Dated: April 20, 2007
The following is ORDERED:

Jennie D. Latta
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re
SANDRA G. NESBITT,
Debtor.

Case No. 06-20349-L
Chapter 7

Bettye S. Bedwell, Chapter 7 Trustee,
Plaintiff,
v.
Sandra G. Nesbit,
Defendant.

Adv. Proc. No. 06-00403

ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

BEFORE THE COURT is the motion for summary judgment filed by Plaintiff Bettye S. Bedwell, Trustee, on March 5, 2007. The complaint seeks an order revoking the Debtor's discharge. No answer has been filed with respect to the complaint and no response filed with respect to the motion. Neither the complaint nor the motion is verified. Attached to the complaint is a copy of a letter from the Trustee to Jimmy McElroy, an attorney. A proceeding seeking revocation of discharge is a core proceeding. *See Buckeye Retirement Co., LLC, v. Heil (In re Heil)*, 289 B.R. 897, 901 (Bankr. E.D. Tenn. 2003); 28 U.S.C. § 157(b)(O).

FACTS

The docket in the underlying bankruptcy case reveals that Sandra G. Nesbitt filed a voluntary petition under Chapter 7 of the Bankruptcy Code on January 18, 2006. Bettye S. Bedwell was appointed Trustee on January 23, 2006. The deadline for filing objections to discharge was April 17, 2006. The meeting of creditors was held March 1, 2006. The Trustee filed a motion for turnover of property of the estate on March 20, 2006, asking that the Debtor be directed to turn over a check in the approximate amount of $15,000 representing proceeds from the refinancing of a debt secured by real property. The bar date for filing objections to the motion was April 6, 2006, but no written objection was filed. Nevertheless, the hearing on the motion was continued several times. While the motion was pending, the Debtor filed a certificate indicating that she had completed the financial management course required by 11 U.S.C. § 727(a)(11), and discharge was entered on May 5, 2006. The motion for turnover was granted by order entered June 15, 2006. Counsel for the Debtor, Jimmy McElroy, filed an expedited motion to withdraw as counsel on September 21, 2006, which was granted orally on October 13, 2006, although no order was entered until February 16, 2007.

The Trustee commenced this adversary proceeding by filing a complaint on August 14, 2006. Attached to the complaint is a copy of a letter from the Trustee to Mr. McElroy dated June 22, 2006. A summons was issued August 21, 2006, which was returned March 7, 2007, indicating service by mail upon the Defendant and Mr. McElroy on August 22, 2006. No answer has been filed. The Trustee filed her motion for summary judgment on March 5, 2007. No response has been filed. Neither the complaint nor the motion is verified. No affidavits were filed, other than the affidavit of service of the adversary complaint. The complaint does not indicate the Bankruptcy Code section relied upon by the Trustee, but alleges that the Debtor made false oaths and affirmations on her petition and during her meeting of creditors, withheld recorded information about her property or financial affairs from the Trustee, and knowingly and fraudulently concealed assets of the estate, which were only revealed to the Trustee through her questioning. The complaint demands that the

court enter judgment "revoking Defendant's discharge for failure to comply with the Trustee and an order entered by the court."

ANALYSIS

In order to grant a motion for summary judgment, the court must first be satisfied that no reasonable trier of fact could find for the non-movant. *Matsushita Elec. Indus. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986). When judgment is appropriate as a matter of law, whether or not a motion for summary judgment is opposed, this requirement is met. Fed. R. Bankr. Proc. 7056(c). On a motion for summary judgment, the movant has the initial burden of showing the absence of a genuine issue of material fact and that it is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 2554, 91 L. Ed. 2d 265 (1986) ("the burden on the moving party may be discharged by 'showing' . . . that there is an absence of evidence to support the non-moving party's case.") If that initial burden is not met, the opposing party is under no obligation to offer evidence in support of its opposition. *See Investors Credit Corp. v. Batie (In re Batie)*, 995 F. 2d 85, 90 (6th Cir. 1993); *In re Rogstad*, 126 F.3d 1224, 1227 (9th Cir. 1997); *Hibernia Nat. Bank v. Admin. Cent. Sociedad*, 776 F.2d 1277, 1279 (5th Cir. 1985). Indeed, the court may sua sponte grant summary judgment for the non-movant, "so long as the losing party [movant] was on notice that she had to come forward with all her evidence." *Celotex Corp. v. Catrett*, 477 U.S. at 326, 106 S. Ct. at 91. *See also Grand Rapids Plastics, Inc. v. Lakian*, 188 F.3d 401, 407 (6th Cir. 1999), *cert. den.* 529 U.S. 1037, 120 S. Ct. 1531 (2000) (District court did not err in granting sua sponte summary judgment motion in favor of defendant on grounds that action was barred by applicable statute of limitations when plaintiff was put on notice by other parties' motions for summary judgment that, "it had to come forward with evidence showing that the statute of limitations did not bar its . . . claims.").

On the other hand, if the movant makes that initial showing, the burden shifts to the non-movant to "go beyond the pleadings and by . . . affidavits, or by the 'depositions, answers to

interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex Corp.*, 477 U.S. at 324. A fact is material and precludes a grant of summary judgment if "proof of that fact would have [the] effect of establishing or refuting one of the essential elements of the cause of action or defense asserted by the parties, and would necessarily affect application of appropriate principle[s] of law to the rights and obligations of the parties." *Kendall v. Hoover Co.*, 751 F.2d 171, 174 (6th Cir. 1984). The burden of designating such facts is not discharged by "mere allegations or denials." Fed. R. Bankr. P. 7056(e). All legitimate factual inferences must then be made in favor of the non-movant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 2513, 91 L. Ed. 2d 202 (1986). Bankruptcy Rule 7056(c) mandates the entry of summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp.*, 477 U.S. at 322.

Even though the Defendant has not responded to the complaint or motion, the court must independently determine that the Trustee is entitled to judgment as a matter of law. The court's review is made more difficult in this case because of the sparsity of the record. The Trustee has made a number factual allegations in her complaint and motion. Without an answer or affidavit, there is no support for these allegations. Although the court could simply deny the motion on that basis alone, the court will first review the complaint to determine whether the Trustee has stated a claim. In doing this, the court will assume that the Trustee could supply the missing proof if given an opportunity to do so. This seems a more expedient method than simply denying the motion, because it will allow the Trustee to correct any deficiencies in her pleadings, if she can, before submitting the matter for further consideration.

The court assumes that the Trustee relies upon section 727(d) as authority for her motion to revoke discharge. That section 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 –
>
> > (1) such discharge was obtained through the fraud of the debtor, and the requesting party did not know of such fraud until after the granting of such discharge;
> >
> > (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; or
> >
> > (4) the debtor has failed to explain satisfactorily –
> >
> > > (A) a material misstatement in an audit referred to in section 586(f) of title 28; or
> > >
> > > (B) a failure to make available for inspection all necessary accounts, papers, documents, financial records, files, and all other papers, things, or property belonging to the debtor that are requested for an audit referred to in section 586(f) of title 28;

11 U.S.C. § 727.

Revocation of discharge is a serious matter. Exceptions to discharge in general are construed strictly in favor of the debtor, and the trustee carries the burden of proof. *In re Heil*, 289 B.R. 897, 903. On the other hand, discharge in bankruptcy is intended for the honest but unfortunate debtor. It is not intended to aid the dishonest or fraudulent debtor. *Grogan v. Garner*, 498 U.S. 279, 286-87, 111 S. Ct. 654 (1991) (*citing Local Loan Co. v. Hunt*, 292 U.S. 234, 244, 54 S. Ct. 695, 699 (1934).

Section 727(e) provides the time limits for filing a motion to revoke discharge. A motion brought under section 727(d)(1) must be brought within one year after discharge is entered, while motions brought pursuant to sections 727(d)(2) or (d)(3) must be brought before the later of one year

from the date of the granting of discharge or the date the case is closed. The Trustee's complaint was filed within one year after discharge was granted on May 5, 2006, and is timely.

The complaint alleges the following: (1) the Debtor failed to disclose in her initial papers the fact that she received a check in the amount of $15,000 as the result of the refinancing of a debt secured by her home; (2) the Debtor disclosed this fact at the meeting of creditors and indicated that the check was still in her possession; (3) the Trustee filed a motion for turn over of the check, which was never objected to; (4) because there was no objection or motion to convert the case to Chapter 13, the Trustee did not object to the entry of discharge; (5) the motion for turnover was granted; (6) the Trustee sent a letter to the Debtor and the Debtor's attorney; and (7) the Debtor failed to respond to the Trustee and turn over the funds.

One possible reading of the complaint is that the Trustee is proceeding under section 727(d)(1) because she believes that the discharge was obtained by fraud. The court gathers this from the allegations that the Debtor failed to disclose an asset, which was revealed only upon questioning, and failed to object to the motion for turnover which caused the Trustee not to object to the entry of discharge. If this is the Trustee's theory, there are two problems. The first is that the facts upon which the Trustee relies were known prior to the entry of discharge. The Trustee admits that the fact of the non-disclosure of the asset was made known to her at the meeting of creditors on March 1, 2006. The Trustee filed her motion for turnover on March 20, 2006. The deadline for filing objections to discharge was April 17, 2006, which was 46 days after the Trustee learned of the missing asset and 28 days after the filing of the motion for turnover. The simple non-disclosure of the asset cannot be relied upon by the Trustee because it was known to the Trustee prior to the entry of discharge. Likewise, the fact that the asset was not turned over was also known to the Trustee prior to the entry of discharge.

The second problem arises if it is assumed that the Trustee's theory is that she was somehow lulled into inaction by the failure of the Debtor to object to the motion for turnover. The fact that

her motion was filed and the fact that the Debtor had not responded were known to the Trustee prior to the entry of discharge. Unless other facts are alleged and proven, the Trustee cannot prevail on this theory either. There is, for example, no allegation in the complaint that the Debtor indicated to the Trustee a willingness or intention to turn over the check, and thus no allegation that the Trustee relied upon this undertaking in failing to file a timely complaint. The bar date for filing objections to the motion for turnover was April 6, 2006, well in advance of the deadline for filing complaints. Pursuant to Local Bankruptcy Rule 9013(b)(2), upon the failure of the Debtor to file a written objection to the motion, the Trustee was entitled to present an order for entry. She did not do so for reasons that are unknown to the court.

A second possible reading of the complaint is that the Trustee is proceeding under section 727(d)(2) because she believes that the Debtor knowingly and fraudulently failed to deliver or surrender property to her as Trustee. The complaint alleges that the Debtor failed to respond to the Trustee's letter of June 22, 2006, and did not turn over "the funds." This is of interest because the earlier allegation was that the Debtor was in possession of the "check" at the time of her meeting of creditors. The reason the court points this out is that it suspects, but of course does not know, that the failure of the Debtor to turn over the check or the funds resulted from the fact that the Debtor no longer had them. Based upon the allegations of the Trustee, the Debtor obtained a check as proceeds from refinancing some 180 days before the filing of her petition. It would be a very unusual person who would obtain a check for a large sum and simply hold it for six months. The Trustee alleges that this was the Debtor's testimony at the meeting of creditors, but the Court was not provided with a transcript or even the Trustee's sworn statement that this is what the Debtor said, and it seems to contradict the later allegation that the Debtor failed to turn over the funds. Even if that is what the Debtor said, the check was already stale at the meeting of creditors. *See* Tenn. Code Ann. § 47-4-404. In that event, the Trustee might still have had recourse against the issuer of the check. That is, the Trustee might have made demand upon the issuer of the check to stop payment and pay the funds to her insofar as they represented an asset of the estate.

If, rather than testifying that she was in possession of the check, the Debtor testified that the funds were on deposit in an account that the Debtor failed to disclose, the Trustee might have taken control of the account, and she might have objected to the Debtor's discharge pursuant to, for example, section 727(a)(2) (concealment of property of the debtor within one year prior to filing); or section 727(a)(4) (knowing and fraudulent false oath, based upon the failure of the debtor to reveal the asset). If instead, as the court suspects, the Debtor negotiated the check and spent the funds prior to filing, the Trustee might have objected to the Debtor's discharge pursuant to, for example, section 727(a)(5) (failure to explain satisfactorily a loss or deficiency of assets); or section 727(a)(4) (knowing and fraudulent false oath, based upon the failure of the debtor to reveal the *transaction* in her statement of financial affairs, not based upon her failure to reveal the asset). All of the facts necessary for the Trustee to take any of these actions were known to the Trustee prior to the deadline for filing complaints objecting to discharge. Further, section 727(d)(2) appears to be directed to property of the estate that a debtor acquires or becomes entitled to acquire *after* the filing of a petition, not to property in the debtor's possession at the time of filing.

A third possible reading of the complaint is that the Trustee is proceeding under section 727(d)(3) because she believes that the Debtor committed one of the acts specified in section 727(a)(6), that is, that the Debtor refused to obey a lawful order of the court, other than an order to respond to a material question or testify. The Debtor cannot be charged with the refusal to obey an order of the court unless it is shown that she was *capable* of obeying the order of the court. For this, it would be necessary for the Trustee to show that the Debtor had the check in her possession or had funds under her control in an equivalent amount at the time that the order was entered and that she refused to turn over the check or the funds to the Trustee. The complaint comes closest to stating a cause of action under this section.[1] If the Trustee is able to provide proof (which might be supplied by affidavit or transcript) that at the meeting of creditors the Debtor admitted that she had in her

[1] Section 727(d)(4) is not indicated here because there is no suggestion that the Debtor's case was selected for audit by the United States trustee pursuant to 28 U.S.C. § 586(f).

possession the check or funds in an equivalent amount and, that the Debtor refused to deliver them to the Trustee in response to the order directing turnover, then it appears that the Debtor *refused* to obey an order of the court. The long delay between the meeting of creditors and the entry of the order is troubling, however. The court is puzzled by the failure of the Trustee to take immediate steps to obtain control of the check or funds if they were in existence at the meeting of creditors. Again, this gap may be explained by the Trustee if, for example, the Debtor or the Debtor's attorney initially made statements indicating a willingness to cooperate.

CONCLUSION

For the foregoing reasons, the Trustee's motion for summary judgment is **DENIED**, without prejudice to its being renewed upon amendment with appropriate evidentiary support.

cc: Debtor/Defendant
Attorney for Debtor/Defendant
Plaintiff
Attorney for Plaintiff