

**UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON**

In re: ROBERT W. KEATON
MARCIA A. KEATON,

Debtors

Case No. 04-31931
Adv. No. 04-3251

DONALD F. HARKER, III, TRUSTEE,

Plaintiff

Judge L. S. Walter
Chapter 7

v.

ROBERT W. KEATON
MARCIA A. KEATON

Defendants

**DECISION GRANTING PLAINTIFF DONALD F. HARKER, III,
TRUSTEE'S MOTION FOR SUMMARY JUDGMENT
AND REVOKING DEBTORS' DISCHARGE**

The court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157(a) and 1334, and the standing General Order of Reference in this District. This proceeding

constitutes a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I). This matter is before the court on the Motion for Summary Judgment of Plaintiff Donald F. Harker, III, Trustee (the “Trustee”) [Est. Doc. 11] (the “Motion”). Defendant/Debtors Robert W. Keaton and Marcia A. Keaton (“Debtors”) have failed to respond to Plaintiff’s Motion.

The issue arising on summary judgment is whether Debtors’ discharge should be revoked pursuant to 11 U.S.C. § 727(d). The Trustee asserts that Debtors have failed and/or refused to comply with various orders of the court and that Debtors have failed to turn over copies of their 2003 tax returns as well as any refunds generated from those returns, copies of their bank statements and Debtors’ 1999 Sterling Dump Truck and that these actions constitute cause to revoke discharge pursuant to 11 U.S.C. § 727(d)(2) and/or (3).

Following the court’s review of the Trustee’s Motion and evidence submitted on summary judgment, the court determines that the Motion is **GRANTED**, and Debtors’ discharge is **REVOKED** pursuant to 11 U.S.C. § 727(d)(3).

FACTUAL AND PROCEDURAL HISTORY

Debtors filed for chapter 7 relief on March 10, 2004. The Trustee was duly appointed as acting trustee for Debtors’ bankruptcy estate. Debtors’ meeting of creditors was held on May 10, 2004. As of the petition date, Debtors were the owners of a 1999 Sterling dump truck which they valued at \$30,000 in their schedules (the “Truck”). [Est. Doc. 1] Debtors claim a \$1,000 exemption in the Truck. [Est. Doc. 1]

By letter dated May 13, 2004, the Trustee requested copies of Debtors’ 2003 federal and state income tax returns and an explanation of any tax refunds received by them. On June 1, 2004, the Trustee sent a second letter to Debtors, again requesting

copies of Debtors' tax returns, and inquiring if Debtors were interested in purchasing the non-exempt equity in the Truck.

On June 10, 2004, Debtors filed a document that the court construed as a motion to dismiss their case [Est. Doc. 29]. The Trustee objected to Debtors' motion to dismiss and the matter was set for hearing on July 13, 2004. Debtors failed to appear for the hearing, and their motion was denied.

On June 16, 2004, the Trustee filed a Motion for Turnover of property, specifically requesting copies of Debtors' 2003 tax returns and bank account statements, and the Truck [Est. Doc. 31]. On July 15, 2004, the court entered an Order requiring Debtors to provide these items to the Trustee [Est. Doc. 37] (the "Turnover Order").

On September 2, 2004, the Debtors' discharge was granted. On September 15, 2004, this adversary proceeding was initiated by the Trustee's filing of a complaint to revoke Debtors' discharge [AP Doc. 1]. Debtors answered the adversary complaint on October 15, 2004 [AP Doc. 5]. Debtors' answer generally denied all of the allegations in the Trustee's complaint (including allegations that were clearly undeniable), and specifically stated that "[o]n May 17, 2004 we sent the bank statements and tax returns and advised Mr. Harker again that no truck will be turned over to him..." [AP Doc. 5, Statement of Fact #1].

On November 5, 2004, the court issued its Order Governing Pretrial and Trial Procedures [AP Doc. 6] ("Pretrial Order"). The Pretrial Order required Debtors to file their pretrial statement with the court on or before November 30, 2004. The Trustee filed his pretrial statement [AP Doc. 8], but, Debtors did not. By further order dated December 7, 2004, the court scheduled a pretrial conference, and a hearing on sanctions for Debtors' failure to comply with the Pretrial Order [AP Doc. 9] (the "Sanction

Order”). The Sanction Order specifically stated that Debtors “[f]ailure to comply with the terms of this **order may result in the imposition of sanctions, including, but not limited to, dismissal** of this action or default judgment.” (Emphasis in original). [AP Doc. 9] Debtors failed to appear at the hearing set by the Sanction Order.

LEGAL ANALYSIS

A. Summary Judgment Standard.

The appropriate standard to address the Trustee’s Motion is contained in Fed. R. Civ. P. 56(c) and incorporated in bankruptcy adversary proceedings by reference in Fed. R. Bankr. P. 7056. Rule 56(c) states in part that a court must grant summary judgment to the moving party if:

the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

In order to prevail, the moving party, if bearing the burden of persuasion at trial, must establish all elements of its claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 331 (1986). If the burden is on the nonmoving party at trial, the movant must: 1) submit affirmative evidence that negates an essential element of the nonmoving party’s claim; or 2) demonstrate to the court that the nonmoving party’s evidence is insufficient to establish an essential element of the nonmoving party’s claim. *Id.* at 331-32. Thereafter, the opposing party “must come forward with ‘specific facts showing that there is a genuine issue for trial.’” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986) (citations omitted); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-251 (1986). All inferences drawn from the underlying facts must be viewed in a light most favorable to the party opposing the motion. *Matsushita*, 475 U.S. at 586-88.

B. Revocation of Discharge.

Discharges in bankruptcy are favored. *Marquis v. Marquis (In re Marquis)*, 203 B.R. 844, 847 (Bankr. D. Me. 1997). As a consequence, any party seeking to revoke a debtor's discharge bears the burden of proof to demonstrate, by a preponderance of the evidence, that the debtor has violated one of the subsections of § 727. *Beaubouef v. Beaubouef (In re Beaubouef)*, 966 F.2d 174, 178 (5th Cir. 1992), citing *Grogan v. Garner*, 498 U.S. 279, 287, 111 S.Ct. 654, 659-60, 112 L.2d 755 (1991); Fed. R. Bankr. P. 4005.

In the adversary proceeding, the Trustee seeks to revoke Debtors' discharge under 11 U.S.C. § 727(d)(3), which provides:

(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—

...

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

11 U.S.C. § 727(a)(6)(A) provides:

(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.

An action brought under § 727(a)(6)(A), for a debtor's refusal to obey a court order, is similar to a proceeding for civil contempt. *Hunter v. Magack (In re Magack)*, 247 B.R. 406, 410 (Bankr. N. D. Ohio 1999). In a contempt proceeding, the basic proposition is that all orders and judgments of the court must be complied with promptly. *N.L.R.B. v. Cincinnati Bronze, Inc.*, 829 F.2d 585, 590 (6th Cir. 1987). The party seeking to deny/revoke a debtor's discharge order must, as is required in a federal civil contempt proceeding, establish that the following three elements 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., at 410, *citing Glover v. Johnson*, 138 F.3d 229, 244 (6th Cir. 1998); *In re Temple*, 228 B.R. 896, 897 (Bankr.N.D.Ohio 1998).

The Pretrial Order, Sanction Order and Turnover Order are all specific in their terms. The Pretrial Order, Sanction Order and Turnover Order were all served on Debtors at the address noted in their case file and as set forth in their answer. Debtors have not disputed receiving these orders. The court record reflects that Debtors did not comply with the Pretrial Order or the Sanction Order. The Trustee's Affidavit supporting his Motion [AP Doc. 12] identifies that Debtors have not turned over complete copies of their 2003 tax returns or the Truck. Debtors' answer specifically states that Debtors would not turn the Truck over to the Trustee. Accordingly, due to Debtors' various refusals to obey the lawful orders of this court or to respond to the Trustee's Motion, the Debtors' discharge is revoked.

The Trustee also argues that Debtors' discharge should be revoked pursuant to 11 U.S.C. § 727(d)(2) which states:

(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.

The court find this section to be inapplicable on the facts of this case or, alternatively, finds that the Trustee has not provided sufficient evidence to justify revocation of the discharge under this section. Furthermore, the court's decision to revoke Debtors' discharge pursuant to § 727(d)(3), makes further consideration of §727(d)(2) unnecessary.

IT IS THEREFORE ORDERED that the Trustee's Motion for Summary Judgment is **GRANTED**, and Debtors' discharge is **REVOKED** pursuant to 11 U.S.C. §727(d)(3).

Copies to:

Robert W. Keaton and Marcia A. Keaton, 35 Poplar Street, Franklin, OH 45005
Donald F. Harker, III, *Trustee*, 2103 First National Plaza, Dayton, OH 45402
Office of the U.S. Trustee, 170 North High Street, Suite 200, Dayton, OH 43215

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