UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF RHODE ISLAND
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In re: :

HAROLD T. PANCIERA, JR. : BK No. 91-11421
Debtor Chapter 7

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ORDER DENYING MOTION TO REOPEN

APPEARANCES:

Kevin D. Heitke, Esq.
Attorney for Debtor
1452 Broncos Highway, Suite 203
P.O. Box 556
Harrisville, Rhode Island 02831

Jason D. Monzack, Esq.
(Former) Chapter 7 Trustee
KIRSHENBAUM & KIRSHENBAUM
888 Reservoir Avenue
Cranston, Rhode Island 02910

BEFORE ARTHUR N. VOTOLATO, United States Bankruptcy Judge

Heard on the Motion of Jason Monzack, Esq., the former Chapter 7 Trustee (Monzack), to reopen this 1991 bankruptcy case which has been closed for eleven years. The issue raised in the motion is: If a secured creditor abandons its claim after the bankruptcy case is closed, freeing up equity in an asset that appeared to be insignificant during the pendency of the case, who gets the windfall? Based on the facts in this case, and for the reasons discussed below, I conclude that the free assets belong to the Debtor, not the estate.

BACKGROUND

The facts discussed below are undisputed and consist primarily of the Debtor's testimony and the papers filed in the case. In 1980, Harold Panciera, Jr., owned a one-sixth interest in a partnership called Dunns' Corner Associates ("Dunns'") which was in the business of developing and managing real estate. In the late 1980s, Panciera and his associates often put money into the business, and by 1990 the partnership was showing a profit.

When Panciera filed this Chapter 7 case in 1991, he listed his interest in Dunns' with a value of $50,000, and during the administration of the bankruptcy case it was acknowledged that New England Savings Bank ("NESB") held an assignment of the profits and

distributions of Dunns' as security for Panciera's promissory note in the amount of $300,000.

NESB filed an adversary proceeding against Panciera seeking denial of discharge, and/or a determination that its debt was nondischargeable. *See* A.P. No. 91-1210. In August 1992, Panciera reached an agreement with NESB, and a stipulation was filed which set $200,000 of the NESB claim as nondischargeable, and that the debt would be paid, *inter alia*, from the distributions, profits and/or proceeds of Dunns', and another partnership in which Panciera held an interest. The agreement also provided that if the partnerships failed to pay the debt, Panciera would have no personal liability, provided he cooperated in the liquidation of the partnerships. Most important for our purposes here, Monzack, the Chapter 7 Trustee, was a party to the stipulation which subsequently received Court approval. In December 1993, Panciera received his discharge and in August 1994, the bankruptcy case was closed, whereupon Monzack's tenure as Trustee ended.

The evidence is that, post-bankruptcy, NESB did not receive any distribution from Dunns' because the partnership was not profitable, and that while his partners continued to make capital contributions to try and keep the business going, Panciera made no contributions. During the late 90s through 2003, however, while Dunns' was

profitable, Panciera began receiving partnership K-1 tax forms. Unhappy about receiving tax bills on income that was not going to him, Panciera sought to liquidate the Dunns' assets to relieve him of his ongoing tax liability. In response, the partnership filed an interpleader action in the state superior court, to which Monzack filed an answer and crossclaim[1] asking that the proceeds due Panciera be paid to him "as Trustee of Panciera's bankruptcy estate."

Between $26,000 to $52,000 is at stake here depending on the outcome of the interpleader litigation.[2] In that action it was noted that NESB was insolvent, that its assets had been assigned to the FDIC, that in 2004 the FDIC conceded that it could not produce documentation to substantiate the assignment from NESB, and dropped its secured claim. This left Panciera's interest in the partnership unencumbered. In March 2005, almost 14 years after his appointment

[1] For reasons not apparent, Monzack failed to move to reopen the bankruptcy case or to be reappointed as trustee prior to filing his purported answer and crossclaim on behalf of the estate. This omission, of course, left Monzack without standing, and renders his activity and participation in the interpleader case a nullity.

[2] While this matter was pending, the Trustee filed a supplemental response indicating that an additional $139,440 was deposited in the registry of the State court where the interpleader action is pending. The deposit represents the net amount due Mr. Panciera from the sale of Dunns Corner assets in October of 2005.

as Trustee, ten plus years after the case was closed, and two years after he filed an (unauthorized) answer and crossclaim in the interpleader action, Monzack filed the instant motion to reopen.

DISCUSSION

Each side argues for a bright line ruling in this case. The Movant (former Trustee Monzack) contends that he only technically abandoned this asset which, he argues, would spring back into the bankruptcy estate upon the reopening of the case, and that the mere filing of a motion to reopen to administer assets is sufficient to undo any technical abandonment. As authority, Monzack cites *Compass Bank for Sav. v. Billingham* (*In re Graves*), 212 B.R. 692 (B.A.P. 1st Cir. 1997), which held that pursuant to 11 U.S.C. § 554(c), property that was only technically abandoned is property of the estate when a case is reopened. The Debtor argues that the abandonment was substantive, given the Trustee's assent to the NESB stipulation in the adversary proceeding, and that even if the abandonment were merely technical, the result is governed by Fed. R. Bank. P. 9024 invoking Fed. R. Civ. P. 60(b), which provides that:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence ...; (3) fraud ... misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment

> has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

Fed. R. Civ. P. 60(b). Panciera correctly argues that since the allegations do not fit any of these categories, relief under Rule 60(b) is not available.

To begin with, Monzack has not cleared the first hurdle in his quest to recover the now unencumbered asset, i.e., this case has not been reopened. The reopening of cases is governed by 11 U.S.C. § 350(b) which states "[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." Also, "[i]t is settled beyond cavil that reopening rests within the sound discretion of the bankruptcy court and depends upon the facts of each case... [and that] [r]eopening is a congiary to be bestowed upon the deserving, not a matter of right." *In re Gray*, 60 B.R. 428, 429 (D.R.I. 1986). This Court has typically applied a totality of circumstances test to case reopening, and to the extent that the BAP decision in *Graves* holds otherwise, I would not follow the case. In addition, *Graves* is clearly distinguishable, i.e., in *Graves* the issue was not whether the case should be reopened, since the bankruptcy judge had already

granted that relief. The question before the BAP was the effect of the reopening, and whether the reopening negated any technical abandonment by the trustee under 11 U.S.C. § 554(c). The BAP stated:

> The issue before the bankruptcy court and before us on appeal is what happens to an unadministered asset upon the reopening of a case where the case is reopened in response to a motion by the trustee in order to administer an asset, a lawsuit related to the debtors' real property, which was improperly reported on the debtors' schedules.
>
> ...This section [11 U.S.C. § 350] of the Bankruptcy Code does not indicate what should happen to property technically abandoned pursuant to section 554(c) upon reopening. The bankruptcy court took the position that the property springs back into the estate. We find no error in this conclusion.
>
> Some bankruptcy courts have held that section 554(c) gives them the power to modify or revise any technical abandonment by simply ordering it because section 554(c) specifically provides that "unless the court orders otherwise, any property ... not otherwise administered ... is abandoned to the debtor...." 11 U.S.C. § 554(c) []; see *In re Shelton*, 201 B.R. 147, 155 (Bankr. E.D.Va. 1996). Other courts have held that technical abandonments may be revoked if the Trustee has not made an intelligent, informed decision with respect to the abandonment, or the abandonment was unintentional or the result of inadvertent error. See *In re Shelton*, 201 B.R. at 155. Still other bankruptcy courts find that when a case is reopened, the original case is revived, effectively negating any technical abandonment under section 554(c). See *In re Shelton*, 201 B.R. at 155; *Figlio v. American Management Services, Inc. (In re Figlio)*, 193 B.R. 420, 424 (Bankr. D.N.J.1996) (finding that the term "closed" means "finally closed"). We find it important that the bankruptcy judge did not limit the purpose for which the reopening was taking place when he reopened the case. For that reason we agree with the third approach and find that the property in question became part of the bankruptcy estate, subject to the

> automatic stay, upon the reopening of the case on July 30, 1993. We find this an appropriate result especially given the short interval during which the case was actually closed.

Graves, 212 B.R. at 695-6. In addition to my disagreement with the conclusion in *Graves,* the case is not factually on point as to timeliness, because that case had been closed for only eleven days before the trustee sought to reopen, *id*. at 694, so *Graves* clearly has little application to reopening a case that has been closed for eleven years.

In the circumstances here, I find and conclude that Mr. Monzack has failed to show cause why this fourteen year old case should be reopened. There are no issues of bad faith, nor was there any attempt by Panciera to conceal his interest in the subject property. To the contrary, Panciera listed the asset in his original schedules with an unencumbered value of $50,000. When it later was learned that NESB held a valid security interest in Panciera's share of the property, the Trustee elected not to pursue the asset, and in fact assented to the repledging of the collateral to secure NESB's judgment of nondischargeability.[3] Then, solely because NESB agreed to waive its claim against Panciera under the consent judgment, and

[3] Regarding substantive abandonment, it would be hard to imagine a clearer case than what we have here.

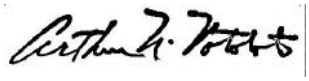
the failure of FDIC (NESB's successor-in-interest), to perfect its assignment, this windfall was created. To allow the former trustee, *on these facts*, to reap the benefit of the secured creditors' errors would clearly skew the equities in the wrong direction, and violate the policy favoring closure and finality in bankruptcy proceedings. See *In re Public Service Co. of New Hampshire*, 963 F.2d 469, 474 (1st Cir. 1992). *See also In re Evanston Motor Co., Inc.,* 26 B.R. 998, 1005 (N.D. Ill. 1983), *aff'd* 735 F.2d 1029 (7th Cir. 1984)("Trustees, creditors, debtors, and even bankruptcy judges are entitled to some measure of finality in bankruptcy proceedings").

Another point needs mentioning – there is no explanation as to why the present motion to reopen was not filed until two years after Mr. Monzack entered his appearance and answered the interpleader action purportedly as "Trustee". Monzack was discharged of his duties in this case in August 1994. Upon the reopening of a case, the re-appointment of a Chapter 7 trustee is not automatic, and will occur only if the Court "determines that a trustee is necessary to protect the interests of creditors and the debtor or to insure the efficient administration of the case." Fed. R. Bankr. P. 5010. So while the outcome in this case probably would not have been different on the merits, Monzack's failure to reopen the case and to be reappointed as trustee was fatally defective to his status and

participation in the interpleader case as "Trustee," because there was no trustee. For the foregoing reasons, Monzack's motion to reopen is DENIED, as is the other relief requested by him.

Enter judgment consistent with this opinion.

Dated at Providence, Rhode Island, this 3rd day of March, 2006.



Arthur N. Votolato
U.S. Bankruptcy Judge

Entered on docket: 3/3/2006