UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE

In re: Bk. No. 99-12517-JMD
Chapter 7

Charles Kalantzis,
Debtor

J. Christopher Marshall, U.S. Trustee,
Katherine Porter, and
Kristen Bowman,
Plaintiffs

v. Adv. No. 99-1173-JMD

Charles Kalantzis,
Defendant

Geraldine B. Karonis, Esq.
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MEMORANDUM OPINION AND ORDER

I. BACKGROUND

On June 8, 2000, this Court conducted a trial regarding a complaint filed by Absolute Financial Services, LP ("Absolute Financial") pursuant to 11 U.S.C. § 727 seeking denial of the Debtor's discharge. After Absolute Financial had rested its case the Defendant moved for a directed verdict. The Court then took a lunch recess to consider the motion. Upon returning from the lunch recess the parties informed the Court that a settlement had been reached. The Court required the settlement to be served upon creditors, the trustee, and the United States Trustee's ("UST"), prior to approval. After being served, the UST and two creditors, Katherine Porter ("Porter") and Kristen Bowman ("Bowman"), objected to the settlement. The parties amended their settlement and the UST, Bowman, and Porter

objected for a second time. The Defendant then withdrew the settlement and Absolute Financial indicated that it no longer wished to pursue the action.

On October 4, 2000, the Court held a hearing regarding a motion by Katherine Porter ("Porter") and Kristen Bowman ("Bowman") to be substituted as plaintiffs in this adversary proceeding. At that time, the Court also heard the United States Trustee's ("UST") request to be substituted as a plaintiff in the proceeding. The Court granted the motions and allowed the UST, Bowman, and Porter (collectively, the "Substituted Plaintiffs") to be substituted as plaintiffs. At the hearing the parties raised the issue of reopening the evidentiary record. The Court entered a separate procedural order allowing the parties to submit memoranda regarding the issue of reopening the record. See Doc. No. 42. Pursuant to the order, the UST has filed a memorandum seeking to have the record reopened.

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the "Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire," dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

II. DISCUSSION

Decisions regarding motions to reopen the record to submit additional proof are within the discretion of the trial court. Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 331 (1971). When deciding whether to reopen the record, the First Circuit Court of Appeals has held that, "[a]mong the material factors which should be assessed by the trial court are whether: (1) the evidence sought to be introduced is especially important and probative; (2) the moving party's explanation for failing to introduce the evidence earlier is bona fide; (3) reopening will cause no undue prejudice to the nonmoving party." Rivera-Flores v. Puerto Rico Tel. Co., 64 F.3d 742, 746 (1st Cir. 1995) (citations omitted).

In Rivera-Flores, the trial court allowed the record to be reopened by the plaintiff when the plaintiff's request was made immediately after the plaintiff rested and the defendant had moved for a

judgment as a matter of law. Id. at 745. Further, the court noted that the delay would be minimal as at least some of the evidence needed appeared to be already attached to the defendant's papers. Id. at 747. The court specifically stated that, "the record bears out the contention that Rivera refrained from introducing the undisputed evidence . . . not because she lacked proof but solely because she reasonably understood that the district court's subject matter jurisdiction had been settled prior to trial." Id.

In a subsequent case decided by the First Circuit Court of Appeals, Blinzler v. Marriott Int'l, Inc., 81 F.3d 1148 (1st Cir. 1996), the court affirmed a trial court ruling to reopen the record when the motion to reopen was made immediately after the plaintiff rested and the defendant had moved for a directed verdict. Id. at 1160. In so doing the court stated that,

> [i]f the additional evidence is immediately available or nearly so, the trial court will have a greater incentive to permit the case to be reopened. Conversely, if gathering the additional evidence portends a significant delay in the trial, the court ordinarily will have a greater reluctance to grant the motion.

Id.

In his motion to reopen the evidentiary record the UST has also requested that the Court reopen discovery to permit the UST to obtain certain documents which would then be introduced into the record. The UST has relied primarily upon Rivera-Flores and Blinzler as support for the motion. The UST claims that all of the elements of Rivera-Flores have been met and that, as in Blinzler, the prejudice is minimal because the Defendant has yet to put on his case. The Court, however, finds that the UST's reliance upon these cases is misplaced. The UST is not only seeking to reopen the record to put in evidence, the UST also wants discovery reopened. Neither, Rivera-Flores nor Blinzler stand for the position that discovery can be reopened once half of a trial has already taken place. To the contrary, both cases involved reopening of the record when the evidence and/or witnesses were already known and readily available. See Rivera-Flores, 64 F.3d at 747; Blinzler, 81 F.3d at1160. In fact, the court in Blinzler specifically stated that significant delays in the trial weigh against reopening the record. Blinzler, 81 F.3d at 1160.

The Court finds that granting the motion to reopen the evidentiary record in this case would lead to delay and be unjust. If the motion were to be granted, the UST would have to be given time to conduct the requested discovery and the Defendant would have to be given time to do discovery as well. The trial would then proceed with the Substituted Plaintiffs reopening the evidence. Not only would there be a delay, the delay would be significant. Such delay would also be unjust to the Defendant. The Defendant in a section 727 action should be able to rely on the Court's pretrial scheduling order and the results of discovery. The purpose of discovery is to permit all parties to determine what evidence is likely to be presented at trial and to permit the parties and their counsel to prepare their examination and cross examination of witnesses, identify exhibits to be presented at trial, stipulate to uncontested issues, develop trial strategy, and consider settlement possibilities. The Defendant's counsel may well have taken a different approach to the cross examination of Absolute Financial's witnesses if the documentary discovery sought by the UST had occurred. He might have advised his client prior to commencement of the trial to perform additional discovery, to identify additional witnesses, or to pursue settlement possibilities. However, the Court is not in a position to determine what might have been. The only way to provide the Defendant with the benefits he was entitled to receive under the pretrial order would be to, in effect, un-ring the bell by reopening discovery for all parties and conducting a new trial. In the absence of any allegations of discovery misconduct or concealment by the Defendant or his counsel, such actions by the Court would be manifestly unjust.

Moreover, section 727 complaints are claims that the bankruptcy system itself has been abused. Section 727 claims do not belong to a unique and specific creditor, but belong to all parties in interest. The UST or any other creditor could have pursued the section 727 action. If the UST was unhappy with Absolute Financial's handling of the case, then it was up to the UST to intervene in the adversary proceeding. The UST was apparently content to sit by and allow Absolute Financial to pursue the action and only now, after Absolute Financial has rested, wishes to get involved. The UST made a decision to stand on the sidelines and cannot now seek to go back and start from the beginning because he is not happy with the discovery and trial conducted by Absolute Financial.

III. ORDER

1. The motion by the UST to authorize limited discovery and to reopen the evidentiary record is **denied**.

2. The Defendant's motion for a directed verdict is **denied**.

2. Pursuant to the Court's order dated December 1, 2000, the trial in this matter will resume on January 16, 2001 at 9:30 a.m. with the presentation of the Defendant's case.

This opinion and order constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052.

DATED this 12th day of December, 2000, at Manchester, New Hampshire.

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J. Michael Deasy
Bankruptcy Judge