

**UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI**

IN RE:

GLANDRA F. WILLIAMS,

CASE NO. 05-19332-NPO

DEBTOR,

CHAPTER 7

UNITED STATES TRUSTEE

PLAINTIFF

VS.

ADV. PROC. NO. 06-01126-NPO

GLANDRA F. WILLIAMS

DEFENDANT

**MEMORANDUM OPINION AND ORDER
DENYING COMPLAINT TO DENY DISCHARGE**

On June 27, 2007, there came before the Court for trial (the "Trial") the Complaint to Deny Discharge (the "Complaint") (Adv. Dk. No. 1) filed by the United States Trustee for Region 5 (the "UST") and the Defendant's Answer to Complaint to Deny Discharge (Adv. Dk. No. 6) filed by Glandra F. Williams (the "Debtor") in the above-styled adversary proceeding. At the Trial, Christopher J. Steiskal appeared for the UST, and John M. Sherman appeared for the Debtor. The Court, having considered the pleadings and the evidence presented at the Trial, concludes for the following reasons that the Complaint is not well taken and should be denied.¹

Jurisdiction

This Court has jurisdiction over the parties and the subject matter of this proceeding pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(A), (J), and (O). Notice of the Trial on the Complaint was proper under the circumstances.

¹ The following constitutes the findings of fact and conclusions of law of the Court pursuant to Federal Rule of Bankruptcy Procedure 7052.

Facts

1. On October 14, 2005, the Debtor filed a voluntary petition for relief pursuant to chapter 7 of the Bankruptcy Code (Dk. No. 1).²

2. On January 26, 2006, the Debtor and her attorney attended the § 341(a) meeting of creditors (the “§ 341(a) Meeting”).³ The § 341(a) Meeting was conducted by Jeffrey A. Levingston, the chapter 7 case trustee (the “Trustee”).

3. As of the date of the § 341(a) Meeting, the Debtor had not filed a 2005 federal tax return.

4. At the opening of the § 341(a) Meeting, the Trustee made an announcement to all debtors that their state and federal tax returns should be filed by February 15, 2006, and that copies of those returns, together with any refunds, should be forwarded to the Trustee.

5. The Trustee thereafter conducted an individual examination of the Debtor (the “Examination”). During the Examination, the Trustee presented the Debtor with a document entitled “Notice to File 2005 State and Federal Tax Returns by February 15, 2006” (the “Notice”) (Tr. Ex. UST 1). The Notice instructed the Debtor to file her original state and federal tax returns for all years that had not been filed, including the year 2005, with the proper state and federal offices; to mail to the Trustee’s office a signed copy of such returns; and, to forward any refunds for 2005 or previous years to the Trustee’s office. The Notice further provided that the tax returns should not

² Hereinafter, all code sections refer to the United States Bankruptcy Code located at Title 11 of the United States Code unless otherwise noted.

³ Section 341(a) provides that “[w]ithin a reasonable time after the order for relief in a case under this title, the United States trustee shall convene and preside at a meeting of creditors.” Section 343 provides, in turn, that the debtor shall appear and submit to examination under oath at the meeting of creditors under § 341(a) and that “any trustee . . . in the case . . . may examine the debtor.”

be filed by "rapid refund." The Debtor and her attorney signed the Notice.

6. At the conclusion of the Debtor's Examination, the Debtor's attorney asked the Trustee if he wanted tax refunds that were under \$3000. The Debtor's attorney understood the Trustee to reply that the Debtor would not be required to turn over a tax refund of less than \$3000.

7. Following the § 341(a) Meeting, the Debtor completed her 2005 federal tax return. The return indicated that the Debtor would receive a refund of less than \$3000. Prior to February 15, 2006, the Debtor filed her tax return through PFA Rapid Tax Services (Tr. Ex. UST 3). She was entitled to receive a refund in the amount of \$2957.

8. On February 8, 2006, the Debtor's attorney mailed correspondence (the "Correspondence") (Tr. Ex. UST 3) to the Trustee enclosing a copy of the Debtor's 2005 federal tax return and a copy of her 2005 federal tax refund (the "2005 Federal Tax Refund") in the amount of \$2451.⁴

9. The Debtor did not forward her 2005 Federal Tax Refund to the Trustee.

10. The UST thereafter filed the Complaint alleging that the Debtor should be denied a discharge pursuant to § 727(a)(2)⁵ based on her failure to comply with the Notice and the instructions from the Trustee. The Debtor, on the other hand, maintains that she is entitled to a discharge because the Trustee disclaimed any interest in the 2005 Federal Tax Refund at the § 341(a) Meeting.⁶

⁴ Presumably, the difference between the \$2957 and \$2451 was the amount charged to file the return via "rapid refund."

⁵ Although the Complaint alleged violations of § 727(a)(2) and (a)(4), the UST stated at the Trial that he would pursue only the purported violation of § 727(a)(2).

⁶ The Debtor contends that the UST pursued the Complaint even in light of her offer to pay, in installments, the full amount of 2005 Federal Tax Refund to the Trustee.

Discussion

Section 727(a)(2) provides, in pertinent part:

(A) The court shall grant the debtor a discharge, unless - -

....

(2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed - -

(A) property of the debtor, within one year before the date of the filing of the petition; or

(B) property of the estate, after the date of the filing of the petition:

Thus, “[a] claim arising under § 727(a)(2) has two elements: (1) a transfer or concealment of property of the debtor or the estate and (2) an improper intent (i.e., a subjective intent to hinder, delay, or defraud)” Hunerwadel v. Dulock (In re Dulock), 250 B.R. 147, 152 (Bankr. N.D. Ga. 2000). The UST must prove, by a preponderance of the evidence, that the Debtor is not entitled to a discharge. Id. at 153 (citing Beaubouef v. Beaubouef (In re Beaubouef), 966 F.2d 174 (5th Cir. 1992)). Moreover, “the discharge provisions must be construed liberally in favor of the debtor and strictly construed against” the UST. Id. at 153. Thus, the UST must demonstrate, by a preponderance of the evidence, that the Debtor transferred or concealed the 2005 Federal Tax Refund while harboring an subjective intent to hinder, delay or defraud the Trustee. The evidence presented at the Trial, however, especially when construed liberally in favor of the Debtor, persuades the Court that the Debtor did not act with the subjective intent to hinder, delay or defraud the Trustee. *See, e.g., Harker v. West (In re West)*, 328 B.R. 736, 753 (Bankr. S.D. Ohio 2004) (“When ascertaining whether a violation of [§] 727(a)(2)(B) . . . has occurred, the trier of fact is

necessarily required to make a subjective inquiry into the debtor's state of mind. Such an inquiry normally requires explanatory testimony by the debtor and an assessment by the trier of fact of the debtor's demeanor and credibility.'').

At the Trial, the Debtor presented a copy of the tape recording of the § 341(a) Meeting. The tape established⁷ that the following conversation occurred after the Debtor's Examination at the § 341(a) Meeting:

Debtor's counsel: Do you want to receive the refund if it is under \$3000?
Trustee: I would like to look at it. (Chuckle).
Debtor's counsel: Alright.
Trustee: I will send it back to you if it's
Debtor's counsel: Alright.

(Tr. Ex. UST 2). At the Trial, the Trustee explained that he had intended his statements to be an instruction to Debtor's counsel that the Debtor should remit her tax return and refund to the Trustee, and if he deemed appropriate, he would return the refund to the Debtor. However, Debtor's counsel interpreted the Trustee's statements to mean that if the refund was less than \$3000, the Debtor should submit copies of the tax return and the refund to the Trustee. Given that both are legitimate interpretations of the conversation, the UST has not demonstrated that the Debtor acted with intent to defraud the Trustee when she did not forward the 2005 Federal Tax Return to him, but rather has established only that the parties had a conversation subject to two different, yet valid, interpretations. See In re Dulock, 250 B.R. at 156 (failure to turn over tax refund may constitute grounds for denial of discharge absent valid justification).

Moreover, the Debtor credibly testified that she did not intend to violate the Notice or the instructions given by the Trustee at the § 341(a) Meeting. Rather, she believed it was appropriate

⁷ When played on the tape recorder in open court, the conversation was fairly garbled. However, when the Court and the parties listened to the recording using headphones, the conversation was understandable.

to file her tax return using "rapid refund" because she understood from her attorney that the Trustee had disclaimed any interest in refunds under \$3000. The Debtor also stated that she had no intent to withhold the refund from the Trustee and, in fact, took the refund to her attorney's office in order to carry out the Trustee's instructions. Debtor's counsel then submitted to the Trustee's office a copy of the return and the refund to demonstrate to the Trustee that the refund was less than \$3000. The Debtor did not cash the refund check until she and her counsel had complied with what they understood as the Trustee's directive regarding refunds under \$3000. Moreover, the Debtor did not cash the refund check until she had been advised by her counsel that it was acceptable to do so. See In re Dryer, 127 B.R. 587, 588 (Bankr. N.D. Tex. 1991) ("A debtor's reliance on advice of counsel constitutes an excuse for his transfer or concealment of property from [the trustee] and will prevent the court from denying his discharge only where his reliance is reasonable and in good faith."). Thus, the Debtor's actions, and those of her counsel, belie any improper intent to transfer or conceal the 2005 Federal Tax Refund.

Having considered the foregoing, the UST has failed to demonstrate a claim arising under § 727(a)(2). The Court therefore finds that the Complaint is not well taken and should be denied. A separate final judgment consistent with this Memorandum Opinion and Order will be entered by this Court in accordance with Federal Rules of Bankruptcy Procedure 7054 and 9021.

SO ORDERED this the 30th day of August, 2007.



NEIL P. OLACK
U.S. BANKRUPTCY JUDGE