

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

NOT FOR PUBLICATION

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In re : Chapter 7
AARON GELBWAKS, :
 : Case No. 94-B-45183(PCB)
 Debtor. :
-----x

DAVID KITTAY, as Trustee :
 :
 Plaintiff, : Adv. Pro. No.03-08978
 -against- :
 :
 AARON GELBWAKS, :
 :
 Defendant. :
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APPEARANCES:

Kittay & Gershfeld, P.C.
Attorneys for Chapter 7 Trustee
100 White Plains Road
Tarrytown, NY 10591
By: David Kittay, Esq.

Wayne Greenwald, P.C.
Attorneys for Debtor-Defendant
99 Park Avenue, Suite 800
New York, NY 10016
By: Wayne Greenwald, Esq.

MEMORANDUM DECISION VACATING ORDER
DENYING DEBTOR'S DISCHARGE

BEATTY, Prudence Carter, U.S.B.J.

David R. Kittay, the Chapter 7 trustee (the "Trustee")
brought this adversary proceeding seeking to deny the discharge of the

Debtor, Aaron Gelbwaks (the "Debtor")¹ on two grounds: first, a failure to produce books, records and documents the Trustee wants to review and second, a failure to explain why his assets were insufficient to pay his liabilities. In September 2004, the Trustee filed a motion for summary judgment on both counts.

On November 16, 2004, the motion came before the court for a hearing. Neither the Debtor nor his counsel, Wayne Greenwald, were present. Nor had any written response been filed. The Trustee's counsel asked that the summary judgment motion be granted on default. Having been advised that counsel for the Debtor had been clearly informed of the date of the hearing, the court granted the motion without requiring the Trustee's counsel to call the Mr. Greenwald to find out why he was not present, a practice which the court usually follows. The court should have followed this practice in this case since the Debtor and his counsel routinely showed up at hearings.

The court thought that the Debtor and his counsel had determined not to defend against the summary judgment motion, for some reason. As it turned out, as stated in Mr. Greenwald's papers seeking to set aside the order, he had calendered the matter for the following week. The Trustee pooh-poohs Greenwald's mistake by pointing to a fax

¹ The Debtor filed a Chapter 11 petition on November 7, 1994. Thereafter, on July 19, 1995, a Chapter 11 Trustee was appointed. The case was converted to Chapter 7 on March 25, 2003.

sent to Mr. Greenwald which sets forth the date of the adjourned hearing. The "re" line on that fax also lists another, totally unrelated, case that was being adjourned to the same date. This other case must have been adjourned since Debtor's counsel did not appear for that case and could well have assumed the two cases had been adjourned together.

A main focus of the Trustee's inquiry is a \$34,000 pre-petition check that the Debtor received. The Trustee argues that the Debtor stated at his 341 meeting that he had no income in 1994, the year the check was received. The word income has different meanings to different people. Most people think it means earned income. A one-time payment from a single source such as a savings account would not necessarily be considered by someone as earned since it was not earned that year. But even if the Trustee is correct and the payment was an improper transfer to the Debtor, the Trustee would still have to collect it from the Debtor, which may be impossible. An additional \$34,000 in this case, however, would provide no meaningful distribution to creditors. The more than \$300,000 turned over to the Trustee by the former Chapter 11 trustee is insufficient to pay more than a portion of the priority claims. Moreover, some of that \$300,000 was also reduced by the Chapter 11 trustee's fees, the Chapter 11 accountant's fees and the Trustee's counsel fees.

Ten years after the fact, there seems to be little or no point in culling through four years of the Debtor's pre-petition records of the matters he handled for his clients in the hope of finding some outstanding receivable. The Trustee also wants the Debtor to produce certain schedules from a particular tax return, even though the Trustee already has a copy. Why does he need another?

Likewise, the Debtor's failure to file operating reports during the course of the Chapter 11 case need not be remediated. All those reports would show is whatever income was earned by the Debtor that was NOT property of the estate, as well as his expenses which were administration expenses.

If there is someone from whom the Trustee should be seeking answers it is the Chapter 11 trustee, Alexander Schacter. The Chapter 11 trustee sold a number of the Debtor's assets during his rather desultory administration. It was apparently the unexpected (to the Chapter 11 trustee) tax liability on the last sale that finally caused the case to be converted. The Chapter 11 trustee should have all of the documents relative to the properties he sold. His accountants spent a lot of time on the case.

The time has come for the Trustee to review what he has, spend at least several hours with the Chapter 11 trustee, look at all of the documents that were docketed before he was appointed and call it a day, unless he can find something large enough to produce a return to

creditors. The Trustee's firm has already received over \$80,000 in fees without collecting any assets. A bankruptcy trustee's efforts must include an attempt to maximize the return to creditors and not the trustee's firm's coffers.

The Debtor's motion to vacate the order denying his discharge is GRANTED.

Debtor's counsel to settle order.

Date: New York, New York
June 9, 2005

/s/ Prudence Carter Beatty
United States Bankruptcy Judge