NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL FOR THE FIRST CIRCUIT

BAP NO. MW 09-016

Bankruptcy Case No. 07-40280-JBR
Adversary Proceeding No. 07-04094-JBR

PETER W. GUBELLINI,
Debtor.

ROBIN CANHA,
Plaintiff-Appellee,

v.

PETER W. GUBELLINI,
Defendant-Appellant.

Appeal from the United States Bankruptcy Court
for the District of Massachusetts
(Hon. Joel B. Rosenthal, U.S. Bankruptcy Judge)

Before Haines, Lamoutte, and Vaughn
United States Bankruptcy Appellate Panel Judges.

Stephan M. Rodolakis, Esq., and Mark S. Foss, Esq., on brief for the Appellant.

Norman Novinsky, Esq., on brief for the Appellee.

November 23, 2009

Lamoutte, U.S. Bankruptcy Appellate Panel Judge.

Peter W. Gubellini (the "Debtor") appeals from the bankruptcy court's order denying his discharge pursuant to 11 U.S.C. § 727(a)(3) for failing to keep or preserve recorded information from which his financial condition may be ascertained, by not identifying the payees of all the checks and withdrawals from his checking account and for his routine disposal of all cancelled checks (the "Order"). The Debtor does not dispute the facts on which the bankruptcy court based its decision, but argues instead that the deficiencies in his financial records do not prevent creditors from ascertaining his financial condition, or alternatively that his failure to maintain records was justified under the circumstances. Because the bankruptcy court did not err in concluding that the Debtor did not maintain records from which his financial condition could be ascertained, and that the failure was not justified under the circumstances, the Order is hereby **AFFIRMED**.

BACKGROUND

The Debtor filed a chapter 7 petition on June 28, 2007. He has been a teacher for the Town of Ayer, Massachusetts, since 2001 and is a licensed attorney who was engaged in the practice of law from 1981 until 2001. The Debtor had represented Robin Canha ("Canha") in an arbitration proceeding, and she later sued him for malpractice. Canha has a claim against the Debtor in his bankruptcy proceeding relating to that malpractice claim.[1]

[1] The claim is not relevant to this appeal other than to explain the relationship between the parties. The Debtor asserted that it is a disputed claim, but conceded that it was a claim for purposes of establishing Canha's standing to object to the Debtor's discharge.

Canha filed a complaint objecting to the Debtor's discharge under 11 U.S.C. § 727(a)(3) for failure to keep or preserve appropriate business records, including any cancelled checks.[2] In her complaint, Canha alleged that the Debtor had failed to produce any cancelled checks in connection with his bank accounts, as had been requested at a Fed. R. Bankr. P. 2004 examination conducted on June 19, 2007. Canha further alleged that the Debtor stated that he destroys all cancelled checks. The Debtor filed an answer in which he admitted that he had failed to produce any cancelled checks and that he had stated that he destroys all cancelled checks, but denied that he had failed to keep appropriate business records.

The parties filed a joint pre-trial memorandum in which Canha asserted that the outstanding issues of fact included the Debtor's failure to keep books and records in the conventional sense, and more specifically his failure to keep cancelled checks despite the fact that he is an attorney. Canha alleged that the issue of law to be determined was whether the failure to keep cancelled checks under this factual scenario is an unjustified failure to keep financial books or records under 11 U.S.C. § 727(a)(3). The Debtor asserted that as an employee of the Town of Ayer Public School System since 2001, his income shown in the W-2 forms, and having maintained a single depository relationship and primary borrowing relationship with Wellesley Bank, he had maintained more than adequate records from which his financial condition could be ascertained. The Debtor stated that the issue of law to be determined was

[2] Canha also objected to the Debtor's discharge under 11 U.S.C. § 727(a)(5) and objected to the dischargeability of debt under 11 U.S.C. § 523(a)(6). The bankruptcy court dismissed the 11 U.S.C. § 523(a)(6) count and entered a directed finding in favor of the Debtor on the 11 U.S.C. § 727(a)(5) count. Only the 11 U.S.C. § 727(a)(3) count is at issue in this appeal.

whether he had maintained adequate records from which to determine his financial condition given the relative lack of complexity of his affairs.

The bankruptcy court held a trial at which the Debtor argued that he kept adequate financial records given that he had been employed as a school teacher for the past several years with no other sources of income and relatively uncomplicated finances. With respect to the condition of his financial records, the Debtor testified that he had never kept his cancelled checks and explained "that's because I know that the bank keeps [them]." The Debtor stated that when he received the cancelled checks each month he reconciled his checkbook and then disposed of the checks. He further testified that there were numerous blank entries in his check register where he had failed to note the payees, explaining that if he was making a "pedestrian purchase" at a store and there were people behind him in line, he did not always enter the payee in his check register. Later he testified that the payees could be identified by obtaining copies of the checks from the bank at a cost.

Canha asserted that the failure to keep proper records regarding his financial condition, including cancelled checks, warranted denial of the Debtor's discharge under 11 U.S.C. § 727(a)(3). Canha further asserted that the Debtor should have known to keep his cancelled checks, because he had filed a motion in Canha's arbitration asserting that "the law indicates that persons must hold checks for seven years after their issuance," and thus expressed an understanding that people should not dispose of their cancelled checks. The bankruptcy court took the matter under advisement.

Thereafter, the bankruptcy court issued the Order denying the Debtor his discharge and an explanatory Memorandum of Decision. In the Memorandum of Decision, the court stated that

the only evidence presented at trial directly relevant to the 11 U.S.C. § 727(a)(3) inquiry was the Debtor's poorly detailed checking account register and his testimony that he routinely disposed of all his cancelled checks. The court further explained that it had not based its decision on evidence regarding the Debtor's credibility as such evidence was not relevant to the inquiry. Additionally, the court stated that the issue before it was whether the Debtor's failure to identify the payees of all his checks and withdrawals from his checking account coupled with his routine disposal of cancelled checks warranted a denial of discharge under 11 U.S.C. § 727(a)(3).

The court summarized the following salient and undisputed facts: the Debtor's bank sent the Debtor his cancelled checks or copies thereof every month; the Debtor reconciled his checkbook and then disposed of the checks; and the Debtor's checking account register contained "countless" entries for which the Debtor did not identify the payees, only denoting "ATM" or a four digit check number, several of them for large sums of money. The court was able to identify some of the ATM transactions that were debit purchases made at gas stations, grocery stores, etc., but many of the ATM entries were mere withdrawals and the court was unable to determine how those monies were spent. Furthermore, the court could not trace the entries described only with a four digit check number. The court calculated that it could account for how the Debtor had spent only 63.2 per cent of his money during the "relevant period" of 2004-2006 and was unable to identify 36.8 per cent.[3] The court concluded that Canha had satisfied her initial burden

[3] The court did not explain how it reached the conclusion that 2004-2006 was the "relevant period" for the 11 U.S.C. § 727(a)(3) inquiry. Although the Debtor claimed Canha's references to transactions dating from 2001 were irrelevant, he does not dispute the bankruptcy court's determination that 2004-2006 was the applicable "look-back" period. The bankruptcy court's time frame seems "reasonable" here. See Campana v. Pilavis (In re Pilavis), 244 B.R. 173, 175 (B.A.P. 1st Cir. 2000) (explaining that discharge is available only to honest debtors who provide creditors with enough information such that creditors can ascertain debtor's financial condition and track financial dealings with substantial completeness and

of proving that the Debtor had failed to keep records from which his financial condition might be ascertained because the Debtor disposed of his cancelled checks and failed to describe how over one-third of his income was spent, noting that the burden had shifted to the Debtor and that he did not convincingly explain why he disposed of the cancelled checks and offered no explanation as to why he did not request copies of the cancelled checks from his bank.

The court found that the Debtor's explanation for his failure to record the payees in many of his register entries was not adequate for larger purchases (higher than $400) or for the aggregate amount of $74,187.00 over the course of three years. The court noted that the Debtor had made no attempt to explain on what the large sums of money, for example $438.74, $530.00, and $1,150.00, were spent, and did not describe any circumstance in his life which would warrant those expenses. The court thus found that the Debtor had failed to prove that his practice of disposing of cancelled checks and his "lacksidasical" record keeping were justified under the circumstances.

Concluding that the lack of information regarding where the Debtor had spent one-third of his income left creditors unable to make "intelligent inquiry" of the Debtor's transactions, the court denied the Debtor his discharge under 11 U.S.C. § 727(a)(3) for failure to keep and preserve records from which his financial condition might be ascertained. This appeal followed.

JURISDICTION

A bankruptcy appellate panel may hear appeals from "final judgments, orders and decrees [pursuant to 28 U.S.C. § 158(a)(1)] or with leave of the court, from interlocutory orders and decrees [pursuant to 28 U.S.C. § 158(a)(3)]." Fleet Data Processing Corp. v. Branch (In re Bank

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accuracy for a reasonable "look-back" period).

of New England Corp.), 218 B.R. 643, 645 (B.A.P. 1st Cir. 1998). "A decision is final if it 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" Id. at 646 (citations omitted). A judgment denying a debtor's discharge is a final order. Gagne v. Fessenden (In re Gagne), 394 B.R. 219, 224-25 (B.A.P. 1st Cir. 2008).

STANDARD OF REVIEW

Appellate courts reviewing an appeal from the bankruptcy court generally apply the "clearly erroneous" standard to findings of fact and examine the lower court's legal conclusions *de novo*. See Stornawaye Fin. Corp. v. Hill (In re Hill), 562 F.3d 29, 32 (1st Cir. 2009); Martin v. Bajgar (In re Bajgar), 104 F.3d 495, 497 (1st Cir. 1997). In this instance we review the bankruptcy court's application of a legal standard in a bankruptcy statute to the facts of the case. The application of a Bankruptcy Code provision to a particular case poses a mixed question of law and fact, subject to review for clear error, unless the bankruptcy court's analysis was based on a mistaken view of the legal principles involved. Gannett v. Carp (In re Carp), 340 F.3d 15, 22 (1st Cir. 2003); Indep. Eng'g Co., Inc. v. U.S. Trustee, et al. (In re Indep. Eng'g Co., Inc.), 197 F.3d 13, 16 (1st Cir. 1999). "Under the clear error standard, the trier's findings of fact and the conclusions drawn therefrom ought not to be set aside 'unless, on the whole of the record, we form a strong, unyielding belief that a mistake has been made.'" In re Carp, 340 F.3d at 22. Consequently, we must uphold the bankruptcy court's determination if its findings are supported by the record when viewed in any reasonable way. Id. Since the parties agree that the relevant facts are undisputed, our review may be *de novo*. In re Smith, __ F.3d __, 2009 WL 3682654 (1st Cir. Nov. 6, 2009). However, our conclusion is the same whether we apply *de novo* review or clear error review. Braunstein v. McCabe, 571 F.3d 108, 124 (1st Cir. 2009).

DISCUSSION

A debtor may be denied a discharge under 11 U.S.C. § 727(a)(3) if "the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case." The purpose of § 727(a)(3)[4] is to give creditors, the trustee and the bankruptcy court complete and accurate information concerning the debtor's affairs and to ensure that dependable information is provided so that the debtor's financial history may be traced. Meridian Bank v. Alten, 958 F.2d 1226, 1230 (3d Cir. 1992). "Creditors are not required to risk having the debtor withhold or conceal assets 'under cover of a chaotic or incomplete set of books or records.'" Id. (quoting In re Cox, 904 F2d 1399, 1401 (9th Cir. 1990)).

The objecting party bears the initial burden of proving by a preponderance of the evidence (i) that the debtor "concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information," and (ii) that the recorded information was information "from which the debtor's financial condition or business transactions might be ascertained." Lassman v. Hegarty (In re Hegarty), 400 B.R. 332, 341 (Bankr. D. Mass. 2008). The objecting party need not establish intent of any kind. Id. at 341. Once the objecting party has proven these two elements, the burden shifts to the debtor to demonstrate that the failure to keep records was justified under the circumstances. Id.

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[4] Unless expressly stated otherwise, all references to "Bankruptcy Code" or to specific statutory sections shall be to the Bankruptcy Reform Act of 1978, as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), Pub. L. No. 109-8, 119 Stat. 23, 11 U.S.C. § 101, et seq.

"Exceptions to discharge are narrowly construed in furtherance of the Bankruptcy Code's fresh start policy." Palmacci v. Umpierrez (In re Umpierrez), 121 F.3d 781, 786 (1st Cir. 1997). The very purpose of exceptions to discharge, however, "is to make certain that those who seek the shelter of the bankruptcy code do not play fast and loose with their assets or with the reality of their affairs." Id. (internal quotation marks omitted). "The discharge in bankruptcy inures to the benefit of the honest debtor who supplies creditors 'with enough information to ascertain the debtor's financial condition and track his financial dealings with substantial completeness and accuracy for a reasonable period past to present.'" Campana v. Pilavis (In re Pilavis), 244 B.R. 173, 175 (B.A.P. 1st Cir. 2000) (quoting Bay State Milling Co. v. Martin (In re Martin), 141 B.R. 986, 995 (Bankr. N.D. Ill. 1992)).

A. Failure to Keep Records From Which Financial Condition Can Be Ascertained

The standard for disclosure of records for purposes of § 727(a)(3) is one of "reasonableness in the particular circumstances." Razzaboni v. Schifano (In re Schifano), 378 F.3d 60, 68 (1st Cir. 2004) (quoting Meridian Bank, 958 F.2d at 1230 (3d Cir. 1992)). "'Complete disclosure is in every case a condition precedent to the granting of discharge, and if such a disclosure is not possible without the keeping of books or records, then the absence of such amounts to that failure to which the act applies.'" Meridian Bank, 958 F.2d at 1230 (citing In re Underhill, 82 F.2d 258, 259-60 (2nd Cir. 1936)). Although debtors need not keep "impeccable" records, "the records must 'sufficiently identify the transactions [so] that intelligent inquiry can be made of them.'" In re Schifano, 378 F.3d at 69. "'Courts and creditors should not be required to speculate as to the financial history or condition of the debtor, nor should they be compelled to reconstruct the debtor's affairs.'" In re Pilavis, 244 B.R. at 175 (quoting Matter of

Juzwiak, 89 F.3d 424, 428 (7th Cir. 1996)). Thus, while a debtor may justify his failure to keep records in some instances, the bankruptcy court may grant a discharge "only if the debtor presents an accurate and complete account of his financial affairs." In re Schifano, 378 F.3d at 68 (citing Meridian Bank, 958 F.2d at 1230).

In Schifano, the First Circuit held that the debtor's failure to maintain a bank account raised "serious doubt about the truthfulness of the [d]ebtor's purported financial status," where the debtor was an individual involved in many extensive transactions. Id. at 70 (reversing bankruptcy court's grant of summary judgment on a § 727(a)(3) claim and remanding for trial on merits). In Pilavis, the Panel concluded that a creditor who had proven that the debtor never kept books and records had established his prima facie case and thus shifted the burden to the debtor to prove that the failure was justified under the circumstances. In re Pilavis, 244 B.R. at 177.

Here, the Debtor does not dispute that he failed to keep his cancelled checks or identify the payees in many entries in his checkbook register, nor does he dispute the bankruptcy court's factual findings regarding the dollar amounts and percentages of expenditures the court was able to identify based on the deficient records. Instead, he argues that the records are not deficient enough to warrant denial of discharge because he need not account for "every penny spent" in order for creditors to determine his financial condition. This argument is disingenuous, however, as the Debtor failed to account for over $74,000.00, or 36.8 per cent of his money, during the three-year period before he filed his petition. This is a significant sum of money and cannot reasonably be construed as mere pennies.

Additionally, the Debtor argues that the identities of the payees are not needed in order for creditors to ascertain his financial condition. He posits that creditors and the courts have all

the information they need by reviewing his bank statements and account ledgers, which show the total funds available to the Debtor. Case law clearly shows, however, that creditors and the courts are entitled to more information than simply the amount of funds available to the Debtor at any time, and should not be compelled to speculate as to where large sums of the Debtor's money went. See In re Schifano, 378 F.3d at 68-69; In re Pilavis, 244 B.R. at 175.

B. Failure Justified Under the Circumstances

Whether a debtor's failure to preserve records is justified under the circumstances is a question of fact to be determined under all the particular circumstances of the case. In re Hegarty, 400 B.R. at 343. "An act is justified if it is right or appropriate in the circumstances." Id. (quoting Lassman v. Keefe (In re Keefe), 380 B.R. 116, 121 (Bankr. D. Mass. 2007), aff'd, 401 B.R. 520 (B.A.P. 1st Cir. 2009)). An act may be justified where a combination of factors led to the failure to preserve records. Id. Consequently, the education and sophistication of the debtor are relevant to the inquiry. In re Schifano, 378 F.3d at 68.

"Sophisticated business persons are generally held to a high level of accountability in record keeping, [f]or example, '[a]ttorneys and other professionals may be held to the standard of care ordinarily exercised by members of their profession.'" In re Leffingwell, 279 B.R. 328, 356 (Bankr. M.D. Fla. 2002) (citing Meridian Bank 958 F.2d at 1232). A debtor's routine practice of discarding credit card statements after verifying the accuracy of the charges and paying the balance was not justified under the circumstances where the debtor was a certified public accountant and his discarding of the credit card statements was inconsistent with his otherwise meticulous handling of the family's financial matters. Id. In another case, the bankruptcy court for the District of Connecticut determined that a debtor's routine practice of destroying his

financial records was not justified under the circumstances, noting that "if such justification [his practice of destroying financial records as a routine] were sufficient to avoid the consequence of a denial of discharge, the exception would become the rule." Katz v. Kurtaj (In re Kurtaj), 284 B.R. 528, 531 (Bankr. D. Conn. 2002). In Kurtaj, the court explained that debtors must preserve recorded information from which the debtor's financial condition may be ascertained because "creditors must be able to test the accuracy of the statements and schedules contained in a debtor's petition." Id.

Here, the Debtor attempted to justify his poor record keeping by explaining that disposing of the cancelled checks was simply his practice, and that sometimes when he was in line at a store he neglected to record the payee of a check. These are not valid justifications, see id.; In re Leffingwell, 279 B.R. at 356, especially in light of the Debtor's level of education and sophistication. See In re Shifano, 378 F.3d at 68. The Debtor's legal training and experience as a high school teacher establish that he is well educated and has, or should have, sufficient understanding of the importance of retaining cancelled checks and recording the payees in his check register. Furthermore, "the debtor's honest belief that he does not need to keep the records in question, or that his records are sufficient, or his statement that it is not his practice to keep additional records, does not constitute justification for failure to keep or preserve records under § 727(a)(3)." Ochs v. Nemes (In re Nemes), 323 B.R. 316, 329 (Bankr. E.D.N.Y. 2005) (quoting McCord v. Sethi (In re Sethi), 250 B.R. 831, 839 (Bankr. E.D.N.Y. 2000)).

The bankruptcy court noted that the Debtor made no attempt to explain why he had not ordered copies of his checks. The Debtor now asserts that he should not be required to pay for such copies in order to obtain the discharge, especially where there are no allegations that he

omitted assets from his schedules and where his financial condition was readily apparent from the available records. As has already been discussed, the Debtor's financial condition was not readily apparent from the records he kept. Additionally, the question of whether the Debtor omitted assets from his schedules is not relevant to the § 727(a)(3) inquiry. Moreover, the bankruptcy court's decision does not suggest that the costs associated with obtaining copies of several hundred checks is a pre-requisite for discharge, but simply that this Debtor's lack of explanation for failing to do so was one of many relevant circumstances that factored into the analysis. The bankruptcy court correctly considered this as a factor given that the Debtor attempted to justify his failure to keep the cancelled checks by explaining that copies of the checks could be obtained from the bank. It is not the creditors' obligation to obtain the information needed to create a complete picture of the Debtor's financial condition; rather, it is the Debtor's responsibility to provide full disclosure. In re Schifano, 378 F.3d at 68; In re Sethi, 291 B.R. 831, 838 (Bankr. E.D.N.Y. 2000). This Debtor could have filled in the missing information by obtaining copies of his cancelled checks, but he neither obtained the copies nor offered an explanation for his failure to do so. Moreover, the Debtor waived this argument by failing to raise it below. See Eastern Savs. Bank v. LaFata (In re LaFata), 483 F.3d 13, 21 n.15 (1st Cir. 2007).

The Debtor asserts that the bankruptcy court should have applied a lower standard because the transactions in question were personal rather than business in nature. First, the Debtor provides no legal support for this argument. Next, there is nothing in the record to suggest that the bankruptcy court did not apply a lower standard due to the (generally) personal nature of the transactions. Indeed, the record reflects that the bankruptcy court was agreeable to

the suggestion that a lower standard applies where the transactions in question are of a personal rather than business nature. Most important, case law does not support the Debtor's suggestion that the appropriate lower standard by which the court should have assessed the sufficiency of his financial records was to ask whether the Debtor's record keeping allowed him to determine whether his check would bounce. It is well established in both the text of § 727(a)(3) and related case law that the inquiry is whether a debtor kept financial records sufficient to enable creditors and courts to make "intelligent inquiry" of a debtor's financial affairs, not whether a debtor kept financial records that served his own purposes. See 11 U.S.C. § 727(a)(3); In re Schifano, 378 F.3d at 68-69.

Lastly, the Debtor argues that he was justified in not providing further information with respect to his ATM withdrawals. More specifically, the Debtor argues that his average weekly withdrawals of $219 to $265 per week during the 2004-2006 period were not extravagant, that the total dollar amounts accounted for over half of what the court deemed to be inadequate records and thus significantly tainted the court's decision, and that any record of an ATM withdrawal is by nature complete as the only possible additional information the Debtor could have produced were receipts for mundane purchases which the court cannot expect the Debtor to retain.

The question of extravagance is not pertinent to the § 727(a)(3) inquiry. The question is whether the Debtor justified his failure to keep records sufficient such that creditors can ascertain his financial condition. In re Sterman, 244 B.R. at 504; In re Hegarty, 400 B.R. at 34. Although there is some validity to the Debtor's assertion that there are no payees for ATM withdrawals as there are for checks, this assertion does not justify the Debtor's failure to maintain financial

records under the circumstances. The circumstances are as follows: the Debtor is a well educated and sophisticated individual who cannot account for over one-third of his expenditures during the three-year period preceding his bankruptcy. He not only failed to keep his cancelled checks, but failed to record the payees in many of the entries in his check register, thus making it impossible for creditors to determine where a significant percentage of his money went. His justification regarding the ATM withdrawals might have had some merit if it did not overlap so squarely with his explanation for failing to record the payees in his check register: he claims that he should not be expected to trace the funds from ATM withdrawals as they were surely for mundane purchases, and yet his explanation for failing to identify the payees of countless checks is that those, too, were for mundane purchases. Extravagant or not, the Debtor's attempt to justify $74,000.00 in unidentified expenditures over a three year period as "mundane purchases" simply doesn't hold. Creditors and the court should not be expected to speculate as to where this money went, particularly when the evidence reflects that some of the check and ATM amounts are several hundreds of dollars. The bankruptcy court did not err in concluding that under the circumstances of this case, the Debtor's failure to maintain financial records was not justified.

CONCLUSION

For the reasons discussed above, the bankruptcy court's decision to deny the Debtor's discharge pursuant to 11 U.S.C. § 727(a)(3) is hereby **AFFIRMED**.