

#S-13

signed 7-30-04

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

In Re:

**GARY LEE JULIAN,
SONYA CHRISTINE HAMMONDS,**

DEBTORS.

**CASE NO. 01-15752
CHAPTER 7**

J. MICHAEL MORRIS,

PLAINTIFF,

v.

ADV. NO. 03-5085

**GARY LEE JULIAN,
SONYA CHRISTINE HAMMONDS,**

DEFENDANTS.

**ORDER DENYING PLAINTIFF'S SUMMARY JUDGMENT MOTION,
BUT SETTING FINAL DEADLINE FOR DEBTORS TO COMPLY WITH THE
COURT'S ORDERS, OR THEIR DISCHARGES WILL BE REVOKED**

This proceeding is before the Court on the plaintiff-trustee's motion for summary judgment. The trustee appears by counsel Sarah L. Newell. At one time, the defendant-debtors were represented by counsel in the proceeding, but their attorney was allowed to withdraw before the trustee filed the motion, and the debtors have not filed any response to it. The Court has reviewed the relevant materials and is now ready to rule.

FACTS

The Court has gleaned the following facts from the summary judgment motion and from various other pleadings filed in both this adversary proceeding and the main bankruptcy case.

Gary Lee Julian and Sonya Christine Hammonds (“Debtors”) filed a joint Chapter 7 bankruptcy petition on December 3, 2001. At the end of February 2002, the trustee for their case filed an interim report estimating, based on their tax refunds for prior years, that they would be entitled to a \$4,000 refund for the 2001 tax year. Their discharges were entered as a matter of course in April 2002. By a letter dated August 12, 2002, the trustee first asked the Debtors to turn over about \$4,100 in 2001 tax refunds, apparently identifying them as both federal and state refunds. Although the pleadings do not expressly say so, because they refer to different refund amounts for each of the Debtors, it is clear that the Debtors filed separate federal income tax returns for the 2001 tax year, rather than a single, joint return.

The initial trustee resigned and was replaced by a successor. After repeated requests for turnover of the refunds (apparently still identified as both federal and state ones) failed, the successor trustee filed a motion on October 1, 2002, for turnover of “Federal and State income tax refunds for 2001 in the approximate amount of \$4,153.94,” serving the motion on the Debtors’ attorney. The Debtors filed no response, and an order was entered in February 2003 directing the Debtors to turn over the federal

and state refunds within 20 days. This order was mailed to the Debtors personally, as well as to their attorney. The successor trustee resigned a short time after the order was entered, and the plaintiff in this proceeding was appointed as the new successor trustee (“Trustee”). Apparently about this time, perhaps in response to the Court’s order, the Debtors’ attorney informed the Trustee that Debtor Hammonds’s federal tax refund had been set off to pay a debt owed to a state agency. As shown by the Trustee’s interim report number 4, the Trustee recovered that money, \$3,737.94, on May 19, 2003. The complaint the Trustee filed to commence this proceeding indicates that figure is the full refund amount shown on Debtor Hammonds’s federal return.

On February 21, 2003, about a week after his appointment, the Trustee filed the complaint that commenced this proceeding, asserting three counts against the Debtors. The first count alleged the Debtors’ federal tax returns for 2001 showed that Debtor Julian was entitled to a refund of \$819, and Debtor Hammonds to a refund of \$3,737.94. The Trustee then made some small math errors. He said the two refund amounts add up to \$4,553.53, not \$4,556.94. Then he subtracted \$400 from his sum, and got \$4,153.94, not \$4,153.53. So the first count of his complaint sought turnover of \$4,153.94. After the Trustee later recovered all of Debtor Hammonds’s refund, he claimed the Debtors still needed to turn over \$443, even though \$4,153.94 minus \$3,737.94 is \$416, not \$443.

The second count of the Trustee's complaint sought revocation of the Debtors' discharges because they had failed to obey a lawful order of the Court, and had acquired property of the estate and knowingly and fraudulently failed to deliver it to the Trustee. The third count asked the Court to direct the Debtors to provide the Trustee with copies of their 2001 state income tax returns and to turn over the bankruptcy estate's share of any refunds they might qualify for. The attorney who represented the Debtors in their main bankruptcy case filed an answer for them, admitting that: (1) their federal tax returns showed they were entitled to refunds; (2) they had failed to provide the Trustee with copies of their 2001 state income tax returns; and (3) the Court had ordered them to turn over about \$4,100 to the bankruptcy estate, but they had failed and refused to do so.

About six weeks after filing the Debtors' answer in this proceeding, their attorney filed a motion to withdraw from representing them in their main bankruptcy case, and two weeks later, filed a motion to withdraw in this proceeding. Both motions stated that the Debtors had failed to keep in contact with the attorney, and had failed and refused to turn over information requested by the Trustee. The Debtors were notified of a deadline for objecting to each motion, but did not object to either one. An order granting the motion to withdraw in the main case was entered on June 17, 2003, and an order granting the motion to withdraw in this proceeding was entered on July 31. On July 22, the Trustee's attorney sent a letter directly to the Debtors, noting that their attorney had

withdrawn, and asking them to turn over, within 10 days, their 2001 state tax returns and \$443 from Debtor Julian's federal tax refund.

The Trustee sought and obtained an order, entered on August 8, 2003, for the Debtors to appear at his office on August 27 for an examination pursuant to Federal Rule of Bankruptcy Procedure 2004. The order also directed them to produce their 2001 state tax returns and \$443, representing the estate's share of Debtor Julian's federal tax refund. The Debtors failed to appear at the Trustee's office and did not produce either the returns or the money. On September 26, the Trustee filed a motion for the Debtors to be held in contempt and sanctioned \$500 for those failures. He served the motion on the Debtors with a notice that they had until October 17 to object to it. They filed no response with the Court.

The same day that he filed the contempt motion, the Trustee filed the motion for summary judgment that is the subject of this order. He also served this motion on the Debtors with a notice that they had until October 17 to object to it. They filed no response to this motion by that deadline, and still have filed no response as of the date of this order.

The Trustee submitted a proposed order on the contempt motion in which he stated that the Debtors had responded to the motion on October 28 by a handwritten letter. Apparently, they sent the letter only to the Trustee; it does not appear in the court file. According to the Trustee, the Debtors indicated they would be meeting with a tax

preparer on November 3 to finish Debtor Julian's tax return. But, the Trustee stated, the Debtors had not responded to any of the Trustee's prior correspondence about turnover of tax returns and refunds, and did not appear for the Rule 2004 examination. The Trustee also noted that his correspondence and the order for the 2004 exam had been served at the address the Debtors gave in their October 28 letter. The Court notes that the address is the same one the Debtors gave on their bankruptcy petition, and the one that has been used to serve the Debtors with all the motions and orders mentioned in this decision. On November 3, the Court signed the Trustee's proposed order finding the Debtors in contempt and giving them 30 more days to provide copies of their tax returns, but struck out a provision that would have imposed a money sanction against them.

The Debtors still did not supply copies of their tax returns, and on December 5, the Trustee filed another motion to find the Debtors in contempt, to impose a \$500 sanction on them, and to compel them to supply the returns. He served this motion on the Debtors at the same address, and notified them the motion would be granted unless they filed an objection by December 23. The Debtors filed no response. On January 23, 2004, an order was entered finding the Debtors in contempt, imposing the \$500 sanction, and directing them to give the Trustee copies of their 2001 state income tax returns within 10 days. Nothing has been entered on the docket for this proceeding since that order was served. Nothing affecting this proceeding has been filed in the main case since that time, either.

DISCUSSION

The Chapter 7 trustee for a bankruptcy case has various duties, including to “(1) collect and reduce to money the property of the estate . . . ; [and] (4) investigate the financial affairs of the debtor.”¹ To help the trustee perform these duties, the debtor also has various duties, including to “(3) . . . cooperate with the trustee as necessary to enable the trustee to perform the trustee’s duties . . . ; [and] (4) . . . surrender to the trustee all property of the estate and any recorded information . . . relating to property of the estate.”² The Debtors have not been fulfilling these duties in this case.

Section 727(d)(3) of the Bankruptcy Code provides that the Court shall revoke a debtor’s discharge if the debtor committed an act specified in § 727(a)(6).³ As relevant here, § 727(a)(6) provides that a debtor’s discharge shall be granted unless the debtor has refused, in the case, “to obey any lawful order of the court.”⁴ Denying or revoking a debtor’s discharge is a serious sanction that the Court is most reluctant to impose.⁵ If the Debtors’ discharge is revoked, they will once again owe all the debts they owed

¹11 U.S.C.A. § 704(1) & (4).

²11 U.S.C.A. § 521(3) & (4).

³11 U.S.C.A. § 727(d)(3).

⁴11 U.S.C.A. § 727(a)(6).

⁵*See 6 Collier on Bankruptcy*, ¶727.02[1] at 727-12 (Resnick & Sommer, eds.-in-chief, 15th ed. rev. 2004).

when they filed for bankruptcy, losing the main benefit they sought to gain here. Of course, having voluntarily invoked the jurisdiction of the Bankruptcy Court, the Debtors should have conducted themselves with appropriate respect for the Court's authority, and made greater efforts to fulfill for their responsibilities under the Bankruptcy Code.

The circumstances relevant to the Trustee's effort to revoke the Debtors' discharges under § 727(d)(3) and (a)(6) show that the Debtors have failed to comply with numerous court orders: (1) the Debtors failed to comply with an order entered in their main bankruptcy case that directed them to turn over their 2001 tax refund money, and still failed to turn over the money despite a provision in the order for the Rule 2004 exam entered in this proceeding that required them to do so; (2) the Debtors have failed to comply with three orders entered in this proceeding that have directed them to supply copies of their 2001 state income tax returns to the Trustee; and (3) the Debtors failed to comply with the Court's order to appear at the Trustee's office on August 28, 2003, for the Rule 2004 exam.

On the other hand, Debtor Hammonds never actually received any of her 2001 federal income tax refund and the Trustee has recovered all of that refund, so any obligation she had to turn that money over to the estate has been satisfied. So far as the Court is aware, when spouses file separate tax returns, neither has any right to receive a refund shown on the other's return. Consequently, to the extent the Trustee has been insisting that Debtor Hammonds is obliged to turn any portion of Debtor Julian's 2001

federal tax refund over to the bankruptcy estate, he has been wrong. In addition, because the Trustee's complaint sought turnover of \$4,153.94 and the Trustee has recovered \$3,737.94 of that total, the Trustee's pleadings show that Debtor Julian is obliged to turn \$416 over to the estate, not the \$443 the Trustee has been claiming. As late as November 2003, at least Debtor Julian apparently had not yet completed a state tax return for 2001, and so could not have given a copy to the Trustee; nothing in the record indicates whether Debtor Hammond has ever completed one. Finally, the Trustee has already obtained a \$500 sanction against the Debtors for some of their failures to comply with orders of the Court.

Under all the circumstances, the Court believes that before their discharges are revoked, the Debtors should be given one last chance to give the Trustee copies of their 2001 state tax returns and the estate's share of any state refunds they are entitled to. Furthermore, Debtor Julian should be given some more time to pay the Trustee the \$416 he owes the estate because of the 2001 federal tax refund he received.

Therefore, Debtor Hammonds will have until Thursday, September 30, 2004, to supply the Trustee with a copy of her 2001 state income tax return, and to pay him the bankruptcy estate's share of any refund shown on the return. If she meets this deadline, her discharge will not be revoked. If she fails to meet the deadline, the Trustee may submit an order revoking her discharge. Debtor Julian will also have until Thursday, September 30, 2004, to supply the Trustee with a copy of his 2001 state income tax

return, to pay him the bankruptcy estate's share of any refund shown on the return, and to pay the Trustee \$416 based on his 2001 federal tax refund. If he meets this deadline, his discharge will not be revoked. If he fails to meet the deadline, the Trustee may submit an order revoking his discharge. In connection with any orders he may submit, the Trustee should inform the Court about any contact he has with either of the Debtors or any contact he has had since the events described in this order, giving details of their communications.

IT IS SO ORDERED.

Dated this 30th day of July, 2004.

DALE L. SOMERS
BANKRUPTCY JUDGE

CERTIFICATE OF SERVICE

The undersigned certifies that copies of the foregoing ORDER DENYING PLAINTIFF'S SUMMARY JUDGMENT MOTION, BUT SETTING FINAL DEADLINE FOR DEBTORS TO COMPLY WITH THE COURT'S ORDERS, OR THEIR DISCHARGES WILL BE REVOKED were placed in the United States Mail on the 30th day of July, 2004, addressed to:

Gary Lee Julian
162 N.E. 20th Ave.
Great Bend, KS 67530
Defendant-Debtor

Sonya Christine Hammonds
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Wichita, KS 67202
Counsel for Plaintiff and Chapter 7 Trustee

Brian Caldwell, Law Clerk to:
THE HONORABLE DALE L. SOMERS

BANKRUPTCY JUDGE