the debtor was owed a refund. The debtor received a net refund of \$2,761.05 the same day.⁵ Three weeks later, on February 20, 2006, the debtor filed her chapter 7 case through her attorney, Charles Van Ness. As part of her filing, the debtor listed monthly income of \$1,776.65 with monthly expenses of \$1,713.00, leaving a net monthly income of \$63.65. She

⁴ Docket 59.

⁵ Tr. exh. 1 and 2 at 11.

had \$40.00 cash and funds on deposit of \$306.99.⁶ She scheduled \$36,519.64 in unsecured debt and no secured debt.

Chapter 7 trustee Richard Baumgart held the meeting of creditors on March 20, 2006. *See* 11 U.S.C. § 341. The debtor appeared with counsel. Because the debtor had received a large tax refund shortly before the case filing, the trustee asked the debtor what she had done with it. The debtor answered, under oath, that she spent it before the filing. When asked what she spent it on, the debtor stated that she paid \$1,900.00 of it to her landlord. The trustee asked the debtor and counsel for an accounting, including documentation, of how the money was spent and adjourned the meeting to April 3, 2006.

By letter dated March 25, 2006, Mr. Van Ness sent the trustee documents provided by the debtor.⁷ His cover letter had as numbered paragraph 2 “Accounting of income tax refunds.” Underneath that, the letter listed “Rent (past due and present) \$2,462.00”, among other things. In support, counsel enclosed a letter dated March 21, 2006 from the debtor’s landlord, East Shore Management, signed by Vytas Apanavicius, stating:

Renee Walker had owed back rent as of September 30, 2005 in the amount of \$2,765.00. Payments made toward the back rent as of March 21, 2006 have totaled \$2,462.00. Payments still due towards Ms. Walker’s back rent is \$303.00.⁸

As further accounting for the tax refund, the letter enclosed (1) prepetition receipts totaling \$418.08; and (2) postpetition receipts for an additional sum. The trustee accepted the prepetition receipts as an adequate accounting and refused to give the debtor credit for the postpetition receipts on the ground that they showed that the debtor had those funds at filing.

Due to circumstances that need not be repeated here, the April 3, 2006 meeting was not held, but was adjourned. By letter dated April 26, 2006, Mr. Van Ness wrote to the trustee:

⁶ Docket 1, Schedule B Personal Property; Stip. 2 and 3.

⁷ Tr. exh. 2.

⁸ Tr. exh. 2 at 3.

. . . I am enclosing further documentation to assist your investigation:

1. A letter from Debtor's landlord which states they received \$1,900.00 on February 15, 2006 for rent. This money came from her tax refund.⁹

The enclosed letter is on East Shore Management stationery, dated April 24, 2006, signed by Vytas Apanavicius, and states in part:

Renee Walker made a payment [of] \$1900.00 on February 15, 2006. Payments have been made toward her back rent as of the dates mentioned. Payments are payed [sic] in full as of April 24, 2006.¹⁰

At this point, the trustee was concerned that the landlord may have received a preferential payment, *see* 11 U.S.C. § 547, and so he contacted the landlord, who denied writing the April 24, 2006 letter. The trustee continued to request information from the debtor.

By letter dated August 22, 2006, Mr. Van Ness wrote to the trustee's counsel that he had also spoken to Mr. Apanavicius and stated that ". . . I am also convinced that he did not write or fax the second letter dated 4/24/06."¹¹ And again, on September 20, 2006, Mr. Van Ness acknowledged on behalf of the debtor that "there is no dispute that the letter submitted by my client dated 4-24-06 is not authentic."¹² The trustee took the debtor's deposition on September 28, 2006. She again failed to provide documentation accounting for the refund.

On April 2, 2007, the trustee filed the turnover motion. At trial, the debtor admitted that her testimony at the 341 meeting that she paid the landlord \$1,900.00 from her tax refund was false and that she had forged the April 24, 2006 letter from the landlord. She claimed that she spent the money prepetition on her daughter's college expense, paid \$800.00 to her landlord, gave some money to her mother, and bought food and toiletries. She did not, however, provide

⁹ Tr. exh. 3.

¹⁰ Tr. exh. 3 at 3.

¹¹ Tr. exh. 6.

¹² Tr. exh. 7.

any breakdown of these expenses and again had no documentation. She also testified that the trustee was not pleasant to her at the 341 meeting and she “felt like she had to lie.” She suggested that the trustee’s motives were racist, citing a comment he made to the effect that: “Oh, *you’re* the one who works for the Cleveland schools and has a daughter in private school.” The debtor testified that she claimed falsely at the 341 meeting that she paid the landlord \$1,900.00 because that was the amount unaccounted for from the refund.

THE POSITIONS OF THE PARTIES

The trustee argues that the debtor had some of the tax refund in her possession at the time of the case filing, which makes it property of the estate, and that she should be required to turn it over to the trustee after being credited with the appropriate exemptions. The debtor contends that she spent the money before the filing and that it is not property of the estate.

DISCUSSION

I.

A chapter 7 estate generally consists of “all legal or equitable interests of the debtor in property as of the commencement of the case.” 11 U.S.C. § 541(a)(1). Money that the debtor has on hand at the time of filing is property of the estate, although the debtor is entitled to certain exemptions. 11 U.S.C. § 522. A debtor has a duty to surrender property of the estate to the trustee. 11 U.S.C. § 521(a)(4). The chapter 7 trustee may file a turnover action against any entity in possession of estate property, including the debtor. 11 U.S.C. § 542(a). The subject of the action must turn over either the original property or its value. 11 U.S.C. § 542(a). With exceptions set out in the bankruptcy code, property transferred by the debtor prepetition is not property of the estate and is, therefore, not subject to a turnover action. *In re Todd*, 359 B.R. 863, 864 (Bankr. N.D. Ohio 2007).

The trustee has the burden of proof by a preponderance of the evidence. *In re Danowski*, 320 B.R. 886, 887 (Bankr. N.D. Ohio 2005).¹³ If the trustee establishes at least a prima facie case, the burden of persuasion shifts to the other party to explain or otherwise go forward. *Evans v. Robbins*, 897 F.2d 966, 968 (8th Cir. 1990); *In re Danowski*, 320 B.R. at 887. The ultimate burden of proof, however, always remains with the trustee. *Evans*, 897 F.2d at 968; *In re Danowski*, 320 B.R. at 887.

II.

The trustee testified that he asked the debtor to account for the tax refund because he was pursuing two possible issues: whether the debtor had cash on hand at filing that would be property of the estate and whether the debtor made any preferential payments with the refund which could be recovered by the estate. These are both legitimate inquiries. The debtor had several opportunities over many months to provide a truthful explanation, but failed to do so.

The debtor's first opportunity to provide a full explanation was at the 341 meeting where she testified under oath that she used \$1,900.00 of the tax refund to pay her landlord before she filed her bankruptcy case. The debtor admitted at trial that she had not made that payment. She had her next opportunity to explain truthfully how she used the money when, at the trustee's request, she gave payment documentation to her attorney. Some of the receipts she gave him were for postpetition expenses; this did not help her case because by definition it showed that she had at least some of the money on hand at filing which she then spent postpetition. She also provided her attorney with a letter from her landlord that was subject to different interpretations.

¹³ There is a split of authority over the appropriate standard of proof to be applied. *See In re Santaella*, 298 B.R. 793, 799 (Bankr. S.D. Fla. 2002) (discussing the split of authority on this issue); *Alofs Mfg. Co. v. Toyota Mfg., Ky., Inc. (In re Alofs Mfg. Co.)*, 209 B.R. 83, 89 (Bankr. W.D. Mich. 1997) (same). Neither party briefed this issue, and the court finds that the better reasoned position is that the trustee's burden is a preponderance of the evidence. *See Grogan v. Garner*, 498 U.S. 279, 286 (1991) (creating a presumption that the preponderance of the evidence "standard is applicable in civil actions between private litigants, unless particularly important individual interests or rights are at stake.") (internal citations and quotation marks omitted).

Asked again to provide a documented explanation for how the funds were used, the debtor provided a second letter purporting to be from her landlord. First the trustee and then the debtor's counsel found the second letter to be a forgery. The trustee later took the debtor's deposition under oath at which time she again failed to provide an accounting for the funds.

At trial, again under oath, the debtor admitted that her earlier testimony was false and that she had forged the second landlord letter. She testified again, however, that she had spent all of the money before she filed her case, this time saying that she paid \$800.00 to the landlord (without corroborating evidence from the landlord), paid some of her daughter's college expenses (without identifying the amount or providing corroborating evidence from the college), gave some money to her mother (without identifying the amount or corroborating evidence from her mother), and bought food and toiletries (without receipts or any attempt at an itemization).

The trustee proved that the debtor received the tax refund, filed her case three weeks later, and subsequently lied about how she spent it. The debtor attempted to corroborate that lie by forging a document. When caught, she gave additional conflicting accounts of how she used the money, none of which was supported by any documentation or other corroborating evidence. If, for example, she really did give some of the money to her mother, she could have called her mother as a witness to testify as to the amount and the reason for the transfer; she did not. The same is true for amounts supposedly paid to the landlord and for the daughter's benefit. Based on all of the above, and having observed the debtor at trial, the court does not believe any of the accounts given by the debtor and finds that the preponderance of the evidence shows that she had the money when she filed, less amounts for which she provided receipts.

By way of either explanation or mitigation, the debtor suggested that the trustee's conduct at the 341 meeting made her think that he was treating her disrespectfully because of her race, which contributed to her decision to lie. The comment attributed to the trustee was not overtly racist, although it was ill-advised because it was irrelevant to the legal issues at hand. Regardless, there is nothing in the trustee's behavior that would excuse the debtor's lies.

The court finds based on this analysis that the debtor had some of the tax refund in her possession at the time of filing and that she concealed the funds from the trustee to avoid paying them over to the estate. The trustee calculated the amount due to the estate in this fashion,¹⁴ and the debtor did not object to the calculation:

2005 Federal tax refund	\$2,761.05
2005 State tax refund	\$119.00
Cash on hand	\$40.00
First Merit account balance	\$187.37
Ohio Educational Credit Union balance	<u>\$119.62</u>
Subtotal	\$3,227.04
Less funds accounted for	<u>(\$418.08)</u>
Subtotal	\$2,808.96
Less available exemptions under bankruptcy code §522	<u>(\$800.00)</u>
Total amount owed to estate	\$2,008.96

The \$2,008.96 which the debtor had in her possession at the time of filing is property of the chapter 7 estate and is subject to turnover.

CONCLUSION

For the reasons stated, the trustee met his burden of proof and his motion is granted, with the debtor ordered to turn over \$2,008.96 to the trustee. A separate order will be entered reflecting this decision.



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

¹⁴ Trustee's brief at 3.

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RENEE D. WALKER,)
Debtor.) Chapter 7
) Judge Pat E. Morgenstern-Clarren
) **ORDER**
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For the reasons stated in the memorandum of opinion issued this same date, the chapter 7 trustee's motion for turnover is granted and the debtor is ordered to turnover \$2,008.96 to the trustee. (Docket 41).

IT IS SO ORDERED.



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge