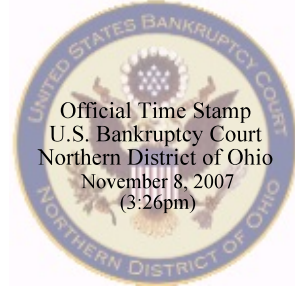


NOT FOR COMMERCIAL PUBLICATION

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION



In re: ) Case No. 06-10443  
)  
RENEE D. WALKER, ) Chapter 7  
)  
Debtor. ) Judge Pat E. Morgenstern-Clarren  
)  
\_\_\_\_\_) )  
HABBO G. FOKKENA, UNITED STATES ) Adversary Proceeding No. 07-1242  
TRUSTEE,<sup>1</sup> )  
Plaintiff, )  
)  
v. )  
)  
RENEE D. WALKER, ) **MEMORANDUM OF OPINION**  
) **REGARDING SUMMARY JUDGMENT**  
Defendant. ) (NOT FOR COMMERCIAL PUBLICATION)

The United States trustee filed this adversary proceeding to request the revocation of defendant-debtor Renee Walker's discharge. The debtor moves for summary judgment on the complaint and the UST opposes that request.<sup>2</sup> For the reasons stated below, the debtor's motion is denied.<sup>3</sup>

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<sup>1</sup> The complaint was filed by Saul Eisen, the former United States Trustee in this district.

<sup>2</sup> See docket 16, 17, 21.

<sup>3</sup> In the court's view, the value of this opinion is solely to decide the dispute between the parties and not as an addition to the general jurisprudence. For that reason, the opinion is not intended for commercial publication.

## 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)(J).

## THE SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate 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); *see also 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.*, 477 U.S. at 323. To meet this burden, the moving party may rely on any of the evidentiary materials listed in rule 56(c). A fact is material if its resolution will affect the determination of the underlying action. *Tenn. Dep't of Mental Health & Mental Retardation v. Paul B.*, 88 F.3d 1466, 1472 (6th Cir. 1996). “The substantive law determines which facts are ‘material’ for summary judgment purposes.” *Hanover Ins. Co. v. Am. Eng'g Co.*, 33 F.3d 727, 730 (6th Cir. 1994) (citations omitted). An issue is genuine if a rational trier of fact could find in favor of either party on the issue. *Schaffer v. A.O. Smith Harvestore Prods., Inc.*, 74 F.3d 722, 727 (6th Cir. 1996) (citation omitted).

If the moving party meets this burden, the burden shifts to the non-moving party to show the existence of a material fact which must be tried. *Id.* The non-moving party “may not rest upon the mere allegations . . . of [its] pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial.” FED. R. CIV. P. 56(e). Those facts may be shown “by any of the kinds of evidentiary materials listed in Rule 56(c) . . . .” *Celotex Corp.*, 477 U.S. at 324.

When addressing a motion for summary judgment, all reasonable inferences drawn from the evidence must be viewed in the light most favorable to the party opposing the motion.

*Hanover Ins. Co.*, 33 F.3d at 730. 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**

The debtor filed her case on February 20, 2006 and was granted a discharge on May 24, 2006. The UST's request to revoke the debtor's discharge under bankruptcy code §§ 727(d)(2) and (d)(3) relates to the debtor's actions with respect to tax refunds and the trustee's efforts to obtain information about them. 11 U.S.C. § 727(d)(2), (d)(3). The UST alleges that the debtor received refunds before filing her bankruptcy case, did not include them on her bankruptcy schedules, failed to provide the chapter 7 trustee with a complete and accurate accounting of the funds, and failed to turn over the non-exempt portion of the funds to the trustee.<sup>4</sup> The UST also alleges that the debtor failed to appear at a court ordered Rule 2004 examination. *See* FED. R. BANKR. P. 2004. The UST must prove his case by a preponderance of the evidence. *Keeney v. Smith (In re Keeney)*, 227 F.3d 679, 683 (6th Cir. 2000); *see also* FED. R. BANKR. P. 4005.

#### **Section 727(d)(2)**

Counts 1 and 2 of the complaint seek revocation under § 727(d)(2), which provides for revocation of a debtor's discharge if:

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

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<sup>4</sup> The debtor was ordered to turn over a portion of her federal tax refund on the chapter 7 trustee's motion. *See In re Renee Walker*, case no. 06-10443, docket 63, 64.

acquisition of or entitlement to such property, or to deliver or surrender such property to the trustee[.]

11 U.S.C. § 727(d)(2). Count 1 asserts that the debtor knowingly and fraudulently failed to report her acquisition of or entitlement to the tax refunds. Count 2 asserts that the debtor knowingly and fraudulently failed to deliver or surrender the refunds to the trustee.

### **Section 727(d)(3)**

Section 727(d)(3) provides for revocation of a debtor's discharge if "the debtor committed an act specified in subsection (a)(6) of this section[.]" 11 U.S.C. § 727(d)(3). Subsection 727(a)(6), in turn, provides for denial of discharge when the debtor "has refused . . . 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). Count 3 of the complaint seeks revocation under this provision based on the debtor's failure to appear in response to the court's order for a Rule 2004 examination.

### **The Summary Judgment Motion**

The debtor requests summary judgment on each of the three counts, arguing that there is no genuine issue of material fact and that she is entitled to judgment as a matter of law.

The debtor asserts that relief is not available under § 727(d)(2) because she did not fail to disclose the refund. This argument, which appears to address count 1, fails because there is a genuine issue of material fact regarding the debtor's disclosure of the refunds. The UST has alleged that the debtor did not schedule the tax refunds and that they were discovered by the chapter 7 trustee at the meeting of creditors. Although the debtor has denied those allegations in her answer, she has not presented any evidence to support her version of the facts on summary judgment. Moreover, she has acknowledged that she gave the trustee contradictory explanations

regarding her disposition of the funds. Therefore, whether the debtor failed to report her acquisition of and entitlement to the refunds within the meaning of § 727(d)(2) is a factual issue that must be resolved at trial.

Count 2 alleges that the debtor fraudulently failed to deliver or surrender property to the trustee. Although the debtor argues that summary judgment on that claim is appropriate because the disputed property has now been delivered to the trustee, that is clearly not the case. Whether the debtor fraudulently failed to deliver or surrender the non-exempt portion of her refund before being ordered to do so by the court is a factual dispute that must be resolved at trial.

The debtor's request for summary judgment as to counts 1 and 2 is, therefore, denied.

The debtor also argues that she is entitled to summary judgment on count 3. She acknowledges that she did not appear as ordered at the initial Rule 2004 examination, but asserts that she ultimately did appear to be examined and that her initial failure was due to confusion concerning her responsibilities. The debtor has not, however, submitted an affidavit or any evidence to support her version of the facts and summary judgment is not appropriate. The facts surrounding the debtor's failure to attend the Rule 2004 examination are clearly material to a decision as to whether a revocation of the debtor's discharge is warranted under § 727(d)(3) and those facts must be developed at a trial. Moreover, to the extent the debtor's suggestion that § 727(d)(3) requires an absolute disregard for a court order was intended to be a legal argument, that argument was not developed and is best addressed in the context of a complete factual record. The debtor's request for summary judgment on count 3 is, therefore, denied.

**CONCLUSION**

For the reasons stated, the defendant's motion for summary judgment is denied.

A separate order will be entered reflecting this decision.

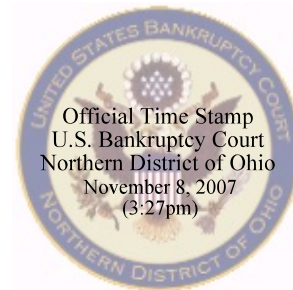


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Pat E. Morgenstern-Clarren  
United States Bankruptcy Judge

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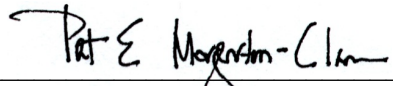
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TRUSTEE, <sup>1</sup>	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
RENEE D. WALKER,	)	<b>ORDER</b>
	)	(NOT FOR COMMERCIAL PUBLICATION)
Defendant.	)	

For the reasons stated in the memorandum of opinion entered this same date, the defendant debtor's motion for summary judgment is denied. (Docket 16).

IT IS SO ORDERED.

  
 \_\_\_\_\_  
 Pat E. Morgenstern-Clarren  
 United States Bankruptcy Judge

<sup>1</sup> The complaint was filed by Saul Eisen, the former United States Trustee in this district.