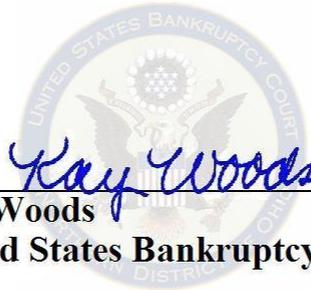


IT IS SO ORDERED.



Dated: October 21, 2010  
09:16:39 AM

Kay Woods  
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO

IN RE:

ANNETTE D. PIZZUTO,  
  
Debtor.

\* \* \* \* \*

ANDREW W. SUHAR, TRUSTEE,  
  
Plaintiff,

v.

ANNETTE D. PIZZUTO,  
et al.,  
  
Defendants.

CASE NUMBER 05-46652

ADVERSARY NUMBER 09-04330

HONORABLE KAY WOODS

\*\*\*\*\*  
MEMORANDUM OPINION REGARDING TRUSTEE'S MOTION FOR SUMMARY  
JUDGMENT AGAINST DEFENDANT ANNETTE D. PIZZUTO  
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This cause is before the Court on Andrew W. Suhar, Trustee's  
[sic] Amended Motion for Summary Judgment against Defendant Annette

Albenze fka Pizzuto ("Motion for Summary Judgment") (Doc. # 9) filed by Andrew W. Suhar, Chapter 7 Trustee ("Trustee"), on July 6, 2010. The Trustee requests the Court to enter summary judgment against Debtor/Defendant Annette D. Pizzuto ("Defendant") revoking her discharge for refusing to turn over to the Trustee property of the estate as previously ordered by this Court. The Defendant failed to file a response to the Motion for Summary Judgment. For the reasons set forth below, the Motion for Summary Judgment is well-taken and this Court will enter judgment in favor of the 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. §§ 1391(b), 1408, and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). 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 October 3, 2005 ("Petition Date"), the Defendant filed a voluntary petition pursuant to chapter 7 of title 11, United States Code, which was denominated Case No. 05-46652 ("Main Case"). On August 14, 2009, the Trustee filed Motion for Turnover (Main Case, Doc. # 31), which requested an order requiring the Defendant to turn over to the Trustee a personal injury settlement in the amount of

\$20,000.00 ("Settlement").<sup>1</sup> On August 17, 2009, the Defendant filed Response to Trustee's Motion for Turnover ("Response") (Main Case, Doc. # 33), in which she acknowledged that, if she received the Settlement, the Trustee was entitled to any personal injury recovery greater than \$5,000.00. The Defendant claimed an exemption on Amended Schedule C (Main Case, Doc. # 13) for the personal injury lawsuit pursuant to O.R.C. § 2329.66(A)(12)(c). (Am. Sch. C at 9.)

On September 10, 2009, the Court held a hearing on the Motion for Turnover, at which appeared: (i) Andrew W. Suhar, Esq., on behalf of the Trustee; and (ii) Richard S. Pluma, Esq., on behalf of the Defendant ("Hearing"). For the reasons set forth on the record at the Hearing, the Court granted the Motion for Turnover. (See Hr'g Tr. at 09:44:27). On that same date, the Court entered Order ("Turnover Order") (Main Case, Doc. # 34) to formalize its ruling. The Defendant was ordered to turn over to the Trustee the Settlement within ten days after entry of the Turnover Order – *i.e.*, on or before September 20, 2009. (Turnover Order at 2.)

On November 30, 2009, the Trustee filed Adversary Proceeding to Avoid a Post-Petition Transfer, to Recover Money or Property; to Revoke the Debtor's Discharge; to Obtain a Declaratory Judgment Relating to the Foregoing and Other Relief ("Complaint") (Doc. # 1), which commenced the instant adversary proceeding. The Trustee alleges the Defendant failed to turn over the Settlement as required

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<sup>1</sup> The Settlement was in consideration of Defendant's pre-petition personal injury claim, which had been pending, as of the Petition Date, in Virginia state court. (Mot. for Turnover, ¶¶ 2-3.)

by the Turnover Order. (Compl., ¶¶ 38-39.) Due to the Defendant's refusal to comply with the Turnover Order, the Trustee requests revocation of the Defendant's discharge, pursuant to 11 U.S.C. § 727(a) and (d). (*Id.* at 7, ¶ 40.)

On December 31, 2009, the Defendant filed Defendant's Answer and Cross-Claim ("Answer") (Doc. # 6). Although the Defendant admits she failed to turn over the Settlement, as required by the Turnover Order (Ans., ¶ 2.), she provides no explanation for such failure. (*See* Ans.) As affirmative defenses, the Defendant asserts: (i) the Trustee failed to state a claim upon which relief may be granted; (ii) the Trustee failed to plead fraud with particularity as required by the Federal Rules of Bankruptcy Procedure; and (iii) she lacked the requisite subjective intent to defraud or deceive the Trustee.<sup>2</sup> (*Id.* at 2.)

The Trustee filed the Motion for Summary Judgment on July 6, 2010, based upon the Defendant's admission that she failed to turn over the Settlement in contravention of the Turnover Order.<sup>3</sup> (Mot. for Summ. J. at 4-5.) The Trustee also alleges the Defendant knowingly failed to report to the Trustee her receipt of the

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<sup>2</sup> The Defendant also asserts a cross-claim against Co-Defendant Nader Hasan for legal malpractice (Ans., ¶ 2), which the Court will not address in this Opinion.

<sup>3</sup> Pursuant to the Adversary Case Management Initial Order (Doc. # 3) issued by the Court on December 1, 2009, "A motion for summary judgment may be filed only if the movant first obtains leave of Court." (Adv. Case Mgmt. Initial Order at 5.) On August 6, 2010, the Trustee filed a motion for leave to file *nunc pro tunc* the Motion for Summary Judgment (Doc. # 10). On August 27, 2010, the Court granted the Trustee's motion for leave to file the Motion for Summary Judgment *nunc pro tunc* to July 6, 2010 ("Order for Leave") (Doc. # 12). Pursuant to the Order for Leave, the Defendant was granted until September 19, 2010, to file a response, if any, to the Motion for Summary Judgment.

Settlement.<sup>4</sup> (*Id.* at 5.) Due to the Defendant's refusal to comply with the Turnover Order and failure to report her receipt of the Settlement, the Trustee contends summary judgment revoking the Defendant's discharge is appropriate, pursuant to § 727(a), (d)(2), and (d)(3). (*Id.* at 4-5.)

## **II. STANDARD FOR REVIEW**

The procedure for granting summary judgment is governed by Federal Rule of Civil Procedure 56(c), made applicable to the instant adversary proceeding by Federal Rule of Bankruptcy Procedure 7056. Rule 56(c) states, in pertinent part: "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 (West 2010). 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. *Id.*; *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). An issue of material fact is genuine if a rational trier of fact could find in favor of either party on the issue. *Id.* at 248-49; *SPC Plastics Corp. v. Griffith*

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<sup>4</sup> In the Complaint, the Trustee never expressly alleges the Defendant failed to report her receipt of the Settlement. (See Compl.) Instead, the Trustee alleges, and the Defendant admits, "[T]he Settlement, the payment of the Legal Fees and the payment of the Debtor Funds were all done without the knowledge or consent of the Trustee and without the approval of any order of this Court." (*Id.*, ¶ 15; Ans., ¶ 2.)

(*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." *Anderson*, 477 U.S. 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. In response to a proper motion for summary judgment, the nonmoving party must present evidence upon which a reasonable trier of fact could rule in its favor. *Id.* at 252. The evidence must be viewed in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

### **III. ANALYSIS**

As the moving party, the Trustee bears the burden of establishing the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. The Trustee contends the Defendant's refusal to obey the Turnover Order warrants revocation of the Defendant's discharge, pursuant to § 727(d)(3). (Mot. for Summ. J. at 4-5.) Furthermore, the Trustee asserts the Defendant has admitted all operative facts in the instant proceeding - *i.e.*, the Defendant admits she refused to obey the Turnover Order. (*Id.* at 5.) Section 727 states, in pertinent part:

(a) The court shall grant the debtor a discharge, unless—

\* \* \*

(6) the debtor has 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[.]

\* \* \*

(d) On request of the trustee, a creditor, or 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; or

(3) the debtor committed an act specified in subsection (a)(6) of this section[.]

11 U.S.C. § 727 (West 2009). Section 727(d)(3) mandates that a court “shall revoke” a debtor’s discharge if the debtor “has refused” to obey an order of the court. (*Id.*)

The Defendant admits she failed to comply with the Turnover Order. (Ans., ¶ 2.) Moreover, the Defendant provides no explanation for her failure to turn over the Settlement. (See Ans.) Although the Defendant does not admit to having “refused” to obey the Turnover Order, the Defendant has, without explanation, failed to comply with the Turnover Order since entry of the Turnover Order more than one year ago on September 10, 2009. Accordingly, this Court finds there is no genuine dispute that the Defendant has

refused to obey the Turnover Order. The Defendant's refusal to obey the Turnover Order provides the basis, pursuant to § 727(d)(3), to revoke her discharge. Accordingly, the Trustee is entitled to judgment as a matter of law; this Court will grant the Motion for Summary Judgment.<sup>5</sup>

The Trustee also contends the Defendant knowingly failed to report to the Trustee receipt of the Settlement, which provides a further basis for revocation of the Defendant's discharge, pursuant to § 727(d)(2). (Mot. for Summ. J. at 5.) Because this Court finds the Defendant's refusal to obey the Turnover Order provides the basis for revocation of her discharge, pursuant to § 727(d)(3), this Court will not address whether revocation of the Defendant's discharge is also proper pursuant to § 727(d)(2).<sup>6</sup>

#### **IV. CONCLUSION**

The Trustee has established: (i) the Turnover Order required the Defendant to turn over to the Trustee the Settlement by September 20, 2009; and (ii) the Defendant has refused to obey the Turnover Order. Thus, there is no genuine issue of material fact that the Defendant refused to obey an order of this Court. Accordingly, the Trustee is entitled, as a matter of law, to judgment revoking the Defendant's discharge, pursuant to

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<sup>5</sup> This Court's finding necessarily includes a finding that the Trustee has stated a claim upon which relief may be granted.

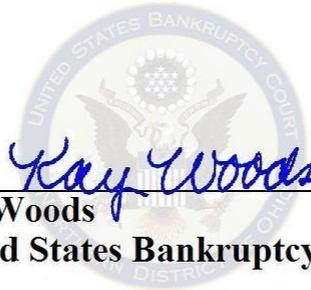
<sup>6</sup> Because the Defendant's fraud-related affirmative defenses - *i.e.*, (i) failure to plead fraud with particularity; and (ii) lack of subjective intent to defraud or deceive - relate only to § 727(d)(2), this Court does not need to address those affirmative defenses.

§ 727(d)(3). This Court will grant the Motion for Summary Judgment.

An appropriate order will follow.

# # #

IT IS SO ORDERED.



Dated: October 21, 2010  
09:16:39 AM

Kay Woods  
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO

IN RE:

ANNETTE D. PIZZUTO,  
  
Debtor.

\* \* \* \* \*

ANDREW W. SUHAR, TRUSTEE,  
  
Plaintiff,

v.

ANNETTE D. PIZZUTO,  
et al.,  
  
Defendants.

CASE NUMBER 05-46652

ADVERSARY NUMBER 09-04330

HONORABLE KAY WOODS

\*\*\*\*\*  
ORDER (i) GRANTING TRUSTEE'S MOTION FOR SUMMARY JUDGMENT; AND  
(ii) REVOKING DEFENDANT ANNETTE D. PIZZUTO'S DISCHARGE  
\*\*\*\*\*

This cause is before the Court on Andrew W. Suhar, Trustee's  
[sic] Amended Motion for Summary Judgment against Defendant Annette

Albenze fka Pizzuto ("Motion for Summary Judgment") (Doc. # 9) filed by Andrew W. Suhar, Chapter 7 Trustee ("Trustee"), on July 6, 2010. The Trustee requests the Court to enter summary judgment against Debtor/Defendant Annette D. Pizzuto ("Defendant") revoking her discharge for refusing to turn over to the Trustee property of the estate as previously ordered by this Court. The Defendant failed to file a response to the Motion for Summary Judgment.

For the reasons set forth in this Court's Memorandum Opinion Regarding Trustee's Motion for Summary Judgment against Defendant Annette D. Pizzuto entered on this date: (i) the Motion for Summary Judgment is hereby granted; and (ii) the Defendant's discharge is hereby revoked, pursuant to 11 U.S.C. § 727(d)(3).

**IT IS SO ORDERED.**

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