

The court incorporates by reference in this paragraph and adopts as the findings and analysis of this court the document set forth below. This document has been entered electronically in the record of the United States Bankruptcy Court for the Northern District of Ohio.

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



Mary Ann Whipple  
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
WESTERN DIVISION

In Re:	)	Case No.: 08-30497
	)	
Andrew M. Robins,	)	Chapter 7
	)	
Debtor.	)	Adv. Pro. No. 08-3212
	)	
Daniel M. McDermott,	)	Hon. Mary Ann Whipple
United States Trustee,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
Andrew M. Robins,	)	
	)	
Defendant.	)	

**MEMORANDUM OF DECISION**

This adversary proceeding is before the court for decision after trial on a complaint filed by the United States Trustee (“UST”) to deny Defendant’s discharge under 11 U.S.C. § 727. Defendant Andrew M. Robins, proceeding pro se, is the debtor in the underlying Chapter 7 bankruptcy case. In his complaint, the UST alleges that Defendant’s Chapter 7 discharge should be denied pursuant to 11 U.S.C. § 727(a)(2)(B) and (a)(6)(A).

The district court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §1334(b) as a civil proceeding arising in or related to a case under Title 11. This proceeding has been referred to this court by the district court under its general order of reference. 28 U.S.C. § 157(a); General Order 84-1 of the United States District Court for the Northern District of Ohio. Proceedings to determine objections to discharge are core proceedings that the court may hear and decide. 28 U.S.C. § 157(b)(1) and (b)(2)(J). This memorandum of decision constitutes the court's findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52, made applicable to this adversary proceeding by Fed. R. Bankr. P. 7052. Regardless of whether specifically referred to in this Memorandum of Decision, the court has examined the submitted materials, weighed the credibility of the witnesses, considered all of the evidence, and reviewed the entire record of the case. Based upon that review, and for the reasons discussed below, the court finds that the UST is entitled to judgment denying Defendant's Chapter 7 discharge under § 727(a)(6)(A).

### **FINDINGS OF FACT**<sup>1</sup>

Defendant is a 35-year-old college graduate, having obtained an undergraduate degree in philosophy, a masters degree in journalism, and having attended one year of law school. He was last employed in 2005, at which time he held a position in which he assisted in the processing of mortgage loans. He has been unemployed since some time in 2005.

Defendant filed a petition for relief under Chapter 7 of the Bankruptcy Code on February 11, 2008. [Case No. 08-30497, Doc. # 1]. His bankruptcy schedules show that he owned a 2005 Ford Focus, valued at \$8,485, free and clear of any liens. [*Id.*, Schedules B & D]. At the first meeting of creditors, Chapter 7 Trustee Ericka Parker explained to Defendant that the vehicle was an asset of the bankruptcy estate and that it was her duty to liquidate the asset for the benefit of creditors. Parker filed a motion for turnover of the vehicle, keys and title. [*Id.*, Doc. #9]. On May 21, 2008, after a hearing on the motion at which Defendant failed to appear, the court entered an order for turnover of the vehicle, keys and title to the Trustee by May 30, 2008.<sup>2</sup> [*Id.*, Doc. # 49; also Plf. Trial Ex. 3]. The court's May 21 order was served on Defendant by

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<sup>1</sup> The court takes judicial notice of the contents of its case docket in this adversary proceeding and in the underlying Chapter 7 bankruptcy case. Fed. R. Bankr. P. 9017; Fed. R. Evid. 201(b)(2); *In re Calder*, 907 F.2d 953, 955 n.2 (10<sup>th</sup> Cir. 1990); *St. Louis Baptist Temple, Inc. v. Fed. Deposit Ins. Corp.*, 605 F.2d 1169, 1171-72 (6<sup>th</sup> Cir. 1979) (stating that judicial notice is particularly applicable to the court's own records of litigation closely related to the case before it).

<sup>2</sup> The court set the motion for turnover for hearing on April 29, 2008, notice of which Defendant received. [*See* Case No. 08-30497, Doc. # 22, 23, 28]. Defendant did not appear at the April 29 hearing, and the court issued an order to show cause for failure to appear and set a show cause hearing for May 20, 2008. [*Id.*, Doc. # 32 & 33]. In the show cause order, the court stated that if Debtor failed to appear at the show cause hearing, the court would immediately rule on the motion for turnover of the 2005 Ford Focus. [*Id.*]. On May 20, 2008, appearances were made by Parker and on behalf of the UST, however, Defendant again failed to appear at the scheduled hearing. [*Id.*, Doc. # 45].

ordinary mail at the mailing address set forth in his petition. [*Id.*, Doc. # 55].

Parker testified that, in an email exchange, she also informed Defendant that he was ordered to turnover the Ford Focus. And, at trial, Defendant conceded that he was aware of the turnover order. Given his education and employment background, Defendant was capable of understanding, and understood, the order. In fact, he filed an appeal of that order that was subsequently dismissed for lack of prosecution. [*Id.*, Doc. ## 60 & 78; also Plf. Trial Ex. 4]. Based on Parker's search of records at the Bureau of Motor Vehicles, Defendant had purchased the vehicle for \$9,800 approximately one month before filing his bankruptcy petition. She offered him the opportunity to pay \$7,500, representing the value of the car less Defendant's \$1,000 exemption under Ohio law and her costs of selling the car, in exchange for keeping the vehicle. He responded that he was not going to turn over the vehicle. According to Defendant, he offered to turn over the vehicle only if Parker gave him "other property" in exchange.

Although Parker made a demand on the debtor to turn over the vehicle, keys and title to her auctioneer, Defendant did not do so, and to date, the Ford Focus has not been turned over to her. At trial, Defendant invoked his constitutional right under the Fifth Amendment of the United States Constitution to remain silent when asked whether he still had possession of the Ford Focus, whether the vehicle is insured, whether he has the title and keys to the vehicle and whether he has turned the vehicle over to the Trustee.

### **LAW AND ANALYSIS**

At trial, the UST argued that Defendant's discharge should be denied under § 727(a)(6)(A) or, alternatively, under § 727(a)(2)(B). The showing necessary to deny a debtor a discharge under § 727(a)(6)(A) for refusing to obey a lawful order of the court is the same as that for determining whether to hold a party liable for civil contempt. *Yoppolo v. Freeman (In re Freeman)*, 293 B.R. 413, 415 (Bankr. N.D. Ohio 2002); *Hazlett v. Gorshe (In re Gorshe)*, 269 B.R. 744, 747 (Bankr. S.D. Ohio 2001); *United States v. Richardson (In re Richardson)*, 85 B.R. 1008, 1011 (Bankr. W.D. Mo. 1988). In a civil contempt proceeding, three elements must be established by clear and convincing evidence: "(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." *Hunter v. Magack (In re Magack)*, 247 B.R. 406, 410 (Bankr. N.D. Ohio 1999) (citing *Glover v. Johnson*, 138 F.3d 229, 244 (6th Cir. 1998)).

In this case, there is no dispute that Defendant had knowledge of the court's May 21, 2008, order to turnover the 2005 Ford Focus as well as the title and keys to the vehicle. The order was properly served

on Defendant, he was informed of the order by the Trustee, and he acknowledged at trial that he was aware of the order. Indeed, he even filed a timely appeal of that order. There is also no dispute that the order was specific and definite. Defendant failed to turn the vehicle over as ordered as indicated by both the Trustee's testimony and the adverse inferences requested by the UST and that this court finds appropriate as a result of Defendant's invocation of his rights under the Fifth Amendment. *See Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976) (“[T]he Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them....”). The court finds that the Trustee has established by clear and convincing evidence each of the three elements necessary to deny Defendant a discharge under § 727(a)(6)(A).

Nevertheless, Defendant asks the court to consider both the legal and policy arguments made by him during the pendency of this adversary proceeding and in his bankruptcy case relating to the motion for turnover. Specifically, he suggests that he was not required to comply with the court's order because (1) an automobile is an “essential asset” under Ohio law and (2) he offered to settle the matter with the Trustee by turning the vehicle over in exchange for “other property” that she was to provide to him. To the extent that a vehicle is considered an “essential asset” under Ohio law such that a Debtor's interest in the vehicle is protected from execution or sale to satisfy the claims of creditors, it is “essential” only to the extent of the value of the exemption provided under Ohio law – in this case, \$1,000. *See Ohio Rev. Code § 2329.66(A)(1)(b)*.<sup>3</sup> In any event, as this court explained in denying Defendant's motion for summary judgment, to the extent that Defendant believed the turnover order should have been amended to specifically address his exemption amount, it was incumbent upon him to either file a timely motion to amend the order or prosecute his appeal of the order. He was not entitled to simply ignore the order. Likewise, he was not entitled to ignore the turnover order simply because he had made an offer to the Trustee that included terms other than those included in the court's order. The court's order was clear and the Trustee's failure to accept Defendant's offer did not absolve him from complying with the turnover order.

Finally, Defendant urged the court to again consider certain public policy and economic considerations that he has previously raised in this proceeding, namely, that he is unemployed and that none of his creditors have objected to his discharge. In denying Defendant's motion for summary judgment, the court rejected these arguments, explaining as follows:

A debtor's financial predicament is certainly a factor in determining whether a Chapter 7

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<sup>3</sup> The Ohio exemption statute, Ohio Revised Code § 2329.66, was amended effective September 30, 2008. However, the pre-amended version applies to Defendant since his bankruptcy case was filed on February 11, 2008.

discharge is warranted. *See Behlke v. Eisen (In re Behlke)*, 358 F.3d 429, 434 (6<sup>th</sup> Cir. 2004) (explaining that under § 707(b)(3)(B), the court must determine whether the debtor is “needy,” that is, whether “his financial predicament warrants the discharge of his debts”). However, a debtor may not enjoy the benefit of a Chapter 7 discharge while avoiding the obligations imposed by the Bankruptcy Code on all Chapter 7 debtors. Those obligations include, among other things, a debtor surrendering his nonexempt assets to the trustee for liquidation and distribution among his creditors. *In re Robinson*, 292 B.R. 599, 610 (Bankr. S.D. Ohio 2003). Section 727 of the Bankruptcy Code sets forth the grounds for denying a Chapter 7 discharge and specifically provides that the United States Trustee, as well as the Chapter 7 Trustee and creditors, may object to the granting of a discharge under that section. 11 U.S.C. § 727(c)(1).

[Doc. # 10, p.5].

### **CONCLUSION**

The UST having established by clear and convincing evidence each element of his claim under 11 U.S.C. § 727(a)(6)(A), the court finds that he is entitled to judgment denying Defendant a Chapter 7 discharge. As such, the court need not address the UST’s alternative claim brought under 11 U.S.C. § 727(a)(2)(B). The court will separately enter judgment in the UST’s favor in accordance with this Memorandum of Decision.