

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Western Division

In re:) Bankr. No. 96-50121
)
WILLIAM C. SHULTZ) Chapter 7
Soc. Sec. No. [REDACTED]-2915)
)
and) MEMORANDUM OF DECISION
) RE: ORDER TO SHOW CAUSE
EVELYN SHULTZ)
Soc. Sec. No. [REDACTED]-1999)
)
Debtors.)

The matter before the Court is the Order to Show Cause entered March 11, 1998 pursuant to Trustee Dennis C. Whetzal's request based on Debtors' failure to timely comply with the Order Compelling Turnover entered January 5, 1998. This is a core proceeding under 28 U.S.C. § 157(b)(2). This Memorandum Decision and accompanying Order shall constitute the Court's findings and conclusions under F.R.Bankr.P. 7052. As set forth below, the Court concludes that Debtors shall not be held in civil contempt at this time for their failure to comply with the January 5, 1998 turnover order but that Debtors remain obligated to comply with the order.

I.

William C. and Evelyn Shultz (Debtors) filed a Chapter 7 petition on April 4, 1996. On June 3, 1996, Trustee Dennis C. Whetzal filed an objection to Debtors' claimed exempt property on the grounds that Debtors would exceed their allowed exemptions if they received an income tax refund in excess of \$2,880.00. The objection was sustained by order entered June 28, 1996 and the

parties were given 30 days to determine the amount due the estate from Debtors. The parties did not timely file an accord and on January 21, 1997 Trustee Whetzal obtained a revocation of Debtors' discharge because they had failed to pay the bankruptcy estate for the excess exemptions.

Debtors still did not comply with the excess exemptions order. On December 3, 1997, Trustee Whetzal filed a motion for turnover. Therein, he stated that he and Debtors' counsel had agreed that Debtors' excess exemptions were \$1,783.86 but that Debtors had failed to timely pay the bankruptcy estate that amount. Debtors did not resist the motion and an order directing turnover was entered January 5, 1998. Still Debtors did not comply. On March 11, 1998, Debtors and their counsel were ordered to appear at a hearing on March 30, 1998 and show cause why they had failed to comply.

The hearing was held March 30, 1998. Debtors and their counsel, Dan Kelley, appeared telephonically because Debtors now live out of state. Trustee Whetzal also appeared. Debtors argued that they had not paid the excess exemptions because they were advised by their counsel that their obligation to do so ceased when their discharge was revoked. Debtors also argued that they did not have the means to comply with the excess exemption and turnover orders because their financial problems continue. Debtors' counsel acknowledged that he had informed Debtors after their discharge was revoked that they no longer needed to comply with the excess

exemptions order.

The Court directed Debtors to submit their income tax return for 1997. The return was received and docketed as an exhibit on April 22, 1998. The matter was then taken under advisement.

II.

To hold a party in contempt for failure to comply with an order, the movant must show with clear and convincing evidence that the defendant has violated a specific, definite, and enforceable order of which the defendant had actual knowledge. *Hazen v. Reagan*, 16 F.3d 921, 924-25 (8th Cir. 1994); *Koehler v. Grant*, 213 B.R. 567, 570 (8th Cir. B.A.P. 1997). If the movant meets that burden, the burden then shifts to the defendant to show that he was unable to comply with the court's order. *Koehler*, 213 B.R. at 570. Due process is satisfied if the defendant is given the opportunity to be heard at a meaningful time and in a meaningful manner. *Fisher v. Marubeni Cotton Corp.*, 526 F.2d 1338, 1343 (9th Cir. 1975). The defendant needs to understand the purpose of the hearing and the probable consequences and the defendant should be allowed to explain his non-responsive acts. *Id.*

III.

Debtors acknowledged at the hearing that they knew about the excess exemption and turnover orders and what their obligation was. Further, the record supports the conclusion that the orders were specific and that the turnover order was enforceable. However, for two reasons the Court will not hold Debtors in contempt for their

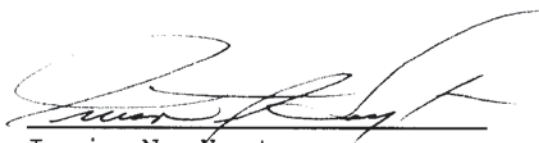
present failure to comply with the turnover order.

First, Debtors were misinformed by counsel that they no longer needed to comply with the excess exemptions order after their discharge was revoked. Therefore, for a majority of the time while this matter remained unresolved, Debtors were unaware of their continuing obligation to turnover the bankruptcy estate funds. Second, during 1997, Debtors did not have sufficient income to pay the Trustee since the five-member family's gross income was under \$20,000.00. Therefore, no order will be entered under F.R.Bankr.P. 9020 holding Debtors in contempt.

Debtors' obligation to pay Trustee Whetzal \$1,783.86, however, remains. The parties need to promptly negotiate repayment terms (amount and dates of the installment payments) and notice that stipulation for objections under F.R.Bankr.P. 9019.

Dated this 11 day of May, 1998.

BY THE COURT:



Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:
Charles L. Nail, Jr., Clerk

By: Charles L. Nail, Jr.
Deputy Clerk

(SEAL)



NOTICE OF ENTRY
Under F.R.Bankr.P. 9022(a)
Entered

CERTIFICATE OF SERVICE **MAY 11 1998**

I hereby certify that a copy of this document was mailed, hand delivered, or faxed this date to those creditors and other parties in interest identified on the attached service list.

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota

By: Charles L. Nail, Jr.
Date: 05-11-98

Case: 96-50121 Form id: 122 Ntc Date: 05/11/98 Off: 3 Page : 1

Total notices mailed: 5

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Aty Gering, Bruce J. Office of the U.S. Trustee, #502, 230 South Phillips Avenue, Sioux Falls, SD 57104-6321