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 94-1256 K

DEPARTMENT OF THE TREASURY
BUREAU OF THE PUBLIC DEBT
UNITED STATES OF AMERICA
J.A. HAWES, BRANCH MANAGER,
PARKERSBURG, WV 26106
AND JAMES J. MICHALEK

Defendants

JOHN H. RING III, ESQ.
2427 William Street
Cheektowaga, New York 14206-2640

Trustee

Jane B. Wolfe, Esq.
Assistant United States Attorney
Federal Centre
138 Delaware Avenue
Buffalo, New York 14202

Attorney for United States of America,
Department of the Treasury, Bureau of
the Public Debt and J.A. HAWES

James J. Michalek, Pro Se

BACKGROUND

This Court has previously ruled that the Debtor (who is in jail after conviction on felony fraud counts in both state and federal courts, as well as bail-jumping) has concealed or failed to account for numerous assets that the law requires be reported to the Chapter 7 Trustee. *Bucki v. Michalek (In re Michalek)*, AP No. 91-1151 K, slip op. (Bankr. W.D.N.Y. March 5, 1993) (denying Debtor's discharge, and now final after appeal). That ruling is now law of the case.

It is a matter of record that he bought $10,000 worth of United States Savings Bonds (face value) within a few months after his voluntary Chapter 11 case was converted to Chapter 7 over his objection. *(See* Trustee's Mot. for Summ. J. in AP 91-1151 at Ex. Q, (evidencing the acquisition of 100 bonds at $100 each (face value) between February 8, 1991 and April 19, 1991).) The Debtor was, at the time, a practicing attorney - not a wage earner - and his case had been converted to Chapter 7 on September 19, 1990.

It is also a matter of record that those bonds have never been redeemed, and that the Debtor has never claimed them to be lost, stolen, destroyed, mutilated, defaced, or unreceived, under 31 C.F.R. §§ 353.25 - 353.29 (1995).

In light of the nature and substance of the Debtor's

arguments here, it would seem that the bonds exist and that the Debtor knows where they are. No one else knows where they are, to the best of the Court's knowledge.

In this Adversary Proceeding, the Trustee seeks to establish ownership of the bonds and to obtain their value from the Debtor or the United States.

The Debtor claims that the bonds "were purchased after the date of conversion and are not within the scope or jurisdiction of the Bankruptcy Proceedings as matter of law [sic]." (Debtor's Aff. of Jan. 10, 1996 at ¶ 5.) In other words, he claims that the bonds are his alone, to the exclusion of the Trustee, even though the record of the United States District Court of this District upon the Debtor's appeal of this Court's earlier decision, contains the Debtor's oath that he is a pauper.[1]

His bankruptcy discharge has been denied under 11 U.S.C. § 727. He is not cooperative. His failure to account for the bonds has put the Trustee to the burden of trying to turn them into cash without having the bonds in hand. Even if the Court were to declare the Trustee to be the true owner under 31

[1]In light of his present claim of ownership of the same bonds he bought in 1991, the Court will refer this matter to the United States Attorney under 18 U.S.C. § 3057 to determine whether the Debtor submitted a false oath to the District Court in seeking leave to appeal *in forma pauperis*, as discussed later herein.

C.F.R. §§ 353.20 - 353.29, the Trustee could not truthfully attest that he knows the bonds to have been lost, destroyed, stolen, etc. He could only attest that he believes them to be the subject of wrongful concealment by an imprisoned felon. Under those circumstances, the Commissioner of the Public Debt might justifiably require a bond of indemnity of the sort contemplated by 31 C.F.R. § 353.25 (unless a bankruptcy trustee is exempt from such bonding requirement under another provision of law) to protect the United States against subsequent redemption of the bonds by the Debtor or his agents. (There appears to be no way to "cancel" an outstanding savings bond to be certain that it cannot be redeemed after it has been paid without surrender on the basis that the bonds were, for example, stolen.)

So the Trustee has attempted to take the shortest distance between two points. He has here sued the United States for the value of the bonds, adding the Debtor as a necessary party-defendant.

The United States has moved to dismiss the action as against it and its officers and agents. The Debtor has joined that motion and has also asked that the action be dismissed in toto.

DISCUSSION

The relief sought by the government will be granted without prejudice to later action by the Trustee if necessary. The relief sought by the Debtor will be denied.

With the exception of one theory, any action against the United States is premature until the Trustee is declared to be the true owner of the bonds, seeks to assert the rights of the owner, and suffers a denial of those rights. The one theory that is ripe for consideration is the theory that by proving: (1) that the Debtor owns the bonds; (2) that the bonds are still outstanding; and (3) that the Trustee is entitled to their value as the Debtor's Trustee in bankruptcy, the Trustee may command direct payment to him by the United States under 31 C.F.R § 353.21(b) or under 11 U.S.C. § 542.

This issue has been briefed. The Court believes that these provisions do not provide the shortcut the Trustee understandably seeks.

When one carefully examines the organizational schema of Part 353 of Chapter II, it is clear that "Subpart F - Relief for Loss, Theft, Destruction, Mutilation, Defacement, or Nonreceipt of Bonds" is the exclusive provision made for bonds that cannot be produced. That Subpart is of equal rank with "Subpart E - Judicial Proceedings," which contains provision for payment to bankruptcy trustees. It must be concluded that anyone

entitled to redeem bonds must follow Subpart F if they cannot produce the bonds, whether the party claiming entitlement is, for example, a registered owner, 31 C.F.R. § 353.39(a), an attorney-in-fact of the owner, 31 C.F.R. § 353.40(d), legal representative of the decedent's estate of the owner, 31 C.F.R. § 353.71, an authorized officer of an owner that is a state, county, city, town, village, or governmental agency, 31 C.F.R. § 353.87, or a bankruptcy trustee, 31 C.F.R. § 353.21(b).[2]

It is clear as well that 11 U.S.C. § 542 does not assist the Trustee as against the government. The government clearly does not have the bonds, nor can it be said that the money that it would use to pay the bonds is "property of the estate." That money is property of the United States. As argued in the government's brief, there is no property possessed by the

[2]It is distressing - almost incredible - that there is no way for the United States to cancel outstanding bonds to deal with cases like the one at bar, assuming that the Trustee is successful in establishing entitlement to the bonds as against the Debtor. However, this Court is not expert in this matter, and can only assume that this feature of liquidity is important to the usefulness of savings bonds in the government's effort to borrow money. (Note that 31 C.F.R. § 353.39(a) provides that, "If the bond is in order for payment, the paying agent will make immediate payment at the current redemption value without charge to the presenter." Apparently, paying agents make no inquiry of any central source to confirm that the bond is valid and outstanding.) It is requested that the governmental defendants take any and all steps available to notify the Trustee of any presentment of or payment of any of the bonds at issue by anyone. This Court thinks it well beyond its jurisdiction to "order" such relief, or any further relief, to the Trustee; the Trustee owns assets *cum onere*.

United States here that can be the subject of a turnover order under § 542.

Section 542 may avail the Trustee as against the Debtor, however, if the Trustee proves entitlement to the bonds. The Debtor does not deny that the bonds exist. He only denies the Trustee's claim of right. He claims now, as he did in the 11 U.S.C. § 727 proceeding, that he bought the bonds with money he earned after conversion to Chapter 7 or with post-petition (but pre-conversion) earnings that he does not believe were property of his Chapter 11 estate. He again attributes a misstatement of law to a now-retired presiding Judge, without offering any evidence that the Judge ever made such statement.[3] Indeed, although some portion of the personal service income of such a debtor might be set apart to the debtor for his personal enjoyment during the Chapter 11 case, and although all personal service income of the Debtor that is newly generated after conversion of the Chapter 11 case to Chapter 7 is his (unless it was generated by use of "property of the estate"), those principles do not empower the Debtor to ignore the duty to disclose and account for all property interests he had at the time of bankruptcy and all he received or parted with while a debtor-in-possession.

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[3]In paragraph 17 of his Answer he states, "The Bankruptcy Court under Judge Crehan [sic] also ruled that the personal service income was exempt to the Trustee's Office."

This Debtor seems to have a bizarre notion that he may disobey his duty to account for property, lie about his assets, abuse the processes of the Court and then, when the Trustee finds conclusive evidence of the existence of property purchased shortly thereafter, claim the benefit of presumptions, inferences, and principles that might have persuaded the Court to let him have the property, had he put the issue before the Court.

This Debtor has repeatedly ignored his duty to properly disclose and account for his pre-bankruptcy assets. The failure to account for those assets continues to this day (more than six years after his voluntary filing under Chapter 11). The same is true as to any assets he acquired or disposed of during his period operating as a debtor-in-possession under Chapter 11. The Trustee has been thwarted, consequently, in attempting to identify and locate any assets that might be used to satisfy the claims of creditors, though he and the predecessor trustee have clear evidence of the existence of some such assets. The creditors include dozens of people who, according to the criminal courts, were bilked out of more than a half-million dollars of those persons' meager savings.

The Debtor's statement that the bonds "were purchased after the date of conversion and are not within the scope or jurisdiction of the Bankruptcy Proceedings as matter of law," (Def's. Aff. at ¶ 5); his statement that "pursuant to law and the Bankruptcy Code, the Bankruptcy Court . . . does not have

jurisdiction over the Subject Matter, (Def's. Aff. at ¶ 7); and his statement that the Complaint "does not state a cause of action," (Def's. Aff. at ¶ 18), are all patently absurd. He is a voluntary debtor (his chagrin at conversion to Chapter 7 notwithstanding), and the financial affairs of such persons are among this Court's reasons for being.

In the earlier proceeding, he offered "not a 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 earlier litigation) -- "not a client's name, not a transaction completed, not an hour of time billed, etc." *Bucki v. Michalek* at 12 (footnote omitted). The conclusion was deemed inescapable in that earlier proceeding that he bought them with money that he concealed from the bankruptcy estate and his creditors. Even before the Court so ruled, the predecessor Trustee included in his December 7, 1992 Motion and Notice of Motion for Summary Judgment Denying Discharge, a motion seeking turnover of all concealed assets. By order of December 18, 1992, this Court entered a Scheduling Order providing the Debtor with the opportunity to file "clearer responses" to the particular paragraphs of the Trustee's summary judgment motion that addressed the grant or denial of discharge.

When this Court in due course denied discharge, it severed its judgment in that regard from the turnover motion in order that the Debtor could take an immediate appeal. Now that

the judgment denying discharge has become final, and now that all defendants other than the Debtor have been dismissed from the present Adversary Proceeding, it is appropriate for the successor Trustee to return to the earlier adversary proceeding for the presentation of all other matters, including his present prayer for judgment against the Debtor regarding these savings bonds. Consequently, Adversary Proceeding number 94-1256 will be statistically closed, and Adversary Proceeding number 91-1151 is restored to the calendar.

Thus, we can see that the Trustee's demand for turnover of the bonds and other concealed assets has been pending since December 7, 1992, obviating the need to consider the Debtor's present arguments regarding service of process in Adversary Proceeding number 94-1256.[4]

Next, it is important to reemphasize the inconsistency between the Debtor's posture in the present Adversary Proceeding and his current posture on appeal as to the older decision. It was on September 7, 1995, that in seeking to take the § 727 decision to the Circuit, he signed an "Application to Proceed In Forma Pauperis," subsequently filed with the District Court in

[4]It may be useful for the Court to point out that the Debtor is complaining of the date that he and the prison received service of process. He thus confuses receipt of process with service of process. Under Fed.R.Bankr.P. 7004(f), it is clear that service is effected by delivery or mailing; receipt by the defendant is not relevant to the matter of the time of service. As to the substance of service, he has clearly been served, and the service is sufficient to provide due process of law.

Case No. 93-CV-0605(E)M. He was asked: "Do you own or have any interest in any real estate, stocks, bonds, notes, automobiles or other valuable property (excluding ordinary household furnishings and clothing)?" (Emphasis added.) He checked the box stating "No" and signed it. Yet twenty-one days later, on September 28, he answered the Complaint in the present adversary proceeding, defending against the Trustee's claim of right to these bonds that were issued to the Debtor and remain outstanding in the Debtor's name. Either he has no interest in any bonds or he defends this suit. He cannot have both.[5]

This Court is a unit of the District Court. As a matter of law, these two conflicting positions have been taken in the same judicial forum. Such disingenuousness and apparent further criminality in the form of false oath will not be tolerated. Further, the Court reiterates its admonitions to the Debtor contained in the December 18, 1992 Scheduling Order in A.P. 91-1151:

> Despite his Pro Se status, Michalek is a law graduate and was a licensed attorney. He will not be granted the latitude accorded unsophisticated pro se litigants, of liberal treatment of his submissions.
>
> Michalek is further admonished that he will not be heard in the present proceeding to complain of [other matters]. Only the matters raised in the Trustee's Motion will be heard, as well as matters properly raised

[5] *See supra* note 3.

by suitable Cross-Motions.

> Finally, he is further admonished that the Court's consideration of the matters currently at Bar will not be further delayed. This Court has been tolerant of the delays occasioned by his trial and conviction in State Court and in Federal Court . . . .
>
> No default judgments were entered against him in this Court during his voluntary absence.
>
> He will not now be permitted to claim lack of notice of the events in the present or other proceedings nor to demand a right to appear personally on mere motions.
>
> . . .
>
> If Michalek is moved, it shall be his duty to advise the Court of his new place of detention, or else he shall waive notice.

CONCLUSION

The Clerk shall enter judgment dismissing the present Adversary Proceeding as against all defendants other than the Debtor, and then shall statistically close this Adversary Proceeding. The Trustee's request for turnover of the bonds or for suitable other relief will continue in the form of further proceedings upon the prior Trustee's motion of December 7, 1992 and the comprehensive exhibits filed on that day in connection therewith.

The successor Trustee may proceed in that regard either piecemeal (as to each of the alleged concealed assets) or

collectively.

In the interest of economy, the Court presently directs that if Michalek intends 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 any pre-conversion work or assets, he shall do so no later than February 29, 1996. He is admonished that it is not necessary for the Trustee to prove beyond all doubt that the bonds were not purchased with non-exempt income. The Trustee may sustain his burden of proof by the use of inferences. Since the Debtor has never complied with his duty to account for all of his pre-petition property and his debtor-in-possession property, and has not offered any evidence of any post-conversion personal service income, the inference is strong that these bonds were purchased with cash concealed from the Chapter 7 Trustee, and the Debtor is not entitled to the benefit of inferences that he might have enjoyed had he duly accounted for all his property.

The December 7, 1992 motion for turnover is restored to the calendar for tracking purposes and will be called on the calendar at 10:00 a.m. on March 6, 1996 for tracking purposes only, in light of the deadline being set in this Order for responses from the Debtor. Therefore, a copy of this Order shall be filed in Adversary Proceeding 91-1151 as well. Because Michalek is in jail, no oral argument will be heard. Each side

will communicate with the Court in writing only, and reports on the calendar in open Court will result only in Scheduling Orders that will be communicated to the Debtor by mail.

SO ORDERED.

Dated: Buffalo, New York
February , 1996

/s/Michael J. Kaplan
_____
U.S.B.J.