

The court incorporates by reference in this paragraph and adopts as the findings and orders 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.



Dated: March 07 2011

Mary Ann Whipple  
United States Bankruptcy Judge

**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
WESTERN DIVISION**

In Re: Beauregard Maximillion Harvey,	)	Case No. 10-33439
	)	
Debtor(s).	)	Chapter 7
	)	
Ericka S. Parker, Trustee,	)	Adv. Pro. No. 10-3355
	)	
Plaintiff(s),	)	Hon. Mary Ann Whipple
	)	
v.	)	
	)	
Beauregard Maximillion Harvey,	)	
	)	
Defendant(s).	)	
	)	
	)	

**ORDER RE MOTION TO DISMISS**

This case is before after a hearing on the Plaintiff’s motion to dismiss her Complaint to Deny Discharge Pursuant to 11 U.S.C. § 727(a)(6)(A)(“Complaint”). Defendant is the debtor in the underlying Chapter 7 case, and also an attorney who represents other debtors in bankruptcy cases in this court. Plaintiff is the duly appointed Chapter 7 Trustee in that case. She filed the Complaint

against Defendant alleging that he had failed and refused to comply with an order of this court entered on September 13, 2010, requiring him to turnover to her by September 30, 2010, copies of property titles and documents necessary for administration of the estate.

The Complaint was filed on October 21, 2010. Plaintiff sought and obtained permission to defer payment of the \$250 filing fee for the Complaint. Plaintiff now seeks in her motion to dismiss, filed on January 10, 2011, permission to dismiss the Complaint on the basis that Defendant finally provided to her the documents ordered by the court to be provided by September 30, 2010.

Dismissal of complaints brought under § 727 objecting to a debtor's discharge are subject to the limitations of Bankruptcy Rule 7041, which provides that "a complaint objecting to a debtor's discharge shall not be dismissed at the plaintiff's instance without notice to the trustee, the United States Trustee and such other persons as the court may direct, and only on order of the court containing terms and conditions which the court deems proper." Fed. R. Bankr. P. 7041. The reasons that complaints objecting to discharge are treated differently and more stringently from the perspective of voluntary dismissal than other actions is that the provisions of § 727 implicate in many respects the heart and integrity of the bankruptcy system, have the potential to affect all creditors and are vulnerable to abuse by creditors using actions objecting to discharge to leverage unfair *quid pro quo* settlements out of debtors to the prejudice and exclusion of other creditors, *see, e.g., Bank One v. Kallstrom (In re Kallstrom)*, 298 B.R. 753 (B.A.P. 10<sup>th</sup> Cir. 2003).

As this is an objection brought by a Chapter 7 Trustee, who has the statutory duty to do so in appropriate cases, 11 U.S.C. § 704(a)(6), this is not a case in which there is a concern about a discharge being bought or sold as a *quid pro quo*. And the Trustee reports that compliance with the court's September 13, 2010, turnover order has finally occurred, which is the basis for the requested dismissal. But given the uncontested and undisputed allegations in the Complaint regarding

interference with and delay of estate administration and disobedience of a court order by someone who is also an officer of this court, the integrity of the bankruptcy system is under direct challenge here. If an officer of the court can get away with disobeying an uncontested and routine court order until a lawsuit is filed, then why should any debtor worry about compliance with any court order?

The court thus finds the requested dismissal a very close question. As this is an action that does affect all creditors, the court finds that there are certain conditions that must be taken before and as a condition of granting the requested dismissal should the court ultimately decide to do so .

First, the Trustee did not serve her motion on Defendant's creditors. Rather, it was served only on Defendant and the United States Trustee. Before it grants or denies the motion, the court is interested in knowing what, if anything, Defendant's creditors have to say about the requested dismissal. The Trustee will therefore be directed to file an amended motion setting forth the allegations in the Complaint and the reasons for the requested dismissal, and to serve the amended motion on all Defendant's creditors scheduled in the underlying Chapter 7 case with a Local Bankruptcy Rule 9013-1 negative notice.

Second, the Trustee requested and obtained deferral of the filing fee for the Complaint. That does not mean the fee is waived, only that it will be deferred unless and until assets are recovered with which to pay it. Defendant has not contested the allegations of the Complaint. He did not file an answer or other response, did not appear at the pretrial conference on December 7, 2010, and did not appear at the hearing on the motion for default judgment set for and held on January 11, 2011, the day after the motion was filed. A Clerk's entry of default is of record and has not been set aside. See Fed. R. Bankr. P. 7055; Fed. R. Civ. P. 55(a), (c). There is no reason that either the bankruptcy court system or Debtor's creditors, in the event of recovery of assets, which appears to be a possibility from the docket in the Chapter 7 case, should bear this cost instead of Defendant. If the

court grants dismissal, it will be conditioned upon payment by Defendant of the \$250 filing for the Complaint.

Third, since Plaintiff had to file suit against Defendant to gain compliance with the court's September 13, 2010, turnover order, the Trustee necessarily engaged counsel, in this case herself, in the underlying Chapter 7 case. [See Chapter 7 Case No. 10-33439, Doc. ## 18, 22]. There is likewise no reason under the circumstances why either the Trustee, as counsel, or the estate, in the event of recovery of assets, should have to bear the legal fees associated with the Complaint, appearing at the pretrial conference, preparing and filing a motion for default judgment, appearing at the hearing thereon and filing the motion to dismiss. If the court grants dismissal, it will also be conditioned upon Defendant's payment to the estate of Plaintiff's legal fees and any other costs related to the Complaint, in addition to the filing fee.

**IT IS THEREFORE ORDERED** that:

1. Plaintiff shall file and serve on or before **March 31, 2011**, an amended motion to dismiss as described above.
2. Plaintiff shall file in this adversary proceeding on or before **April 8, 2011**, an itemized statement of her attorney's fees and costs incurred in prosecuting this adversary proceeding, in addition to the \$250.00 deferred filing fee for the Complaint. Defendant shall file any objection to Plaintiff's fee statement on or before **April 15, 2011**.
3. Plaintiff's motion to dismiss [Doc. # 13] is continued to further order of the court pending these actions.

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