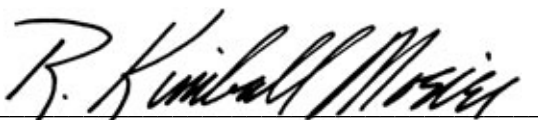


The below described is SIGNED.

Dated: September 30, 2010

  
R. KIMBALL MOSIER  
U.S. Bankruptcy Judge



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IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF UTAH

In re: TEARA WOOD,  Debtor.	Bankruptcy Number: 09-24402  Chapter 7  Judge R. Kimball Mosier
STEPHEN W. RUPP, Trustee,  Plaintiff.  v.  TEARA WOOD,  Defendant.	Adversary Proceeding No. 09-02482

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MEMORANDUM DECISION ON TRUSTEE'S MOTION  
FOR DEFAULT JUDGMENT

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The matter before the Court is the Motion for Default Judgment (Motion) filed by Plaintiff, the Chapter 7<sup>1</sup> trustee appointed to this case, Stephen W. Rupp (Trustee). The Court held a hearing on this Motion on April 15, 2010, as permitted under Federal Rule of Civil

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<sup>1</sup> All chapter and section references are contained in Title 11 of the United States Code unless otherwise specified herein.

Procedure 55(b)(2) (applicable to this proceeding by Federal Rule of Bankruptcy Procedure 7055). For the reasons set forth herein, the Court grants the Trustee's motion for default judgment denying defendant's discharge and denies the Trustee's motion for default judgment for money damages.

### **Jurisdiction**

The Trustee commenced this adversary proceeding seeking a denial of the defendant's discharge, and a money judgment. These are "Core" matters under 28 U.S.C. § 157(b)(2)(E), (J) and (O), and 28 U.S.C. § 1334.

### **Factual Background**

Teara Wood (Defendant), acting pro se in this case, filed her petition for relief under Chapter 7 of the United States Bankruptcy Code on May 1, 2009. On September 9, 2009, pursuant to the Trustee's motion, the Court entered an order extending the deadline for filing complaints objecting to the Defendant's discharge under § 727 and demanding turnover of certain property or imposing a \$500.00 penalty.

Trustee filed the above-captioned adversary proceeding on October 16, 2009. The adversary proceeding seeks an order denying Defendant's discharge with prejudice under § 727 and a money judgment in favor of the Trustee and against the Defendant in the amount of \$7,740.38.

The factual allegations in the complaint are sparse. The Trustee alleges that the Defendant has "failed to produce or turnover any of the information, books, records or properties of the bankruptcy estate as set forth in the Court's order."<sup>2</sup> The Trustee also asserts that the

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<sup>2</sup> The complaint does not identify the information set forth in the Court's order.

Defendant has failed to pay \$500.00 to the Trustee and failed to otherwise timely comply with the Court's turnover order. No other factual allegations exist in the complaint.

### **Discussion**

A court may grant a default judgment if a party fails to defend an action. *See* Fed. R. Bankr. P. 7055; Fed. R. Civ. P. 55. Judicial preference, however, is to resolve cases on their merits rather than by default. *Gomes v. Williams*, 420 F.2d 1364, 1366 (10th Cir. 1970) (citation omitted). Even if a default is entered, a court must “consider whether the unchallenged facts constitute a legitimate cause of action, since a party in default does not admit mere conclusions of law.” *Bixler v. Foster*, 596 F.3d 751, 762 (10th Cir. 2010) (citation omitted). To properly plead a cause of action, a complaint must allege facts that satisfy each element of the cause of action. *See* Fed. R. Bankr. P. 7008(a); Fed. R. Civ. P. 8(a)(2). To plead actions of fraud, a complaint must satisfy a heightened standard: providing specific facts that identify the time, place, and contents of the conversations and circumstances resulting in fraud, the identity of the party engaging in the fraudulent conduct or conversation, and the consequences thereof. *See Lawrence Nat'l Bank v. Edmonds (In re Edmonds)*, 924 F.2d 176, 180 (10th Cir. 1991); *see also* Fed. R. Bankr. P. 7009; Fed. R. Civ. P. 9(b). “[C]onclusory allegations without supporting factual averments are insufficient to state a claim on which relief can be based.” *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991).

#### **I. Denial of Discharge**

Bankruptcy discharges under Chapter 7 are addressed by § 727. Section 727(a) provides for a discharge unless the debtor's conduct or the facts in the case fall within the exceptions set forth in § 727(a). If an adverse party proves any one of the exceptions, it is sufficient to deny a

debtor's discharge. See *Mathai v. Warren (In re Warren)*, 2005 Bankr. LEXIS 496, \*36 (Bankr. D. Utah Mar. 28, 2005) (quoting *Woolman v. Wallace (In re Wallace)*, 289 B.R. 428, 433 (Bankr. N.D. Okla. 2003)).

On the Trustee's first claim for relief, under § 727(a)(2), the Trustee must allege that the Defendant transferred, removed, destroyed, concealed, etc., property of the Defendant within one year prior to the date of filing with an intent to hinder, delay or defraud creditors. The Court must find actual intent to defraud. *Marine Midland Bus. Loans v. Carey (In re Carey)*, 938 F.2d 1073, 1077 (10th Cir. 1991). The Trustee failed to allege—certainly not with specificity—that the Defendant committed specific acts with an intent to hinder, delay or defraud creditors. The Trustee did not identify any estate property that the Defendant converted, transferred or removed. Although the Trustee asserts that the Defendant's actions resulted in the loss of \$7,740.38 in federal and state tax returns and bank accounts, the Trustee did not allege that those accounts or refunds actually belonged to the estate. The Trustee alleged that the Defendant's conduct "effectively resulted in the Defendant's wrongful conversion of property of the estate." Without any factual allegations to support the Trustee's conclusory statements, the complaint is insufficient to support a default judgment on this claim.

On the Trustee's second claim for relief, under § 727(a)(3) and (a)(4)(D), the Trustee's allegations are also insufficient. To be successful, the Trustee would have to show that the Defendant (1) destroyed or failed to keep records by which the Trustee could determine the Defendant's financial condition or (2) knowingly or fraudulently withheld recorded information relating to the Defendant's property or financial affairs. The Trustee fails to set forth any factual basis for the conclusory statement that documents were not preserved. Although the Trustee

alleged that the Defendant failed to turnover the items sought in the Court's turnover order, the complaint contains no allegations that those documents exist or ever existed. Further, the Trustee failed to allege that there is no justification for the lack of records; subsection (a)(3) does not require a specific mental state, *see Cobra Well Testers, LLC v. Carlson (In re Carlson)*, 2008 U.S. App. LEXIS 1521, \*11–12 (10th Cir. Jan. 23, 2008) (unpublished) (citations omitted) (need not find debtor intended to conceal financial condition under § 727(a)(3)), but it does require that no justification for the act or failure to act exists, *see* § 727(a)(3). The Trustee's claim under § 727(a)(4)(D) fails for the reasoning above and additionally on the lack of specific allegations that the Defendant withheld such documents knowingly or fraudulently. The Trustee simply alleged conclusions based on legal standards rather than factual bases.

The Trustee's third claim for relief, based on § 727(a)(4)(A), fails for a lack of factual allegations. The Trustee does not identify any oath or account that he believes is false. Further, there are no allegations as to the falsity of any oath or the Defendant's intent to make such false oaths or accounts with knowledge or fraudulent intent.

The Court will grant default judgment on the Trustee's fourth claim for relief, under § 727(a)(6)(A), alleging that the Defendant refused to obey a lawful order of the Court. Although disobedience to an order must be willful or intentional, *see Martinez v. Los Alamos Nat'l Bank (In re Martinez)*, 126 Fed. Appx. 890, 896 (10th Cir. 2005) (unpublished) (*quoting D'Agnese v. Cotsibas (In re Cotsibas)*, 262 B.R. 182, 186 (Bankr. D. N.H. 2001)); *Gillman v. Green (In re Green)*, 335 B.R. 181, 184 (Bankr. D. Utah 2005), the lack of willfulness or intent is raised by defense. The Defendant failed to respond to the Trustee's complaint and assert that

her failure to obey this Court's order was not willful or intentional. Therefore default judgment on the Trustee's § 727(a)(6)(A) claim is appropriate.

## **II. Money Judgment**

The Trustee's fifth claim for relief seeks a money judgment alleging that the Defendant has converted estate assets. "A conversion is an act of wilful interference with a chattel, done without lawful justification by which the person entitled thereto is deprived of its use and possession. . . . [I]t does not . . . require a conscious wrongdoing, but only an intent to exercise dominion or control over the goods inconsistent with the owner's right." *Allred v. Hinkley*, 328 P.2d 726, 728 (Utah 1958). A court can only grant a default money judgment upon determining, upon unchallenged facts, that there is a legally binding obligation. *See Pope v. United States*, 323 U.S. 1, 11 (1944).

The Trustee alleges the Defendant has failed to turnover (1) an account balance of \$1,185.51 in her Cyprus Federal Credit Union account number 667; (2) other account balances totaling \$240.38; (3) 2008 state and federal tax refunds amounting to approximately \$6,000.00; and (4) the Court-ordered payment of \$500.00.<sup>3</sup> Little evidence in the record exists of these accounts and receivables or as to their balances and outstanding demands on the petition date.

In this case, the Trustee has not alleged sufficient facts to establish a cause of action for conversion for purposes of a default judgment. The Trustee's only allegation is that "the Defendant's acts and conduct and failures to act and omissions effectively resulted in the Defendant's wrongful conversion of property of the estate." Because the Trustee has not yet

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<sup>3</sup>The Court has already entered an order awarding this \$500.00; accordingly, an additional order is not necessary.

conducted discovery, he appears to be alleging that a failure to respond to his turnover demands constitutes conversion, which the Court finds inadequate to award a default judgment.

The Trustee failed to allege that the Defendant's failure was intentional, thus creating a willful interference with the property of the estate. The Trustee has also failed to allege sufficient facts to establish that the Trustee is entitled to the funds at issue. As to the tax refunds, the Trustee did not provide any evidence that the tax refunds were actually received post-petition. This is especially troubling because the Trustee represented to the Court that he received tax returns from the Defendant at the 341 meeting. The timing of the receipt of the tax refunds would be more readily ascertainable if the tax returns were incorporated into the complaint or a specific allegation was made as to the date the tax returns were filed. The Trustee, however, did not, thus, there are no allegations or evidence before the Court indicating that the tax refunds are actually property of the estate to which the Trustee is entitled. With respect to the bank accounts, because a bank account is not "money belonging to the depositor and held by the bank . . . [but] nothing more or less than a promise to pay . . . the depositor," *Citizens Bank of Maryland v. Strumpf*, 516 U.S. 16, 21 (1995), the Court must determine who was the beneficiary of the promise to pay prior to finding the Defendant converted assets of the estate. If the account funds were paid to the Defendant or she controlled to whom those funds would be paid after the petition date, then a claim for conversion could possibly be supported. If, however, those funds were already in demand due to outstanding checks, a claim by the Trustee that the Defendant converted estate property is less clear.<sup>4</sup> These facts would also more

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<sup>4</sup> The Court recognizes a split of authority as to whether a debtor or the payees must replenish a bankruptcy estate for checks written pre-petition that have been honored post-petition, but finds it unnecessary to address this issue in this ruling. *Compare In re Brubaker*, 426 B.R. 902 (Bankr. M.D. Fla. 2010); *Yoon v. Minter-Higgins*, 399 B.R. 34 (N.D. Ind. 2008); *In*

likely permit the Court to determine if the Defendant acted with the necessary intent to support a claim of conversion. Finding a lack of the necessary allegations, the Court cannot determine a legally binding obligation exists on behalf of the Defendant to pay to the Trustee damages for conversion and the Court will not enter a default judgment on the Trustee's fifth claim for relief.

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*In re Spencer*, 362 B.R. 489 (Bankr. D. Kan. 2006); *In re Sawyer*, 324 B.R. 115 (Bankr. D. Ariz. 2005); *In re Dybalski*, 316 B.R. 312 (Bankr. S.D. Ind. 2004); *Maurer v. Hedback* (*In re Maurer*), 140 B.R. 744 (D. Minn. 1992) with *Pyatt v. Brown* (*In re Pyatt*), 348 B.R. 783 (8th Cir. B.A.P. 2006); *In re Taylor*, 332 B.R. 609 (Bankr. D. Mo. 2005); *In re Figueira*, 163 B.R. 192 (Bankr. D. Kan. 1993).



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**SERVICE LIST**

Service of the foregoing **Memorandum Decision on Plaintiff's Motion for Default Judgment** will be effected through the Bankruptcy Noticing Center to the following parties.

Stephen W. Rupp  
McKay Burton & Thurman  
170 South Main Street, Suite 800  
Salt Lake City, UT 84101

Teara Wood  
3052 West 3835 South  
West Valley City, UT 84119

Office of the United States Trustee  
Ken Garff Building  
405 South Main Street, Suite 300  
Salt Lake City, UT 84111

ORDER SIGNED