

IT IS SO ORDERED.



Honorable Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

DANIEL REYNOLDS GILL and
JERRI LYNN GILL,

Debtors.

CASE NUMBER 05-84430

ANDREW W. SUHAR, TRUSTEE,

Plaintiff,

ADVERSARY NUMBER 07-4148

vs.

DANIEL REYNOLDS GILL and
JERRI LYNN GILL,

Defendants.

THE HONORABLE KAY WOODS

MEMORANDUM OPINION REGARDING MOTION FOR SUMMARY JUDGMENT

This matter is before the Court on Plaintiff's Motion for Summary Judgment and Memorandum of Points and Authority ("Motion for Summary Judgment") (Doc. # 14), filed by Plaintiff/Trustee Andrew W. Suhar ("Trustee") on October 29, 2008. Debtors/Defendants Daniel Reynolds Gill and Jerri Lynn Gill

("Debtors") did not oppose the Motion for Summary Judgment. Trustee contends in the Motion for Summary Judgment that, as a matter of law, Debtors' discharge should be denied for their failure to abide by this Court's Order of December 19, 2006 ("Turnover Order") (Main Case Doc. # 49). The Turnover Order directed Debtors to turn over to Trustee (i) Debtors' 2002 Pontiac Sunfire automobile ("Sunfire"); (ii) the amount of \$3,206.11 on deposit in Debtors' checking account at the time of Debtors' bankruptcy filing ("Bank Account Balance"); (iii) copies of Debtors' 2005 federal and state income tax returns ("Tax Returns"); and (iv) Debtors' 2005 federal and state income tax refunds ("Tax Refunds").

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.

I. STANDARD OF REVIEW

The procedure for granting summary judgment is found in FED. R. CIV. P. 56(c), made applicable to this proceeding through FED. R. BANKR. P. 7056, which provides in part that:

The judgment sought shall be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.

FED. R. CIV. P. 56(c). Summary judgment is proper if there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); *Celotex*

Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). A fact is material if it could affect the determination of the underlying action. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Tennessee Department of Mental Health & Retardation v. Paul B.*, 88 F.3d 1466, 1472 (6th Cir. 1996). An issue of material fact is genuine if a rational fact-finder could find in favor of either party on the issue. *Anderson*, 477 U.S. at 248-49; *SPC Plastics Corp. v. Griffith (In re Structurlite Plastics Corp.)*, 224 B.R. 27 (B.A.P. 6th Cir. 1998).

In a motion for summary judgment, the movant bears the initial burden to establish an absence of evidence to support the nonmoving party's case. *Celotex*, 477 U.S. at 322; *Gibson v. Gibson (In re Gibson)*, 219 B.R. 195, 198 (B.A.P. 6th Cir. 1998). The burden then shifts to the nonmoving party to demonstrate the existence of a genuine dispute. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 590 (1992). The evidence must be viewed in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970). However, in responding to a proper motion for summary judgment, the nonmoving party "cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must 'present affirmative evidence in order to defeat a properly supported motion for summary judgment.'" *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989) (quoting *Anderson*, 477 U.S. at 257). That is, the nonmoving party has an affirmative duty to direct the court's attention to those specific portions of the record upon which it seeks to rely to create a genuine issue of material fact. *Street*, 886 F.2d at 1479.

II. FACTUAL AND PROCEDURAL HISTORY

Debtors filed their chapter 7 petition on October 16, 2005 ("Petition Date"). Trustee conducted the first meeting of creditors, pursuant to 11 U.S.C. § 341, on December 29, 2005. At that meeting, Debtors informed Trustee that they (i) owned a Sunfire, and (ii) had substantial income for the years 2004 and 2005, but had not yet filed their 2005 federal and state income tax returns.

Trustee requested Debtors to turn over their (i) Sunfire; (ii) Tax Returns; (iii) Tax Refunds; and (iv) copies of Debtors' bank statements from October 2004 through November 2005. Debtors turned over only the bank statements, which revealed the Bank Account Balance.

Trustee filed Motion for Turnover (Main Case Doc. # 43) on November 15, 2006. In the motion, Trustee indicated that, despite his best efforts to obtain the requested Sunfire, Tax Returns, Tax Refunds, and Bank Account Balance (collectively, "Estate Property"), Debtors and their attorney had refused or failed to turn over the Estate Property. Debtors did not respond to the Motion for Turnover.

The Court entered the Turnover Order on December 19, 2006, which granted the Motion for Turnover and directed Debtors to turn over the Estate Property to Trustee. However, Debtors did not turn over the Estate Property. As a consequence, on November 3, 2007, Trustee initiated this Adversary Proceeding by filing Complaint (Doc. # 1) seeking revocation of Debtors' discharge pursuant to 11 U.S.C. § 727(d)(3).

Debtors filed Answer (Doc. # 7) on March 8, 2008. The Court held two telephonic status conferences in this case, on April 28, 2008, and June 16, 2008, during which the parties represented that they expected to settle the matter with an agreed order. No such order has been submitted to date.

On October 15, 2008, the Court issued an Order directing the parties to either submit an agreed order or file "an appropriate alternative filing . . . explaining the inability to submit such order[.]" In response, Trustee filed the Motion for Summary Judgment, on October 29, 2008, and a Supplemental Affidavit in Support of Motion for Summary Judgment (Doc. # 15) on November 7, 2008. Trustee asserts that (i) he "now doubts [Debtors'] sincerity in the representations made during the course of this proceeding" and (ii) summary judgment is appropriate because there are no genuine issues of material fact. (Mot. for Summ. J. at 3.) Debtors have failed to respond to the Motion for Summary Judgment.

III. ANALYSIS

Trustee is correct in that Debtors have admitted all material facts. Specifically, their Answer expressly admits Paragraph Four of the Complaint, which reads:

On December 19, 2006, the Court entered an Order requiring the Debtors to turnover their 2002 Pontiac Sunfire automobile, the amount of \$3,206.11 on deposit in the Debtors' checking account at the time of their bankruptcy filing, a copy of their 2005 federal and state income tax returns, as well as their 2005 federal and state income tax refunds The Defendants have failed to comply with the Court's Order.

Therefore, the only remaining issues are those of law.

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, 549 U.S. 365, 127 S.Ct. 1105, 1107 (2007)(quoting *Grogan v. Garner*, 498 U.S. 279, 286-287 (1991)).

Section 727(a) of the Bankruptcy Code provides that a debtor is entitled to a discharge in bankruptcy unless one or more of the conditions listed in subsections (a)(1) through (a)(10) applies.

Section 727(d)(3) provides, in pertinent part,

(d) On request of the trustee, . . . and after notice and a hearing, 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 2008).¹

Section 727(a)(6) reads, in pertinent part,

(a) 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. Debtors' refusal to comply with the Turnover Order is proper grounds for revocation of their discharge. See, e.g., *Davis v. Stevens (In re Stevens)*, 2007 Bankr. LEXIS 2434 (Bankr. N.D. Ohio July 17, 2007) and *Sicherman v. Skiljan (In re Skiljan)*, 355 B.R. 642 (Bankr. N.D. Ohio 2006).

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

¹The Bankruptcy Code defines "after notice and a hearing" as meaning "after such notice as is appropriate in the particular circumstances and such opportunity for a hearing as is appropriate in the particular circumstances[.]" In the instant case, Debtors were properly served with the Motion for Summary Judgment, but have failed to respond to it or to produce any evidence admissible under FED. R. CIV. P. 56 that would demonstrate the existence of a material fact.

with a court order is insufficient to warrant revoking a debtor's discharge. *Parker v. Hudson (In re Hudson)*, 2007 Bankr. LEXIS 764, *5 (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, 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 violated order must have been specific and definite. *Hudson* 2007 Bankr. LEXIS 764 at *6, *Magack*, 247 B.R. at 410. In the instant case, Trustee has established all three of the required elements for revocation of discharge under § 727(a)(6).

First, the Turnover Order was served upon Debtors by first class mail at 3469 St. Rt. 193, Fowler, Ohio 44410, which is the address Debtors provided to the Court. There is no indication on the Docket that such mail was returned as "undeliverable." Further, Debtors acknowledged in their Answer that the Court entered an Order on December 19, 2006, requiring Debtors to turn over the Estate Property, which demonstrates that Debtors were aware of the Turnover Order. (Answer at 1.)

Second, Debtors admitted in their Answer that they failed to comply with the Turnover Order. (*Id.*) Debtors' actions in this case indicate that their noncompliance was not a mistake or inadvertent lapse, but a willful refusal to comply with the Turnover Order. Debtors engaged in active negotiation with Trustee for a period of some months, participated in two telephonic status conferences with the Court, and represented to the Court that they

would enter into an agreement with Trustee and file an agreed order. Despite these actions, Debtors have still not complied with the Turnover Order.

Third, the Turnover Order was specific and definite. The Turnover Order ended with the following sentence:

It is therefore ORDERED that within ten (10) days from the date of this Order, the Debtors, Daniel Reynolds Gill and Jerri Lynn Gill, shall turnover the amount of \$3,206.11 on deposit in their bank account at the time of their bankruptcy filing, their 2002 Pontiac Sunfire automobile, and a copy of their 2005 federal and state income tax returns, as well as their 2005 federal and state income tax refunds.

(Turnover Order at unnumbered 2.) The Turnover Order not only listed the specific Estate Property that Debtors were to turn over to Trustee, but it also gave them a definite time frame in which to do so.

IV. CONCLUSION

Trustee has demonstrated that Debtors have refused to obey a Court order, (*i.e.*, the Turnover Order). Debtors have knowingly refused to turn over property of the estate in contravention of a lawful order of the Court. As a result of the foregoing, this Court finds that Debtors' discharge should be revoked pursuant to 11 U.S.C. § 727.

An appropriate Order will follow.

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CLERK U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
YOUNGSTOWN

IT IS SO ORDERED.



Honorable Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:	*	
	*	
DANIEL REYNOLDS GILL and	*	
JERRI LYNN GILL,	*	
	*	CASE NUMBER 05-84430
Debtors.	*	
	*	

	*	
ANDREW W. SUHAR, TRUSTEE,	*	
	*	ADVERSARY NUMBER 07-4148
Plaintiff,	*	
	*	
vs.	*	
	*	
DANIEL REYNOLDS GILL and	*	
JERRI LYNN GILL,	*	
	*	THE HONORABLE KAY WOODS
Defendants.	*	
	*	

ORDER GRANTING SUMMARY JUDGMENT AND REVOKING DISCHARGE

For the reasons set forth in this Court's Memorandum Opinion entered this date, the Motion for Summary Judgment filed by Trustee Andrew W. Suhar is granted. The discharge of Debtors Daniel Reynolds Gill and Jerri Lynn Gill, previously entered on August 9, 2006, is hereby revoked.

IT IS SO ORDERED.

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