UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE FIRST CIRCUIT

In re:	*	
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STEVEN J. TENOFSKY	*	BAP NO. 96-1104
Debtor	*	96-1105
	*	(Consolidated)
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	*	
STEVEN J. TENOFSKY	*	Case No. 94-17454-CJK
Defendant	*	ADV. No. 95-1117
Appellant	*	95-1335
	*	
v.	*	
	*	
SAMUEL PERLMAN &	*	
HERBERT RUBIN,	*	
Trustees of H.D.S. Realty Trust	*	
	*	
and	*	
	*	
JOSEPH BRAUNSTEIN	*	
Trustee of Steven J. Tenofsky	*	
Plaintiffs	*	
Appellees	*	
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Before VOTOLATO, LAMOUTTE and DE JESUS, U.S. Bankruptcy Judges.

ORDER

The debtor appeals the bankruptcy court's denial of discharge in his chapter 7 case pursuant to 11 U.S.C. § 727(a)(3). The appeal came before the panel for oral argument on December 17, 1996.

Background

Debtor filed his petition for relief under chapter 7 of the Bankruptcy Code on November 11, 1994 (case no. 94-17454-CJK). This is debtor's third petition. The previous case was filed on August 9, 1988 (case no. 88-11454-CJK).

On February 9, 1995, appellee/plaintiffs Samuel Perlman and Herbert Rubin, trustees of H.D.S. Realty Trust, filed a complaint objecting to debtor's discharge and to determine dischargeability of its debt. (adversary proceeding no. 95-1117-CJK). The basis of HDS's claim against debtor is a 1988 real estate transaction. The claim was also part of debtor's prior bankruptcy case, no. 88-11454-CJK, and adversary proceeding no. 88-1469-CJK. That adversary proceeding was settled by debtor's reaffirmation of his debt to Perlman and Rubin, evidenced by a promissory note dated September 6, 1989.

HDS's complaint was amended on May 18, 1995, and October 20, 1995, to request that debtor be denied a discharge pursuant to § 727(a)(3), (a)(2), (a)(5) and § 523(a)(10). Subsequently, HDS moved the court for leave to dismiss count II of the amended complaint, pertaining to non-dischargeability under § 523(a)(3); said motion was granted. On May 16, 1995, trustee filed a complaint objecting to discharge, commencing adversary proceeding 95-1335-CJK, seeking denial of discharge pursuant to § 727(a)(3) and (5).

On July 2, 1996, a consolidated trial was held for both adversary proceedings. After taking a brief recess at the conclusion of the trial, the bankruptcy judge rendered a bench ruling denying debtor a discharge pursuant to § 727(a)(3). On July 3, 1996, the bankruptcy court entered identical final judgments in each of the adversary proceedings. Debtor filed a notice of appeal on July 12, 1996, in each of the adversary proceedings, and his request to consolidate the appeals was granted by this panel on August 29, 1996.

Debtor is a commercial real estate broker and conducts his business through a Massachusetts corporation known as the Bayliss Company, Inc., of which he is the sole shareholder. Bayliss is a subchapter "S" corporation for tax purposes with all profits or

losses passing directly to debtor as the sole shareholder and accounted for in the debtor's personal income tax returns. Bayliss maintains a business bank account with Baybank.

The debtor testified that he was placed on a national blacklist by banks and other financial institutions because of his prior bankruptcies and was therefore unable to open and maintain a personal bank account or obtain any credit services. As a result, he claims, debtor received his salary from Bayliss in the form of checks payable either to his wife or to cash. Debtor also received reimbursement of business and travel expenses on an as needed basis in the form of ATM withdrawals from the Bayliss account. Debtor's pay checks were deposited into his wife's account and were used to pay household and family expenses. Debtor alleges that all of his personal income from Bayliss is documented in Bayliss' bank statements, his wife's records, and in his tax returns, and he provided account statements and canceled checks from Bayliss' account at Baybank. (Trial transcript pp. 145-47). Debtor's wife provided copies of her checking account statements and canceled checks from her account at Fleet Bank. (Trial transcript pp. 178-82). Debtor provided copies of his tax returns for 1992 and 1993, but not for 1994, the year preceding the filing of the petition. (Trial transcript pp. 43-45, 81-82, 125, 129).

Discussion

This panel reviews the bankruptcy court's decision pursuant to the provisions of 28 U.S.C. § 158(b)(1). The bankruptcy court's findings of fact should not be set aside by this panel unless they are clearly erroneous, while its conclusions of law are subject to de novo review. Fed. R. Bankr. P. 8013; In re LaRoche, 969 F.2d 1299, 1301 (1st Cir. 1992); In re G.S.F. Corp., 938 F.2d 1467, 1474 (1st Cir. 1991). "A finding of fact is clearly erroneous when, after reviewing the evidence, the appeals court is 'left with the definite and firm conviction that a mistake has been committed.'" G.S.F., 938 F.2d at 1474, citing Anderson v. City of Bessemer City, 470 U.S. 564 (1985). Applications of law are set aside "only when they are made in error or constitute an 'abuse of discretion.'" In re DN Associates, 3 F.3d 512, 515 (1st Cir. 1993) (citations omitted). Debtor argues that the bankruptcy judge erred in denying him a discharge pursuant to § 727(a)(3) by concluding that he failed to keep or preserve recorded information from which his personal financial condition could be ascertained.

In determining whether the debtor has complied with the record keeping requirements of § 727(a)(3), the court must look at the totality of the circumstances.

Section 727(a)(3) of the Bankruptcy Code provides that the court shall grant the debtor a discharge unless 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. Thus, "[i]f the facts disclose a breach of the debtor's duty to creditors to keep or preserve proper books or records and he fails to establish facts and circumstances in justification thereof, a discharge should be denied." 4 Lawrence P. King, et al., Collier on Bankruptcy ¶ 727.03 (15th ed. 1996). The requirement of keeping such recorded information is imposed on debtors "to enable their creditors, with the assistance of proper books and records, to ascertain the true status of the debtor's affairs and to test the completeness of the disclosure requisite to a discharge." Id. at 727-38. The debtor's obligation to keep financial records is intended to protect the trustee and creditors by enabling them to determine the debtor's financial condition and the cause of his financial difficulty. Id. at 727-44, citing Koufman v. Sheinwald, 83 F.2d 977 (1st Cir. 1936). The production of appropriate records is the quid pro quo for the debtor's relief from substantially all financial obligations through a discharge in bankruptcy. In re Ridley, 115 B.R. 731, 735 (Bankr. D. Mass. 1990). See also, Meridian Bank v. Alten, 958 F.2d 1226, 1232 (3rd Cir. 1992).

The records which must be kept pursuant to § 727(a)(3) do not need to be in any particular form, but they must be sufficient to enable the debtor's creditors "to ascertain his present financial condition and to follow his business transactions for a reasonable period in the past." Collier at 727-44, citing In re Cox, 904 F.2d 1399, 1402 (9th Cir. 1990). It is sufficient if the books and records are kept so as to reflect with a fair degree of accuracy the debtor's financial condition and in a manner appropriate to the debtor's business. Id.

The determination of whether debtor's records are adequate will be made on a case-by-case basis, considering debtor's education, the sophistication of the debtor, debtor's business experience, size and complexity of debtor's business, debtor's personal financial

structure, and any special circumstances which may exist. In re Wiess, 132 B.R. 588, 592 (Bankr. E.D. Ark. 1991). Thus, in determining whether to deny a discharge under this section, the court must "apply a case-by-case analysis, taking into account the particular facts and circumstances of the debtor's case." In re Ridley, 115 B.R. 731, 733 (Bankr. D.Mass. 1990). The court in Ridley further stated that "each case must, to a larger extent, turn on its own facts", noting that "the credibility of the debtor is often a key element." Id. The principles underlying the requirements of § 14c(2) of the Bankruptcy Act, the predecessor of § 727(a)(3), were set forth by the Second Circuit in Matter of Underhill, 82 F.2d 258 (2d Cir. 1936), wherein the court stated:

> It is a question in each instance of reasonableness in the particular circumstances. Complete disclosure in every case is a condition precedent to the granting of the discharge, and if such 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.

Id. at 259-260. See also, Meridian Bank v. Alten, 958 F.2d 1226, 1231 (3rd Cir. 1992); In re Frommann, 153 B.R. 113 (Bankr. E.D.N.Y. 1993); In re Shapiro, 59 B.R. 844, 848 (Bankr. E.D. N.Y. 1986); In re Brown, 56 B.R. 63, 66 (Bankr. D.N.H. 1985).

Debtor argues that the court erred in failing to consider the standards of record keeping required of an individual and financially non-complex debtor, which provide that an individual debtor need not keep any more records than that of any other taxpayer and which are sufficient to prepare and file tax returns, citing Vetri v. Meadowbrook Mall Co., 174 B.R. 143 (Bankr. M.D.Fla. 1994), and In re Rowe, 81 B.R. 653 (Bankr. M.D.Fla. 1987). This panel rejects the assertion that an individual debtor is not under any duty to keep records any more detailed than that of an individual taxpayer. The court in Vetri observed the

standard but did not apply it in that case, noting, "[a] determination of what constitutes 'accurate' records and books encompasses the reasonableness and particular circumstances that accompany the facts of each individual case." 174 B.R. at 146. The court went on to find that the debtors therein "failed to provide a satisfactory amount of information to assist the court in establishing their accurate financial condition." Id. The use of tax records to meet the requirements of § 727(a)(3) was also rejected by the court in In re Morando, 116 B.R. 14 (Bankr. D.Mass. 1990), the court stating "[f]or tax returns, the taxpayer provides information from which and in reliance on the same a return is prepared. Tax returns, whether filed timely or belatedly, do not require a full scale audit or even an investigation of the taxpayer's affairs." Id. at 16. Similarly, the court in In re Frommann, 153 B.R. 113 (Bankr. E.D.N.Y. 1993) observed "tax returns 'prepared by an accountant from whatever records the accountant can garner from the taxpayer, are not a significant indicia of sufficient record keeping. The tax returns themselves clearly do not provide sufficient documentation, since they fail to provide itemization of transactions.'" Id. at 118, citing In re Goldstein, 123 B.R. 514, 524-25 (Bankr. E.D. Pa. 1991).

Debtor argues that the bankruptcy judge further erred in holding him to a higher record keeping standard based upon his previous bankruptcy filings. There is no indication in the record that the bankruptcy judge did so; however, as has been stated by another court, in a case involving a debtor's third bankruptcy filing, "[i]t would belie logic and common sense not to consider [debtor's] familiarity with the bankruptcy laws to support a general inference that the failure to keep records was not accidental." Stewart Enterprises, Inc. v. Horton (In the Matter of Horton), 621 F.2d 968 (9th Cir. 1980).

The findings of the bankruptcy court are not clearly erroneous, and they are well supported by the evidence.

The bankruptcy court, after presiding over a full day of trial, held that the debtor should be denied a discharge pursuant to § 727(a)(3), finding that the debtor failed to keep or preserve recorded information from which his personal financial condition could be ascertained. The bankruptcy court's findings and conclusions are not clearly erroneous. In addition, the record before this panel amply supports the bankruptcy court's findings and conclusions.

Debtor also argues that the bankruptcy court erred in considering the lack of books and records of Bayliss corporation, rather than of the debtor personally. He indicates that the bankruptcy judge's decision only refers to the inadequacy of Bayliss' records, and does not even mention the records of debtor's wife. He argues that discharge should not be denied where the financial records upon which a discharge is sought to be denied are those of a bona fide separate entity, such as a corporation, and not the records of an individual debtor, citing In re White, 177 B.R. 110 (Bankr. M.D.Fla. 1994); Matter of Hyers, 70 B.R. 764 (Bankr. M.D.Fla. 1987).

While debtor may be correct in that, in the case of a debtor engaged in business, it is the books and records of the individual debtor, not his corporation, which are relevant, in this case the court correctly considered the records of Bayliss. By debtor's own admission, he used the Bayliss account as his own and, when asked for his financial records produced those of Bayliss. (Trial transcript pp. 107, 163). The debtor's use of the Bayliss corporate account as his own compounds the problem of inadequate record keeping in this case, In re Ridley,

115 B.R. at 735, and in our view the bankruptcy court correctly considered the Bayliss account information in evaluating the existence of recorded information from which debtor's financial condition could be ascertained. Under the circumstances of this case, the bankruptcy court was obliged to consider the records of third parties, given the fact that debtor kept no records of his own.

Debtor argues that the bankruptcy court erred in not considering the books and records maintained by his wife. By debtor's own admission, he did not keep his own personal financial records, but rather relied upon his wife's record keeping. (Trial transcript pp. 123-24). He alleges that his reliance upon his wife's books and records is reasonable and justified under the circumstances of the case, and that this type of record keeping is sufficient to meet the requirements of § 727(a)(c). However, Mrs. Tenofsky's records do not, by themselves, accurately reflect debtor's financial condition, because they include income other than the debtor's, and do not include all of debtor's financial transactions. (Trial transcript pp. 14-15, 184-87). Moreover, courts applying the "totality of the circumstances" test have found records of the type maintained by debtor's wife to be inadequate. Vetri v. Meadowbrook Mall Co., 174 B.R. 143, 145 (M.D. Fla. 1994); In re Frommann, 153 B.R. 113, 118 (Bankr. E.D.N.Y. 1993); In re Morando, 116 B.R. 14, 15 (Bankr. D. Mass. 1990); In re Shapiro, 59 B.R. 844, 850 (Bankr. E.D.N.Y. 1986).

The bankruptcy court's issuance of a bench ruling does not indicate a lack of consideration of the evidence before the court.

Debtor argues that the timing of the bankruptcy judge's decision indicates that she did

not have time to consider debtor's voluminous exhibit containing his wife's books and records, which was introduced near the end of the trial. Contrary to appellants argument, the issuance of a bench ruling does not connote a lack of consideration of the evidence presented at the hearing. Rule 52 of the Federal Rules of Civil Procedure, which applies in adversary proceedings pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure, provides that "[f]indings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." It further provides for the issuance of bench rulings, stating that "[i]t will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Fed. R. Civ. P. 52(a). "Ideally, findings of fact should be clear, specific and complete, without unrealistic and uninformative generality on the one hand, and without an unnecessary and unhelpful recital of nonessential details of evidence on the other. The court need only make brief, definite, and pertinent findings and conclusions upon contested matters." 9A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2579 p. 541 (2d ed. 1995). It has been held that Rule 52 is satisfied as long as the factual bases for the court's findings are reasonably discernible from the record. Keller v. United States, 38 F.3d 16, 25 (1st Cir. 1994). Furthermore, "overelaboration of detail or particularization of facts" is not required. Reich v. Newspapers of New England, Inc., 44 F.3d 1060, 1079 (1st Cir. 1995). The court in Reich noted that the purpose of Rule 52 is to apprise the appellate court of the grounds on which the trial court based its decision, and that so long as the district court's findings make clear

the grounds for the court's decision they are an adequate basis for appellate review. Id. Even when the district court's findings are deficient, it's decision may be upheld when the record on appeal affords complete understanding of the issues. Id.

The bankruptcy court found that in this case there were not sufficient documents from which the creditors and the trustee could determine the debtor's income and expenses in the year preceding the filing of his petition. (Trial transcript p. 217). The bankruptcy court also found the debtor's testimony to be "generally lacking in credibility on several issues." (Trial transcript p. 218). This panel holds that the bankruptcy court's findings were clear, specific and complete, and are sufficient to determine the grounds on which the bankruptcy court based its decision.

Conclusion

There are ample facts in the record to support the bankruptcy court's factual findings; this panel holds that said findings are not clearly erroneous. The bankruptcy judge presided over a full day of trial, received abundant documentary and testimonial evidence, and issued a well-reasoned decision supported by the record to which she correctly applied the applicable law. Accordingly, the judgment of the bankruptcy court is affirmed.

SO ORDERED.

This 14th day of March, 1997.