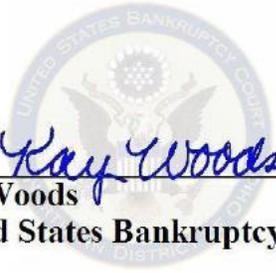


IT IS SO ORDERED.

Dated: January 17, 2014
10:03:34 AM


Kay Woods

Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

JOSEPH SANKEY and
TAMI L. SANKEY,

Debtors.

* * * * *

ANDREW W. SUHAR, TRUSTEE,

Plaintiff,

v.

JOSEPH SANKEY and
TAMI L. SANKEY,

Defendants.

CASE NUMBER 12-41154

ADVERSARY NUMBER 13-4035

HONORABLE KAY WOODS

MEMORANDUM OPINION REGARDING AMENDED MOTION FOR SUMMARY JUDGMENT

This matter is before the Court on an unopposed Amended Motion for Summary Judgment (Doc. # 21) filed by Plaintiff

Andrew W. Suhar, Chapter 7 Trustee ("Trustee"), on December 27, 2013. The Trustee seeks to revoke the discharge of Debtors Joseph Sankey and Tami L. Sankey because the Debtors failed to abide by this Court's November 30, 2012 Order Directing Turnover of Property ("Turnover Order") (Main Case, Doc. # 30).

This Court has jurisdiction pursuant to 28 U.S.C. § 1334 and the general order of reference (Gen. Order No. 2012-7) 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. STANDARD OF REVIEW

Federal Rule of Civil Procedure 56(a), made applicable to this proceeding by Federal Rule of Bankruptcy Procedure 7056, states, in pertinent part:

The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.

FED. R. CIV. P. 56(a) (West 2014). Material facts are those "that might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine issue of material fact exists "if a reasonable person

could return a verdict for the non-moving party." *Jacob v. Twp. of W. Bloomfield*, 531 F.3d 385, 389 (6th Cir. 2008) (citing *Anderson*, 477 U.S. at 248).

"The moving party bears the burden of proving the absence of genuine issues of material fact and its entitlement to judgment as a matter of law." *Longaberger Co. v. Kolt*, 586 F.3d 459, 465 (6th Cir. 2009) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)). The burden then shifts to the nonmoving party to present specific facts demonstrating the existence of a genuine dispute. *Pucci v. Nineteenth Dist. Court*, 628 F.3d 752, 759-60 (6th Cir. 2010) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). In evaluating a motion for summary judgment, "the court must view the factual evidence and draw all reasonable inferences in favor of the nonmoving party." *Banks v. Wolfe County Bd. of Educ.*, 330 F.3d 888, 892 (6th Cir. 2003) (citing *Matsushita*, 475 U.S. at 587).

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, 1477 (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; FED. R. CIV. P. 56(e).

II. FACTS

On May 8, 2012, the Debtors filed a voluntary petition pursuant to chapter 7 of the Bankruptcy Code. The Debtors were granted a discharge on September 18, 2012 (Main Case, Doc. # 23), revocation of which is the subject of this adversary proceeding.

At the First Meeting of Creditors on August 21, 2012,¹ "the Debtors testified that they had received and spent their 2011 federal income tax refund in the amount of \$9,614."² (Main Case, Doc. # 28 at 1.) As a result, the Trustee instructed the Debtors (i) to provide documentation related to (a) their 2011 federal income tax return and (b) their expenditure of the tax refund ("Tax Refund Documentation"); or (ii) in the alternative, to turn over to the Trustee \$9,614.00 ("Tax Refund"). (*Id.*) After several unsuccessful attempts to obtain either the Tax

¹ The First Meeting of Creditors was scheduled for August 7, 2012, at which both of the Debtors appeared. According to the main case docket, the Trustee asked the Debtors to produce additional information and the Meeting of Creditors was continued to August 21, 2012.

² Neither Schedule B (filed on May 8, 2012) (Main Case, Doc. # 1) nor Amended Schedule B (filed August 20, 2012) (Main Case, Doc. # 17), which identify the Debtors' personal property, includes any reference to the Debtors' 2011 income tax refunds. Likewise, the Debtors do not claim an exemption for such funds on Schedule C (filed on May 8, 2012) (Main Case, Doc. # 1) or Amended Schedule C (filed on August 20, 2013) (Main Case, Doc. # 18).

Refund Documentation or the Tax Refund from the Debtors, on October 29, 2012, the Trustee filed Motion for Turnover (Main Case, Doc. # 28). (*Id.*) The Debtors did not object or respond to the Trustee's Motion for Turnover.

On November 30, 2012, this Court entered the Turnover Order, which required the Debtors to "turnover [sic] all documentation, not already provided, evidencing the receipt and expenditure of their 2011 income tax refunds or in the alternative . . . the amount of \$9,614.00." (Turnover Order at 1.) The Turnover Order was served upon counsel for the Debtors, Carlo A. Ciccone, Esq.,³ on November 30, 2012 through the Court's CM/ECF electronic mail system and upon the Debtors on December 2, 2012 by first class mail. (Main Case, Doc. # 31.)

Subsequent to the issuance of the Turnover Order, the Debtors failed to provide the Trustee with the Tax Refund Documentation or the Tax Refund. (Amended Mot. for Summ. J., Ex. 1 ¶¶ 8-9.) Mr. Ciccone, on behalf of the Debtors, sent the Trustee a letter dated December 10, 2012, which contained an unsubstantiated explanation that the \$9,614.00 Tax Refund was used to pay (i) approximately seven months of past due rental payments to Robert W. Cregan in the total amount of \$5,000.00;

³ Subsequent to filing the Debtors' Answer in this adversary proceeding, Mr. Ciccone filed Motion to Withdraw as Attorney (Doc. # 10) on July 1, 2013. This Court granted the Motion on July 2, 2013. (Doc. # 11.) Since that time, the Debtors have proceeded *pro se*.

(ii) installment payments to Robert W. Cregan on a "2010 loan" in the total amount of \$3,800.00; and (iii) unidentified past due utility bills in the amount of \$814.00.⁴ (*Id.*, Ex. D.) By e-mail dated December 11, 2012, the Trustee requested the Debtors to provide an affidavit setting forth (i) the date that they received their income tax refund as well as a bank statement evidencing same; and (ii) the dates of the payments to Robert W. Cregan, along with canceled checks and/or receipts. (*Id.*, Ex. E.) The Debtors did not respond to the Trustee's request. (*Id.*, Ex. 1 ¶¶ 8-9.)

On April 29, 2013, the Trustee initiated this adversary proceeding to revoke the Debtors' discharge. The Complaint (Doc. # 1) alleges that the Debtors have not turned over the Tax Refund Documentation or the Tax Refund in violation of a lawful order of this Court. (Compl. ¶ 4.)

The Debtors filed Answer to Complaint and Defenses ("Answer") (Doc. # 5) on May 29, 2013, in which the Debtors assert that they "believe[] that substantial compliance exist[s] regarding the November 30, 2012 Order of this Court" (Ans. ¶ 4) and they "inadvertently were under the mistaken belief that [the Debtors] complied with the November 30, 2012 Order of this Court

⁴ Contradicting the statements in Mr. Ciccone's December 10, 2012 letter (Amended Mot. for Summ. J., Ex. D), the Debtors' Schedules and Statement of Financial Affairs do not include the alleged payments made on any antecedent debt. (Main Case, Docs. ## 1, 17.) Statement of Financial Affairs, Section 3 "Payment to Creditors," was marked "none." (Main Case, Doc. # 17 at 8.)

and that [the Debtors] were not deliberately, wantonly, willfully, or purposefully attempting to violate this Court's Order" (*id.* ¶ 5).

The Court held a telephonic status conference in this proceeding on July 29, 2013, during which the parties represented that they expected to settle the matter with an agreed order; however, the parties failed to submit a proposed agreed order.

The Trustee filed the Amended Motion for Summary Judgment⁵ on the basis that there is no genuine issue of material fact that the Debtors (i) failed to comply with the Turnover Order; and (ii) did not turn over the Tax Refund Documentation or the Tax Refund, which are property of the bankruptcy estate and the subject of the Turnover Order. In support of his Motion, the Trustee appended records of his communications with the Debtors and Mr. Ciccone, along with a sworn affidavit attesting that he has not received the Tax Refund Documentation or the Tax Refund. The Debtors did not oppose or respond to the Amended Motion for Summary Judgment.

⁵ The Trustee filed Motion for Summary Judgment (Doc. # 15) on November 15, 2013. When the Trustee failed to file the requisite affidavit or support pursuant to Fed. R. Civ. P. 56(c), the Court denied the Motion without prejudice. (Doc. # 19.) Shortly thereafter, the Trustee filed the Amended Motion for Summary Judgment.

III. ANALYSIS

As the moving party, the Trustee bears the burden of establishing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The Trustee asserts that the Debtors have not complied with the Turnover Order, which is a lawful order of this Court, and, thus, the Trustee is entitled to entry of summary judgment in his favor. (Amended Mot. for Summ. J. at 2.) Based on all of the evidence before the Court, there are no genuine issues of material fact, *i.e.*, the Debtors have failed to comply with the Turnover Order by not turning over the Tax Refund Documentation or the Tax Refund to the Trustee. In applying the law to these facts, as set forth below, the Trustee has established all of the elements required for this Court to revoke the Debtors' discharge.

The Tax Refund Documentation and the Tax Refund are property of the estate pursuant to 11 U.S.C. § 541. The Trustee is required to "collect . . . property of the estate for which such trustee serves" 11 U.S.C. § 704(a)(1) (West 2014). Section 521 requires the Debtors to "cooperate with the trustee as necessary to enable the trustee to perform the trustee's duties" under the Bankruptcy Code and "surrender to the trustee all property of the estate and any recorded information, including . . . documents, records, and papers, relating to property of the estate" 11 U.S.C. § 521(a)(3)-(4).

Federal Rule of Bankruptcy Procedure 4002(a)(4) further requires the Debtors to "cooperate with the trustee in . . . the administration of the estate." FED. R. BANKR. P. 4002(a)(4). "In addition to imposing affirmative duties on the Debtors, these provisions impress the policy that a debtor who voluntarily submits him or herself to the jurisdiction of the bankruptcy court to obtain the benefit of a discharge of debts, [sic] must fulfill certain duties to insure that estate assets are administered in accordance with applicable law." *Beach v. Morris (In re Beach)*, 281 B.R. 917, 921 (B.A.P. 10th Cir. 2002) (citing *In re McDonald*, 25 B.R. 186, 189 (Bankr. N.D. Ohio 1982)). A trustee's receipt of a debtor's tax returns is necessary for the trustee to assess what portion, if any, of the tax refunds is property of the estate. *Id.*

This Court finds that revocation of the Debtors' discharge is appropriate, based on their failure to turn over either the Tax Refund Documentation or the Tax Refund. Entry of a bankruptcy discharge is predicated on a debtor fulfilling certain duties imposed by the Bankruptcy Code. "Among the most fundamental of a debtor's duties is the requirement to comply with orders entered by the court." *Graham v. Knott (In re Knott)*, Case Nos. 12-3027, 11-32473, 2013 WL 1314989, at *3

(Bankr. N.D. Ohio Mar. 28, 2013). In pertinent part, section 727 states:

(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[.]

11 U.S.C. § 727.

"In order to protect the integrity of the Bankruptcy process, § 727(a)(6)(A) provides that a debtor who refuses to obey any lawful order of the court, [sic] must be denied a discharge in bankruptcy." *Yoppolo v. Meyers (In re Meyers)*, 293 B.R. 417, 419 (Bankr. N.D. Ohio 2002). The court in *In re Meyers* went on to state that:

[A] debtor will be found to have 'refused' to obey a court order under § 727(a)(6)(A), when the debtor's inaction would give rise to a charge of civil contempt.

For purposes of federal law, a person will be found in civil contempt when all of the following three elements are met 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.

Id. (internal citations omitted).

Parker v. Thompson (In re Thompson), 383 B.R. 407 (Bankr. N.D. Ohio 2007), is similar to the instant case. In *In re Thompson*, the trustee established civil contempt when (i) the debtor acknowledged receipt of the court order in his answer to the trustee's complaint; (ii) the debtor did not contest the fact that he had not yet turned over his tax refunds; and (iii) the court's order was direct, specific and definite, requiring a surrender of the specific tax return and associated refunds. *Id.* at 410.

This Court entered the Turnover Order on November 30, 2012 directing the Debtors to turn over the Tax Refund Documentation or the Tax Refund. (Turnover Order at 2.) The Turnover Order was served upon the Debtors by first class mail on December 2, 2012 at the address the Debtors provided to the Court in their Petition. The case docket does not reflect that such mail was returned as "undeliverable." Based on service of the Turnover Order upon the Debtors, as reflected in the docket in this case, and the Debtors' admission regarding the Turnover Order in Paragraph 2 of the Debtors' Answer, there is no dispute that the Debtors had knowledge of the Turnover Order. Thus, the first prong of the *Meyers* test is met.

The Trustee attests that the Debtors did not turn over the Tax Refund Documentation or the Tax Refund — thereby violating the Turnover Order. (Amended Mot. for Summ. J., Ex. 1.) While the Debtors' Answer asserts that they "believe[] that all documentation originally provided was within compliance of the Court's Order," the Debtors do not deny that they failed to turn over the Tax Refund Documentation or the Tax Refunds. Moreover, the Debtors provide no facts or evidentiary support for their claimed compliance. (Ans. ¶¶ 2-3.) There is no basis for the Debtors' statement that they "believe[] that all documentation originally provided was within compliance of the Court's Order" (Ans. ¶ 2 (emphasis added)), because the Turnover Order required that the Debtors to turn over "all documentation, not already provided" (Turnover Order at 2 (emphasis added)). The Debtors' non-compliance was not a mistake or inadvertent lapse, but a willful refusal to comply with the Turnover Order. As a result, prong two of the *Meyers* test is met.

The text of the Turnover Order expressly provides that it is:

ORDERED that within ten (10) days from the date of this Order, the Debtors, Joseph Sankey and Tami L. Sankey, shall turnover [sic] all documentation, not already provided, evidencing the receipt and expenditure of their 2011 income tax refunds or in the alternative the Debtors, Joseph Sankey and Tami L. Sankey shall turnover [sic] the amount of \$9,614.00.

(Turnover Order at 2.) The Turnover Order not only listed the specific estate property the Debtors were required to turn over to the Trustee, but it also gave them a definite time frame in which to do so. There is no ambiguity in the Turnover Order; it is "clear and definite" as required by prong three of *Meyers*.

If the moving party can show each of these elements, then the Debtors have an obligation to explain their non-compliance. *Sicherman v. Gates (In re Gates)*, Case No. 11-10347, 2012 WL 1302626, at *2 (Bankr. N.D. Ohio Apr. 13, 2012). "In defending a charge of contempt, good faith is generally not a defense as the elements of willfulness or contumaciousness are not essential elements in civil contempt proceeding." *In re Temple*, 228 B.R. 896, 898 (Bankr. N.D. Ohio 1998) (citations omitted). However, good faith may be applicable as a defense where the alleged contemnor makes a showing that he substantially complied with the court order.⁶ *Maggio v. Zeitz*, 333 U.S. 56 (1948).

"Substantial compliance is established by demonstrating that one has taken all reasonable steps to comply with the court order." *In re Temple*, 228 B.R. at 898. The alleged contemnor must provide supporting evidence to explain his or her non-compliance; mere assertions are not sufficient. *In re Harrell*, Case No. 09-10989, 2012 WL 2412031, at *2 (Bankr. N.D. Ohio June

⁶ The Debtors engaged in active negotiation with the Trustee and represented to the Court that they would resolve this adversary proceeding with an agreed order. Despite these representations, the Debtors still have not complied with the Turnover Order.

26, 2012). Specifically, this requires showing that "reasonable diligence and energy was [sic] employed by the alleged contemnor in attempting to accomplish what the court ordered." *In re Temple*, 228 B.R. at 898.

As set forth above, the Debtors testified that they spent the Tax Refund; they merely allege in their Answer that they believe that "substantial compliance existed" and that they were not "deliberately, wantonly, willfully, or purposefully attempting to violate this Court's order." (Ans. ¶¶ 4-5.) However, these are unsupported assertions. The Debtors failed to provide any factual support for their belief that they were in "substantial compliance" with the Turnover Order. Moreover, the Debtors failed to oppose the Amended Motion for Summary Judgment. As stated in Federal Rule of Civil Procedure 56(e), the Debtors may not rest on the allegations in their Answer alone.

The Court finds that there are no genuine issues of fact that (i) the Debtors failed to comply with the Turnover Order; (ii) the Trustee has established all elements of the *Meyers* test; and (iii) the Trustee is entitled to judgment as a matter of law. Accordingly, the Court will grant the Amended Motion for Summary Judgment.

IV. CONCLUSION

After reviewing the evidence in a light most favorable to the Debtors, the Court finds that no genuine issue of material fact exists regarding the Debtors' failure to obey the Court's Turnover Order. The Trustee has demonstrated that the Debtors knowingly refused or failed to turn over property of the estate in contravention of a lawful order of the Court. In addition, the Debtors' failure to obey the Turnover Order is not defensible on the basis of substantial compliance. As a result of the foregoing, the Court finds that the Debtors' discharge should be revoked pursuant to 11 U.S.C. § 727.

An appropriate order will follow.

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IT IS SO ORDERED.

Dated: January 17, 2014
10:03:35 AM


Kay Woods

Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

JOSEPH SANKEY and
TAMI L. SANKEY,

Debtors.

* * * * *

ANDREW W. SUHAR, TRUSTEE,

Plaintiff,

v.

JOSEPH SANKEY and
TAMI L. SANKEY,

Defendants.

CASE NUMBER 12-41154

ADVERSARY NUMBER 13-4035

HONORABLE KAY WOODS

ORDER GRANTING AMENDED MOTION FOR SUMMARY JUDGMENT

This matter is before the Court on Amended Motion for
Summary Judgment (Adv. Proc., Doc. # 21) filed by Plaintiff

Andrew W. Suhar, Chapter 7 Trustee ("Trustee"), on December 27, 2013. Debtors Joseph Sankey and Tami L. Sankey did not respond to the Amended Motion for Summary Judgment.

For the reasons set forth in this Court's Memorandum Opinion Regarding Amended Motion for Summary Judgment entered on this date, the Court hereby:

1. Finds that no genuine issue of material fact exists;
2. Finds that the Debtors failed to comply with this Court's November 30, 2012 Order Directing Turnover of Property (Main Case, Doc. # 30);
3. Finds that the Trustee is entitled to judgment as a matter of law;
4. Grants the Trustee's Amended Motion for Summary Judgment; and
5. Pursuant to 11 U.S.C. § 727(a)(6)(A), revokes the discharge granted to the Debtors in Case No. 12-41154 by Order (Main Case, Doc. # 23) entered on September 18, 2012, which Order is hereby vacated.

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