

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re

JAMES J. MICHALEK

Case No. 89-12184 K

Debtor

CARL BUCKI, as Chapter 7 Trustee
of JAMES J. MICHALEK

Plaintiff

-vs-

AP 91-1151 K

JAMES J. MICHALEK

Defendant

Carl L. Bucki, Esq.
70 Niagara Street
Buffalo, New York 14202

James J. Michalek, Debtor
Pro Se

ORDER GRANTING PARTIAL SUMMARY

JUDGMENT DENYING DISCHARGE

INTRODUCTION AND PROCEDURAL BACKGROUND

James Michalek (formerly an attorney) is a Chapter 7 Debtor.¹ In this Adversary Proceeding the Trustee seeks denial of

¹His voluntary Chapter 11 case was initially converted to Chapter 7 by Order entered on September 19, 1990. He appealed that decision. In October, 1991 the District Court remanded on the narrow issue of whether the attorney for the Creditors Committee

Michalek's discharge under 11 U.S.C. § 727. Presently before the Court is the Trustee's Motion for Summary Judgment thereon, and for other relief as discussed herein.

The Court finds that Michalek has either concealed or has failed to satisfactorily explain the loss of property that would be "property of the estate." The Court need not determine precisely which of the two malfeasances the Debtor has committed, since either one is sufficient to deny discharge under 11 U.S.C. § 727.

The Defendant "strongly objects" to the manner in which this litigation is being conducted. He does not explain his objection (except in one regard, to be noted later). Briefly, the matter has proceeded as follows. This Adversary Proceeding was commenced on May 29, 1991 by the Trustee of the Chapter 7 Estate of James J. Michalek, asking that the Debtor be denied discharge of his debts. The Complaint contains seven causes of action, each alleging a different factual basis or theory under the various provisions of 11 U.S.C. § 727.

On July 5, 1991, the Debtor filed his "Answer, Affirmative Defenses and Counterclaims." They consist of a general denial coupled with various conclusory allegations to the effect that the Debtor has done nothing wrong, but that the Trustee has

had a conflict of interest and if so whether that conflict infected the decision to convert the case. After hearing on notice, this Court determined that no conflict existed and that the case was properly proceeding in Chapter 7. That determination was not appealed.

violated his various duties. They were filed pro se, but the Debtor was, at the time, a licensed attorney. He has since been convicted of fraud-related charges, both in Federal and State Courts. He continues to represent himself. On November 8, 1991 (before conviction) he appeared in Chambers with the Trustee for a Rule 16 Scheduling Conference in this proceeding. A deadline of March 2, 1992 was set for completion of discovery and he and the Trustee were ordered to appear on March 18, 1992 for a Calendar Call.

Instead, while out on bail after sentencing in State Court and after conviction in Federal Court (but before sentencing in Federal Court) Michalek absented himself from the jurisdiction. He was eventually apprehended in Wyoming and in May, 1992 was returned to this jurisdiction. He has been charged with jumping bail.

During the period of Michalek's absence and for a while after his capture, the Trustee reported on the record his own uncertainty as to how to obtain good service upon Michalek in order to proceed in the matter at Bar.² It was not until December 7, 1992 that the litigation progressed. On that day the Trustee filed the present Motion for Summary Judgment to Deny Discharge under six of the seven causes of action. He also requested Summary Judgment

²In point of fact and law, service by mail at the debtor's last known residence would have sufficed.

Denying the Debtor's Counterclaims. Finally he requested under 11 U.S.C. § 521(3) and (4) that the Court order the Debtor to surrender assets that are the subject of certain of the allegations of the Adversary Proceeding and that have not been turned over.³ The Trustee's Motion was returnable before the Court on December 14, 1992 and was served by mail.

There can be no doubt that the Trustee obtained service of this Motion on Michalek in the Erie County Holding Center, for on or about December 11, 1992, Michalek's brother, Paul Michalek (who is also an attorney) called "on behalf of" James Michalek, but not "as attorney for" James Michalek, to request an adjournment of the December 14 hearing until Michalek could appear. The Court advised the brother that no adjournment would be granted because the hearing on the return date would concern only the scheduling of proceedings on the Motion in light of the Debtor's incarceration and status as a pro se defendant. The Court advised the brother that a written response would suffice. On the morning of December 14, 1992 the United States Marshals Service called this Chambers to advise that James Michalek was in their custody in the building in connection with the criminal matter, and that Michalek had advised

³Enforcement of 11 U.S.C. § 523(3), (4) does not require an amendment of the pleadings. The Debtor's duty of cooperation under 11 U.S.C. §§ 521 and 542 is absolute, and in the view of this Court that duty may be enforced by Motion.

them that he was to appear before me. Court staff advised the Marshal that this was incorrect, and that he had been advised that a written appearance was sufficient. Thus on that same date, before the afternoon session at which the Motion for Summary Judgment was returnable, the Court received a voluminous handwritten submission from James Michalek which was also dated December 14, 1992.

On December 17, 1992 the Debtor filed a letter objecting to the Court's having denied him the opportunity to personally appear at all proceedings. On December 21, 1992, and based upon the hearing that was conducted on December 14, 1992 (a transcript of which was mailed to the Debtor as noted below), the Court issued and mailed to the Debtor an Order giving him until January 15, 1993 to clarify his responses to the Trustee's Motion and setting forth further procedures. That Order also advised him that the Court would not order him out of jail to appear to argue a Motion.

On January 22, 1993, the Court received a further submission supposedly from Michalek. It is dated December 14, 1992 (the same date as the earlier submission). This submission is typewritten. It makes references to January 14, 1993 as an "upcoming" appearance date. It does not mention the earlier submission, or the Court's Order of December 21, 1992, nor does it comply with that Order. January 14, 1993 was not an appearance date in this case and has no significance in this case; possibly the reference is to the December 14 appearance date or possibly it

relates to the January 15 deadline for clarification of Michalek's responses.

Significantly, this submission, supposedly signed in two places by James Michalek, bears a signature that is clearly different from that on other documents signed by James Michalek, and different from that on the submission received on December 14, 1992. The document bears no address and apparently arrived at the Court in a blank envelope. The Court recalls that his December 17, 1992 letter, Michalek complained of the amount of notice and said he had wanted to have his December 14 submission typed. Thus, the Court finds that although the later submission appears not to have been signed by Michalek, it should be and has been fully considered by the Court.

Additionally, the transcript of the December 14 proceedings that had been mailed to the Debtor on January 13, 1993 was returned to the Court on January 22, 1993, marked to signify that the Debtor James Michalek was no longer at the Erie County Holding Center. (The copy of the December 21 Order mailed to Michalek at that address on or about December 21, 1992 was not returned to the Court.)

Upon the January 22, 1993 receipt of the "second" submission of "December 14, 1992," and the return of the transcript, the Court determined that fairness dictated re-service of its December 21, 1992 Order and of the transcript of the December 14, 1992 hearing upon Michalek and that he be given

additional time to clarify his responses to the present Motion for Summary Judgment. On January 25, 1993, the Court asked that the United States Marshals Service achieve personal service upon James Michalek of (1) a copy of the January 25 Order directing such service; (2) a copy of the Court's Order of December 21, 1992 (which Order was actually signed on December 18, 1992, though not docketed until December 21, 1992), and (3) a copy of the transcript of the proceedings of December 14, 1992. The January 25 Order extended Michalek's time to clarify his responses to fifteen days from the date on which the Marshal achieved personal service on him. On January 26, 1993 the Marshal filed an Affidavit of Service attesting that personal service had been made upon Michalek on that day at the McKean Federal Correctional Institute in Bradford, Pennsylvania. Thus a deadline of February 10, 1993 was established for Michalek's further response to the Trustee's Summary Judgment Motion. Having received nothing further from Michalek by February 17, 1993, the Court undertook to decide the present Motion.

ANALYSIS

The Trustee's Complaint alleges several different causes of action under 11 U.S.C. § 727. The Court may deny discharge if any one cause is sustained. Thus, and in light of the Court's disposition of this matter, the Court need address only those aspects of the Trustee's Summary Judgment Motion to which Michalek

has not duly responded. It is not necessary for the Court to assess Michalek's response to the remainder of the Motion.

Firstly, Michalek's Cross-motions are denied. He objects to the procedure employed by the Court in proceeding in this matter. He collaterally attacks all proceedings in his bankruptcy case and in the bankruptcy cases of his affiliates. He attacks the Trustee. These claims are rejected for present purposes. The Court believes the procedure in this Adversary Proceeding to be fair. Michalek was a licensed attorney. The attacks on the conduct of the Trustee and of the course of the underlying bankruptcy cases are an effort to divert attention from, and are irrelevant to, the merits of the present proceeding. His attack on the notice provided of the events in any of these matters is (to the extent that he voluntarily absented himself from this District) disingenuous and frivolous. He will not be permitted to collaterally attack matters that are now final, or to divert the present Complaint from its proper focus. He knows how to answer a Motion in writing, and is not entitled to personally appear thereon. He will not be permitted to fail to disclose the whereabouts of assets yet claim inability to afford counsel, so that his pro se status, combined with convictions on State and Federal charges, might earn him privileges not accorded others -- such as a privilege to argue all motions in person.

I.

Michalek filed his personal Chapter 11 case on September 7, 1989. The case was converted to Chapter 7 by Order of September 18, 1990.

In evidence is a Financial Statement of September 30, 1988, supported by the Affidavit of Walter Thorman (Ex. A) of Lockport Savings Bank who attests that Michalek presented the Statement to him: in the Statement Michalek represented his own financial condition by itemizing \$9.3 million in assets and a positive net worth of \$6.78 million. Michalek does not deny signing or presenting the Statement. Nor does Michalek claim that the representations in the Financial Statement were false. Yet his September 22, 1989 Schedules filed with this Court itemized only \$2.145 million in assets and they further claimed a \$10.3 million excess of liabilities over assets (a negative net worth of over \$8 million). Those Schedules disclose only the following transfers of assets during the one year preceding September 22, 1989 - condominium space at 37 Cathedral Park Tower for \$275,000; canoes, etc. for \$3600, and a 1988 Lincoln traded-in.

Not only has Michalek failed to provide a reasonable explanation of the loss of more than \$7 million between September 30, 1988 and September 22, 1989, but he has provided no explanation at all, reasonable or otherwise. The Trustee's Motion itemizes the

missing assets.

Summary Judgment denying discharge is granted on the Fifth Cause of Action.

II.

On October 26, 1990 Michalek was examined under oath at a meeting under 11 U.S.C. § 341. He then and there testified that his home at 84 Fox Chapel Drive (which he scheduled at a value of \$250,000) was encumbered by two mortgages (Trans. at Trustee's Exhibit F, p. 11). The Trustee's inquiry into the availability of equity was presumably thus sidetracked. A July 22, 1992 title search provided by the Trustee (Trustee's Exhibit J) demonstrates that Michalek and his then wife Judith took title to Parcel A by a Referee's deed in a tax foreclosure on June 19, 1979 and that it has never been encumbered by a mortgage.

Similarly, Michalek testified at that same time (October 26, 1990) that he did not own property in Sherman, New York; that no corporation of which he had an interest owned property Sherman, New York; that his wife had no interest in property in Sherman, New York; and that he was not familiar with the "old Odd Fellows building" in Sherman, New York. He also testified that neither he or his relatives had any relationship with "groups" who owned those properties in Sherman, New York. (Trustee's Exhibit E, Transcript pp. 41-46.)

Yet ten months earlier (on December 20, 1989), the Chautauqua County Legislature had approved a tax sale of land in Sherman, New York to "Paul M. Michalek as Trustee." [Trustee's Exhibit O]. Paul Michalek testified under oath on December 30, 1991 at deposition that James Michalek had asked Paul Michalek to be a Trustee for James' children on some property, "and the next thing [Paul] knew," he got a letter from the building inspector in Sherman, New York addressed to Paul as "owner" of the Odd Fellows property. [Trustee's Exhibit P]. James Michalek has not challenged his brother's account other than to say that this had something to do with some unspecified "attorney-client" relationship.

The Court finds that James Michalek either concealed or testified falsely regarding the encumbrances on his residence and/or the land in Sherman, New York, and that he has failed to account for and to turn over his rights in the property in Sherman, New York, each of which bases warrants denial of discharge under 11 U.S.C. § 727(a)(4)(A) or § 727(a)(2) or both. Judgment denying discharge is granted on these grounds as well.

III.

The Trustee's Exhibits demonstrate that Michalek transacted thousands of dollars of cash, securities, and savings bonds the existence of which was never disclosed to the Court. [Trustee's Exhibits F, G, I, Q, R, S]. To the extent that Michalek

suggests that this is all attributable to post-conversion personal earnings, he offers not a shred of evidence in support thereof: not a client's name, not a transaction completed, not an hour of time billed, etc.⁴

The conclusion is inescapable that Michalek has concealed and converted property of the estate, or has failed satisfactorily to explain their loss. This too warrants denial of discharge under 11 U.S.C. § 727.

IV.

The Court need not consider any further Causes of Action or bases for objection to discharge.

Discharge is denied as above.

The balance of this Adversary Proceeding involves only the Trustee's efforts to obtain truthful information from Michalek, to obtain Michalek's cooperation in obtaining property of the estate and in recovering concealed property. Michalek's aid in these regards will result in the reduction of the amounts of the debts he must repay. Thus there is no just cause for delay of

⁴He claims that U.S. Bankruptcy Judge John W. Creahan (now retired) ordered or directed that all law office income was his personally after conversion to Chapter 7. He cites no order of Judge Creahan to that effect. Only post-conversion earnings attributable to the debtor's own post-conversion labors are his personally.

entry of Judgment denying discharge. Furthermore, a multitude of creditors have sought judgment declaring particular debts exempt under 11 U.S.C. § 523(a), from discharge. The present denial of discharge in toto under 11 U.S.C. § 727 renders those separate actions moot. Those creditors, as well as Michalek, are entitled to finality as to Michalek's surviving liability to them. Hence, under Rule 54(b), F.R.Civ.P. and B.R. 7054, the Clerk is directed to enter final judgment denying discharge, so that any appeal by Michalek must be taken now, rather than later, in accordance with Part 8 of the Rules of Bankruptcy Procedure.

SO ORDERED.

Dated: Buffalo, New York
March 5, 1993



U.S.B.J.