UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re

JAMES J. MICHALEK Case No. 89-12184 K

Debtor

JAMES J. MICHALEK by
John H. Ring, III, Trustee

Plaintiff

-vs- AP 91-1151 K

JAMES J. MICHALEK

Defendant

John H. Ring III, Esq.
2427 William Street
Cheektowaga, New York 14206-2640

Trustee

James J. Michalek, Pro Se

By Order of February 2, 1996, the Court closed Adversary Proceeding 94-1256 and ordered that this matter continue in the context of former Trustee Carl L. Bucki's December

7, 1992 Motion for Summary Judgment. It is now Ordered that John Ring, Esq. be substituted for Carl Bucki as Plaintiff in that Adversary Proceeding. In its February 2, 1996 Order, the Court also gave Michalek an opportunity "to present any proof that the bonds in issue were purchased from personal service income attributable to personal services rendered after the date of conversion and rendered without use of property of [sic] any preconversion work or assets," and to do so no later than February 29, 1996. He mailed a response on February 27, 1996, which was received on March 1, 1996 and will be treated by the Court as having been timely submitted.

The matter came before the Court on March 6, 1996, for tracking purposes only. The Trustee requested thirty days in which to submit to the Debtor some form of proposal (the nature of which was not disclosed to the Court) that he thought might be satisfactory to Michalek. By Order issued that day, tracking was continued to April 10, 1996, at 10:00 a.m. to enable that proposal to be transmitted to the Debtor and to determine whether he had in any way responded thereto.

When the matter came before the Court for tracking purposes only on April 10, 1996, at 10:00 a.m., the Trustee reported that he had submitted a proposal to Michalek and had received no response, and that he would submit an affidavit of service to that effect. The Court indicated that it would issue some form of further scheduling order, and this is that Order.

The Court has fully examined Michalek's submission of February 27, entitled "Responses to Court Order and Judgment." The first matter of significance contained therein is that Michalek now disclaims any interest in the bonds that are the subject of the present motion.

The pages are not numbered, but on the seventh unnumbered page the Debtor states, "The Debtor has no interest in any bonds." And on the eleventh page he states, "The Debtor is without funds and has no interest in these bonds, and claims no interest." He does not tell us where they are or where he last saw them.

Secondly, the Debtor has, for at least a third time, ignored the Court's admonition to provide some "shred of evidence" as to how he earned the money to buy the bonds (as well as various stocks and other investments that are the subject of the broader litigation at hand). He has provided "not a client's name, not a transaction completed, not an hour of time billed."[1] In his Exhibit A entitled "Offer of Proof," Michalek states, "The bonds were purchased weekly out of cash flow from the money being earned from the practice of law. . . . The records as to income or by independent evidence and testimony will show that the money came from the practice during that time period. The cash flow of the practice." And he again states, "The bonds, the Debtor has no interest and claims no interest." Michalek was an attorney and member of the Bar. He knows full well that having been asked at least three times to provide evidence in the form of a name or transaction, it does not suffice to make an "offer of proof" that says that at a trial he will provide some evidence of the source of the funds. Again, and despite repeated prodding, Michalek fails to provide an iota of evidence that might have let him get to trial on the matters at hand. Who? What? When? Where? He answers none of these questions.

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[1] *See* page 9 of this Court's Decision of February 2, 1996, quoting yet an earlier decision of the Court.

Thirdly, the Debtor states (on the fourth unnumbered page) that, "The Debtor was also exempted by Judge Crehan [sic] as to his personal service income which income was not reflected in the D-I-P statements for the period of 9/89 to 9/90. It is noted that all other income and/or expenses which are listed. The personal service income being exempt." Thus, seven years into this case, Michalek admits for the first time that he "certified" and filed false monthly operating statements with the Court for the one year period that he was operating as a debtor-in-possession. He was omitting from those reports what he thinks his "personal service income" was from his law practice. He again claims that that income was "exempted" by Judge Creahan. But he again ignores this Court's repeated admonition to indicate where, how, or when Judge Creahan ever so stated, so that the Court could examine the statement and determine whether it was as unqualified as Michalek claims it to have been.[2] Decisively, even if one assumes, for the

[2]Although 11 U.S.C. § 541(a)(6) states that "earnings from services performed by an individual debtor after the commencement of the case" are outside the scope of "property of the estate," scores of cases recognize what the present Court has told Michalek in previous written decisions - it is only when it can be shown that the Debtor did not utilize any "property of the estate" and did not utilize any pre-petition property (receivables for pre-petition work, pre-petition causes of action, pre-petition equipment or facilities, etc.) that the income can be said to be "personal service income." In a case converted from Chapter 11 to Chapter 7, as this case was, the analysis must also be performed after conversion, with respect to post-petition but pre-conversion "property of the estate." For example, post-conversion receipts on an account generated by use of "property of the Chapter 11 estate" is not such "personal service income" as may be set apart as "property of the debtor." *See* 11 U.S.C. § 348(a).

sake of argument only, that such a broad unqualified statement was made by Judge Creahan, Michalek has pointed to no suggestion or indication from any source, anywhere, that his intentional failure to report his so-called "exempt" income in his monthly operating statements was authorized by anyone or anything. In the present Court's view, Michalek now admits that he concealed post-petition earnings from this Court by filing false reports in violation of 11 U.S.C. § 152. This too will be reported to the United States Attorney for such action as he deems appropriate.

Michalek repeatedly complains about denial of his right to notice and right to appear in person in this Court. On the contrary, he has clearly received and responded to every notice acted upon in this case. That is because this Court has insisted on re-noticing, re-service, and other extraordinary efforts to make certain he receives fair opportunity to participate. As to appearances in Court, most federal courts do not require (and some usually do not even permit) oral argument of motions. This Court's use of the word "mere" to describe motions in the prior decisions was not a reference to their significance, but instead was meant to distinguish them from trials and other evidentiary hearings. When testimony and presentation of other evidence may rightly be accomplished on papers, no personal appearance is necessary. Despite endless conclusory rhetoric in his many rambling submissions, Michalek has never offered to this Judge a single piece of evidence or assertion of fact in this adversary proceeding that would entitle him to an evidentiary hearing or trial. (In the matter of the bonds, all he ever has had to do was to name one post-conversion transaction that netted him $5,000 with which to buy them.) If and

when this Court were ever to have concluded that a trial or other evidentiary hearing were required, it would have permitted Michalek to make arrangements to be present. The expense to taxpayers that would be required for him to be present in Court to argue every motion militates that this Court instead address as much as possible by means of written submissions. Michalek's imprisonment is no excuse for his failure to provide at least his own sworn affidavits (or those of others) of facts or assertions of fact beyond the mere claim that he would provide evidence if permitted a hearing or trial. (The Court has placed a similar disability on Michalek's opponent, Trustee John Ring. Other than as to parties other than Michalek,[3] since his service of process on Michalek, the Court has heard no argument from Ring in this case, has not met with Ring in this case since his service of process on Michalek, and has placed all communications with Ring in this case since that time on the record in open court, and those communications have consisted of nothing more than confirmation of whether something of record was sent, whether something of record was received, and whether another scheduling order should issue.)

Michalek's desire for a day or two out of jail, to come here and offer nothing of value but his characteristic attacks on the mass of evidence and undisputed proofs of his malfeasances as a debtor in this Court will not be entertained. His unceasing characterizations

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[3]The Court has presided over Ring's suit against Michalek's siblings to resolve the matter of co-owned real estate, and presided over Ring's suit against the United States over the bonds, before it became evident that Michalek was a necessary party.

of concrete and undisputed evidence as mere "half-truths," "rumors" and "innuendos," and accompanying claims that they can only be addressed by his presence in Court, cannot be credited.

His vigorous efforts in support of the United States's motion to dismiss the Trustee's suit to obtain the value of the bonds, put the lie to his current claim of having "no interest" in the bonds and of not knowing the whereabouts of the bonds. It is convenient to claim "no interest" and no knowledge of the whereabouts of the bonds, now that this Court has referred him to the United States Attorney for having filed an affidavit with the District Court claiming pauper status within days of seeking to deny the Trustee's interest in the bonds. It is also convenient for Michalek to claim a desire to help the Trustee to repay Michalek's victims, now that the Court has made it clear that this Court will be no refuge for Michalek's chronic failure to account for his assets and financial affairs. If Michalek truly wished to repay those he has injured, he would tell the Trustee where the bonds went, where the $7 million in assets spoken of in this Court's decision of March 5, 1993 went, and he would fully cooperate and explain the existence or non-existence of all assets, pre and post-petition.

There is a point at which the litigation strategy of a felonious ex-lawyer becomes vexatious and malicious, and that point has been reached. The Court has been considerate and tolerant despite Michalek's malfeasance and misfeasance as a debtor in this Court.

This Court has repeatedly emphasized the difference between the generality of civil litigation in the federal courts, and bankruptcy litigation in which a recalcitrant, vexatious

and dilatory debtor is a party. A debtor who has not performed his duties here has few rights here. Due Process is one of them, but a presumption of innocence is not. This Debtor is entitled to no further latitude and no benefit of a doubt.

No triable issue of fact having been raised by Michalek, the Trustee may submit an Order directing judgment awarding him ownership of the bonds upon the December 7, 1992 motion. He may also submit a suitable motion for further summary judgment upon such remaining causes of action in this adversary proceeding as are appropriate.

SO ORDERED.

Dated: Buffalo, New York
April 16, 1996

/s/Michael J. Kaplan

U.S.B.J.