NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL FOR THE FIRST CIRCUIT

BAP NO. MB 10-015

Bankruptcy Case No. 09-14033-JNF

ROLF ANDERSEN,
Debtor.

THE CADLE COMPANY, General Partner of
D.A.N. Joint Venture,
Appellant,

v.

ROLF ANDERSEN,
Appellee.

Appeal from the United States Bankruptcy Court
for the District of Massachusetts
(Hon. Joan N. Feeney, U.S. Bankruptcy Judge)

Before
Votolato, Lamoutte, and Tester,
United States Bankruptcy Appellate Panel Judges.

Mark H. Bluver, Esq., on brief for Appellant.

January 20, 2011

Per curiam.

The Cadle Company ("Cadle"), as General Partner for D.A.N. Joint Venture, LLP ("DJV"), appeals from the bankruptcy court's March 10, 2010 order ("Order") denying its motion to reopen the bankruptcy case of Rolf Andersen (the "Debtor") so that it could file a complaint to revoke his discharge under § 727(d)(1).[1] For the reasons set forth below, the Panel **REVERSES** the Order and **REMANDS** the matter to the bankruptcy court for proceedings consistent with this opinion.

BACKGROUND

Prior to the commencement of this case, DJV obtained a judgment in the amount of $1,183,614.00 against the Debtor in the Connecticut Superior Court.

The Debtor filed a chapter 7 petition on May 1, 2009, and he identified DJV as an unsecured creditor on Schedule F. Interbrands, Inc. ("Interbrands"), a family owned scotch whiskey import company of which the Debtor had been president and director, filed a chapter 7 petition that same day.

On July 2, 2009, Cadle moved for an order requiring the Debtor to appear for a Rule 2004 examination and to produce certain documents, stating its belief that the Debtor had transferred or hidden his assets in Interbrands. The bankruptcy court granted the motion. As the Rule 2004 examination was scheduled for a date after the deadline for filing objections to

[1] 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. All references to "Rule" or "Bankruptcy Rule" shall be to the Federal Rules of Bankruptcy Procedure.

discharge, Cadle requested and was granted an extension to September 12, 2009 to object to the Debtor's discharge.

Cadle conducted the Rule 2004 examination of the Debtor on August 24, 2009. During the examination, the Debtor testified that Interbrands had stopped doing business in 1993 when its lender called in its line of credit. He also testified about another family owned and controlled business, International Brands ("IB"), also a scotch whiskey importer, which he claims was unrelated to Interbrands. He stated that his role in IB was limited to signing forms and picking up mail, that he did not receive any compensation, that he seldom traveled, and that he did not have access to credit cards. With respect to a third entity identified on the Debtor's Schedule F, Bellboy Corporation ("Bellboy"), he testified that Bellboy was a wholesale liquor distributor and that it purchased goods from IB. When questioned further about debts owed to Bellboy, the Debtor refused to answer claiming that he was under a restraining order prohibiting discussion of the matter.

In conjunction with the Rule 2004 examination, the Debtor produced tax returns showing gross income for 2007 and 2008 exceeding $10 million and $15 million, respectively. He testified that almost all of that income came from gambling winnings and almost all of these winnings were offset by gambling losses. He explained that the discrepancy between the income stated on his tax returns and the income stated in his statement of financial affairs was because his tax returns did not take into account his losses, which cancelled out nearly all of his winnings.

Thereafter, Cadle filed a motion for authority to conduct a Rule 2004 examination of the Debtor's accountant, which the bankruptcy court granted. Before the examination was

conducted, however, the September 12, 2009 extended deadline to object to discharge expired, and the bankruptcy court issued an order discharging the Debtor on September 15, 2009 (the "discharge order"). Although Cadle immediately moved for a retroactive extension of time to object to discharge and revocation of the discharge, that motion was denied because Cadle had failed to request a further extension before the extended deadline had expired. Two weeks later, the bankruptcy court entered an order discharging the trustee and closing the bankruptcy case. Thereafter, Cadle moved for an order compelling compliance with the court's prior order authorizing the Rule 2004 examination of the Debtor's accountant, which the bankruptcy court denied as the case had been closed.

Cadle and the trustee then filed a joint motion to reopen the case ("Motion to Reopen") so that Cadle could conduct the Rule 2004 examination of the Debtor's accountant and further investigate the Debtor's financial affairs to ascertain whether there were grounds for objecting to the Debtor's discharge.[2] According to Cadle, it was concerned about discrepancies between what the Debtor reported in his schedules and statement of financial affairs and what certain documents (e.g., tax returns) indicated.

At an initial hearing on January 6, 2010, the bankruptcy court did not rule on the Motion to Reopen, but entered an order authorizing Cadle to conduct a Rule 2004 examination of the Debtor's accountant and ordering Cadle to report its findings to the bankruptcy court at a continued hearing date. Cadle conducted a Rule 2004 examination of the Debtor's accountant on February 5, 2010. After the deposition, Cadle filed a memorandum and affidavit in support of

[2] The trustee subsequently withdrew as a moving party to the Motion to Reopen, stating that he thought that such efforts to pursue the Debtor for alleged fraud would be futile.

its Motion to Reopen, arguing that the testimony of the Debtor's accountant and the documents produced in connection therewith directly contradicted the financial information in the Debtor's statement of financial affairs and the testimony he had provided in his Rule 2004 examination. According to Cadle, the documents revealed that, contrary to the Debtor's prior testimony, millions of dollars were being transferred in and out of IB, tens of thousands of dollars in wire transfers were occurring on a nearly daily basis between IB, Interbrands, and Bellboy, and there were significant travel expenses of $3,000.00 to $15,000.00 per month. Cadle argued that the documents produced, together with the accountant's testimony, showed that the Debtor was not forthcoming regarding his financial condition, and that his misrepresentations were part of a scheme to conceal assets and impair his creditors' efforts to collect debts due from him.

The bankruptcy court held the continued hearing on March 10, 2010. At the conclusion of the hearing, the bankruptcy court denied the Motion to Reopen, stating:

> If the creditor was concerned about unanswered questions, the creditor's remedy was to seek an extension of time to file under Section 727(a)'s numerous subsections before the time. That wasn't done. Now, in Section 727(d) are not the appropriate time or remedy for curing that failure. I find that there have been no grounds alleged for making an allegation that the discharge should be revoked, and the motion to reopen is denied.

Cadle appealed.

JURISDICTION

Before addressing the merits of an appeal, the Panel must determine that it has jurisdiction, even if the issue is not raised by the litigants. See Boylan v. George E. Bumpus, Jr. Constr. Co. (In re George E. Bumpus, Jr. Constr. Co.), 226 B.R. 724 (B.A.P. 1st Cir. 1998). The Panel has jurisdiction to hear appeals from: (1) final judgments, orders and decrees; or (2) with

leave of court, from certain interlocutory orders. 28 U.S.C. § 158(a); Fleet Data Processing Corp. v. Branch (In re Bank of New England Corp.), 218 B.R. 643, 645 (B.A.P. 1st Cir. 1998). A decision is considered 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), whereas an interlocutory order "only decides some intervening matter pertaining to the cause, and requires further steps to be taken in order to enable the court to adjudicate the cause on the merits." Id. (quoting In re American Colonial Broad. Corp., 758 F.2d 794, 801 (1st Cir. 1985)). The Panel has jurisdiction over this appeal from the final order of the bankruptcy court denying Cadle's motion to reopen the Debtor's bankruptcy case. See Riazuddin v. Schindler Elevator Corp. (In re Riazuddin), 363 B.R. 177, 182 (B.A.P. 10th Cir. 2007); Crofford v. Conseco Fin. Serv. Corp. (In re Crofford), 301 B.R. 880, 882 (B.A.P. 8th Cir. 2003).

STANDARD OF REVIEW

A bankruptcy court's findings of fact are reviewed for clear error and its conclusions of law are reviewed *de novo*. See Lessard v. Wilton-Lyndeborough Coop. School Dist., 592 F.3d 267, 269 (1st Cir. 2010). Section 350(b) of the Bankruptcy Code gives the bankruptcy court broad discretion in deciding whether to reopen a case, and the decision to grant or deny a motion to reopen shall not be overturned unless the court abused its discretion. See Mass. Dep't of Rev. v. Crocker (In re Crocker), 362 B.R. 49, 53 (B.A.P. 1st Cir. 2007); In re Weinstein, 217 B.R. 5, 6 (D. Mass. 1998), aff'd, 164 F.3d 677 (1st Cir. 1999).

DISCUSSION

Bankruptcy Rule 5010 provides, in relevant part, that "[a] case may be reopened on motion of . . . [a] party in interest pursuant to § 350(b) of the Code." Fed. R. Bankr. P. 5010. In

turn, § 350(b) provides that "[a] case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause." 11 U.S.C. § 350(b). It is well settled that the decision to reopen a case is within the sound discretion of the bankruptcy court. See In re Crocker, 362 B.R. at 53 (citation omitted). This discretion depends upon the particular circumstances and equities of the individual case. Id.; see also Finch v. Coop (In re Finch), 378 B.R. 241, 245 (B.A.P. 8th Cir. 2007), aff'd, 285 Fed. Appx. 576 (8th Cir. 2010).

As Cadle does not contend that there are additional assets to be administered, or that reopening is necessary to accord the Debtor additional relief, this case can only be reopened for "other cause." 11 U.S.C. § 350(b). As the moving party, Cadle had the burden of demonstrating "cause" for reopening the case. See In re Otto, 311 B.R. 43, 47 (Bankr. E.D. Pa. 2004); In re Carter, 38 B.R. 636, 638 (Bankr. D. Conn. 1984). The Bankruptcy Code does not define "other cause" for purposes of § 350, but bankruptcy courts may consider equitable factors in determining whether such cause exists. In re Malden Mills Indus., Inc., 361 B.R. 1, 7 (Bankr. D. Mass. 2007). A creditor's request for an opportunity to seek a revocation of a discharge pursuant to § 727(d) may be sufficient cause to reopen a case depending on the circumstances of the specific case. See In re Kirschner, 46 B.R. 583, 586 (Bankr. E.D.N.Y. 1985); see also Leach v. Buckingham (In re Leach), 194 B.R. 812, 814 (E.D. Mich. 1996) (stating "the option to reopen is available to creditors . . . to pursue the revocation of the debtor's discharge . . ."); In re Savage, 167 B.R. 22 (Bankr. S.D.N.Y. 1994).

Section 727(d)(1) provides that "[o]n request of the trustee, a creditor, or the United States trustee, and after notice and a hearing, the court shall revoke a discharge granted under

subsection (a) of this section if . . . such discharge was obtained through the fraud of the debtor, and the requesting party did not know of such fraud until after the granting of such discharge." 11 U.S.C. § 727(d)(1). "[B]ecause revoking a discharge is an extraordinary remedy, § 727(d) should be construed liberally in favor of the debtor and strictly against those objecting to discharge." Gillis v. Gillis (In re Gillis), 403 B.R. 137, 144 (B.A.P. 1st Cir. 2009).

In determining whether to revoke a discharge, the court must consider whether: "(1) the debtor obtained the discharge through fraud; (2) the creditor possessed no knowledge of the debtor's fraud prior to the granting of the discharge; and (3) the fraud, if known, would have resulted in denial of discharge under § 727(a)." Id. The party moving to revoke a debtor's discharge bears the burden of proving each element by a preponderance of the evidence. In re Gillis, 403 B.R. at 144. If it is clear that the moving party is unable to satisfy any of the requirements of § 727(d)(1), there will be no cause to reopen the case for the purpose of revoking the discharge. In re Kirschner, 46 B.R. at 587.

Here, Cadle claims that the Debtor concealed assets and engaged in fraudulent misrepresentations that fall under the rubric of "fraud" contemplated by § 727(d)(1). Specifically, it alleges that the Debtor made certain misrepresentations at his Rule 2004 examination that he had no access to credit cards, and that he did not travel for the company. In addition, Cadle alleges that the Debtor failed to disclose any information regarding the financial dealings between the various companies, IB, Interbrands, and Bellboy, and that the substantial amount of money going in and out of those allegedly defunct companies constituted fraud, and that these misrepresentations constituted a violation of the Debtor's duties under the Bankruptcy Code. The Debtor's conduct and lack of candor, together with the "outrageous dollar amounts at

issue" and "the unanswered questions surrounding the millions of dollars going in and out of a purportedly defunct company," is clear evidence of the Debtor's fraudulent conduct which the Panel feels was overlooked or ignored by the bankruptcy judge.

Furthermore, Cadle asserts that it was not until after the accountant's Rule 2004 examination and the accompanying production of documents (which occurred after the discharge order was entered), that sufficient facts surfaced to warrant a denial of discharge. Cadle admits that through inadvertence, it neglected to request an extension of time to object to discharge before the deadline expired. It argues, correctly, in the view of the Panel, that this is not determinative, because evidence of the Debtor's fraud did not "come to light" until several months after the entry of the discharge order.

The Panel concludes that, under all of the circumstances, the bankruptcy court abused its discretion in denying Cadle's request to reopen the case to file a § 727(d)(1) complaint seeking a revocation of the Debtor's discharge. From the record, it is clear that at the time the discharge entered, Cadle had concerns about the Debtor's financial condition based on its Rule 2004 examination of the Debtor and the documents he produced. For example, Cadle was concerned about discrepancies between the income reported in the Debtor's statement of financial affairs and what certain documents (e.g., tax returns) indicated. The record also shows, however, that it was not until after the accountant's Rule 2004 examination[3] and the accompanying production of documents that significant information surfaced about the financial relationship and flow of substantial amounts of money between IB, the allegedly defunct Interbrands, and Bellboy. In the

[3] In fact, it was the bankruptcy court's authorization of Cadle to depose the Debtor's accountant after the entry of discharge and closing of the case that led to the newly discovered evidence. In addition, based upon the record before it, it appears that the discharge and case closing emanated from the clerk's office as administrative matters.

face of potentially significant newly discovered post-discharge evidence, the bankruptcy court should have allowed the bankruptcy case to be reopened to allow Cadle to pursue a § 727(d)(1) revocation of discharge proceeding.

However, the reopening of a case is a ministerial act which allows the file to be retrieved so the court can receive a new request for relief; the reopening, by itself, has no independent legal significance and determines nothing with respect to the merits of the relief to be requested. In re Haralambous, 257 B.R. 697, 698 (Bankr. D. Conn. 2001); see also Giddens v. Kreutzer (In re Kreutzer), 249 Fed. Appx. 727, 729 (10th Cir. 2007). Consequently, the Panel makes no determination as to the merits of a potential revocation of discharge action, or whether such an action might be time-barred under the Bankruptcy Code. The Panel simply holds that the bankruptcy court abused its discretion in declining to reopen the case to enable Cadle to pursue such an action.

CONCLUSION

For the reasons set forth above, the Panel **REVERSES** the Order denying Cadle's Motion to Reopen, and **REMANDS** to the bankruptcy court for proceedings consistent with this opinion.