UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK
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In re

JOHN WITBECK | Case No. 99-17372
Chapter 7

Debtor
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APPEARANCES:

WILLIAM M. McCARTHY, ESQ.
Chapter 7 Trustee
60 South Swan Street
Albany, New York 12210

RICHARD CROAK, Esq.
Attorney for Debtor
1450 Western Avenue
Albany, New York 12203

Hon. Robert E. Littlefield, Jr., U.S. Bankruptcy Judge

**MEMORANDUM-DECISION AND ORDER**

The matter before the court is a motion to compel turnover or obtain a money judgment pursuant to 11 U.S.C. §§ 329, 330, 341, 343, 521, 541, 542, 543, 549 and 550 ("second turnover motion"). The court has jurisdiction over this core proceeding pursuant to 28 U.S.C. §§ 157(a), 157(b)(1), 157(b)(2)(E) and 1334(b).

**Facts**

The court docket and documents filed in this court expose the following troubling facts:

On December 30, 1999, the Debtor filed a voluntary Chapter 7 petition. After the section 341 meeting of creditors, the Trustee filed several motions to extend the time to object to discharge on the grounds that Debtor's counsel had agreed to provide documentation related to the Debtor's tax returns and property and to amend schedules but had failed to comply with either of the Trustee's requests ("section 727 extension motions"). On April 6, 2000, August 3, 2000, November 16, 2000 and March 1, 2001, the court entered orders granting each of the Trustee's section 727 extension motions. The latest order provides for an extension until June 1, 2001.

On August 16, 2000, the Trustee filed a motion to compel turnover of estate property, seeking turnover of: (a) real property located at Westerlo Street, Coeymans ($10,000); (b) $100 or such other amount in Catskill Savings Bank; (c) a 1991 4 x 4 Nissan truck ($6,375); (d) a 1995 Plymouth Neon ($6,150); and (e) a 1987 T-Bird ($1,200) ("first turnover motion"). As alternative relief, the Trustee requested a money judgment in the amount of $23,825. The Debtor had listed property items (a) through (d) on his original Schedules A and B at the values stated in the Trustee's motion papers. On his original Schedule C, he did not claim any exemptions; he also did not sign the original Declaration Concerning Debtor's Schedules.

Neither the Debtor nor his attorney filed an objection to the first turnover motion and on September 14, 2000, the court entered an order directing the Debtor to turnover all of the property items the Trustee had requested. After the Debtor failed to comply with that order, the Trustee filed the second turnover motion. In the second turnover motion, he asks the court to compel the Debtor to turnover the same property items he requested in the first turnover motion or, in the alternative, to allow a nondischargeable money judgment for $23,825, plus 9% interest, and authority to appropriately record it. The Trustee also requests attorney's fees in the amount of $480 for three hours of legal work necessitated by the Debtor's and/or his attorney's failure to perform the agreement made at the section 341 meeting.

Somewhere between the second and third adjourned hearings on the second turnover motion, the Debtor's attorney signed the Declaration Concerning Debtor's Schedules involving the "amended" Schedules A, B and C that were filed on February 14, 2001. The "amended" Schedule B lists property item (e)'s worth as $900. It also reduced property item (c)'s value to $2,000.

At the third adjourned hearing, Debtor's attorney appeared and raised an "improper service" issue. Despite timely and proper service on Debtor's counsel, and although counsel himself had not filed any opposition to the second turnover motion on or before this fourth hearing, the Trustee agreed to serve the Debtor prior to the fourth adjourned hearing. On February 26, 2001, Debtor's counsel filed a "response" to the second turnover motion; it is essentially five sentences long. It states that on February 27, 2001, counsel expected to receive "documentation" indicating why the Debtor could not comply with the Trustee's turnover demands. If the Debtor did, in fact, provide the documentation, the docket does not show receipt by the Trustee or filing in this court.

At the fourth adjourned hearing on the second turnover motion, Debtor's counsel stated the Chapter 7 petition the Debtor filed was supposed to be a joint petition but the Debtor and his wife experienced marital problems while the petition was being prepared. He offered two explanations of why the Debtor had not complied with the Trustee's turnover request: (1) the Debtor did not receive correspondence or phone calls regarding the matter because he no longer resided at the former marital residence and/or (2) the Debtor's wife had possession of some of the property items requested. Debtor's counsel asked the court to either dismiss the petition or require the Trustee to explain how the Debtor could turn over property he no longer possesses.

After the Trustee reminded Debtor's counsel that it was the Debtor's duty to accurately report his assets and properly claim any exemptions, the court instructed him that the Debtor could convert to a Chapter 13 case, however, any application to have the Chapter 7 case dismissed had to be done by written motion with proper service on the Trustee, the United States Trustee and all creditors. After he indicated he wanted some time to set out the facts he believed were favorable to the Debtor and to explain why the Debtor could not comply with the Trustee's request for turnover, the court advised Debtor's counsel that if he wanted to submit anything further regarding the turnover issue and/or attorney's fees request, he should file a brief on or before March 16, 2001. When Debtor's counsel did not file anything, the Trustee submitted a letter to the court indicating he also had not received anything from counsel.

**Discussion**

The court finds the Debtor's and his attorney's conduct in this case astounding. After two turnover motions, the second one requiring five hearings, the Trustee still does not have the estate property he is clearly entitled to administer under 11 U.S.C. § 542 nor has he received any documentation explaining the Debtor's turnover failure. As for Debtor's counsel's weak attempt to claim the $100 cash and the 1991 Nissan truck as "exempt," he most certainly should know that only a debtor can claim an exemption, not his or her attorney. The fact that the Debtor did not claim any exemptions on his original Schedule C provides further evidence that he does not claim any exemptions with regard to any of the property the Trustee seeks. Furthermore, even if the court treated Debtor's counsel's declaration as the Debtor's, the exemptions claimed on the purported amended Schedule C fall short of the various property items the Trustee seeks to administer.

Having had ample opportunity to turn over the property to the Trustee or to provide him with a satisfactory explanation and backup documentation showing his entitlement to exemptions or offering some other reason why the property could not or should not be turned over, the court finds the Trustee is entitled to a money judgment in the amount of $23,525, plus 9% interest. Although the court does not find the "amended" schedules valid, it will use the $900 figure listed for the 1987 Thunderbird as opposed to the value listed in the Trustee's motion papers. It will not, however, use the $2,000 figure listed for the 1991 Nissan truck. The court also finds the Trustee is entitled to the legal fees he requests in the amount of $480.

Accordingly, it is

ORDERED that the Trustee is entitled to a money judgment in the amount of $23,525, plus 9% interest, and attorney's fees in the amount of $480; and it is further

ORDERED that the Trustee shall prepare and submit a judgment conforming to this decision.

Dated: April 9, 2001

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Hon. Robert E. Littlefield, Jr.
United States Bankruptcy Judge