

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF)	
)	
JOHN CARL CUNDIFF,)	CASE NO. 03-37077 HCD
)	CHAPTER 7
DEBTOR.)	
)	
GARY D. BOYN, TRUSTEE,)	
PLAINTIFF,)	
vs.)	PROC. NO. 04-3091
)	
JOHN CARL CUNDIFF,)	
METROPOLITAN LIFE INSURANCE COMPANY)	
DEFENDANTS.)	

Appearances:

Philip R. Skodinski, Esq., attorney for defendant, 502 West Washington Street, South Bend, Indiana 46601; and Gary D. Boyn, Esq., Chapter 7 Trustee, 121 West Franklin Street, Suite 400, Elkhart, Indiana 46516.

MEMORANDUM OF DECISION

At South Bend, Indiana, on February 24, 2005.

Before the court is the Motion for Summary Judgment, filed on October 25, 2004, by Gary D. Boyn, Esq., Chapter 7 Trustee of the bankruptcy case of debtor John Carl Cundiff. The Motion asks the court for summary judgment on the Trustee's Complaint to Compel Turnover of Property, filed July 2, 2004. Along with the Motion, the Trustee submitted a brief, a statement of material facts, and an affidavit. The debtor failed to respond. For the reasons that follow, the court grants the Trustee's Motion for Summary Judgment.

Jurisdiction

Pursuant to 28 U.S.C. § 157(a) and Northern District of Indiana Local Rule 200.1, the United States District Court for the Northern District of Indiana has referred this case to this court for hearing and determination. After reviewing the record, the court determines that the matter before it is a core proceeding within the meaning of § 157(b)(2)(E) over which the court has jurisdiction pursuant to 28 U.S.C. §§ 157(b)(1)

and 1334. This entry shall serve as findings of fact and conclusions of law as required by Federal Rule of Civil Procedure 52, made applicable in this proceeding by Federal Rules of Bankruptcy Procedure 7052 and 9014. Any conclusion of law more properly classified as a factual finding shall be deemed a fact, and any finding of fact more properly classified as a legal conclusion shall be deemed a conclusion of law.

Background

The following background information is undisputed. On December 15, 2003, the debtor filed a voluntary chapter 7 petition, and the plaintiff was appointed Trustee. In Schedule B, the debtor listed “Met Life Annuity” as personal property valued at \$1,167.27. *See* R. 17, Statement of Material Facts, Ex. A. In Schedule C, he claimed the annuity as an exempt asset. *See id.*, Ex. B. The Trustee filed an objection to the allowance of an exemption of the annuity. *See id.*, Ex. C. The parties then entered into a Stipulation, agreeing and stipulating that the Trustee’s objection be granted and that “the claimed exemption be disallowed in its entirety.” *See id.*, Ex. D, “Stipulation Regarding Trustee’s Objection to Claimed Exemption.” The court approved the Stipulation on February 20, 2004. *See id.*

On March 9, 2004, the debtor, again attempting to keep the annuity, filed a Motion to Retain Annuity Due to Hardship. *See id.*, Ex. E. The motion stated that the debtor suffers from AIDS and takes three medications, for which he pays a portion of the expense. The United States Trustee and the Chapter 7 Trustee objected to the motion. On June 2, 2004, the debtor signed a stipulated compromise and settlement with the two Trustees. *See id.*, Ex. F, “Joint Motion and Stipulation.” This Stipulation stated that the debtor was not entitled to the relief sought and that, by agreement of the parties, the debtor’s motion would be denied by the court. *See id.*, Ex. F, ¶ 4(A). It also provided that the debtor had agreed to turn over the annuity checks, uncashed, to the Trustee, until all unsecured claims were paid in full, with interest. *See id.* ¶ 4(B). It further stated that, if the debtor did not abide by the terms of the settlement, the Trustee would be entitled to retain the full annuity check and could apply it to administrative costs and claims allowed by the court. *See id.* ¶ 4(E).

One month later, after the debtor had failed to turn over the annuity check as agreed in the Stipulation, the Trustee commenced this adversary proceeding on July 2, 2004.¹ He filed a complaint to compel the turnover of the debtor's monthly annuity payment. *See* R. 1 at 2. The complaint alleged that the debtor was to receive the annuity in monthly payments of \$1,167.27 from the Metropolitan Life Insurance Company until March 2021. It claimed that the annuity was property of the estate that should be turned over to pay the debtor's secured and unsecured debts, the total sum of which was \$95,271.00. The debtor, by counsel, filed an Answer to the complaint. He admitted the underlying facts but stated that the debtor "suffers from a medical hardship in which he requires the monthly annuity to meet his monthly medical and living expenses to sustain himself." R. 6 at 1.

At the pre-trial conference on the complaint, held on September 22, 2004, the Trustee was in attendance but counsel for the defendant debtor failed to appear. The court directed the parties to file dispositive motions. The Trustee filed a Motion for Summary Judgment, asserting that the debtor had not complied with the Stipulation's agreed provisions. Under the terms of the Stipulation, therefore, claimed the Trustee, the debtor must turn over the entire value of the annuity to the Trustee. The defendant debtor neither filed a summary judgment motion nor responded to the Trustee's motion. The court took the matter under advisement on November 3, 2004, after the briefing schedule had passed.

Discussion

A court renders summary judgment when 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." Fed. R. Civ. P. 56(c); Fed. R. Bankr. P. 7056; *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L.Ed.2d 265 (1986); *Tegtmeier*

¹ In the main chapter 7 case, Case No. 03-37077, the debtor filed two documents in disagreement with the Joint Motion and Stipulation. He filed an Objection to the stipulation, R. 31, and a Motion to Withdraw Stipulation, R. 37, on the ground that it would create an undue hardship on him. After a hearing on the stipulation and the debtor's two responses, the court denied the Debtor's Motion to Withdraw Stipulation and overruled the Debtor's objection to the stipulation. *See* Order of July 22, 2004, R. 38.

v. Midwest Operating Eng'rs Pension Trust Fund, 390 F.3d 1040, 1045 (7th Cir. 2004). The moving party bears the initial burden of demonstrating that no genuine issue of material fact exists. See *Celotex*, 477 U.S. at 323. If the moving party satisfies its initial burden, then the nonmoving party must “go beyond the pleadings and by [its] own affidavits, or by the ‘depositions, answers to interrogatories, and admissions on file,’ designate ‘specific facts showing that there is a genuine issue for trial.’” *Id.* at 324 (quoting Fed. R. Civ. P. 56(e)). The court neither weighs the evidence nor assesses the credibility of witnesses. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L.Ed.2d 202 (1986). Summary judgment must be granted “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*, 477 U.S. at 322.

In this case, the debtor failed to file a response to the Trustee’s summary judgment motion; nor did he oppose the motion by filing a “Statement of Genuine Issues.” Without any objection to the motion for summary judgment before the court, under the local rules the court deems to be admitted all the material facts set forth by the Trustee and properly supported by evidence. See N.D. Ind. L.B.R. B-7056-1 (“In determining the motion for summary judgment, the court will assume that the facts as claimed and supported by admissible evidence by the moving party are admitted to exist without controversy, except to the extent that such facts are controverted in the ‘Statement of Genuine Issues’ filed in opposition to the motion.”); see also *Waldrige v. American Hoechst Corp.*, 24 F.3d 918, 922 (7th Cir. 1994).

The Trustee objected to the debtor’s claimed exemption of the annuity on the ground that it did not qualify for an exemption under Indiana Code § 34-2-28-1(a)(2) or under any other provision of the exemption statute.² The debtor agreed with the Trustee, and together they stipulated that the Trustee’s objection should be granted and that the claimed exemption should be disallowed. The debtor’s second attempt to keep the annuity,

² The debtor claimed the annuity as an exemption under Indiana Code § 34-2-28-1(a)(2). That statute was repealed on July 1, 1998, and re-enacted as Indiana Code § 34-55-10-2(b)(2). Subsection(b)(2) allows a debtor to exempt real estate that is not the family residence and tangible personal property up to \$4,000. It does not cover annuities. The debtor did not claim that Indiana Code § 34-55-10-2(b)(4) provided an exemption for his medications or other professionally prescribed health aids for his illness.

this time by asserting a medical hardship caused by his illness, was resolved by a second stipulation that the debtor was not entitled to the claimed exemption and that his motion to retain the annuity because of his hardship should be denied. The debtor again tried to retain the annuity by filing a Motion to Withdraw Stipulation. However, the court upheld the stipulation, denied the debtor's motion to withdraw the stipulation and overruled his objection to the stipulation.

The debtor's final attempt to keep the monthly annuity checks was his Answer to the Trustee's complaint, which admitted all the facts but asserted the medical hardship again. However, the debtor did not attend the pre-trial conference on the complaint, did not file a motion seeking summary judgment, and did not respond to the Trustee's summary judgment motion.

The court finds that the debtor has failed to respond to the court's directive to file a dispositive motion. He has failed, as well, to proffer a statement of genuine issues or to provide any factual or legal issues that would preclude the court from entering judgment in favor of the Trustee. He provided no evidence to support his claim of undue hardship. Such a lack of response conclusively establishes the validity of the Trustee's properly supported material facts. The court determines, therefore, that there are no triable issues remaining in this adversary proceeding. *See Acequia, Inc. v. Prudential Ins. Co. of America*, 74 F.Supp.2d 792, 796 (N.D. Ill. 1999), *aff'd*, 226 F.3d 798 (7th Cir. 2000). Because the Trustee, as the moving party, has succeeded in his burden of proof and the debtor, as the nonmoving party, has failed to make a sufficient showing of a genuine issue for trial, the court must render summary judgment for the Trustee.

Conclusion

