

**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK**

**Not for Publication**

-----X

In re:

JESSE M. HILSEN

Chapter 7

Case No. 87-11261 (JMP)

Debtor.

-----X

**MEMORANDUM DECISION AND ORDER DENYING APPLICATION  
SEEKING EXAMINATIONS AND ISSUANCE OF SUBPOENAS PURSUANT TO  
RULE 2004 OF THE FEDERAL RULES OF BANKRUPTCY PROCEDURE**

APPEARANCES:

SEIDMAN & PINCUS, LLC  
777 Terrace Avenue, 5<sup>th</sup> Floor  
Hasbrouck Heights, New Jersey 07604

Andrew Pincus, Esq.  
Counsel for Rita Hilsen

M. STUART GOLDBERG, LLC  
81 Main Street, Suite 205  
White Plains, New York 10601

Marc Stuart Goldberg, Esq.  
Counsel for Marc Stuart Goldberg, as Chapter 7 Trustee

FORMAN HOLT ELIADES & RAVEN, LLC  
888 7<sup>th</sup> Avenue, Suite 4500  
New York, New York 10106

Joseph M. Cerra, Esq.  
Counsel for Hahn Bros. Fireproof Warehouses, Inc.

GARY GINSBERG  
970 East 19<sup>th</sup> Street  
Brooklyn, New York 11230

Gary Ginsberg, Esq.  
Counsel for Debtor, Jesse M. Hilsen

**JAMES M. PECK**  
**United States Bankruptcy Judge**

Rule 2004 of the Federal Rules of Bankruptcy Procedure governs discovery in cases under title 11 of the United States Code (the "Bankruptcy Code"). Rule 2004 discovery, while flexible in application and broad in scope, by its terms extends only to the acts, conduct, or property and financial condition of the debtor, or to any matter that may affect the administration of the debtor's estate or the debtor's right to a discharge. *See* Fed. R. Bankr. P. 2004(b). The rule is debtor-centric and allows considerable leeway for all manner of so-called fishing expeditions provided that there is a reasonable nexus to the debtor and the administration of the debtor's case.

The Application for Order Authorizing Examinations and Issuance of Subpoenas Related to Artwork (the "Application") presented by Rita Hilsen ("Ms. Hilsen"), the former spouse of Jesse Hilsen (the "Debtor" or "Mr. Hilsen"), relies on Rule 2004 as authority to obtain discovery regarding what may have happened to a certain missing sculpture entitled "Kiss # 6"<sup>1</sup> that was to have been turned over to her fifteen years ago in connection with the settlement of marital property disputes with the Debtor.

---

<sup>1</sup> Kiss # 6 is the work of John Chamberlain, a well-known contemporary artist with an established reputation. Conceivably, the title of the sculpture may have some significance in light of Mr. Hilsen's background as former manager of the rock group "Kiss."

Despite the passage of so much time, Ms. Hilsen claims that she needs discovery now to enable her to find the sculpture, a valuable piece of personal property that she asserts is rightfully hers pursuant to her settlement with the Debtor. Ms. Hilsen wants to examine Mark Stuart Goldberg (the “Trustee” or “Mr. Goldberg”), who served as chapter 7 trustee for Debtor's estate, and the current owners of the Hahn Brothers Fireproof Warehouse Inc. (“Hahn Bros.”), where the sculpture was stored at the direction of the Trustee.

The Trustee resists the requested discovery, stressing that he has fully performed all of his duties as trustee, including delivery of all property to Ms. Hilsen. Hahn Bros. submits that discovery at this late date would be futile since no one currently employed by the warehouse knows anything about what happened to the sculpture. From the point of view of the warehouse, discovery under such circumstances would be both burdensome and a waste of time.

The question presented is whether Ms. Hilsen has the right to utilize the liberal provisions of Rule 2004 in a case that has been fully administered to obtain discovery from Mr. Goldberg and Hahn Bros. about property in which neither the Debtor nor his estate has any interest. As discussed in this decision, the Court denies the Application because the requested discovery is not authorized under the plain language of Rule 2004.

### **JURISDICTION AND VENUE**

The Court has subject matter jurisdiction under 28 U.S.C. §§1334(b) and 157(a) and under the July 10, 1984 “Standing Order of Referral of Cases to Bankruptcy Judges” of the United States District Court for the Southern District of New York. This is a core

proceeding pursuant to 28 U.S.C. §157(b)(2)(O). Venue of this case is proper in this district under 28 U.S.C. §1408.

This Decision and Order constitutes the Court's findings of fact and conclusions of law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure, made applicable by Rule 7052 of the Federal Rules of Bankruptcy Procedure.

**FINDINGS OF FACT AND PROCEDURAL BACKGROUND**

On May 26, 1984, the Debtor filed an action for divorce in state court against Ms. Hilsen. Lawrence Goldberg (the "Receiver") was appointed as receiver in the divorce action and took possession of certain artwork located in the marital residence, including the sculpture known as Kiss #6, the subject of the present discovery request. Application at 3.

On July 1, 1987, while the matrimonial litigation was pending, Mr. Hilsen filed a voluntary petition for relief under chapter 11 of the United States Bankruptcy Code.<sup>2</sup> On August 23, 1988, the judge in the matrimonial case awarded Kiss #6 and other assets to Ms. Hilsen.<sup>3</sup> The Debtor thereafter voluntarily converted his chapter 11 case to a case under chapter 7, and the Trustee was appointed.

Soon after his appointment, the Trustee commenced two separate adversary proceedings against Ms. Hilsen, including one seeking to hold Ms. Hilsen in contempt for liquidating several pieces of artwork in her possession that allegedly constituted part of the Debtor's estate. On April 12, 1991, at the direction of the Trustee, Hahn Bros. picked up Kiss #6 and various other pieces of artwork from the Receiver and delivered these

---

<sup>2</sup> On October 13, 2005, Mr. Hilsen filed a second petition under chapter 7 in the United States Bankruptcy Court for the Eastern District of New York. That second case is still pending.

<sup>3</sup> The Bankruptcy Court granted relief from the automatic stay permitting the State Court to adjudicate the marital disputes.

items to the Hahn Bros. warehouse. Trustee's Objection to Application ("Trustee's Objection") at 5.

On May 26, 1993, the Bankruptcy Court approved a stipulation between the Trustee and Ms. Hilsen (the "Stipulation") that settled both of the adversary proceedings against Ms. Hilsen and that required the Trustee to turn over all artwork in his possession, including Kiss #6, to a trust for the benefit of Ms. Hilsen and her children. *Id.* The Debtor moved for reconsideration of the order approving the Stipulation. This motion was denied, and the Debtor subsequently appealed to the District Court. *Id.* at 3. On July 27, 1993, the District Court imposed a stay of further transfers by the Trustee to Ms. Hilsen pending the outcome of the appeal.

On October 28, 1993, the District Court dismissed Debtor's appeal as moot and remanded the case to the Bankruptcy Court for further proceedings. Exhibit G to Trustee's Objection. The District Court found that the artwork was transferred from the Receiver to Hahn Bros. and that the Trustee subsequently had conveyed all of the property to Ms. Hilsen pursuant to the Stipulation. *See* 10/28/93 Tr. (3:2-23, 5:19-25, 6:1-22). On October 3, 1997, orders dismissing the complaints were entered in each adversary proceeding, rendering the Stipulation final and ending all controversy as to ownership of Kiss #6. Order Signed on 10/03/97, Closing Remand of May 26, 1993 (ECF Doc. # 259). At that point, Ms. Hilsen unquestionably was the sole owner of Kiss # 6.

Ms. Hilsen filed her own chapter 7 petition with this Court on December 2, 1994. Hal M. Hirsch ("Hirsch") was appointed trustee of Ms. Hilsen's chapter 7 estate. Hirsch secured an order authorizing an examination of the Trustee and the production of the

Trustee's books and records. Based on his investigation, Hirsch concluded that the Trustee had conveyed all property to Ms. Hilsen in accordance with the Stipulation.

Trustee's Objection at 6. On April 21, 1997, Ms. Hilsen's chapter 7 case was closed.

Following a lengthy delay, at the Court's request, on May 17, 2006, the Trustee filed a final report (the "Final Report") relating to his administration of the Debtor's chapter 7 case. The Trustee mailed a Notice of Hearing of the Final Report to Ms. Hilsen at the address maintained by the Clerk of the Bankruptcy Court and to her last known counsel of record, Jacqueline Bukowski. *See* Notice of Final Report and of Hearing (ECF Doc. # 264). *See also*, Certificate of Service dated May 17 2006 (ECF Doc. #265). On June 15, 2006, the Court held a hearing on the Final Report, which was approved without objection. On February 3, 2007, the Court entered a final decree finding that the estate was fully administered and discharging Mr. Goldberg as chapter 7 trustee. The final decree was vacated on June 1, 2007, due to a clerical error.<sup>4</sup> As of the filing of the Application, the case is open on the Court's docket, but the case has been fully administered.

In September 2007, Ms. Hilsen contacted Karen Dowling, the owner of Hahn Bros., claiming that she never received Kiss #6 from the warehouse. After checking her records, Ms. Dowling explained that she could not find any documentation relating to the sculpture given the lapse of so many years. Objection of Hahn Bros. to Application at 5. The Court has no reason to doubt the accuracy of Ms. Dowling's representation, but the alleged inability to produce these business records plays no role in the determination of the current discovery dispute because the Application can be denied on other grounds.

---

<sup>4</sup> The Clerk of the Bankruptcy Court discovered that the final decree had been entered without granting a discharge to the Debtor. In order to correct this oversight, the final decree was vacated.

On January 16, 2008, Ms. Hilsen sent a letter to the Office of the United States Trustee alleging that, despite repeated inquiries as to its whereabouts, she never received Kiss #6 from the Trustee. *See* R. Hilsen's Letter to L. Riffkin dated 1/16/08 (ECF Doc. # 270). In her letter, Ms. Hilsen further asserted that the first time she received a copy of the Trustee's Final Report was in early January 2008. *Id.* The U.S Trustee's Office asked Mr. Goldberg to comment. In his written response, the Trustee claimed that the property had been conveyed in 1993 pursuant to the Stipulation, that the Final Report had been served on Ms. Hilsen and her counsel of record in 2006, and that Ms. Hilsen had not previously inquired as to the whereabouts of Kiss #6. M. Goldberg's Letter to R. Hilsen dated 2/11/08 at 1-2 (ECF Doc. # 270). Ms. Hilsen and the Trustee have presented conflicting versions of the facts, but it is unnecessary to resolve this conflict for purposes of deciding whether Rule 2004 discovery is currently proper.<sup>5</sup>

On April 28, 2008, Ms. Hilsen filed the Application for authority to take discovery from the Trustee and Hahn Bros. concerning the missing sculpture. The Trustee and Hahn Bros. object to the Application. Argument took place on June 11, 2008,<sup>6</sup> and the Court reserved decision.

### **DISCUSSION**

Kiss #6, the subject matter of the Application, is not property of the Debtor's estate and is outside the scope of permitted discovery under Rule 2004. Furthermore, because Debtor's case has been fully administered, discovery is not needed to explore

---

<sup>5</sup> If it were necessary to resolve the conflicting accounts, the undisputed facts are not helpful to Ms. Hilsen's credibility. Notably, the investigation conducted by her chapter 7 trustee supports the conclusion that the Stipulation was fully performed before commencement of her own chapter 7 case.

<sup>6</sup> The Trustee did not appear at the hearing to press his objection (and has offered no explanation for failing to appear), but the Court has considered the papers submitted by him in opposition to the requested discovery.

questions regarding the administration of the case. Ms. Hilsen has filed the Application more than a decade after final resolution of all disputes as to ownership of Kiss #6. As such, the Application is inexcusably late. Rule 2004 is a liberal discovery tool, but it is not designed to aid a non-debtor seeking to locate her own personal property long after the estate has surrendered any claim to such property.

**A. NON-ESTATE PROPERTY IS BEYOND THE SCOPE OF RULE 2004**

The Application oversteps the boundaries of permissible discovery that are plainly set forth in Rule 2004. Although Rule 2004 allows for expansive discovery of matters relating to the debtor, property of the debtor and administration of the estate, there are limits built into the rule. The discovery sought by Ms. Hilsen is purely personal in nature and goes beyond these limits by requesting information that has no connection whatsoever to her former husband, his property or his bankruptcy case. The property in question is not estate property.

Rule 2004 examinations “may relate *only* to the acts, conduct, or property or to the liabilities and financial condition of the debtor, or to any matter which may affect the administration of the debtor’s estate, or to the debtor’s right to a discharge.” Fed. R. Bankr. P. 2004 (emphasis added). *See, In re Recoton Corp.* 307 B.R. 751, 755 (Bankr.S.D.N.Y. 2004)(holding any third party who has a relationship with a debtor may be subject to a Rule 2004 investigation, yet courts may limit discovery when it is designed to abuse or harass); *In re Bakalis*, 199 B.R. 443, 447 (Bankr. E.D.N.Y. 1996) (citing *In re Foerst*, 93 F. 190, 191 (Bankr. S.D.N.Y. 1899).

A party in interest may use Rule 2004 to determine the nature and extent of a bankruptcy estate and to ascertain whether wrongdoing has occurred. *See In re Recoton*



*Corp.* 307 B.R. 751, 755 (Bankr.S.D.N.Y. 2004); *In re Enron Corp.*, 281 B.R. 836, 840 (Bankr.S.D.N.Y. 2002); *In re Duratech Indus., Inc.*, 241 B.R. 283, 289 (E.D.N.Y. 1999); *In re GHR Energy Corp.*, 33 B.R. 451, 453 (Bankr.D.Mass. 1983).

Rule 2004 may be used to discover information about estate property, but it is not a proper means to inquire with respect to non-estate property. The Application clearly targets only one item of missing property – Kiss #6, and the Application recognizes that this sculpture is not property of the Debtor’s estate. Indeed, the record demonstrates convincingly that the sculpture, whatever may have happened to it and wherever it presently may be located, rightfully belongs to Ms. Hilsen and has been her property exclusively for at least the last ten years. Accordingly, the requested discovery relating to a sculpture that is non-estate property is not authorized under Rule 2004.

**B. RULE 2004 DOES NOT APPLY AFTER FULL CASE ADMINISTRATION**

Discovery of any matter that may affect administration of a debtor’s estate only makes sense while estate administration still is in progress. After administration has been completed in all material respects, it is difficult to conceive of any discoverable matters that potentially could affect estate administration.

For that reason, Rule 2004 by its terms deals with discovery that may be relevant in an active bankruptcy case where an estate exists with assets and claims to administer. A party in a case that has been fully administered should not be entitled to discovery when such discovery cannot possibly yield information relevant to or affecting the administration of the bankruptcy case. *In re Johns-Manville Corp.*, 42 B.R. 362, 364 (S.D.N.Y. 1984). *See also, In re Board of Directors of Hopewell Intern. Ins. Ltd.*, 258 B.R. 580, 582 (Bankr.S.D.N.Y. 2001) (stating that Rule 2004(b) permits discovery of

“any matter which may affect the administration of the debtor's estate”); *In re Coffee Cupboard Inc.*, 128 B.R. 509, 514 (E.D.N.Y. 1991).

The proposition stated above is self-evident – Rule 2004 should be freely available to parties in interest in active cases as a means to discover facts regarding case administration but is procedurally inapplicable when there is nothing to discover about current estate administration and when no activity in a case is required other than to close it. That is precisely the situation presented by Ms. Hilsen. The Application seeks discovery in a case that is more than a generation old in which the Trustee filed his Final Report and a final decree was once entered.

There is a presumption that a chapter 7 case has been fully administered if no objection is filed to the trustee’s final account and report within thirty days. Fed. R. Bankr. P. 5009. *See also, In re Ginsberg*, 164 B.R. 870, 873 (Bankr.S.D.N.Y. 1994). Ministerial functions yet to be performed do not prevent a case from being considered fully administered. 3 Collier on Bankruptcy ¶ 350.02[2] (15th ed. rev. 2007); *Matter of Wade*, 991 F.2d 402, 407 (7th Cir. 1993).

Even though the final decree was vacated and the case is open on the docket, there is no doubt that the case has been fully administered in all respects and is ready for a final decree to be entered for the second time. Debtor’s case previously was closed by final decree on February 3, 2007, and was reopened on June 1, 2007, not for purposes of administering assets, but to cure a clerical error. Once the Clerk’s Office grants a discharge to the Debtor, a final decree can be entered again.

Even if the case were not ripe for entry of a final decree, the Application still would not satisfy the requirements of Rule 2004. The Application seeks information

about historical events that have no current relevance to “any matter which may affect the administration of the debtor’s estate.” The discovery requested in the Application conceivably could be helpful to Ms. Hilsen as she tries to find her long-missing artwork, but whatever clues she may uncover relate exclusively to her lost property and are not calculated to obtain any facts relating to the Debtor or estate administration. The Court understands her desire to conduct an investigation, but Rule 2004 is designed to be used in active cases and does not provide the authority to undertake what amounts to a private investigation under the guise of bankruptcy-related discovery.<sup>7</sup>

**CONCLUSION**

The Application fails to satisfy the requirements of Rule 2004 and is denied for the reasons stated.

IT IS SO ORDERED.

Dated: New York, New York  
July 25, 2008

*s/James M. Peck*  
\_\_\_\_\_  
HONORABLE JAMES M. PECK  
UNITED STATES BANKRUPTCY JUDGE

---

<sup>7</sup> The Court’s finding that Ms. Hilsen is not entitled to the discovery requested under Rule 2004 is without prejudice to her substantive rights and claims, if any, with respect to the missing sculpture or to any proper request for discovery that she may make in another forum.