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 TRUSTEE,[1]	)	Adversary Proceeding No. 07-1242
Plaintiff,	)	
	)	
v.	)	
	)	
RENEE D. WALKER,	)	**MEMORANDUM OF OPINION**
	)	
Defendant.	)	

The United States trustee filed a complaint to revoke the discharge of debtor-defendant Renee Walker under 11 U.S.C. § 727(d)(2) and (d)(3). For the reasons stated below, the court finds in favor of the plaintiff under § 727(d)(3).[2]

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).

---

[1] The complaint was filed by Saul Eisen, the former United States Trustee in this district.

[2] 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.

FACTS

I.

The UST presented his case through the testimony of Vytas Apanavicius (the defendant's landlord) and Richard A. Baumgart, Esq. (the chapter 7 trustee). The debtor presented her case through the cross-examination of Mr. Apanavicius and Mr. Baumgart. Both parties drew on exhibits admitted into evidence.[3] At trial, the parties agreed to incorporate the findings of fact and conclusions of law from the court's memorandum of opinion granting the trustee's motion for turnover[4] and limit the scope of testimony to matters not already determined in the previous hearing.

These findings of fact are based on the evidence presented at trial and reflect the court's weighing of the evidence, including determining the credibility of the witnesses. "In doing so, the Court considered the witnesses' 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). 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] say[s] with reference to the [issue at hand]. He is satisfied. He no longer wonders. He is contented.

---

[3] Docket 33.

[4] Case no. 06-10443, docket 63, 64.

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

II.

The debtor filed her chapter 7 petition on February 20, 2006. According to her petition, she had $40.00 cash and funds on deposit of $306.99.[5] She scheduled $36,519.64 in unsecured debt and no secured debt.

At the § 341 meeting of creditors, 11 U.S.C. § 341, the debtor acknowledged that she had received a federal income tax refund of $2,761.05 on January 31, 2006, three weeks before she filed her case. When asked what she did with the money, the debtor answered, under oath, that she spent it before the filing, and stated that she paid $1,900.00 of that amount to her landlord. The trustee asked the debtor and counsel for an accounting of how the money was spent, including documentation, and adjourned the meeting for that purpose. For reasons which need not be reiterated here, the meeting of creditors was adjourned several times until it was finally concluded on May 3, 2006. The debtor received her discharge on May 24, 2006.

On August 1, 2006, the trustee filed a motion for a rule 2004 examination of the debtor, which was granted by an order entered August 2, 2006.[6] *See* FED. R. BANKR. P. 2004. The rule 2004 exam was scheduled for August 15, 2006. The debtor did not appear. The trustee filed a motion for an order requiring the debtor to appear and show cause why she should not be held in contempt for failing to obey the court order to appear. Following a hearing at which the court

[5] Case no. 06-10443, docket 1, 63.

[6] Case no. 06-10443, docket 20, 21.

ordered the debtor to cooperate, the debtor eventually did appear for the exam, and the show cause was concluded on October 19, 2006.

Based on the information gained through the debtor's § 341 meeting and her rule 2004 exam, the trustee filed a motion for turnover of the income tax refund.[7] At the August 24, 2007 hearing on the motion, the debtor admitted that she lied at the § 341 meeting when she testified that she paid the landlord $1,900.00 from her tax refund. The debtor also admitted that she forged a letter purporting to be from the landlord, which she presented to the trustee to support her earlier false statement. In the memorandum and order resulting from that hearing, the court found 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 court found that the debtor had $2,808.96 cash in her possession at the time of filing, which was property of the chapter 7 estate, and ordered the debtor to turn over $2,008.96 ($2,808.96 minus $800.00 for exemptions) to the trustee. The debtor complied with the turnover order.

POSITIONS OF THE PARTIES

The UST bases his complaint on bankruptcy code § 727(d)(2) and (d)(3). 11 U.S.C. § 727(d)(2), (d)(3). Counts I and II allege 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. Count III alleges that the debtor failed to appear at a court ordered rule 2004 examination and, therefore, refused to obey a court order. *See* FED. R. BANKR. P. 2004.

[7] Case no. 06-10443, docket 41.

The debtor responds by arguing that while her behavior may not have constituted the preferred course of conduct for a debtor in these circumstances, her actions do not fall within the statutory requirements for revoking her discharge. Specifically, the debtor argues that her failure to properly account for the tax refund does not mean that she "failed to report" that property under § 727(d)(2). 11 U.S.C. § 727(d)(2). At trial, she also argued that she was not required to report her tax refund in her petition because she acquired it prepetition and the statute applies to property acquired postpetition. Finally, the debtor argues that her *failure* to attend the rule 2004 examination does not constitute a *refusal* to obey a lawful order of the court under § 727(a)(6). 11 U.S.C. § 727(a)(6), (d)(3).

DISCUSSION

Chapter 7 debtors are generally entitled to a discharge under bankruptcy code § 727(a). 11 U.S.C. § 727(a). "However, in exchange for receiving the benefits of a bankruptcy discharge, debtors are expected to fully, honestly and unconditionally cooperate with the bankruptcy process." *U.S. Trustee v. Halishak (In re Halishak)*, 337 B.R. 620, 624 (Bankr. N.D. Ohio 2005). To ensure the debtor's ongoing cooperation even after a discharge has been entered, the code provides that the discharge may be revoked under certain circumstances. 11 U.S.C. § 727(d)(1)–(4).

Because discharges in bankruptcy are preferred, the UST has the burden of proving his case by a preponderance of the evidence. *Keeney v. Smith (In re Keeney)*, 227 F.3d 679, 683 (6th Cir. 2000); *Hunter v. Magack (In re Magack)*, 247 B.R. 406, 409 (Bankr. N.D. Ohio 1999); *see also* FED. R. BANKR. P. 4005. Moreover, because the discharge lies at the heart of the code's "fresh start" policy, the code provisions that allow a party to challenge the discharge must be construed liberally in favor of the debtor and strictly against the party bringing the action.

Yoppolo v. Walter (In re Walter), 265 B.R. 753, 758 (Bankr. N.D. Ohio 2001). When determining whether to revoke a debtor's discharge, the court "'must balance the policy in favor of liberally applying the Bankruptcy Code to grant discharge to the honest debtor against the policy of denying relief to debtors who intentionally engage in dishonest practices and violate the Bankruptcy Code provision.'" *Id.* (quoting *Solomon v. Barman (In re Barman)*, 237 B.R. 342, 352 (Bankr. E.D. Mich. 1999)).

I. Revocation Under 11 U.S.C. § 727(d)(2)

Bankruptcy code § 727(d)(2) states in part:

> On request of . . . the United States trustee, and after notice and a hearing, the court shall revoke a discharge granted under subsection (a) of this section if— . . . (2) 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 acquisition of or entitlement to such property, or to deliver or surrender such property to the trustee[.]

11 U.S.C. § 727(d)(2). To meet his burden of proof under this section, the UST must establish two elements: (1) the debtor acquired or became entitled to acquire property of the estate; and (2) the debtor knowingly and fraudulently failed to report or deliver this property to the trustee. The UST focuses on the second element; he did not, however, prove the first element.

The disputed property here is the debtor's cash-on-hand at the time she filed her bankruptcy petition. The court has already determined that the debtor had $2,808.96 cash-on-hand when she filed her bankruptcy case, of which $2,008.96 was property of the estate.[8] The issue is whether property in the debtor's possession at the time of filing, but hidden from the

[8] Case no. 06-10443, docket 63, at 8.

chapter 7 trustee, satisfies the requirement that the "debtor acquired property that is property of the estate."[9] 11 U.S.C. § 727(d)(2).

There is some debate as to whether § 727(d)(2) applies to property acquired by the debtor prebankruptcy. Section 727(d)(2) does not on its face distinguish between property acquired by the debtor prepetition and that acquired postpetition. Some courts and a leading commentator have concluded that the section only applies to property acquired postpetition. *See Citicorp Real Estate, Inc. v. DaMaia (In re DaMaia)*, 217 F.3d 838 (4th Cir. 2000) (unpublished table decision); *Still v. Gualt (In re Gualt)*, Adv. No. 05-1050, 2006 WL 2270338, at *3 (Bankr. E.D. Tenn. Aug. 4, 2006) (noting in dicta that property acquired prepetition does not fall under § 727(d)(2)); *Werner v. Puente (In re Puente)*, 49 B.R. 966, 968 (Bankr. W.D.N.Y. 1985); *see also* 6 COLLIER ON BANKRUPTCY ¶ 727.15[4] (Alan N. Resnick & Henry J. Sommer eds., 15th rev. ed. 2008) ("This provision [§ 727(d)(2)] imposes a duty upon the debtor to report to the trustee any acquisition of property after the filing of the petition."). Others disagree. *See Rezin v. Barr (In re Barr)*, 207 B.R. 168, 174 (Bankr. N.D. Ill 1997) (holding in part that § 727(d)(2) does apply to property owned prebankruptcy).

A careful reading of § 727(d)(2) indicates that it only applies to property acquired postpetition. The word "acquire" means "to come into" possession or control. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 18 (unabr. 1993). The phrase "to come into" implies the gaining of something new, but when a debtor conceals property from the bankruptcy estate, she is not so much gaining something new as she is avoiding losing something already in her possession. *See In re Gualt*, 2006 WL 2270338, at *3. Moreover, the plain language of the

[9] Both parties correctly quote the statute, but neither side briefed this issue. As noted above, the debtor raised it in closing argument.

statute contemplates a bankruptcy estate that is in existence, or at least one that was in existence, at the time the debtor acquired the property or became entitled to acquire the property. 11 U.S.C. § 727(d)(2). As the chapter 7 estate only comes into existence when the debtor files a bankruptcy petition, *see* 11 U.S.C. § 541(a), this section must refer to property acquired after the petition date.

This conclusion gives effect to the distinction drawn by Congress between the standard for denying the debtor a discharge under § 727(a)(2) and the standard for revoking a discharge under § 727(d). In § 727(a)(2), Congress provided a mechanism to deny the debtor a discharge when the debtor conceals prepetition assets. Congress could have provided a similar mechanism for revoking a debtor's discharge in § 727(d). Instead, Congress chose to phrase § 727(d)(2) in terms of acquiring property or becoming entitled to acquire property. *See* 11 U.S.C. § 727(d)(2). Such language is more consistent with circumstances where a debtor receives a postpetition payment on a note issued prepetition (i.e., the debtor acquired funds that are property of the estate) or when a debtor inherits property within 180 days after the filing of the petition (i.e., the debtor becomes entitled to acquire property that would be property of the estate under § 541(a)(5)). *See* 11 U.S.C. § 541(a)(5)(A). In short, concealment of prepetition property does not conceptually fit within the requirements of § 727(d)(2). *See In re Gualt*, 2006 WL 2270338, at *4 (noting that Congress "apparently made an intentional distinction between ordinary concealment of pre-petition property and concealment of new property or entitlements that arose post-petition").

Additionally, Congress addressed concealment of prepetition property in a different subsection of § 727(d). Subsection (d)(1) requires the court to revoke a debtor's discharge that was obtained through fraud, and applies to instances where the debtor concealed an asset at the

time he filed his case. 11 U.S.C. § 727(d)(1); *see* 6 COLLIER ON BANKRUPTCY, *supra* ¶ 727.15[4]; *cf. Yoppolo v. Sayre (In re Sayre)*, 321 B.R. 424, 427–29 (Bankr. N.D. Ohio 2004) (holding that the debtor obtained her discharge through fraud by concealing a prepetition transfer of property, then giving wrongful information to the trustee regarding that transfer). As Congress provided an avenue to revoke the discharge of a debtor who concealed prepetition property under § 727(d)(1), there is no need to override the plain meaning of § 727(d)(2) to shoehorn such situations into that subsection. *See In re Gualt*, 2006 WL 2270338, at *3 (noting that § 727(d)(1) has statutory limitations not found in § 727(d)(2), and interpreting (d)(2) to apply to the concealment of property obtained prepetition would make those limitations practically meaningless).

With this distinction made, the court finds that the UST did not satisfy his burden of showing that the debtor's behavior falls under § 727(d)(2). As the debtor did not acquire property of the estate, or become entitled to acquire property of the estate, revocation of the discharge under § 727(d)(2) is not applicable in this case. The UST's argument that the debtor failed to properly account for the proceeds of her refund is not enough, standing alone, to revoke a discharge under § 727(d)(2). *See Sicherman v. Rivera (In re Rivera)*, 338 B.R. 318, 324 (Bankr. N.D. Ohio 2006), *aff'd*, 356 B.R. 786 (B.A.P. 6th Cir. 2007) (noting that a debtor's discharge may only be revoked for the reasons clearly expressed by statute). The court, therefore, finds in favor of the debtor with respect to counts I and II of the UST's complaint.

II. Revocation Under 11 U.S.C. § 727(d)(3)

Section 727(d)(3) provides that the debtor's discharge shall be revoked 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 that the discharge will be denied 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). Although a rule 2004 exam includes an order to testify, complete failure to appear at the exam may be grounds for revoking or denying a discharge. *See In re Rivera*, 338 B.R. at 329–30. The issue in this case is whether the debtor's failure to appear at the initially scheduled rule 2004 exam constitutes a refusal to obey a lawful order of the court.

In the context of § 727(a)(6)(A), the word "refused" must be distinguished from the word "failed" as used elsewhere in § 727(a) and, consequently, the debtor's mere failure to obey an order of the court, without more, is insufficient to revoke a discharge. *See, e.g.*, *Pierce v. Fuller (In re Fuller)*, 356 B.R. 493, 495 (Bankr. D.S.D. 2006); *In re Rivera*, 338 B.R. at 329; *In re Walter*, 265 B.R. at 758. Courts disagree, however, as to what additional evidence is needed to prove that the debtor "refused" to obey the court's order. *See In re Fuller*, 356 B.R. at 495. Some courts require a showing that the debtor's lack of compliance was willful and intentional. *See, e.g.*, *Grochocinski v. Eckert (In re Eckert)*, 375 B.R. 474, 480 (Bankr. N.D. Ill. 2007); *Gillman v. Green (In re Green)*, 335 B.R. 181, 184 (Bankr. D. Utah 2005). Other courts hold "that a debtor will be found to have 'refused' to obey a court order under § 727(a)(6)(A), when the debtor's inaction would give rise to a charge of civil contempt." *See Yoppolo v. Meyers (In re Meyers)*, 293 B.R. 417, 419 (Bankr. N.D. Ohio 2002). This court has previously used the latter approach, but not expressly adopted it. *See Brown v. Koonce (In re Koonce)*, Ch. 7 Case No. 05-25359, Adv. No. 06-1703, at 4 (Bankr. N.D. Ohio Jan. 4, 2007) (unpublished). Under either standard, however, the outcome of this case is the same: the UST established a *prima facie* case that the debtor refused to obey a court order, which the debtor did not successfully rebut.

The UST established a *prima facie* case that the debtor's failure to appear at the rule 2004 exam was both willful and intentional, as the evidence shows that the debtor knew about the order to appear and failed to comply with that order. *In re Fuller*, 356 B.R. at 495. Moreover, the UST showed that before the originally-scheduled rule 2004 exam, the debtor gave her counsel a handwritten note containing the phrase, "This is all I have call me with results."[10] From this evidence, the court concludes that the debtor knew of the rule 2004 exam and had no intention of appearing at that exam. Such a showing then imposes upon the debtor an obligation to explain her non-compliance. *See In re Fuller*, 356 B.R. at 495; 6 COLLIER ON BANKRUPTCY, *supra* ¶ 727.09[1]. The ultimate burden of proof, however, stays with the UST.

The debtor argues through counsel that her failure to appear was merely inadvertent. Counsel stated that the debtor was confused about her responsibilities and that she tried diligently to reschedule the 2004 exam. The debtor did not, however, offer any evidence to support this argument. The debtor chose not to attend the trial, and did not, therefore, explain under oath why she failed to appear for the exam. The only evidence to support the debtor's argument is: (1) the handwritten note stating, "This is all I have call me with results"; (2) a statement from the trustee that the debtor offered to reschedule the examination, but only after the trustee filed a motion to hold her in contempt for failing to appear; (3) letters sent after the scheduled exam from the debtor's counsel to the trustee asking how the trustee desired to proceed with the 2004 exam;[11] and (4) an acknowledgment from the trustee that the debtor did later attend the rescheduled 2004 exam. This evidence shows, at best, that the debtor knew about the order to appear at the 2004

---

[10] UST's exh. C-4.

[11] UST's exhs. C-1, D-1.

exam, failed to appear at that exam, and belatedly attempted to reschedule the exam after the trustee raised the stakes by filing a motion to hold her in contempt. Given the debtor's established history of not cooperating with the trustee, the note stating that the debtor expected her counsel to relay to her the results of the exam is insufficient to support the theory that the debtor failed to appear because she was confused about her responsibilities. The court finds, therefore, that the debtor did not rebut the UST's showing that the debtor willfully and intentionally refused to obey a court order.

Under the contempt analysis, the result is the same. At a minimum, three elements must be established to hold a party in civil contempt: "(1) the alleged contemnor had knowledge of the order which he is said to have violated; (2) the alleged contemnor did in fact violate the order; and (3) the order violated must have been specific and definite." *In re Temple*, 228 B.R. 896, 897 (Bankr. N.D. Ohio 1998) (citing *United States v. Cutler*, 58 F.3d 825, 834 (2d Cir. 1995)). Willfulness is not an element of contempt and an intent to disobey is not relevant. *In re Jaques*, 761 F.2d 302, 306 (6th Cir. 1985). The alleged contemnor may defend by showing an inability to comply with the order. *In re Walker*, 257 B.R. 493, 497 (Bankr. N.D. Ohio 2001). "It is the moving party who has the burden to make a *prima facie* showing that the above elements are established, and then to ultimately prove that such elements are met by clear and convincing evidence." *In re Temple*, 228 B.R. at 897–98 (citing *Nat'l Labor Relations Bd. v. Cincinnati Bronze Inc.*, 829 F.2d 585, 591 (6th Cir. 1987)).

The UST successfully established a *prima facie* showing of these three elements. First, the order issued August 2, 2006 was specific and definite in that it required the debtor to appear at the trustee's office on August 15, 2006 at 1:30 p.m., to submit to the rule 2004 exam, and to

bring certain documents with her.[12] Second, the debtor was served with the order and admits to having knowledge of it.[13] And third, the debtor failed to appear on August 15, 2006.[14] With this showing, the burden shifts to the debtor to demonstrate why she was unable to comply with the court's order. *See In re Temple*, 228 B.R. at 898.

The debtor does not argue that she was unable to comply with the court's order. Rather, she argues that her failure to comply was merely inadvertent. Again, however, she did not offer evidence to support this. Moreover, willfulness is not an element of civil contempt, and this argument does not rebut the UST's showing of the elements of civil contempt. *In re Jaques*, 761 F.2d at 306.

Finally, the debtor argues that none of this analysis is necessary because she eventually did attend a rule 2004 exam and § 727(a)(6) requires complete refusal to comply with the court's order.[15] Even if the court were to accept this as a legal principle, the factual record does not show that the debtor's refusal to comply was anything less than complete. *Cf. Colombo Bank v. Barnes (In re Barnes)*, 348 B.R. 613, 617 (Bankr. D.D.C. 2006) (noting that even in instances of belated compliance, the court requires a finding of fact whether the initial failure was a refusal). The court's order was specific and definite as to when and where the debtor was to appear for the rule 2004 examination, and the factual record shows a willful and intentional violation of that order. The debtor's belated decision to cooperate does not negate the earlier refusal. *Cf. Myers v. Internal Revenue Serv. (In re Myers)*, 216 B.R. 402, 405 (B.A.P. 6th Cir. 1998), *aff'd*, 196

---

[12] Case no. 06-10443, docket 21.

[13] Case no. 06-10443, docket 22; UST's exh. C.

[14] Debtor's trial brief, at 3. (Docket 23).

[15] Debtor's supp. brief, at 6. (Docket 37).

F.3d 622 (6th Cir. 1999) (the decision to "come in from the cold" and start paying taxes will not purge the conduct of a debtor who willfully attempted to evade or defeat a tax liability resulting in the denial of discharge with respect to that tax debt under § 523(a)(1)(C)); *In re Halishak*, 337 B.R. at 630 (noting that a debtor's willingness to voluntarily disclose the existence of property only after its discovery by a third-party will not erase a false oath on the petition).

It is an understatement to say that the debtor's behavior throughout this case fell far below what was expected of her—she gave false testimony about material issues, forged a document, and engaged in deliberate stall tactics. *Cf. Olsen v. Reese (In re Reese)*, 203 B.R. 425, 432 (Bankr. N.D. Ill. 1997) ("A debtor seeking the benefit of a discharge pays a price. That price is the performance of certain duties, such as cooperation with the Trustee."). In short, the debtor's failure to appear at the rule 2004 exam is not an isolated incident, and there is no evidence on the record that causes the court to believe that the debtor's lack of compliance was anything less than a complete refusal to obey a court order. The court finds, therefore, that the UST met his burden of showing that the debtor refused to obey a lawful order of the court, and that the debtor failed to rebut it. Accordingly, the court finds in favor of the UST on count III.

CONCLUSION

For the reasons stated, the court finds in favor of the UST on count III of the complaint. A separate order will be entered reflecting this judgment and revoking the debtor's discharge.

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

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 TRUSTEE,[1]	)	Adversary Proceeding No. 07-1242
Plaintiff,	)	
	)	
v.	)	
	)	
RENEE D. WALKER,	)	**JUDGMENT**
	)	
Defendant.	)	

For the reasons stated in the memorandum of opinion entered this same date, judgment is entered in favor of the plaintiff United States trustee under 11 U.S.C. § 727(d)(3), only, and the debtor's discharge is revoked.

IT IS SO ORDERED.

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

[1] The complaint was filed by Saul Eisen, the former United States trustee in this district.