

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re

ROBERT RYDER, d/b/a
Pizzaman Express

Case No. 91-10977 K

Debtor

The United States Trustee seeks sanctions and disciplinary action against Gerald B. Cohen, Esq. based upon facts evident in the transcript of proceedings on April 3, 1992 and October 23, 1992. To summarize the facts, Cohen represented the Debtor, Ryder, in the filing of Ryder's Chapter 13 case and in Ryder's conversion from Chapter 13 to Chapter 7. As the Chapter 7 Trustee undertook to liquidate the assets of Mr. Ryder's estate, and notified all parties of the proposed sale of certain pizza-making equipment to a Mr. Gfroerer (who happened to be a creditor of Mr. Ryder), Cohen accepted \$200 from a Mr. Donoghue (another creditor of the debtor). Donoghue supposedly simply wished to make a higher bid for the property; but in fact, upon obtaining a hearing through Cohen's efforts on his behalf, Donoghue arrived with Cohen in Court and asserted ownership of the property, contrary to the claim of ownership contained in sworn schedules and statements filed by Cohen on behalf of his "other" client, Mr. Ryder. Cohen's representation of Donoghue was supposedly both at the behest of and with the consent of Ryder and Donoghue, but Cohen denies any knowledge that Donoghue planned to assert ownership in

contradiction of the sworn statements of Ryder. Neither Donoghue nor Ryder have been called to the stand by Cohen or the U.S. Trustee.

Although Donoghue ultimately withdrew his claims of ownership and the sale to Gfroerer was approved, this was only after the Court had been brought into the matter by means of the hearing that Cohen had requested on Donoghue's behalf.

It is important to note that when Cohen requested¹ the hearing on behalf of Donoghue he did not advise the Clerk's office (with which the request was filed), the case Trustee, or the Court that he had also represented the Debtor in this case. Had he done so, the Clerk's office or the Trustee would presumably have raised question as to whether the hearing could or should be set on the request of the Debtor's attorney, who was claiming to represent a creditor as well.

Further, it should be noted that it was the Trustee, not Cohen, who first brought the conflicting claims of ownership asserted by Cohen's two clients to the attention of the Court at the hearing. While the Court cannot be certain what disclosures Cohen might have made had the Court not first asked the Trustee to present the matter at hand, it is significant that Cohen did not

¹"Request" is a misleading term. Under Rule 25(b) of the Local Rules of the Bankruptcy Court of the Western District of New York, such a "request" constitutes a "demand" that is never dishonored by the Clerk.

seem to "trip over himself" in attempting to advise the Court of his dual capacity or of the conflict posed by Donoghue's claim of ownership.

This Court has had similar prior difficulties with Cohen,² and perhaps no statement of Cohen's provides greater insight into a possible source of these difficulties than this (in response to my inquiry about whether Cohen had an attorney-client relationship with Donoghue at a certain point in time, such that Cohen telling me what Donoghue said to him might have violated the attorney-client privilege):

Your Honor, if A T & T or some large corporation was a creditor and approached me about having me represent them, it might have been a different situation. Mr. Donoghue with a two hundred dollar total fee, it wasn't a retainer, I agreed to write the letter [requesting the hearing] and appear in court to the sum of two hundred dollars." Transcript of Proceedings of October 23, 1992, p. 35.

Cohen does not appear to understand (or he denies) that what transpires between an attorney and a client is not a "transaction," it is a "relationship" known as the "attorney-client relationship." And when an attorney files a Bankruptcy Petition for a client, or appears of record for a client in this or another court, the attorney is also establishing a relationship with the

²An example was documented in the transcript of proceedings of June 13, 1990 in the case of *In re Allen*, BK # 87-11358 (Bankr. W.D.N.Y. June 13, 1990), in which Mr. Cohen represented the debtor although his own lending company (Paramount Enterprises) had become the debtor's creditor.

Court - that of an "officer" of the Court -- in connection with that case. The above quote establishes that Cohen does not see the role of an attorney in this fashion. In exchange for what the Debtor paid him he filed some papers. In exchange for the \$200 that Donoghue paid him he filed other papers. These were mere transactions to him. He does not believe that he owed any obligation to the Court, when demanding the hearing on behalf of Donoghue, to disclose that this was the second capacity in which he was making an appearance in the case.

The transcript of October 23, 1992 shows that when on April 3, 1992 I disqualified him from representation of Donoghue, and he spoke to Donoghue during recess on that day, he did not believe himself to have been in danger of continuing an attorney-client relationship in contravention of my direction, because he felt that he had simply been paid \$200 in order to appear for Mr. Donoghue in Court, and that therefore no attorney-client relationship had been created with Donoghue. He certainly did not seem concerned about the potential of violating the attorney-client privilege when he recited to the Court on October 23, 1992 what Donoghue had to say to him after the hearing on April 3, 1992.

The impression left in the mind of the Court is that despite his long years of practice, Cohen either does not understand what an attorney - client relationship or "officer of the Court" relationship is, or he is trying to make the Court believe that he has no such understanding.

Mr. VanBaalen, stated: "It scares me ... that Mr. Cohen sees nothing wrong in the conduct." pp. 47,48. The Court echoes that sentiment.

The United States Trustee asks that the Court find Cohen to be in violation of numerous provisions of the Code of Professional Responsibility as well as in violation of provisions of the Bankruptcy Code and Bankruptcy Rules, and asks additionally that the Court impose sanctions and undertake disciplinary action. The United States Trustee asks that the Court take notice of the totality of this Court's difficulties with Cohen throughout the years. This Court does not have those difficulties before it today, and will not consider them in deciding this case. It will, however, forward this decision to State Bar Authorities for investigation and such action as it deems appropriate.

The Court finds that Cohen has violated 11 U.S.C. § 329 and Bankruptcy Rule 2016 which requires that a debtor's attorney disclose all compensation received, from whatever source, for services in connection with the case.³ For this failure, I direct Cohen to pay to the Trustee all amounts that he received from Ryder, Donoghue or any other source for services rendered on their behalf or anyone else's behalf in connection with this case, and such funds received by the Trustee will be considered to be assets of the estate for distribution to creditors.

³See *In re Vann*, 136 B.R. 863 (D. Colo. 1992).

Further, I find that Cohen's demand for a hearing on behalf of Donoghue, filed without disclosure to the Court of Cohen's prior involvement in the case, and without consulting the Trustee in the case toward determining whether in fact a hearing would be required or would even be appropriate, constituted a violation of Rule 11 of the Federal Rules of Civil Procedure, as incorporated by Bankruptcy Rule 9011, under the unique circumstances presented here: even if Cohen did not recognize his duty to refrain from representation of Donoghue, he should have recognized the need to discuss that representation and Donoghue's interest with the case Trustee in an effort to avoid a hearing, and such a discussion might have lead to Cohen learning from Carl Bucki, Esq. that Donoghue was claiming an interest adverse to Ryder.⁴ Thus I find that Cohen's demand was filed "for an improper purpose." I direct that Cohen pay to the Trustee the sum of \$350.00 additional as the fair value of the services of the Trustee, as an attorney, in addressing Cohen's actions undertaken on behalf of Donoghue; Mr. Bucki may make suitable application to be allowed that amount as attorney's fees, under the Rules of Bankruptcy Procedure.

As a further and final sanction in this case to prevent

⁴Cohen states that Donoghue said "he had trouble dealing with him [Bucki] and he said that Mr. Bucki suggested that he get his own lawyer." Transcript of October 23, 1992, p. 46. At the very least Cohen should have found out what the trouble was.

future similar action, and on authority of Rule 11, the Court directs Cohen to pay Carl Bucki, Esq. as Trustee a further and additional sum equal to twice the amount of fees ordered to be disgorged by Cohen for his violation of 11 U.S.C. § 329, as described above.

In sum, then, Cohen will pay to the Trustee three times the amount of fees he received from clients for services in connection with this case, plus an additional sum of \$350. The United States Trustee's request that the Court find breaches of Disciplinary Rules and Ethical Considerations contained in the Code of Professional Responsibility, and for further disciplinary action, are denied, except that a copy of this decision shall be forwarded to an appropriate Committee of the New York State Bar Association, to the Appellate Division, and also to the Clerk of the U.S. District Court, since it is by virtue of his admission to practice in that Court that Cohen is admitted to practice in this Court.

SO ORDERED.

Dated: Buffalo, New York
December 17, 1992



U.S.B.J.