

UNITED STATES BANKRUPTCY COURT
DISTRICT OF CONNECTICUT

IN RE:)	CASE NO. 02-32395 (LMW)
)	
MARY F. NORTHRIP,)	CHAPTER 7
)	
DEBTOR.)	
-----)	
ROBERTA NAPOLITANO, TRUSTEE,)	ADV. PRO. NO. 05-3003
)	
PLAINTIFF)	DOC. I.D. NO. 12
)	
vs.)	
)	
MARY F. NORTHRIP,)	
)	
DEFENDANT.)	
-----)	

APPEARANCES

Mary F. Northrip 40 Highview Avenue West Haven, CT 06516	Debtor and <i>Pro Se</i> Defendant
Roberta Napolitano, Esq. P. O. Box 9177 Bridgeport, CT 06601	Chapter 7 Trustee and Plaintiff

**MEMORANDUM AND ORDER OF DECISION
RE: MOTION FOR DEFAULT JUDGMENT**

Lorraine Murphy Weil, United States Bankruptcy Judge

Before the court is the chapter 7 trustee’s (the “Trustee”) motion (Adv. P. Doc. I.D. No. 12, the “Motion”) for entry of default judgment on her complaint to revoke the above-captioned debtor’s

(the “Debtor”) discharge. This court has jurisdiction over this core matter under 28 U.S.C. §§ 1334 and 157(b) and that certain Order dated September 21, 1984 of the District Court (Daly, C.J.).¹

I. FACTS²

This case was commenced by a voluntary chapter 7 petition filed on May 15, 2002. That petition listed the Debtor’s address as “40 Highview Avenue, West Haven, CT 06516 [the “Listed Address”].” (*See* Chapter 7 Case Doc. I.D. No. 1.) The petition was filed through an appearing attorney, Timothy J. Lee, Esq. (*See id.*) The schedules (included in Chapter 7 Case Doc. I.D. No. 1, the “Schedules”) filed with the petition listed secured claims in the aggregate amount of \$99,872.00, no priority unsecured claims and general unsecured claims in the aggregate amount of \$34,296.12. (*See* Chapter 7 Case Doc. I.D. No. 1.) The Schedules listed a “fee simple” interest in the real property (the “Property”) constituting the Listed Address with a stated value of \$140,000.00. The secured debt listed in the Schedules relates to a mortgage on the Property. (*See id.* (Schedule D. Creditors Holding Secured Claims).) The Schedules further listed personal property of the Debtor in the stated aggregate value of \$8,806.00 including \$4,400.00 in the aggregate attributed to a “1992 Plymouth Voyager” and a “1991 Dodge Grand Caravan [collectively, the “Vehicles”].” (*See id.* (Schedule B. Personal Property).) Schedule C (Property Claimed as Exempt) of the Schedules claimed the Debtor’s interest in the Property as exempt under Conn. Gen. Stat. § 52-352b(t). (*See*

¹ That order referred to the “Bankruptcy Judges for this District” *inter alia* “all proceedings arising under Title 11, U.S.C.”

² The facts which follow are set forth in the respective case files for this adversary proceeding (cited as “Adv. P. Doc. I.D. No. ___”) and this chapter 7 case (cited as “Chapter 7 Case Doc. I.D. No. ___”), as well as relevant audio records in both the chapter 7 case and adversary proceeding (cited, respectively, as 12/4/02 Audio Record at ___:___:___, 9/1/04 Audio Record at ___:___:___ and 7/13/05 Audio Record at ___:___:___).

id.) On July 1, 2002, the Debtor filed amended Schedules A, B, F and I (Chapter 7 Case Doc. I.D. No. 5) which, in relevant part, increased the stated value of the Property to \$155,000.00. (*See id.* (Amended Schedule A).)

The Debtor received her Chapter 7 discharge on September 3, 2002. (*See* Chapter 7 Case Doc. I.D. No. 5, the “Discharge.”) On October 28, 2002, the Trustee filed a Motion To Approve Compromise (Chapter 7 Case Doc. I.D. No. 7, the “Compromise Motion”). The relevant compromise provided that the Debtor would retain the Vehicles and a \$1,500.00 tax refund³ in return for a cash payment in the amount of \$3,500.00. (*See id.*) The compromise originally provided that: the Debtor would give the Trustee a mortgage on the Property (maturing on April 1, 2004) to secure her monetary obligation under the compromise; the Trustee would abandon the Property pursuant to 11 U.S.C. § 554; and the Debtor would use her “best efforts to sell or refinance the [P]roperty.” *Id.* To settle an objection (Chapter 7 Case Doc. I.D. No. 9) to the Compromise Motion by the United States Trustee, the order (Chapter 7 Case Doc. I.D. No. 12, the “Compromise Order”) approved the proposed compromise but provided that “the abandonment of the Property . . . shall not be effective until the Trustee receives the sum of \$3,500.00 in good funds,” *id.*⁴ The Compromise Order was issued on December 4, 2002 and was served on the Debtor’s counsel, and on the Debtor at the Listed Address. (*See* Chapter 7 Case Doc. I.D. No. 12 (Certificate of Mailing).)

³ The Trustee advised the court at the hearing on the Compromise Motion that the Debtor had spent the tax refund before the compromise was reached. (*See* 12/4/02 Audio Record at 1:35:33 – 1:35:38.)

⁴ The Trustee served the proposed revised Compromise Order on the Debtor at the Listed Address and upon her counsel on November 5, 2002 (*see* Chapter 7 Case Doc. I.D. No. 10); the notice of the hearing on the (revised) Compromise Motion was served on the same two people (among others) at the same addresses on November 6, 2002 (*see* Chapter 7 Case Doc. I.D. No. 11).

On February 14, 2003, the Trustee filed a Motion To Compel Debtor To Comply with Settlement Agreement, and for Sanctions (Chapter 7 Case Doc. I.D. No. 13, the “Motion To Compel”) which alleged that “the Trustee requested that the Debtor’s attorney forward the mortgage [after recordation, the “Mortgage”] to her on January 13, 2003 and January 27, 2003” but “[t]o date, there has been no compliance with that request.” (See Motion To Compel ¶ 6.) A hearing on the Motion To Compel was scheduled for March 19, 2003. (See Chapter 7 Case Doc. I.D. No. 14) That hearing was continued on several occasions and was marked “off” on August 13, 2003. On July 27, 2004, the Trustee filed a request that a hearing on the Motion To Compel again be scheduled by the court. (See Chapter 7 Case Doc. I.D. No. 21.) In accordance with that request, the court scheduled a hearing (the “Hearing”) on the Motion To Compel for August 25, 2004. (See Chapter 7 Case Doc. I.D. No. 22.) The Debtor received notice of the Hearing at the Listed Address (and her counsel received notice at his offices). (See Chapter 7 Case Doc. I.D. No. 24.) On August 25, 2004, the Hearing was continued on the record to September 1, 2004. The Hearing was held as so scheduled. Neither the Debtor nor her counsel appeared at the Hearing (see 9/1/04 Audio Record at 3:10:30) and this court issued that certain Order Compelling Compliance (Chapter 7 Case Doc. I.D. No. 25, the “Mortgage Order”) on the same date. The Mortgage Order ordered the Debtor to deliver the Mortgage to the Trustee. (See *id.*) The Mortgage Order was served upon the Debtor (among others) at the Listed Address. (See Chapter 7 Case Doc. I.D. No. 26.)

On January 5, 2005, the Trustee timely filed the complaint (Adv. P. Doc. I.D. No. 1, the “Complaint”) that commenced this adversary proceeding. The Trustee caused the Complaint (and related summons, the “Summons”) to be served by first-class mail on the Debtor at the Listed Address and on Attorney Lee pursuant to Rule 7004(b)(9) of the Federal Rules of Bankruptcy

Procedure.⁵ (See Adv. P. Doc. I.D. No. 6.) The Complaint alleges that the Debtor had failed to deliver the Mortgage to the Trustee as required by the Mortgage Order and seeks a revocation of the Discharge pursuant to Bankruptcy Code § 727(d)(3)⁶ “because . . . [the Debtor] refused . . . to obey . . . [the Mortgage Order]” (Complaint ¶ 6.) Attorney Lee did not file an appearance in the

⁵ Rule 7004(b) provides in relevant part as follows:

(b) Service by First Class Mail. Except as provided in subdivision (h), in addition to the methods of service authorized by Rule 4(e)-(j) F.R.Civ.P., service may be made within the United States by first class mail postage prepaid as follows:

. . . .
(9) Upon the debtor, after a petition has been filed by or served upon the debtor and until the case is dismissed or closed, by mailing a copy of the summons and complaint to the debtor at the address shown in the petition or statement of affairs or to such other address as the debtor may designate in a filed writing and, if the debtor is represented by an attorney, to the attorney at the attorney’s post-office address.

Fed. R. Bankr. P. 7004(b)(9) (West 2005).

⁶ Section 727(d)(3) provides in relevant part as follows:

(d) On request of the 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(d)(3) (West 2005). Section 727(a) provides in relevant part as follows:

(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(a)(6)(A) (West 2005).

adversary proceeding and the Debtor was deemed to have appeared *pro se*. See *Katz v. Araujo (In re Araujo)*, 292 B.R. 19, 22 (Bankr. D. Conn. 2003).

The Trustee obtained a Clerk's entry of default against the Debtor on March 29, 2005 for failure to plead or defend. (See Adv. P. Doc. I.D. No. 10.) The Trustee filed the Motion on May 5, 2005 and served it upon the Debtor at the Listed Address (and also upon Attorney Lee). (See Adv. P. Doc. I.D. No. 12 (Certification).) A (continued) hearing (the "Continued Hearing") on the Motion was scheduled for June 29, 2005. Notice of the Continued Hearing date was served on the Debtor at the Listed Address. (Adv. P. Doc. I.D. No. 16.)

Because the court had some sensitivity to revoking a chapter 7 discharge in the context of a "deemed" appearance in these circumstances, the court scheduled an on-the-record status conference in the chapter 7 case to discuss the status of that case "including the whereabouts of the . . . Debtor . . ." (Chapter 7 Case Doc. I.D. No. 28.) That status conference (the "Status Conference") was convened on July 13, 2003.⁷ Notice of the Status Conference was served on the Debtor at the Listed Address (and on Attorney Lee). (See Chapter 7 Case Doc. I.D. No. 29.) The Trustee and Attorney Lee appeared; the Debtor did not. (See 7/13/05 Audio Record at 3:14:24 *et seq.*) At the Status Conference, Attorney Lee advised the court: (a) Attorney Lee had been advised by the Debtor's son that the Debtor now lived in Tennessee (but the son would not give Attorney Lee an address or telephone number); (b) the Debtor had sold the Property about two and a half years earlier without telling either the Trustee or Attorney Lee; and (c) subsequently the Debtor brought \$1,600.00 to Attorney Lee's office to be paid to the Trustee and indicated that she might pay the remaining \$1,900.00 to the Trustee some time in the future. (See 7/13/05 Audio Record at

⁷ The Continued Hearing had been further continued to that date in open court.

3:13:42 *et seq.*)⁸ At the Status Conference, the Trustee advised the court that all mailings to the Debtor with respect to this adversary proceeding had been returned as undeliverable. (*See* 7/13/05 Audio Record at 3:14:42 – 3:14:52.) At the close of the Status Conference (and the further continued Continued Hearing), the court took the Motion under advisement.

The Debtor has never amended the Listed Address (nor notified the Trustee (or Attorney Lee) of any new address) and it remains the only address which the court has for the Debtor. (*See* Chapter 7 Case Docket; 7/13/05 Audio Record at 3:14:52 *et seq.*)

II. DISCUSSION

The Trustee claims that she is entitled to revocation of the Discharge under Bankruptcy Code § 727(d)(3) because the Debtor allegedly “refused” to comply with the Mortgage Order.⁹ To prevail on the Motion, the Trustee must demonstrate a *prima facie* case under Section 727(d)(3). *See In re Araujo*, 292 B.R. at 22.

Section 727(a)(6) denies a discharge to a debtor who has refused to obey any lawful order of the court

The purpose of section 727(d)(3) is to make it possible for the debtor to obtain a discharge early in the case but, to protect the estate and creditors, makes it revocable if the debtor later refuses to obey an order. . . . The “refusal” under section 727(d)(3) should be considered a refusal that occurs after the granting of a discharge.

6 Alan N. Resnick & Henry J. Sommer, *Collier on Bankruptcy* ¶ 727.15[5], at 727-78 – 727-78.1 (15th ed. rev. 2005) (“*Collier on Bankruptcy*”) (footnotes omitted). Section 727(d)(3) specifically refers to Section 727(a)(6). Thus, (subject to the qualification that the “refus[al]” must occur post-

⁸ Attorney Lee remitted the \$1,600.00 payment to the Trustee. (*See* 9/1/04 Audio Record at 3:10:37 – 3:10:40.) The sale of the Property moots any argument that the Mortgage Order was defective because it did not set an outside date for performance by the Debtor.

⁹ For the purposes of the Motion and based on the record made at the Status Conference, the court finds that the Debtor did not comply with the Mortgage Order.

discharge) if discharge would have been denied under Section 727(a)(6) for the same “refus[al],” discharge may be revoked for such “refus[al].” Under Section 727(a)(6)

[a] debtor will be denied a discharge if he or she has refused to obey any lawful order of the court. An order is lawful if it is authorized in the words of, or by implication from, the statute.

The original burden of going forward, as well as the ultimate burden of proof under section 727(a)(6)(A), is on the [Trustee] . . . to show that there has been a violation of a lawful order of the court. The burden of going forward then shifts to the debtor to prove that he or she has not committed the objectionable act.

6 *Collier on Bankruptcy* ¶ 727.09[1], at 727-50 (footnotes omitted). Courts are not in complete agreement as to whether the statutory term “refuse[.]” requires an element of willfulness or intent. Compare *Wilmington Trust Co. v. Jarrell (In re Jarrell)*, 129 B.R. 29, 33 (Bankr. D. Del. 1991) (“refuse[.]” requires a willful or intentional act) with *Hunter v. Magack (In re Magack)*, 247 B.R. 406, 410 (Bankr. N.D. Ohio 1999) (civil contempt standard, which does not require proof of intent, applies).¹⁰

There are three issues which merit consideration here. First, was service of the Motion To Compel, the Mortgage Order, the Summons and Complaint and the Motion (together with related notices, collectively, the “Pleadings”) at the Listed Address effective even if the Debtor was not there to receive them?¹¹ Second, is the Debtor’s failure to perform in accordance with the Mortgage

¹⁰ Arguably, willfulness or intent (or lack thereof) can be considered by the court in any event. Cf. *In re Kokoszka*, 479 F.2d 990, 997-98 (2d Cir. 1973), *aff’d*, 417 U.S. 642 (1974). Accordingly, it may be that the apparent disagreement among the courts on that issue may relate more to the proper allocation of the burden of proof on the issue rather than to an additional necessary substantive element of a Section 727(a)(6) discharge objection.

¹¹ The court will assume that all of the Pleadings were returned as undeliverable.

Order a “refus[al]” within the purview of Section 727(a)(6)(A)? Third, is it equitable to revoke the Discharge for a \$1,900.00 default? The court will consider each question in turn.

A. Effective Service

The court concludes that service of the Pleadings by mail upon the Debtor at the Listed Address was effective even if the Debtor was not there to receive them. Rule 7004 authorized service of the Pleadings upon the Debtor by mail. The Listed Address was the only mailing address provided to the court by the Debtor. It was the Debtor’s responsibility to maintain a current mailing address on file with the court at all times during the pendency of this chapter 7 case. Thus, service of the Pleadings by mail upon the Debtor at the Listed Address (the only address on file with the court) was effective even if she was not there to receive them. *See In re Araujo*, 292 B.R. at 23.

B. “Refus[al]”

Because it makes no difference to the result, the court adopts (for purposes of this memorandum only) the *Jarrell* view that “refus[al]” requires a willful or intentional act. Using that standard, the court concludes that the Trustee has made out a *prima facie* case of “refus[al].” It is true that the Debtor might have lacked actual knowledge of the Mortgage Order. However, that was her own fault. That is because, as discussed above, it was the Debtor’s responsibility to maintain a current mailing address on file with the court at all times during the pendency of this chapter 7 case. Moreover, the Debtor was on notice from the Compromise Motion and the Compromise Order of her obligation to deliver the Mortgage to the Trustee. Given the Debtor’s failure to perform fully in accordance with the Compromise Order, entry of the Mortgage Order should have come as no surprise to the Debtor. Finally, the record shows that the Debtor sold the Property without telling the Trustee but failed to pay the Trustee in full. Amended Schedule A is at least some evidence that

the sale of the Property should have yielded sufficient equity to the Debtor to have paid in full her monetary obligations under the Compromise Order. If the Debtor had given the Trustee the Mortgage, the Debtor could not have closed the sale without the Trustee's participation (because the Debtor could not have conveyed marketable title to the Property).¹² The Debtor cannot expect to retain the Discharge under such circumstances. Based upon the foregoing, the court concludes that the Trustee has made a *prima facie* case on the issue of "refus[al]." *Cf. In re Araujo*, 292 B.R. at 24.

The court concludes that the Trustee has made out a *prima facie* case in all respects for revocation of the Discharge.¹³

C. The Equities

At the further continued Continued Hearing, the Trustee expressed some reservations concerning the equity of revoking the Discharge when such a small amount was involved. (*See* 7/13/05 Audio Record at 3:15:06 – 3:15:16.) Assuming (but not deciding) that the court could exercise its equitable powers for the Debtor's benefit here, this is not a proper case for such exercise. The size of the amount in question standing alone is not a sufficient basis because such a rule would

¹² It is not clear that the Debtor did in fact convey marketable title to the Property even in the absence of the Mortgage. The Trustee contends that the Property was still property of the estate because it has not been abandoned pursuant to Bankruptcy Code § 554 and the Compromise Order. *Cf.* 11 U.S.C. § 549(c). Attorney Lee contends that the Property was not property of the estate at time of sale because the Debtor had exempted all the equity in it. The court expresses no opinion on that point herein.

¹³ The court further finds and/or concludes that the Mortgage Order was a legitimate means of enforcing the Compromise Order and thus constitutes a "lawful order" within the purview of Bankruptcy Code § 727(a)(6).

impair trustees' ability to settle small disputes with debtors in exchange for future payment. Any other factors which might be helpful to the Debtor are lacking here.


III. CONCLUSION

For the reasons set forth above, the Motion is granted and judgment will issue for the Trustee revoking the Discharge.

SO ORDERED.

BY THE COURT

Dated: October 4, 2005


Lorraine Murphy Weil
United States Bankruptcy Judge