

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OHIO

IN RE: : CHAPTER 7
RANDALL LEE WINTERS :
SHIRLEY ANN WINTERS :
DEBTORS. : CASE NUMBER 07-60786
HABO FOKKENA, U.S. TRUSTEE :
PLAINTIFF :
vs. : JUDGE RUSS KENDIG
RANDALL LEE WINTERS :
SHIRLEY ANN WINTERS :
DEFENDANTS. : ADVERSARY CASE NUMBER 07-6053

**REPLY IN OPPOSITION TO PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT (RULE 7056)**

Defendants, Randall Lee Winters and Shirley Ann Winters, through their attorney object to and oppose Plaintiff's Motion for Summary Judgment.

Rule 7056 adopts Rule 56 of the Federal Rules of Civil Procedures. For Claimant's Motion to be granted it must appear to the Court from the Affidavits filed that construing the assertions made most favorably to the defense, that the Court can reach but one conclusion in favor of the Claimant.

The Court's analysis must commence with a review of the Complaint. Plaintiff served an Amended Complaint upon Defendants asserting two separate basis for denying Defendants their Chapter 7 Discharge.

The first violation asserted is that:

"the debtor has...falsified...any recorded information from which the debtor's financial condition...may be ascertained, unless such act or failure to act is justified in all the circumstances of the case."

The second violation asserted is that:

"the debtor knowingly and fraudulently, in connection with the case-...made a false oath or claim."

FACTUAL FAILURE OF PROOF

The Court's analysis must then turn to a review of the Affidavit of Movant. Unfortunately, no Affidavit has been filed by the Movant that the Court can rely on. See attached docket report, Pacer 10/31/07.

Assuming arguendo that an Affidavit had been attached asserting the factual statements contained in Movant's Motion, Movant has failed to advance its burden of proof.

THE LAW

The underlying question posed by this case is, "What significance did Congress place on debtors receiving Credit Counseling?" Did the debtors receiving Credit Counseling to the extent that Congress intended? Did the debtors comply with the spirit of the law?

It should be noted that the debtors filed a Chapter 13 bankruptcy action on April 2, 2005 in case numbered 05-61736. They participated in the process, attended a 341 Meeting of Creditors, had their case reviewed by a Chapter 13 Trustee, and attended an one hour information seminar conducted by the Chapter 13 Trustee's

office. Only after they fell on hard times did they allow their Chapter 13 case to be dismissed on August 30, 2006 due to their inability to continue to make payments.

Subsequently, they participated in Credit Counseling as required by 11 U.S.C. §109 with Consumer Credit Counseling Service of Greater Atlanta, Inc. on September 13, 2006. A copy of the Certificates of Completion were introduced as evidence by the Plaintiff at hearing on Defendants' Motion to Dismiss their bankruptcy. This certificate was received outside the 180 day period imposed by 11 U.S.C. §109 (h) (1).

The purpose of 11 U.S.C. §109 (h) (1) was to see that individuals received independent analysis of their financial condition prior to filing a Chapter 7 bankruptcy action. It was to review their income, their expenses, and their debt structure. The goal was to offer alternatives to a Chapter 7 bankruptcy filing. The debtors in this case received their counseling plus also received the review of the Chapter 13 Trustee's office prior to debtors' Chapter 13 case being approved at confirmation.

The debtors attempted to dismiss this Chapter 7 bankruptcy when the United States Trustee discovered their noncompliance with the 180 day rule under 11 U.S.C. §109 (h). The United States Trustee opposed the dismissal as adverse to the creditors' interests and because it had not had an opportunity to investigate the assets of the estate. Debtors since have attended a 341 Meeting of Creditors and cooperated with the Standing Trustee.

They attended the 341 Meeting of Creditors on August 23, 2007 and a "no asset" report was filed September 5, 2007. There are no assets for debtors' creditors.

**11 U.S.C. §727 DOESN'T ADDRESS A FAILURE UNDER
11 U.S.C. §109 (h)**

Congress intended violations of 11 U.S.C. §109 (h) to be dealt with the United States Trustee filing a Motion to Dismiss. See, Collier on Bankruptcy (15th Edition).

When imposing new requirements in 2005, Congress chose not to include a failure such as debtors in 11 U.S.C. §727. They did, however, speak to a different new requirement. Congress chose to deny debtors a Discharge if they failed to attend and complete a "Credit Education" course. See 11 U.S.C. §727 (a)(11).

**DEBTORS' DID NOT FALSIFY RECORDED INFORMATION FROM
WHICH THEIR FINANCIAL CONDITION COULD BE ASCERTAINED (COUNT 1)**

There is no evidence that debtors falsified any recorded information from which their financial condition could be ascertained. Debtors have cooperated with their Standing Trustee. A "no asset" report has been filed. Their case is ready for completion and discharge.

**PLAINTIFF'S EVIDENCE DOESN'T SUPPORT THAT DEBTORS
KNOWINGLY OR FRAUDULENTLY MADE A FALSE OATH (COUNT 2)**

There is no evidence before the Court that debtors knowingly or fraudulently made a false oath. Plaintiff filed no Affidavits or depositions on which the Court can rely. The case law in this area describes situations in which debtors have hidden or omitted assets from their Schedules or failed to cooperate with the

Standing Trustee. No case cited to date has dealt with facts similar to this case.

CONCLUSION

Debtors' case is the result of their loss of employment, predatory lending, and medical problems. To deny them their Discharge is a harsh punishment for their failure to meet the 180 day requirement of 11 U.S.C. §109 (h), even if all of the allegations of Plaintiff were supported by the evidence.

A more balanced punishment would have been achieved had their case been dismissed or debtors held in contempt for their conduct.

Plaintiff's Motion should be denied.

RESPECTFULLY SUBMITTED,

/s/ Thomas J. Budd, II
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TJB:aj-letters/winters.randall.reply

**U.S. Bankruptcy Court
Northern District of Ohio (Canton)
Adversary Proceeding #: 07-06053-rk**

Assigned to: JUDGE RUSS KENDIG

Date Filed: 05/02/07

Related BK Case: 07-60786

Related BK Title: Randall Lee Winters and Shirley Ann Winters

Related BK Chapter: 7

Demand:

Nature[s] of Suit: 41 Objection / revocation of discharge - 727(c),(d),(e)

Plaintiff

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V.

Defendant

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Shirley Ann Winters
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Filing Date	Docket Text
05/02/2007	<u>1</u> Adversary case 07-06053. 41 (Objection / revocation of discharge - 727(c),(d),(e)): Complaint by United States Trustee, Region 9, Randall Lee Winters against Randall Lee Winters, Shirley Ann Winters. Fee Amount N/A \$0 <i>Complaint to Deny Discharge</i> (41 (Objection / revocation of discharge - 727(c),(d),(e))) (ust35, Scott R. Belhorn tr) Modified on 5/3/2007 (seshe,). (Entered: 05/02/2007)
05/02/2007	<u>2</u> Document <i>Cover Sheet</i> Filed by United States Trustee, Region 9. (ust35, Scott R. Belhorn tr) (Entered: 05/02/2007)
05/02/2007	<u>3</u> Request for Issuance of Summons Filed by United States Trustee, Region 9. (ust35, Scott R. Belhorn tr) (Entered: 05/02/2007)
05/04/2007	<u>4</u> Notice of Filing Deficiency; Exhibit D, referenced in the Complaint, is missing. (RE: related document(s) <u>1</u> Complaint,) (dhaid,) Modified on 5/4/2007 (dhaid,). **NOTATION MADE BY COURT-DISREGARD NOTICE, ENTERED IN ERROR** (Entered: 05/04/2007)
05/06/2007	<u>5</u> Notice of Filing Deficiency w/ BNC Certificate of Service (RE: related document(s) <u>4</u>) Service Date 05/06/2007. (Admin.) (Entered: 05/07/2007)
05/07/2007	<u>6</u> Summons Issued on Randall Lee Winters Answer Due 6/6/2007; Shirley Ann Winters Answer Due 6/6/2007 (RE: related document(s) <u>1</u> Adversary case 07-06053. 41 (Objection / revocation of discharge - 727(c),(d),(e)): Complaint by United States Trustee, Region 9, Randall Lee Winters against Randall Lee Winters, Shirley Ann Winters. Fee Amount N/A \$0 <i>Complaint to Deny Discharge</i> (41 (Objection / revocation of discharge - 727(c),(d),(e))) (ust35, Scott R. Belhorn tr) Modified on 5/3/2007 (seshe,). filed by Plaintiff United States Trustee, Region 9). Pre-Trial Conference set for 6/27/2007 at 09:15 AM at 109C Fed Bldg Canton. (dhaid, crt) (Entered: 05/07/2007)
05/07/2007	<u>7</u> Initial Pretrial and Case Management Order. Signed on 5/7/2007 (RE: related document(s) <u>1</u> Complaint,). (dhaid, crt) (Entered: 05/07/2007)
05/07/2007	<u>8</u> Amended <i>Complaint to Deny Discharge</i> by Scott R. Belhorn ust35 on behalf of United States Trustee, Region 9 against all defendants. (RE: related document(s) <u>1</u> Adversary case 07-06053. 41 (Objection / revocation of discharge - 727(c),(d),(e)): Complaint by United States Trustee, Region 9, Randall Lee Winters against Randall

	Lee Winters, Shirley Ann Winters. Fee Amount N/A \$0 <i>Complaint to Deny Discharge</i> (41 (Objection / revocation of discharge - 727(c),(d),(e))) (ust35, Scott R. Belhorn tr) Modified on 5/3/2007 (seshe,). filed by Plaintiff United States Trustee, Region 9). (ust35, Scott R. Belhorn tr) (Entered: 05/07/2007)
05/07/2007	<u>9</u> <i>Notice of Amended Complaint to Deny Discharge</i> Filed by United States Trustee, Region 9 (RE: related document(s) <u>8</u> <i>Amended Complaint to Deny Discharge</i> by Scott R. Belhorn ust35 on behalf of United States Trustee, Region 9 against all defendants. (RE: related document(s) <u>1</u> Adversary case 07-06053. 41 (Objection / revocation of discharge - 727(c),(d),(e)): <i>Complaint by United States Trustee, Region 9, Randall Lee Winters against Randall Lee Winters, Shirley Ann Winters. Fee Amount N/A \$0 Complaint to Deny Discharge</i> (41 (Objection / revocation of discharge - 727(c),(d),(e))) (ust35, Scott R. Belhorn tr) Modified on 5/3/2007 (seshe,). filed by Plaintiff United States Trustee, Region 9). (ust35, Scott R. Belhorn tr) filed by Plaintiff United States Trustee, Region 9). (ust35, Scott R. Belhorn tr) (Entered: 05/07/2007)
05/08/2007	<u>10</u> <i>Summons Service Executed on Randall Lee Winters 5/8/2007; Shirley Ann Winters 5/8/2007</i> (ust07, UnitedStates Trustee tr) (Entered: 05/08/2007)
06/05/2007	<u>11</u> <i>Response to Amended Complaint to Deny Discharge</i> Filed by Randall Lee Winters, Shirley Ann Winters (related documents <u>1</u> <i>Complaint,</i> , <u>8</u> <i>Amended Complaint,</i> ,) (Budd, Thomas aty) (Entered: 06/05/2007)
07/26/2007	<u>13</u> <i>Notice of Further Pre-Trial Conference Signed on 7/26/2007 . Pre-Trial Conference set for 8/29/2007 at 09:30 AM at 109C Fed Bldg Canton.</i> (mfish, crt) (Entered: 07/26/2007)
07/28/2007	<u>14</u> <i>Notice of Scheduling Order w/ BNC Certificate of Service</i> (RE: related document(s) <u>13</u>) <i>Service Date 07/28/2007.</i> (Admin.) (Entered: 07/29/2007)
08/30/2007	<u>15</u> <i>Memorandum Order following Pretrial Conference Signed on 8/30/2007. Dispositive and limiting motions due by October 31, 2007.</i> (mmccr, crt) (Entered: 08/30/2007)
09/01/2007	<u>16</u> <i>Notice of Order.(PDF) w/ BNC Certificate of Service</i> (RE: related document(s) <u>15</u>) <i>Service Date 09/01/2007.</i> (Admin.) (Entered: 09/02/2007)
10/02/2007	<u>17</u> <i>Motion For Summary Judgment Pursuant to Fed. R. Bankr. Pro. 7056</i> Filed by United States Trustee, Region 9 (ust35, Scott R. Belhorn tr) (Entered: 10/02/2007)
10/02/2007	<u>18</u> <i>Amended Motion For Summary Judgment (no changes other than to clarify Plaintiff, United States Trustee Habbo G. Fokkena)</i> Filed by United States Trustee, Region 9 (ust35, Scott R. Belhorn tr) (Entered: 10/02/2007)

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