

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re

RICHARD S. PENEPEPENT

Case No. 99-13022 K

Debtor

On March 10, 2000, this Court declared that Debtor, Richard S. Penepent, initiated this case as a Chapter 11 case in 1999 “simply to delay his creditors and to defer any day of reckoning.” At that time, the only creditors of which the Court was aware were the family members with which the Debtor had been engaged “in vitriolic litigation” for ten years. Those family members were his siblings, not his daughter or son.

After conversion of the case to Chapter 7, this Court declared on November 28, 2001, that all state law money judgments taken by Sophie Penepent individually and as Executrix of the Estate of Francis Penepent are non-dischargeable debts of this Debtor.

Subsequently, proofs of claims were filed in the Chapter 7 case on behalf of Richard Penepent’s daughter and son. Additionally, compensation was sought by his Chapter 11 attorneys for the work that they did when he was a Chapter 11 Debtor-in-Possession. The Court is also advised of a credit card claim of less than \$600.

The only creditor whose claim has been adjudicated and liquidated by any Court is the claim of Sophie Penepent, individually and in a representative capacity, in an amount in excess of

\$400,000.

Nonetheless, for some unknown reason, the Trustee has chosen to pursue the interests of the Debtor's son, daughter, former attorneys and one small credit card debt, to the detriment of the one creditor whose interests have been adjudicated by the Court and whose interests led this Court to compel the Debtor either to convert this case voluntarily to Chapter 7, or to suffer a lifting of the automatic stay to permit Sophie Penepent to pursue enforcement of her judgment.

In open court on August 18, 2004, there was clear personal animus on the part of the Trustee and his counsel toward Sophie Penepent's counsel. The Trustee expressed exasperation that he had received no offer from Sophie Penepent for the acquisition of Richard Penepent's shares in the corporation known as Penepent Corporation.

Under the circumstances of this case, the Court finds it bizarre that the Trustee expects the largest creditor in the case, and the only creditor whose rights have been fully adjudicated and liquidated, to pay money to the Chapter 7 estate for the benefit of Richard Penepent's son, daughter, former attorneys (who assisted the Debtor in thwarting Sophie Penepent) and Richard Penepent's \$500 credit card bill.

In a written submission dated August 20, 2004, the Trustee's counsel complains that "the Trustee has repeatedly requested, and has been refused by the Francis Penepent estate, cooperation in dissolving or liquidating the P. Corporation's assets." But, in open court, the Trustee indicated that the assets of the Penepent Corporation should not be sold because the capital gains taxes would eat up any possible proceeds.

And so the rigid position of the Trustee, it seems, has been that the estate is in a stalemate, with neither Sophie Penepent nor the Trustee in a position to control the Penepent Corporation and with the Trustee therefore demanding money from Sophie Penepent for the Debtor's shares, which money would be used to satisfy claims other than the claims of Sophie Penepent, claims which have yet to be adjudicated as having any validity, particularly the claims of Richard Penepent's daughter and son.

In the meantime, as the Court understands it, Richard Penepent continues to operate the Penepent Corporation, to derive income from it, to purport to act on its behalf, and perhaps to act in his own behalf to the detriment of the value of the Penepent Corporation.

Sophie Penepent now asks either for lift of stay or dismissal of this case. This is not a motion under 11 U.S.C. § 324 to remove the Trustee. The strongest words in that direction from movant's counsel are that "it is time" for someone else to take over issue of "monetizing" the Penepent Corporation so that Sophie Penepent and her principals can be paid.

The Court agrees. If there is no market for Richard Penepent's shares in the Penepent Corporation, that asset should have been abandoned, and not held hostage for the benefit of those in a close relationship with Richard Penepent.

In the Court's view, this case presents an opportunity for the application of 11 U.S.C. § 725, which states "After the commencement of a case under this chapter, but before final distribution of property of the estate under § 726 of this title, the Trustee, after notice and a hearing, shall dispose of any property in which an entity other than the estate has an interest, such as a lien, and that has not been disposed of under another section of this title."

Sophie Penepent does not appear to have a lien on the Debtor's stock in the Penepent Corporation. However, the legislative history to 11 U.S.C. § 725 states that the section "would apply . . . to property co-owned by the estate and another entity."

Consider the case of *In re 82 Milbar Boulevard, Inc.*, 91 B.R. 213 (Bankr. E.D.N.Y. 1988). There it was stated with regard to a Chapter 7 estate's possessory interest in polluted property, that abandonment of the site under 11 U.S.C. § 554 would be inappropriate because the Court could not insure the health, safety and welfare of the public, nor would abandonment allow other creditors to monitor expenditures related to clean-up or have adequate assurance that the property would be sold for the highest possible price. Consequently, the Court directed disposition of the possessory interest to the EPA.

Here, the Penepent Corporation, which is not a Title 11 debtor, is property that is co-owned by the estate and by Sophie Penepent. Re-vestiture of Richard Penepent's shares in Richard Penepent either by abandonment under § 554 or by the dismissal of this case, would not be appropriate because it would merely reinstate the long history of vexatious litigation that this Court sought to end in inviting Richard Penepent to convert his case to Chapter 7. Moreover, the stock may have value, and § 725 distribution to Sophie Penepent will permit the estate to monitor the administration of the Penepent Corporation and to benefit from that administration (just as a foreclosing mortgage-holder might generate a surplus for a Chapter 7 estate).

It is now ORDERED that Sophie Penepent's motion shall be deemed to include an alternate prayer under 11 U.S.C. § 725, and it is ORDERED under that statute that the Trustee shall

convey all of the Debtor's right, title and interest in the Penepent Corporation to Sophie Penepent individually and in her representative capacity. She shall account to this Court for all value of any kind obtained through her administration of the interests so transferred and shall hold in trust the estate's pro rata portion of any such value subject to further order of this Court.

SO ORDERED.

Dated: Buffalo, New York
August 27, 2004

U.S.B.J.