

IT IS SO ORDERED.



Dated: December 09, 2009
04:16:43 PM

Honorable Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

JENIFER L. THOMAS and
GEORGE A. THOMAS,

Debtors.

CASE NUMBER 07-43090

ELAINE B. GREAVES, TRUSTEE,

Plaintiff,

ADVERSARY NUMBER 08-04256

vs.

JENIFER & GEORGE THOMAS,

Defendants.

HONORABLE KAY WOODS

MEMORANDUM OPINION REGARDING TRUSTEE'S MOTION
FOR SUMMARY JUDGMENT

This cause is before the Court on Motion for Summary Judgment (Doc. # 17) filed by Plaintiff, Elaine B. Greaves, Chapter 7 Trustee ("Trustee"), on October 19, 2009. Trustee moves the Court for

summary judgment against Defendants Jenifer L. Thomas and George A. Thomas ("Defendants") for turnover of the non-exempt portion of their 2007 tax refund as previously ordered by the Court. (Mot. for Summ. J. at 2.) Defendants failed to file a response to the Motion for Summary Judgment. For the reasons set forth below, Trustee's Motion for Summary Judgment is well-taken and judgment will be entered in favor of Trustee.

This Court has jurisdiction pursuant to 28 U.S.C. § 1334 and the general order of reference (General Order No. 84) entered in this district pursuant to 28 U.S.C. § 157(a). Venue in this Court is proper pursuant to 28 U.S.C. § 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(E). The following constitutes the Court's findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052.

I. PROCEDURAL AND FACTUAL BACKGROUND

On December 4, 2007, Defendants filed a voluntary petition pursuant to chapter 7 of the Bankruptcy Code, which was denominated Case No. 07-43090 ("Main Case"). On May 20, 2008, Trustee filed Motion for Turnover (Main Case, Doc. # 30), moving the Court for an order requiring Defendants to turn over: (i) copies of their 2007 federal and state tax returns; and (ii) the non-exempt portion of their 2007 tax refund. (Mot. for Turnover at 2.) On June 6, 2008, Defendants filed Debtors' Response and Request for Hearing as to Chapter 7 Trustee's Motion for Turnover ("Response") (Main Case, Doc. #32), in which Defendants requested that the Motion for Turnover be set for hearing. (Resp. at 1.)

On August 14, 2008, the Court held a hearing ("Hearing") on the Motion for Turnover, at which appeared: (i) Elaine B. Greaves, Esq., as Counsel for Trustee; (ii) Wayne W. Sarna, Esq., as Counsel for Defendants; and (iii) Defendant George A. Thomas. At the Hearing, Defendants acknowledged that the non-exempt portion of their 2007 tax refund in the amount of \$3,282.00 ("Tax Refund") was an asset of the bankruptcy estate, but represented that they had spent the Tax Refund. After hearing the arguments of both counsel, the Court granted Trustee's Motion for Turnover.

On October 9, 2008, the Court entered Order on Motion for Turnover ("Turnover Order") (Main Case, Doc. # 42). Pursuant to the Turnover Order, Defendants were to "turn over to the Trustee the non-exempt portion of their 2007 Federal and State tax refund in the amount of \$3,282.00." (Turnover Order at 2.)

On December 16, 2008, Trustee filed Complaint to Recover Money ("Complaint") (Doc. # 1), which commenced the instant adversary proceeding.¹ Trustee asserted that Defendants failed to turn over the sum of \$3,382.00, as required by the Turnover Order. (Compl. at 2.) Trustee prayed for an order requiring Defendants to turn over to Trustee the non-exempt portion of their 2007 tax refund in the amount of \$3,282.00. *Id.*

Defendants filed Amended Answer to Trustee's Adversary Complaint ("Answer") (Doc. # 11) on February 13, 2009. In the

¹The Court fails to understand the purpose of this adversary proceeding since it seeks the same relief already granted by the Court in the Turnover Order.

Answer, Mr. Sarna stated that his last contact with Defendants was at the Hearing on August 14, 2008. (Ans. ¶ 6.) Mr. Sarna also stated that Defendants spent their 2007 tax refund to pay basic living expenses. (*Id.* ¶ 4.) Mr. Sarna represented that “[u]nder Ohio’s exemption law that went into effect in 2008, the tax refunds in question would be exempt” and asked that the Court set the matter for further hearing. (*Id.* ¶ 6.)

On September 21, 2009, the Court held a telephonic hearing in which Ms. Greaves and Mr. Sarna participated. Mr. Sarna reiterated that: (i) he had not been in contact with Defendants since the Hearing; (ii) Defendants’ telephone had been disconnected; and (iii) he had filed the Answer to protect Defendants’ interests, but that he did not dispute Defendants’ failure to turn over the Tax Refund.

At the telephonic hearing, the Court set a schedule for dispositive motions and responses. Trustee filed Motion for Summary Judgment on October 19, 2009. Defendants failed to file a response to the Motion for Summary Judgment.

II. STANDARD FOR REVIEW

The procedure for granting summary judgment is found in Federal Rule of Civil Procedure 56(c), made applicable to this proceeding through Federal Rule of Bankruptcy Procedure 7056. Rule 56(c) provides in part that: “The judgment sought should 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) (West 2009). 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 & Mental Retardation v. Paul B.*, 88 F.3d 1466, 1472 (6th Cir. 1996). An issue of material fact is genuine if a rational trier of fact 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, 30 (B.A.P. 6th Cir. 1998). Thus, summary judgment is inappropriate "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 248.

In a motion for summary judgment, the moving party bears the initial burden of establishing the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. The burden then shifts to the nonmoving party to demonstrate the existence of a genuine dispute. *Anderson*, 477 U.S. at 248-49. 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 1479-80. Moreover, the "mere existence of a scintilla of evidence" in support of the nonmoving party's position is insufficient. *Anderson*, 477 U.S. at 252. The nonmoving party must present evidence upon which a reasonable trier of fact could rule in its favor. *Id.*

III. ANALYSIS

As the moving party, Trustee bears the burden of establishing the absence of a general issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Trustee asserts that Defendants have no factual or legal basis for failing to turn over the Tax Refund, and, thus, Trustee is entitled to an entry of summary judgment in her favor. (Mot. for Summ. J. at 2.) Trustee contends that this matter is "simple and straightforward," involving the "continued failure of the defendants to turn over non-exempt funds as ordered by the Court." (*Id.* at 1.)

In the Motion for Summary Judgment, Trustee establishes that: (i) a portion of Defendants' 2007 tax refund is non-exempt; (ii) the non-exempt portion of Defendants' 2007 tax refund is an asset of the estate to be turned over to Trustee; and (iii) the non-exempt portion of Defendants' 2007 tax refund is \$3,282.00. (*Id.* at 1-2.) Trustee has met her burden, demonstrating that there are no genuine issues of material fact in this matter.

Defendants have made no effort to dispute any of Trustee's factual assertions. Defendants failed to respond to the Motion for Summary Judgment. Indeed, Defendants, by and through Mr. Sarna, acknowledge that: (i) the non-exempt portion of their 2007 tax refund is \$3,282.00; and (ii) they are obligated to turn over this amount to Trustee. Furthermore, this Court has previously ordered Defendants to turn over the Tax Refund to Trustee. (Turnover Order at 2.)

Although Defendants' Answer asserted that the Tax Refund is exempt under Ohio's exemption law, Defendants provided no factual or legal basis for this statement.² (Ans. ¶ 5.) In addition, Mr. Sarna acknowledged at the telephonic hearing that Defendants' failure to turn over to Trustee the Tax Refund is not disputed.

Trustee has met her burden to establish the absence of a genuine issue of material fact in this matter. Defendants have presented no contrary evidence to defeat Trustee's properly supported Motion for Summary Judgment. Accordingly, summary judgment is proper in the instant adversary proceeding and Trustee is entitled to judgment as a matter of law.

IV. CONCLUSION

Trustee has established that the non-exempt portion of Defendants' 2007 federal and state tax refund is \$3,282.00, and that Defendants are required to turn over the Tax Refund to Trustee as

²The change in Ohio's exemption law occurred subsequent to the date Debtors filed their petition, *i.e.*, December 4, 2007, and also subsequent to Trustee filing the Motion for Turnover.

property of the estate. Defendants have presented no contrary evidence. Accordingly, this Court finds that there are no genuine issues of material fact and that Trustee is entitled to summary judgment.

An appropriate order will follow.

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Judgment; and (ii) orders Defendants to turn over to Trustee the non-exempt portion of their 2007 federal and state tax refund in the amount of \$3,282.00 ("Tax Refund"). Defendants shall turn over the Tax Refund to Trustee within thirty (30) days after entry of this Order.

IT IS SO ORDERED.

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