

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF)	
)	
BRITTANY NICOLE GARVER and)	CASE NO. 11-34512 HCD
MICHAEL ROBERT GARVER, Jr.,)	CHAPTER 7
)	
DEBTORS.)	
)	
)	
REBECCA HOYT FISCHER,)	
TRUSTEE,)	
PLAINTIFF,)	
vs.)	PROC. NO. 13-3012
)	
BRITTANY NICOLE GARVER and)	
MICHAEL ROBERT GARVER, Jr.,)	
DEFENDANTS.)	

MEMORANDUM OF DECISION

At South Bend, Indiana, on November 4, 2013.

Before the court is the Motion for Default Judgment filed in this adversary proceeding by the plaintiff Rebecca Hoyt Fischer, Trustee (“plaintiff” or “Trustee”) of the chapter 7 bankruptcy estate of Brittany Nicole and Michael Robert Garver, Jr., against those debtors (“debtors” or “defendants”). The Trustee commenced this adversary proceeding by filing a Complaint To Revoke Discharge for Failure to Cooperate with the Trustee, pursuant to 11 U.S.C. § 727(d)(2) and § 727(d)(3). The Complaint alleged the debtors’ failure to turn over the 2012 federal tax refund, despite numerous letters from the Trustee and a court Order requiring turnover of those funds to the Trustee. The debtors have neither turned over the tax refund nor responded to the Trustee’s Complaint or the Motion for Default Judgment. For the reasons stated below, the court grants the Motion for Default Judgment.¹

¹ The court has jurisdiction to decide the matter before it pursuant to 28 U.S.C. § 1334 and § 157 and the Northern District of Indiana Local Rule 200.1. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(E), (J), (O).

The court begins its analysis, as it always does, by determining that the Trustee's Complaint initiating this adversary proceeding was timely filed within one year after the discharges were entered. *See* 11 U.S.C. § 727(e)(1). The Trustee duly served the summons and Complaint upon the debtors-defendants and their bankruptcy attorney of record, pursuant to Federal Rules of Bankruptcy Procedure 7004(b)(9) and (g). *See* R. 3, 4. The defendants failed to file an answer or other response within thirty days of issuance of the summons and a copy of the complaint. *See* Fed. R. Bankr. P. 7012(a). After the bar date had passed, the Trustee sought entry of default.

The court finds that the Trustee has followed the criteria set forth in the rules governing defaults, Rule 55 of the Federal Rules of Civil Procedure and Rule 7055 of the Federal Rules of Bankruptcy Procedure. She complied with Rule 55(a) by establishing the defendants' default and by requesting the Clerk's Entry of Default. *See* R. 7, Affidavit; *see also Target Nat'l Bank v. Redmond (In re Redmond)*, 399 B.R. 628, 632 (Bankr. N.D. Ind. 2008). Because the plaintiff showed, by affidavit, proper service of process on the defendants and the defendants' failure to respond, the Clerk of the Court entered default against the defendants on March 28, 2013. *See* R. 8, 9.

The plaintiff now requests that the court enter a judgment by default, in accordance with Rule 55(b). Attached to the Motion for Default Judgment were an Affidavit of Non-Military Status and the Status Reports of each defendant produced by the Department of Defense-Manpower Data Center. *See* R. 12. Also attached was the Affidavit of the Trustee in Support of Motion for Default Judgment, which chronicled the debtors' bankruptcy case and the Trustee's correspondence with the debtors and the Internal Revenue Service concerning the federal tax refund sent to the debtors in April 2012. It was clear, from the debtors' state tax return, that the debtors had received a federal tax refund of \$4,571.00, of which the amount of \$4,205.32 was not exempt and was property of the debtors' bankruptcy estate. The Affidavit also described the Trustee's Motion to Compel the turnover of the tax refund; the court's Order of January 28, 2013, demanding turnover; service of that Order on the debtors and their attorney; and the lack of response by

either party. All the relevant documents were attached to the Affidavit as exhibits. In addition, the Affidavit described a telephone call to the Trustee's Office on April 3, 2013, by the debtor Brittany Garver, in which the debtor stated that she would send the refund and the filing fee for the adversary proceeding. When no funds were forthcoming and no further communication was made, however, the Trustee filed the Motion for Default Judgment now before this court.

In the exercise of its discretion, before entering a default judgment, a bankruptcy court requires that a plaintiff establish a *prima facie* showing on the merits of its claim. *See In re Taylor*, 289 B.R. 379, 382 (Bankr. N.D. Ind. 2003) (“[B]efore a litigant is awarded the relief it seeks when the opposing party fails to respond, the court needs to satisfy itself that the facts before it demonstrate a *prima facie* entitlement to that relief.”). The Trustee's Complaint seeks revocation of the debtors' discharges pursuant to 11 U.S.C. § 727 (d)(2), (d)(3), and (a)(6).² This court, having evaluated the plaintiff's pleading, finds that the Trustee's Complaint presented allegations that were well pled and were sufficient to state a legitimate claim for relief. *See In re Redmond*, 399 B.R. at 633. The Trustee demonstrated a *prima facie* case for turnover of the debtors' 2012 federal tax refund, as property of the estate, through competent evidence. She also made a thorough showing that the debtors received the refund and willfully refused to obey the court's order to turn it over to the Trustee.

Because the revocation of a discharge reinstates all the debtors' obligations, it certainly is a harsh measure to impose upon debtors. *See In re Smith*, 582 F.3d 767, 777 (7th Cir. 2009). The revoking of a discharge removes the debtors' “fresh start,” and for that reason it is construed strictly against the Trustee.

² Section 727(d) of the Bankruptcy Code requires the court to revoke the discharge of a debtor if:
. . .
(2) the debtor acquired property that is property of the estate; [or]
(3) the debtor committed an act specified in subsection (a)(6) of this section.

Section 727(a)(6) requires the court to grant the debtor a discharge unless “the debtor has refused . . . to obey any lawful order of the court[.]”

11 U.S.C. § 727(d)(2), (3); (a)(6).

See In re Eckert, 375 B.R. 474, 478 (Bankr. N.D. Ill 2007). The Trustee herein has borne the burden of proving, by a preponderance of the evidence, the elements of § 727(d)(2) and (3) and § 727(a)(6). She has established the defendants' willful conduct in refusing to obey this court's order, as well, by demonstrating that the debtors knew their duty to give any tax refund they received to the Trustee and their subsequent refusal to do so. The Trustee presented as an exhibit the "Debtor Acknowledgment Concerning Tax Refunds," signed by the debtors at the 341 meeting, which affirmed their obligation. She exhibited and described her numerous letters and the Motion to Compel, which the debtors received before the court's Order required their compliance. The debtors disregarded them all. *See In re Kutrubis*, 486 B.R. 895, 901 (N.D. Ill. 2013) ("To establish willfulness, the party objecting to discharge must demonstrate that 'the debtor received the order in question and failed to comply with its terms.'") (citation omitted). Moreover, one of the debtors called the Trustee's office, acknowledged the requirement, and yet failed to carry out her promise of turnover. The debtors' intentional refusal to comply with the court's turnover Order is documented and uncontested. *See id.* (stating that the debtor must explain his non-compliance). The court therefore finds that the Trustee established more than a *prima facie* case justifying that the grounds for revocation of the debtors' discharges existed as a matter of law under § 727(d)(2) and (3) and § 727(a)(6) of the Bankruptcy Code.

One more matter should be considered. Section 727(d) provides for revocation of discharge "after notice and a hearing." Following the view of many courts, this court has determined that "after notice and hearing" denotes the opportunity for a hearing "as appropriate in the particular circumstances, but a hearing – much less an evidentiary hearing – is not required in every instance." *In re Graft*, 489 B.R. 65, 72 (Bankr. S.D. Ohio 2013) (citing 11 U.S.C. § 102(1); quoting *Prebor v. Collins (In re I Don't Trust)*, 143 F.3d 1, 3 (1st Cir. 1998); concluding that no hearing was necessary before revocation of discharge); *see also In re Galarza*, 2012 WL 6055328 at *2 (Bankr. N.D. Ill. Nov. 30, 2011) (stating that court has discretion to conduct "such hearing . . . as it deems necessary and proper" under Rule 55(b)).

The court finds that it was neither necessary nor appropriate to conduct a hearing in this matter. The Trustee complied with all the requirements of § 727(d) and Rules 55 and 7055, and the debtors failed to comply with the court's Order for Turnover or to respond in this adversary proceeding. Moreover, the Trustee's evidence was completely sufficient for a determination that the defendants had refused compliance in full knowledge of the many opportunities provided to them to turn over the required funds.

Accordingly, the court finds that the Trustee has complied with the procedural requirements of Rule 55(a) and (b). Moreover, because the Complaint's allegations supported the relief sought, and because the defendants have not offered any response to them, the court determines that a judgment by default is proper. The plaintiff has demonstrated her entitlement to the federal tax refund; her entitlement to the turnover of that property of the debtors' bankruptcy estate for distribution to creditors; and the complete failure or refusal by the debtors-defendants to uphold their responsibility to turn over those funds, to comply with the demands of the Trustee, and to obey the lawful Order of this court. Therefore, the court grants the Trustee's Motion for Default Judgment against the defendants and grants the relief sought in the Complaint, the revocation of the debtors' discharges.

CONCLUSION

For the reasons presented in this Memorandum of Decision, the Motion for Default Judgment filed by the plaintiff Rebecca Hoyt Fischer, Trustee, against the defendants Brittany Nicole Garver and Michael Robert Garver, Jr., is granted. The relief requested in the plaintiff's Complaint pursuant to 11 U.S.C. § 727(d)(2) and (d)(3) and § 727(a)(6) is granted. The discharges of the debtors-defendants, entered in their bankruptcy case on March 19, 2012, are now revoked.

SO ORDERED.

/s/ HARRY C. DEES, JR.

HARRY C. DEES, JR., JUDGE
UNITED STATES BANKRUPTCY COURT