The following constitutes the order of the Court.

Signed February 25, 2005.

Barbara J. Houser

United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	§	
	§	
NORVELL LEE FINNEY and	§	**CASE NO. 02-34147-BJH-7**
CAROLYN JEAN FINNEY,	§	**Chapter 7**
	§	
Debtors.	§	
	§	
THE CADLE COMPANY,	§	**ADV. PROC. 04-3309-BJH**
	§	
Plaintiff,	§	
	§	
- against -	§	
	§	
NORVELL LEE FINNEY,	§	
	§	
Defendant.	§	

MEMORANDUM OPINION

Before the Court is the First Amended Complaint Objecting to Discharge (the "Complaint") filed by the Cadle Company ("Cadle"). In the Complaint, Cadle seeks to have Norvell L. Finney's

("Finney" or the "Debtor") discharge revoked.[1] The Debtor opposes a revocation of his discharge. The Court has jurisdiction over the Complaint, which constitutes a core proceeding, in accordance with 28 U.S.C. §§ 1334 and 157. This Memorandum Opinion constitutes the Court's findings of fact[2] and conclusions of law.

Cadle contends that the Debtor's discharge must be revoked because the Debtor refused to obey a lawful order of the Court entered in the Case. *See* 11 U.S.C. § 727(d)(3); *see also* 11 U.S.C. § 727(a)(6)(A). Specifically, Cadle contends that the Debtor's post-petition transfer of title to the Carbona Properties violated the terms of the July 30, 2002 Order Denying Motion for Relief from the Automatic Stay (the "Order"), in which the Debtor and Cody Trustee (of the Finney Trust) were enjoined from "executing any conveyance of the Trust assets or encumbering said assets of the Trust or interfering with the Bankruptcy Trustee concerning the Trust Assets." Plaintiff's Exhibit 4 at p. 2.

In response, the Debtor contends that his discharge should not be revoked because he did not refuse to comply with the Order with the requisite intent. Specifically, the Debtor testified that he signed Warranty Deeds in favor of the parties who had entered into prepetition contracts for deed

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[1]Due to a series of mistakes no longer relevant, Finney and his wife had not been granted a discharge in the Case at the time of trial, although they were entitled to have a discharge issued as the time period in which to object expired without an objection having been filed. By way of brief explanation, the parties had agreed to extend the time for filing objections to discharge in the event a mediation described in more detail hereinafter was unsuccessful. The wording of the Order, among other things, created some confusion and a discharge order was never entered in the Case. Such an Order is being entered contemporaneously with this Memorandum Opinion. Although Finney initially raised defenses of prematurity (there is nothing yet to revoke), statute of limitations (the time period to object to Finney receiving a discharge – Cadle's alternative requested relief – has run), and/or laches, Finney agreed after opening arguments to proceed to the merits of the Complaint, as Cadle could simply refile a complaint to revoke his discharge once the discharge was actually issued. Cadle does not seek to revoke Mrs. Finney's discharge.

[2]The Court adopts the parties' stipulated facts (the "Stipulated Facts") as part of its factual findings as if fully set forth herein. *See* Amended Joint Pretrial Order (docket no. 28) at ¶ 2. Capitalized terms not defined in this Memorandum Opinion shall have the meaning ascribed to them in the Stipulated Facts.

with respect to the Carbona Properties to protect them from the collection efforts of Cadle, who he thought would end up with the properties. Moreover, the Debtor testified that he never intended to deprive Seidel Trustee (the bankruptcy trustee appointed in the Case) or the Debtor's estate of the proceeds due under the prepetition contracts for deed. According to the Debtor, he drafted the Warranty Deeds and made them subject to the obligation to pay set forth in the contracts for deed to insure that Seidel Trustee and the estate got those proceeds. In short, the Debtor claims to have acted solely to insure that the purchasers under the contracts for deed were entitled to keep their properties, subject to their obligation to pay the remaining sums due under the contracts for deed to Seidel Trustee. The Debtor testified that he did this because these parties were his neighbors and friends and he wanted to protect them.[3] Thus, according to the Debtor, he did not wilfully refuse to obey a lawful order of the Court.

Revocation of a discharge is "a drastic measure that runs contrary to the general policy of the Bankruptcy Code of giving Chapter 7 debtors a 'fresh start.'" *Anderson v. Poole (In re Poole)*, 177 B.R. 235, 239 (Bankr. E.D. Pa. 1995). The revocation provision is strictly construed against the objector and in favor of the debtor's retention of the discharge. *State Bank of India v. Kaliana (In re Kaliana)*, 202 B.R. 600, 603 (Bankr. N.D. Ill. 1996); *Buckstop Lure Co. v. Trost (In re Trost)*, 164 B.R. 740 (Bankr. W.D. Mich. 1994). In an action to revoke discharge under § 727(d), the moving party bears the burden of proof. *Samson v. Connor (In re Connor)*, 288 B.R. 807, 808 (Bankr. S.D.

[3]The Debtor testified that he and his wife bought their home in 1947, that the backyards of the Carbona Properties can be viewed out the Debtors' kitchen window, and that the Debtors socialized with the contract for deed purchasers and their families.

Ill. 2002); *Kaliana*, 202 B.R. at 604; *see also* FED. R. BANKR. P. 4005.[4] The moving party must establish each of the required elements of § 727(d)(3) by a preponderance of the evidence. *Connor*, 288 B.R. at 807; *see also Kaliana*, 202 B.R. at 603–04 (stating that a proper application of *Grogan v. Garner*, 498 U.S. 279, 286–87 (1991) requires a court to apply the preponderance of evidence standard to § 727(d) actions). Once the moving party has met its initial burden of proof, the burden shifts to the debtor "to prove that he or she has not committed the objectionable act." *Rothman v. Beeber (In re Beeber)*, 239 B.R. 13, 30 (Bankr. E.D.N.Y. 1999); *see also Connelly v. Michael*, 424 F.2d 387, 389 (5th Cir. 1970).

To prevail on an action under § 727(a)(6)(A) via § 727(d)(3), the movant must show that "the debtor has refused, in the case – (A) to obey any lawful order of the court, other than an order to respond to a material question or to testify." 11 U.S.C. § 727(a)(6)(A). The failure to comply with a court order does not necessarily warrant the revocation of discharge; rather, the decision to revoke discharge is left to the discretion of the court. *See Friendly Fin. Disc. Corp. v. Jones (In re Jones)*, 490 F.2d 452, 456 (5th Cir. 1974) (stating that "the referee must exercise his discretion whether or not to grant a discharge, even when an order has not been followed") (citations omitted).[5] The Fifth Circuit has outlined some of the factors a court should consider in determining whether the failure to obey an order justifies denying discharge, including (1) whether the debtor's acts were wilful (or

[4]FED. R. BANKR. P. 4005, which places the burden of proof on the party objecting to discharge, applies to actions brought under § 727(a)(6). Since § 727(d)(3) incorporates § 727(a)(6), this rule should also apply to actions brought under § 727(d)(3).

[5]The *Friendly Finance* decision was decided under § 14(c)(6) of the former Bankruptcy Act, which states that a "discharge should be granted unless the court is satisfied that the bankrupt 'in the course of a proceeding under this title refused to obey any lawful order of . . . the court." *Friendly Finance*, 490 F.2d at 454–55 (citing § 14(c)(6) of the Bankruptcy Act). Since the elements under § 14(c)(6) of the Bankruptcy Act and § 727(a)(6) of the Bankruptcy Code are virtually identical, the standards set forth in the *Friendly Finance* decision are still binding on this Court.

whether there was a justifiable excuse), (2) whether creditors have been injured, and (3) whether "there is some way the [debtor] could make amends for his conduct." *Id.* (citations omitted). If the debtor mistakenly or inadvertently fails to comply with a court order, the court may certainly refuse to penalize the debtor without abusing its discretion. *Id.* at 456–57; *see also Silverman v. Katz (In re Katz)*, 146 B.R. 617, 622 (Bankr. E.D.N.Y. 1992) (stating that the failure of a debtor to obey a lawful order of the court is not "an axiomatic bar that obviates the need to exercise any discretion") (citations omitted).

In this case, there is no dispute that the Order is a lawful order. Moreover, the Debtor does not dispute that his actions were in violation of the Order. The sole dispute is whether the Debtor acted with the requisite intent. Although the Court agrees with the Debtor that an innocent or mistaken failure to comply with a lawful order of the Court cannot result in the revocation of a discharge, the Court finds the Debtor's arguments about revocation of his discharge unpersuasive for several reasons.

First, the Debtor's explanation for his actions is inconsistent with the acts taken, which causes the Court to find much of the Debtor's testimony to be not credible. For example, the Debtor testified that he understood that title to the Carbona Properties transferred to the purchasers under the contracts for deed when the contracts for deed were originally signed. However, if the Debtor truly thought that title to the Carbona Properties had vested in the contract for deed purchasers prepetiton, then the mediation term sheet (Plaintiff's Exhibit 1) and the subsequent Settlement and Release Agreement (Plaintiff's Exhibit 2) should not have required the Finney Trust to transfer "record title, ownership, and possession" of the Carbona Properties to Seidel Trustee, in addition to assigning the contracts for deed on those properties to Seidel Trustee. Plaintiff's Exhibit 2 at p. 3,

¶ 1; *see also* Plaintiff's Exhibit 1. Rather, those documents should have simply required the Finney Trust to assign the contracts for deed to Seidel Trustee. Moreover, if the Debtor thought title had passed when the contracts for deed were first signed, then there was no need for him to sign and record the Warranty Deeds on September 30, 2002 (Plaintiff's Exhibit 5(A), (B), (C)), as that would have been a superfluous act. His execution of the Warranty Deeds is inconsistent with his testimony that he believed title had already passed.

Second, while the acts taken by Finney are laudable when viewed through the eyes of the contract for deed purchasers, Finney's acts caused real harm to creditors and to the Debtors' estate. By way of background, and as explained more fully in the Stipulated Facts, Seidel Trustee, Cadle, the Debtors, and the Finney Trust had a dispute over whether the assets held in the Finney Trust were property of the Debtors' bankruptcy estate. To preserve the status quo pending the outcome of a mediation of that dispute (among other disputes), the Court enjoined the Debtors and Cody Trustee of the Finney Trust from "executing any conveyance of the Trust assets or encumbering said assets of the Trust or interfering with the Bankruptcy Trustee concerning the Trust Assets" in the Order. Plaintiff's Exhibit 4 at p. 2. The parties successfully mediated their disputes, and in accordance with the mediation term sheet (Plaintiff's Exhibit 1) and the subsequent Settlement and Release Agreement (Plaintiff's Exhibit 2), the Finney Trust agreed (among other things) to transfer title to the Carbona Properties to Seidel Trustee.

Of course, after the Debtor prepared, signed, and filed the Warranty Deeds on behalf of the Finney Trust in violation of the terms of the Order, and thereby caused title to the Carbona Properties to be transferred to the contract for deed purchasers for no new consideration, the Finney Trust was unable to convey title to the Carbona Properties to Seidel Trustee in accordance with the parties'

settlement agreement. Accordingly, the Trustee had to commence litigation against the contract for deed purchasers (now allegedly record title holders) to set aside the purported transfers to them. Ultimately, agreed judgments were entered into with the contract for deed purchasers, who returned title to the Finney Trust,[6] so that title could be conveyed to Seidel Trustee in accordance with the parties' settlement agreement. In that process, Seidel Trustee incurred attorney's fees and costs in excess of $10,000.00 that the estate must now pay that would not have been incurred if the Debtor had obeyed the Order.

Third, there appears to be no way for the Debtor to make amends for his conduct in some less draconian fashion than through a revocation of discharge. While the Debtor did not offer any testimony with respect to a lesser remedy and/or his willingness to make the estate whole for the costs it was required to incur because of his actions, the Court inquired during closing argument about the Debtor's ability to compensate the estate for the damages it suffered because of the Debtor's failure to comply with the Order. The Court was advised that the Debtor has limited means and could not repay the estate without payment terms being negotiated. In short, the Debtor is apparently unable to reimburse the estate for the economic loss he caused the estate to suffer in a lump sum or over a reasonably prompt time period. Moreover, if the Debtor hoped for a lesser remedy than revocation of discharge to be imposed for his refusal to obey a lawful order of the Court, the Debtor was obligated to come forward with evidence of how the estate could be made whole, which he failed to do. *See Connelly v. Michael*, 424 F.2d 387, 389 (5th Cir. 1970) (stating

[6]The post-petition transfers had granted each contract for deed purchaser a warranty deed with a vendor's lien. The agreed judgments avoided these transfers and restored the contracts for deed. The contract for deed purchasers then continued to pay Seidel Trustee the amounts due under the contracts for deed until otherwise notified by Seidel Trustee. *See* Agreed Judgments Avoiding Post-Petition Transfers, *Seidel v. Gallegos*, Adv. Proc. 04-3261 (docket nos. 8, 15 & 16).

that the burden shifts to the debtor once the moving party has met its burden under § 14(c)(6) of the Bankruptcy Act); *Friendly Fin. Disc. Corp. v. Jones (In re Jones)*, 490 F.2d 452, 455–456 (5th Cir. 1974) (stating that, even when it is undisputed that a debtor did not comply with a lawful court order, the court should still consider whether or not "there is some way the bankrupt could make amends for his conduct") (citations omitted).

Based on all of the evidence admitted at trial, the Court finds that the Debtor knew that title to the Carbona Properties had not passed to the contract for deed purchasers when the contracts for deed were first signed, and knew further that the purchasers were at risk of losing their homes since the contracts for deed were not recorded prepetition (and might be avoidable by Seidel Trustee using his strong arm powers). Because the Debtor wanted to protect his neighbors from the potential of losing their homes, the Debtor, purporting to act as agent for the Finney Trust,[7] gratuitously deeded title to them on September 30, 2002. In doing so, the Court finds that the Debtor wilfully violated the Order which enjoined the Debtor "from executing any conveyance of the Trust assets . . . or interfering with the Bankruptcy Trustee concerning Trust assets." Plaintiff's Exhibit 4 at p. 2.

Other evidence supports the Court's finding of a wilful act of disobedience on the Debtor's part. For example, the Debtor did not consult either his bankruptcy attorney or the attorney for the Finney Trust in connection with these transfers. Rather, he prepared, signed, and filed the documents himself. Moreover, the Debtor never expressed his concerns about the potential treatment to be received by the contract for deed purchasers with Seidel Trustee. He simply took it upon himself

[7]It is unclear that the Debtor had authority to act as "Agent for Trustee," the purported capacity in which he signed the Warranty Deeds on behalf of the Trust. *See* Plaintiff's Exhibit 5(A), (B), (C). There was no written agency agreement or power of attorney expressly authorizing the Debtor to act. Nonetheless, the Debtor signed the Deeds and purported to act on behalf of the Trust.

to attempt to protect their rights. As noted previously, while laudable from the perspective of the contract for deed purchasers, the effect of the actions taken was to prejudice the rights of the bankruptcy estate. While Seidel Trustee was successful in mitigating the long-term effect by setting aside the transfers and ultimately selling the Carbona Properties to the contract for deed purchasers himself,[8] that does not absolve the Debtor of his wilful act of disobedience. Finally, the Debtor never disclosed his actions to anyone. Seidel Trustee discovered the acts when attempting to consummate the parties' settlement – a settlement that the Debtor testified he participated in the negotiation of, read, understood, and agreed to.

For all of these reasons, the Court concludes that the Debtor's discharge must be revoked.

END OF OPINION

[8]The Court has approved these sales, pursuant to which the contract for deed purchasers will obtain third party financing for their purchase of the property from Seidel Trustee. Two of the sales have closed; one has not yet closed.