23-1322

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

IN RE RICHARD JOSEPH LEGENZA
Debtor
****

GINA DEL ROSARIO
Plaintiff-Appellee
V
Docket #: 23-1322

RICHARD JOSEPH LEGENZA
Debtor-Defendant-Appellant

FINAL BRIEF FOR APPELLANT

October 21, 2024

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Appellant Richard Joseph Legenza, a debtor, appeals pursuant to 28 U.S. Code § 1291 from a Final Order of the United States District Court for the Western District of New York dated July 26, 2023, Hon. John L. Sinatra, ([270], Dkt. 16)* affirming a Final Order of the United States Bankruptcy Court for the Western District of New York dated October 20, 2022, Hon. Carl L. Bucki, denying him a discharge in bankruptcy. [265] Dkt 1-2.

The issues presented include the Bankruptcy Court's granting of summary judgment in the face of unresolved material facts and the District Court's refusal to apply case law regarding the debtor's justification for loss of business records.

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*Citations to the Appendix; plus 2d Cir appellate docket in this case will be cited as "Dkt." Citations to the docket of underlying bankruptcy case (No. 21-1036) will be cited as "Bankr Dkt"

FACTS

This case concerns a loan that Gina Del Rosario, the plaintiff-appellee made to Legenza for the purpose of developing a casino-based game called "Wild Aces." On April 3, 2015, the parties executed a Loan and Royalty Agreement ([4] Dkt 03-4) in which they acknowledge a "loan" in the amount of $70,000. Legenza actually borrowed $58,000, but the $70,000 in the Agreement includes interest on the loan; ([15] Dkt 6-10 ¶ 8) he paid the Plaintiff royalties from the licensing of the game of $42.50 per month for about a year, but when licensing revenue stopped, he could pay no further royalties. He did later pay a partial lump sum settlement of $4,200. [19] Dkt 6-10 ¶ 16. The money Legenza borrowed was not deposited in a bank but was maintained as cash. [21] Dkt 6-10 ¶ 21. Although Legenza maintained a bank account, it was solely to render payment to Del Rosario from the revenue received from the location in which Wild Aces was being played. *Id.* He kept a cash journal along with other business papers. *Id.* Legenza is an experienced salesman and made regular local sales calls and sales trips to California, meeting with casino managers, seeking to place Wild Aces on blackjack tables, train staff, and obtain revenue-producing licensing opportunities. He also pursued casinos in other locations including Ontario, Canada, and succeeded in placing a trial installation in Niagara Falls, Ontario. *Id* at [17] ¶ 11, 12. After several flights to the Western New York

area, it became apparent that living in this area would allow closer supervision of a potentially lucrative customer, so he moved to Amherst, New York (about 25 miles from the casino. https://www.google.com/maps/dir/amherst+ny/Niagara+Falls,+Ontario,+Canada). The family's household goods and Legenza's business records were packed and sent with a moving company that misplaced several boxes, and the records were lost. [21] Dkt 6-10 ¶ 21.

Mr. Legenza's business had partial success with trial placements of Wild Aces in several locations in Nevada ([12] Dkt 6-10 ¶ 3) and later in Niagara Falls, Ontario ([17] Dkt 6-10 ¶ 11, 12), but the COVID epidemic closed the casinos on both sides of the border. Ontario's were closed for 15 months. ([20] Dkt 6-10 ¶ 19) Del Rosario then opted out of the agreement ([19] Dkt 6-10 ¶ 16) and on June 3, 2020, brought suit against Legenza in Nevada state court alleging breach of contract and fraud. [20] Dkt 6-10 ¶ 19. While that case was pending and legal fees mounting, Legenza filed for bankruptcy in United States Bankruptcy Court for the Western District of New York. [21] Dkt 6-10 ¶ 20. On November 22, 2021, Del Rosario commenced this adversary proceeding requesting that the Bankruptcy Court deny Legenza discharge in bankruptcy. [229] Dkt 1. Del Rosario then moved for summary judgment, seeking "a judgment on Count III o f her Amended Complaint, determining that [Legenza] was not entitled to a discharge under 11

U.S.C. §727 (a) (3)" because Legenza failed to preserve recorded information from which his financial condition or business transactions might be ascertained. ([10] Dkt 5-2) Legenza responded in opposition to Del Rosario's motion and cross moved for summary judgment. [11] Dkt 6-9 – 7-9. Del Rosario replied. Dkt 7-10.

On October 20, 2022, Chief United States Bankruptcy Judge Carl L. Bucki issued a Decision and Order granting Del Rosario's motion for summary judgment and denying Legenza's cross motion. [265] Dkt 7-12. The court concluded that Legenza "will be denied a discharge" pursuant to 11 U.S.C. § 727 (a) (3), and ordered that the adversary proceeding be closed. *Id.* On November 3, 2022, Legenza filed an appeal in District Court arguing that the court "should have given a closer examination—a trial—in order to properly consider whether an across-the-board denial of a discharge was a fair and just remedy." See [183] Dkt. 9 p35. Del Rosario opposed, see [184] Dkt 10, and Legenza replied. [213] Dkt 13. The District Court issued and Decision and Order by Hon. John L. Sinatra, dated July 26, 2023, affirming the Bankruptcy Court Order ([270] Dkt 16), and Legenza appealed.

POINT 1

THE PLAINTIFF-CREDITOR HAD COMPLETE AND ACCURATE INFORMATION CONCERNING THE STATUS OF THE DEBTOR'S BUSINESS AFFAIRS, ACTIVITIES AND FINANCES

The applicable section of the bankruptcy code: 11 U.S.C. § 727 (a) (3), which pertains to record keeping, 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.

The District Court Decision quoted the statute and went on to explain its purpose:

> The "purpose of § 727 (a) (3) is to give a creditor and the Bankruptcy Court complete and accurate information concerning the status of the debtor's affairs and to test the completeness of the disclosure requisite to a discharge." *In re Erdheim,* 197 BR. 23, 29 (Bankr ED NY 1996) (quoting *In re Artura,* 165 BR. 12 (Bankr ED NY 1994)). Dkt 16 p4.

No evidence was put forth that Richard Legenza concealed or destroyed or mutilated or falsified any recorded information. Mr. Legenza "kept" books and records in the sense that he maintained a cash journal and collected receipts for various expenses, but he did not "preserve" those records for the filing of his bankruptcy since they were lost during the move of his family to Western New York. The records themselves were limited to expenses since the only revenue

Wild Aces produced during the contract period was from the installation at the Las Vegas Hilton (a/k/a Westgate Resort) which ended in spring of 2016. and Del Rosario had received monthly checks for her royalty from the profits. Lacking original documents, Mr. Legenza sought to provide copies of some invoices for airline tickets, moving costs, and his family's temporary stay in Western New York while awaiting arrival of their vehicle, household goods, and boxes of records and miscellaneous items (which never arrived). He also provided a list of Reconstructed Expenses ([132] Dkt 7-8 Exhibit AA) based on recollection of activities.

The statute requires "any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained," (§ 727 (a) (3)) but it does not specify only contemporaneous records or only records prepared by third parties. The law "does not require that if they are kept they shall be kept in any special form of accounts." *In re Underhill* 82 F2d 258 (2d Cir), *cert. denied,* 299 U.S. 546 [1936]. It would be unfair to compare Mr. Legenza's recollections with those of the debtor in *In re Artura* (165 BR 12 [ED NY 1994]) who "as witness, was barely credible."

Both the Bankruptcy Court and the District Court ignored the fact that Mr. Legenza met regularly with the Plaintiff ([15–17] Dkt 6-10 ¶ 7, 9, 11, 13) and he

fully informed the Plaintiff of his sales trips in California and Nevada. Initially, the only revenue was coming from the Hilton Las Vegas ([16] Dkt 6-10 ¶ 10) After it became apparent that further marketing efforts in the western states were not successful, he made several trips to Ontario during which he successfully placed a trial of Wild Aces in Casino Niagara. He informed De Rosario and her husband of his move from Nevada to Western New York to devote more attention to the trial of the game. Mr. Legenza's meetings with the Plaintiff then took place by phone during which he answered questions put by the Plaintiff and her husband. Although the Plaintiff denied Legenza's claim to have kept the Plaintiff fully informed, his factual allegations must be taken as true in the context of the Plaintiff's summary judgment motion.

The cases cited by the District Court in which a lender or creditor is kept in the dark by a debtor's absence of records, lack of memory, and inability to explain the details of their business are nothing like the relationship between the Plaintiff and Mr. Legenza.

The Plaintiff's summary judgment motion relied on the debtor's lack of records to give the Bankruptcy Court complete and accurate information concerning the status of the debtor's affairs even though the Plaintiff had already acquired complete and accurate information concerning the status of the debtor's

affairs in real time. In contrast, the Bankruptcy Court, its judge, clerks, and trustees, raised no issue about any lack of records. Mr. Legenza's petition, schedules, and testimony at his 341 meeting were sufficient for their purposes. The only objection came from the one creditor who was kept fully informed.

POINT 2

THE DISTRICT COURT'S IMPROPERLY REJECTED THE DEBTOR'S JUSTIFICATION FOR THE LOSS OF RECORDS AND THE AUTHORITY OF *IN RE BRENES*

The District Court relied heavily on *In re Cacioli,* 463 F3d 229, 235 (2d Cir 2006) which it cites four times ([273–275, 280] Dkt 16 pp 4, 5, 6, 11), emphasizing the "two-step approach" in which the creditor has the initial burden to show that the debtor "failed to keep and preserve any books or records from which the debtor's financial condition or business transactions might be ascertained." Mr. Legenza did not "fail[ ] to *keep*" books and records; he used, kept, and made entries into a cash journal and saved receipts for various expenses, but his record keeping went far beyond that:

> 7. I kept a record of my contacts in binders, including names of management personnel, dates and times of contact, and expenses directly associated with the calls on each casino. I created a binder for each set of casinos I saw in a fiscal month, listing names of each contact, dates of contact, contact numbers, and points of various

> discussions that were held. At the start of each month I would change the cover page in each binder to reflect new month and update any information. That kept me current with any dialog being exchanged on a regular basis. I also used card holders with each person's business card I'd collected and kept with the respective binders for each group of casinos . This was done this way because, over time, earlier casinos would be further along in any potential placement scenario versus newer ones. when moving company didn't deliver boxes they also didn't deliver this accumulated material which included costs for the trip and expenses incurred during the trip. [15] Dkt 6-10 ¶ 7

This collection of binders and their accumulated contents was central to his business activities, and was a visual aid when he briefed Del Rosario and her husband on the progress of his sales efforts. It also would more than fit the definition of "books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained" (11 USC 727 (a) 3) more completely than his cash journal alone.

Although Legenza *kept* these records, he did not *preserve* the records because they were lost by movers when he and his family came to Western New York. As explained above, the move itself was business related, necessitated by his sales efforts shifting to Ontario, Canada. He had been unsuccessful in Nevada and California, but had secured a trial placement with the casinos of Ontario, Canada. Multiple trips to Ontario from Nevada proved costly, and moving closer to the customer was a logical business move.

Both the Bankruptcy Court and the District Court appear to assume, a priori, that packing financial records, receipts, journals, multiple loose leaf binders, business cards, schedules, maps, contact lists and entrusting them to a moving company was reckless or careless, but no one presented evidence that hiring professional movers is irresponsible by definition. The implication that other means of transport may have been more secure is speculation, and does not render using professional movers patently inadequate. The District Court compared Mr. Legenza to the debtor in *In re Buzzalli* 246 BR 75, 97, 98 Bankr Court, [WD PA 2000] who testified vaguely that all his records were lost because he had moved several times, and so was unable to explain any of several losses of paperwork pertaining to multimillion dollar assets including multiple Ferrari automobiles, art collection, and fine wine. Legenza's loss was attributable to a specific event followed by efforts to recover the missing items. *Buzzalli* demonstrated a failure not only to *preserve* business records but to *keep* records in the first place.

The Bankruptcy Court also assumed that if only Mr. Legenza had used a bank account rather than a cash journal, that his loss of a discharge could have been avoided. They overlook the trajectory of Mr. Legenza's business which involved no sudden catastrophic losses. Except for some initial success in placing the Wild

Aces game in the Las Vegas Hilton plus non-paying trial placements in other locations including the Niagara Casino, there was no revenue. Any record, whether bank withdrawals or cash journal entries, would show a steady erosion of the $58,000 over a 2-1/2 year period, consistent with sales and marketing expenses laid out in the reconstructed expenses ([132] Dkt 7-8 Exhibit AA)

In the appeal to the District Court, Mr. Legenza cited multiple cases that dealt with the issue of justification pursuant to § 727 (a) (3), but the District Court repudiated them out of hand in footnote 2:

> 2. The Court rejects Legenza's argument that the Bankruptcy Court should have applied the standards set forth in *In re Brenes,* 261 BR 322, 329 (Bankr D Conn. 2001) to assess justification. See Dkt. 9 at 13-17; Dkt. 13 at 14. The test in *Brenes* is derived from *In re Sethi,* 250 BR. 831, 838 (Bankr ED NY 2000), which articulated factors relating to the first prong of the test—i.e. "whether the records produced by the debtor are sufficient." *In re Sethi,* 250 BR. at 838. Indeed, the Second Circuit recognizes that "some courts seem to mix up the creditor's proof of whether the debtor failed to keep records with the debtor's proof of justification." *In re Cacioli,* 463 F3d at 236 (internal citation omitted). This is "problematic because different parties have the burden of proof on the statutory elements of lack of records and of justification." *Id*. As such, this Court declines to apply that test to assess justification. 275, Dkt 16 p 6.

Declining “to apply that test to assess justification” was an extreme abuse of discretion on the part of the District Court. A better analysis lay in the *Cacioli* decision itself which said: “Other courts have looked to vastly similar factors to

determine whether the debtor has shown 'justification' for the absence of records under all of the circumstances of the case. See *Meridian Bank,* 958 F2d at 1231." *Cacioli* at 236. The term "vastly similar factors" sounds like a term that could describe identical twins, and the *Cacioli* court only notes that the confusion is problematic when the burdens of proof are conflated. *Id* at 236. The *Cacioli* case was able to sort out the burdens of proof, and the same can be done with the instant case without resorting to amputation and discarding of the well-reasoned set of standards set forth in *In re Brenes,* 261 BR 322, 329 (Bankr D Conn. 2001).

Since the District Court chose to reject the authority or application of *In re Brenes,* it effectively ignored the arguments in the appellant's brief that followed it, ([153] Dkt 9 p 8 et seq) necessitating that they be substantially repeated.

The procedural standards for evaluating a debtor's justification for not producing financial records is outlined in *In re Brenes,* 261 BR 322, 329 (Bankr Court, D Conn [2001]):

> Once a plaintiff has established a prima facie case that the debtor concealed, destroyed, or failed to keep material records, the burden of proof shifts to the defendant to furnish credible, rebuttal evidence that such act or failure was justified. E.g., *In re Blonder, supra,* 258 BR. 534; *In re Hecht,* 237 BR. 7, 9 (Bankr D Conn. [1999]); *In re Moreau,* 161 BR. 742, 746 (Bankr D Conn.[1993]); *United States Fidelity and Guaranty v Delancey (In re Delancey),* 58 BR. 762, 767 (Bankr SD NY[1986]).

Section 727 (a) (3) does not specify what constitutes justification for maintaining inadequate records, but rather it requires the court to make a determination based upon all the circumstances of the case. *In re Halpern,* 387 F2d 312, 314 (2nd Cir[1968]) ("What constitutes adequate record keeping, `is a question in each instance of the reasonableness in the particular circumstances' "), quoting *In re Underhill, supra,* 82 F2d at 259-60; *Meridian Bank v Alten,* 958 F2d 1226 [3d Cir 1992]).

> In considering a debtor's justification for missing records, the court may consider:
> 1. Whether the debtor is engaged in business, and if so, the complexity and volume of the business;
> 2. The amount of the debtor's obligations;
> 3. Whether the debtor's failure to keep or preserve records was due to the debtor's fault;
> 4. The debtor's education, business experience and sophistication;
> 5. The customary business practices for record keeping in the debtor's type of business;
> 6. The degree of accuracy disclosed by the debtor's existing books and records;
> 7. The extent of any egregious conduct on the debtor's part; and
> 8. The debtor's courtroom demeanor, *In re Sethi, supra,* 250 BR. at 838.

Applying each standard to Mr. Legenza's case, consider the following:

(1.) Whether the debtor is engaged in business, and if so, the complexity and volume of the business. No question that Mr. Legenza was in business, but what

was its complexity and volume? He was the creator of Wild Aces, a blackjack side wager, referred to herein as "the game,"and his job was to market it to casinos. Casino games can be complex to design and test, but there was little complexity in leasing them to casinos: He sold only one product; he had no employees; he operated by himself and followed a one-man marketing and leasing plan of soliciting casinos, making cold calls for presentation appointment, giving presentations and demonstrations, and arranging trial installations. His hope was that Wild Aces would soon be readily accepted by numerous casinos just as it was at the Las Vegas Hilton. If it had been, Mr. Legenza may have been compelled to hire assistants, trainers, solicitors, or additional leasing personnel, but it was not, and he succeeded only in making one paying installation of the game and arranging three trial installations in Nevada, and a trial installation in Ontario, Canada. [12] Dkt 6-10 ¶ 3. Clearly, the volume was very limited as was the complexity and the revenue extremely limited, requiring minimal record keeping.

(2.) The amount of the debtor's obligations. The amount owed the plaintiff was significant, but it was directly tied to the revenue received from the sale and installation of Wild Aces, which was not happening. After 2-1/2 years, at the election of the plaintiff, Mr. Legenza was obligated to pay $70,000 to the Plaintiff and was obligated to apply all revenue from the game toward that end. There were

no specific obligations to the Plaintiff in terms of reporting and record keeping, nor were there any restrictions on the use or application of the borrowed funds other than they were intended for the promotion of Wild Aces, and by the terms of the agreement, such application was spread over a 30 month period. Accordingly, there was a financial obligation based on the revenue received from Wild Aces, the game, but there were no specific record-keeping or reporting obligation. Nevertheless, Mr. Legenza met regularly and repeatedly with the Plaintiff and her husband, and discussed his leasing activities as well as his continued plans in marketing the game. [18–19] Dkt 6-10 ¶ 14, 15, 17.

(3.) Whether the debtor's failure to keep or preserve records was due to the debtor's fault. Mr. Legenza has affirmed that although he maintained the loan proceeds in cash, he kept a cash journal to record expenses. [21] Dkt 6-10 ¶ 21. His error was in placing his financial and marketing records in the hands of the movers who brought all his family's personal property from Las Vegas to Western New York. If he had driven here, it may have been considered negligent not to put it in his car, but he and his family flew to New York, and trusted the records, as well as boxes of family pictures and personal items, would arrive with the furniture. Nevertheless, the records, that were lost pertained mostly to his marketing and leasing activities in Nevada and California, two markets he had left with the

intention of spending his leasing efforts in Ontario and other parts of Canada. He never considered bankruptcy at the time, hoping to be successful with the trial in Niagara Falls, Ontario. It was only after the COVID pandemic shut down casinos everywhere, and the Plaintiff brought her lawsuit, that bankruptcy became an option Richard Legenza had to consider.

(4.) The debtor's education, business experience and sophistication. Mr. Legenza has attested to his extensive experience in creating, marketing, and leasing, but he has never claimed to be particularly skilled in accounting or bookkeeping. The fact that using a checking account rather than keeping cash and a cash journal would ultimately have allowed easier reproduction of records did not occur to him. More importantly, however, the only individual to whom he felt he owed a responsibility for reporting activities was the Plaintiff herself which is why he communicated regularly with her, advising her of where he had gone and his progress in reaching the decision makers at the various casinos.

(5.) The customary business practices for record keeping in the debtor's type of business. Similar to question number 1, this asks for customary business practices for the work Mr. Legenza was doing. Although some traveling sales personnel must keep detailed records to obtain reimbursement from an employer, Mr. Legenza was never required to do so either by the agreement with the Plaintiff

or pursuant to any request on the Plaintiff's part. In fact, whether Mr. Legenza was spending his own money or the funds he had borrowed from the Plaintiff, his obligation to the Plaintiff was the same: pay a percentage of revenue received. Any expense for marketing and leasing was his expense.

(6.) The degree of accuracy disclosed by the debtor's existing books and records. While actual receipts would be ideal, Mr. Legenza's reconstruction of his expenses were entirely consistent with reality. He claims no expense for "miscellaneous." The range of expenses was very limited: airline fares, car rental, gas, hotel fees, and meals with prospects for the various trips he made to California and Ontario; and even more limited with local travel in the Las Vegas area. The costs associated with those activities are not esoteric to Mr. Legenza's business; they are common to thousands of traveling salespeople, well known, and readily available. Added to these expenses were the costs of moving to Western New York to be close to Ontario in which a trial installation of Wild Aces was being played, costs for which he did have documentation. Although costly, the move was ultimately a saving due to reduced living expenses, and the proximity to Ontario eliminated the need to make repeated flights from Las Vegas. All this could be explained in greater detail if Mr. Legenza had the opportunity to testify.

(7.) The extent of any egregious conduct on the debtor's part. The Plaintiff

highlighted several stark examples drawn from a rich legacy of cases in which debtors were denied discharges due to egregious conduct. The debtor in *In re Artura,* 165 BR 12 (Bankr Court, ED NY [1994]) is a virtual poster boy for egregious conduct As president and sole stockholder of his Corporation, he purchased the assets of another business, guaranteed a $25,000 promissory note, and pledged assets which he subsequently sold or concealed. He opened businesses in Flushing and Great Neck but provided no books or records, claimed he never earned enough to file taxes, produced no personal records, failed to provide an adequate explanation for the disappearance of assets he purchased, sold some assets and could not explain what he did with the proceeds. At trial, he "was barely credible [and], either failed to remember or . . .without detailed information and responded vaguely to specific questions asked." Id. at 14.

The *Artura* case also features a rogues gallery of similar miscreant debtors in this passage:

> The Bankruptcy Courts have consistently denied a debtor a discharge for failing to keep records from which the debtor's financial status and business dealing might be ascertained. See, e.g., *In re Bujak,* 86 BR. 30 (Bankr WD NY [1988]); *In re Milano,* 35 BR 89 [Bankr SD NY 1983], (disclosure of financial condition is prerequisite to obtaining a discharge); *In re Switzer,* 55 BR 991 [Bankr SD NY 1986] (debtor unable to produce documentary evidence to trace funds denied discharge); *In re Delancey,* 58 BR 762 [Bankr SD NY 1986]) (debtor's failure to produce adequate records to allow creditor to ascertain his

financial condition warranted denial of discharge). *Artura* at 15.

A hallmark of these cases is the debtor's failure to satisfactorily explain what happened to the money that was borrowed, the assets that they sold or lost, and the implausibility of the explanations given. Mr. Legenza's situation is nothing like the egregious cases described above and cited by Artura. He had no significant assets other than the funds he borrowed from the Plaintiff and applied to the everyday expenses of marketing and leasing over a 30-month period. He suffered no catastrophic loss, only a steady depletion of resources which, unfortunately, produced no significant revenue to offset the expenses. He made no large transfers and incurred few expenses beyond regular sales travel expenses other than the costs of moving to Western New York and the extended stay in a hotel due to unanticipated delay in moving into a more permanent residence, expenses for which Mr. Legenza had at least some documentation. [95] Dkt 7-8 Exhibits W1–Y2)

The debtor's courtroom demeanor. Mr. Legenza's courtroom demeanor has yet to be determined since he has never had his day in court. There has not even been a deposition of the Defendant. The debtors in the foregoing cases testified and were cross-examined either at trial or in depositions, and in each case their ability to explain their financial situations or produce pertinent documentation was

challenged and found wanting. Richard Legenza's explanation of his situation in his Supporting Affidavit, which the court was bound to accept as true for the purpose of the summary judgment motion, was nevertheless rejected. Instead. The court simply accepted the conclusions promoted by the Plaintiff.

Consider also the facts in the case of *In re Brenes* (261 BR 322 [Bankr Ct., D Conn 2001]). Dr. Brenes was an Officer, Shareholder and Director of a solo medical practice and was aware of all corporate decisions. In 1994 and 1995, loans were made to the Debtor from some of his business entities, yet no formal records were generated. The Debtor invested substantial sums of his own money in the Offices including money from his children's savings. In addition, two mortgages totaling approximately $2.2 million were taken against the Offices. The *Brenes* court made the following finding:

> The Court has carefully examined the documents and records produced at trial and finds only a partial, not a complete or substantially complete, picture of the Debtor's financial affairs — the records produced at trial are insufficient to permit any party to reasonably and effectively trace, evaluate, and reconstruct a substantially complete financial history, and ascertain the present condition, of the Debtor's bankruptcy estate. *Id* at 332

Dr. Brenes invited the plaintiff to review records of the business, but the plaintiff cited *Matter of Esposito,* 44 BR. 817, 827 (Bankr SD NY [1984]) ("it is not the intent of the Bankruptcy Code to inflict upon the Trustee the burden of sifting

through every shred of the remaining records, no matter how great the cost, in the hope of piecing together a debtor's financial condition"). The court, however, contrasted Dr. Brenes from the debtor in *Esposito,* who ". . .was denied his discharge upon findings, inter alia, that he caused the destruction of most of the books and records of his company with obvious intent to conceal a fraud just several months before fleeing the country. Esposito's company was a substantial enterprise in the stream of commerce with liabilities in excess of $10 million and assets of at least $3.5 million. As the *Esposito* Court observed:"

> Significantly, all of the following books and records, which are generally maintained by corporations of [the company's] type and size, are missing: general ledger, general journal, cash receipts journal, cash disbursements journal, accounts receivable ledger, accounts payable ledger, bank statements and canceled checks, inventory and material cost records, invoices, purchase journals, sales invoices, sales journals, payroll records, stock certificate and minute books, fixed asset records, federal and state corporate tax returns and other business and payroll tax returns. *Matter of Esposito,* 44 BR. 817, 827 (Bankr SD NY [1984]). *Brenes* at 332

The *Brenes* court concluded that while Dr. Brenes was engaged in a complex medical practice and associated businesses, owned several parcels of real property, and the total amount of the obligations he seeks to discharge is significant, he is no Esposito. Esposito fled this country and was ultimately convicted of federal felony offenses. . . . There was no credible evidence of egregious conduct with Dr. Brenes,

concluding that, "The acknowledged failure to make certain records, as alleged, in view of all the circumstances of this case, was justified and is not fatal to the Debtor's bankruptcy discharge." *Brenes* at 332. Likewise, Mr. Legenza "is no Esposito," and should not be treated as though he is—at least not without a fair evidentiary hearing.

Consider also the case of *In re First,* (37 BR 275 [Bankr Court, ED Wis 1983]) in which two parties engaged in a joint venture formed for the purpose of developing mineral interests, drilling oil and gas wells and developing and operating a petroleum company. The venture took a turn that those aware of the facts of the instant case may find familiar:

> While the business arrangement began with extremely optimistic hopes, including a proposed purchase of an eight billion dollar bank in Italy and a shipping fleet in Panama, these ideas, as well as others, never materialized. Eventually, the business relationship ended on a sour note leaving in its path a number of unpaid bills and extremely bitter feelings between the parties. *Id* at 277.

And even more familiar would be the justification offered by the debtor for his failure to maintain financial records, leading the court to state:

> With respect to § 727 (a) (3), a court may, in its discretion, excuse any failure to keep or preserve records if circumstances justify such excuse. COWANS, BANKRUPTCY LAW AND PRACTICE, § 5.34 (Interim Ed. 1983). The Code section itself recognizes that circumstances may justify such failure. In this case, defendant acknowledged that some of his records were missing, but explained that on four separate

> occasions during one year, he was required to move, and that during the course of packing, unpacking and moving, some records were lost. However, defendant did, in response to plaintiff's request at the trial, produce books and records of the First-Lesperance venture. These included, among other things, the partnership agreement, financial statements and financial projections. In view of the foregoing, the Court does not believe circumstances exist which warrant a denial of defendant's discharge under § 727 (a) (3).
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> This Court is therefore satisfied that there is no sufficient basis in the record to deny discharge to defendant on any of the grounds submitted. As was stated in the case of *In re Schnoll* 31 BR. 909 (Bkrtcy ED Wis 1983), § 727 must be construed liberally in favor of the debtor. A denial of a discharge to a debtor is a step not to be lightly taken. *In re Terkel,* (7 BR 801 [Bkrtcy SD Fla1980]). *In re First* (37 BR 275, 277)

Consider also the case of *Matter of Martin* (554 F2d 55 [2nd Circuit 1977]) in which a stockbroker debtor failed to provide check stubs showing withdrawals and deposits of millions of dollars in connection with his securities transactions. The debtor testified that at the time of filing his bankruptcy he shipped most of his records, including his check stubs, to a warehouse. The records were ultimately received by the trustee except for the stubs. When the debtor first became aware that the check stubs were missing he went to the accountant's office, but without success. On appeal from the denial of discharge, the court stated:

> We conclude it was error to hold the bankrupt strictly responsible regardless of fault for the loss of his checkbook stubs. Section 14 c(2) [now § 272(a)(3)] denies discharge to any debtor who has "failed to keep or preserve books of account or records, from which his financial

> condition and business transactions might be ascertained, unless the court deems such ... failure to have been justified under all the circumstances of the case ...." The denial of discharge serves both to deter inadequate record-keeping and to protect creditors whenever a failure to preserve records may have been motivated by fraud. However, where records have been lost or destroyed through no fault of the bankrupt, any prophylactic 58*58 function to be performed by § 14 c(2) [now 18 U.S.C. 727 (a) (3)] becomes minimal and is outweighed by the Bankruptcy Act's general policy in favor of giving the bankrupt a fresh start. *Gross v Fidelity & Deposit Co.,* 302 F2d 338, 341 (8th Cir 1962); *International Shoe Co. v Lewine,* 68 F2d 517, 518 (5th Cir 1934).
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> Discharge should not be denied unless the referee finds [the debtor's] testimony to be false or concludes that the bankrupt was remiss in his efforts to trace the missing records. *Matter of Martin*, at 57-58

These cases involved businesses far more complex and regulated than Mr. Legenza's work as a traveling salesman leasing the Wild Aces game to casinos.

Since providing this response to the Plaintiff, Mr. Legenza was able to discover and retrieve certain documents that previously were not readily available, and he was able to reconstruct a list of expenses based upon his recollection of his activities during the pertinent period of time when he was actively marketing and leasing Wild Aces as a side wager to casinos in Nevada, California, and Ontario, Canada. As he described in his Supporting Affidavit ([21] Dkt 6-10 ¶ 21), his expenses for his trips to California coupled with his trips to Ontario while he was living in Las Vegas, plus the costs of relocating in order to service his customer in

Ontario more efficiently were relatively simple to calculate. [132] Dkt 7-8 Exhibit AA. They were not illusory or speculative or even unusual, and similar figures are readily available today (albeit with inflation added). His frequent contacts with the Plaintiff, apprising her of his activities and progress were never suspect. The fact that he was able to obtain trial installations of Wild Aces in Nevada and Ontario confirm his work, notwithstanding that he could not close a sale due to circumstances beyond his control. Even the marketing trips to California, although not fruitful, were at least able to generate interest and invitations to make presentations.

Mr. Legenza's creativity, activity and diligence, and his frequent travel, is not only testimony to the veracity of his claimed costs and expenses, but they also strongly militate against the Plaintiff's dubious charge of fraud. And they are supported by both actual documentation ([95] Dkt 7-8 Exhibits W1--W8) consisting of hotel reservation, and airline bookings, plus a reconstructed listing of marketing expenses ([132] Dkt 7-8 Exhibit AA) calculating his expenses during the relevant period, and accounting for relocation expenses.

Not only did the District Court reject an extensive line of cases and arguments supporting Mr. Legenza’s justification of the loss of financial records, but the court also took the opportunity to use Mr. Legenza as a “whipping boy”—to

teach an object lesson to those who misstep in the preservation of financial records, even though it draws this lesson from a case that excuses a debtor's loss of records:

> Further, in *Matter of Martin,* 554 F2d 55 (2d Cir 1977), the court concluded that "it was error to hold the bankrupt strictly responsible regardless of fault for the loss of his checkbook stubs." 554 F2d at 57. The court recognized that one purpose of denying discharge is to "deter inadequate record-keeping," and explained that "any prophylactic function to be performed" is negated "where records have been lost or destroyed through no fault of the bankrupt." Id. (emphasis added). Here, Legenza admits that the loss of his documents is at least partially his fault. See Dkt. 9 at 15 (Legenza's "error was in placing his financial and marketing records in the hands of the movers. . . ."). Denial of discharge, therefore, would advance the "prophylactic function" of deterring similarly careless behavior. [278] Dkt 16 p 9.

If the District Court had only followed the initial guidance of *Cacioli,* it would have construed Mr. Legenza's situation differently:

> [W]e have described § 727 as "impos[ing] an extreme penalty for wrongdoing," which "must be construed strictly against those who object to the debtor's discharge and `liberally in favor of the bankrupt.' " *State Bank of India v Chalasani (In re Chalasani),* 92 F3d 1300, 1310 (2d Cir 1996) (quoting *Bank of Pa. v Adlman (In re Adlman),* 541 F2d 999, 1003 (2d Cir 1976)). *Cacioli* at 234

Neither the Bankruptcy Court nor the District Court addressed the special circumstances raised in the defense of the plaintiff's summary judgment motion involving the allegedly criminal self-help activity of the plaintiff's husband. Since the indifference demonstrated by both courts implies judgment that the issue was altogether irrelevant, there is nothing to add to what was fully addressed in Mr.

Legenza's Affidavit and Answer in the Bankruptcy Court ([29–31] Dkt 6-10 ¶ 39–44; [257–261] 5-1 ¶ 98-124) except to say that the facts raise concerns that should reinforce the admonition in *Cacioli* and construe § 727 strictly against the plaintiff and liberally in favor of Mr. Legenza.

POINT 3

SUMMARY JUDGMENT WAS NOT APPROPRIATE IN DETERMINATION OF THE DEBTOR'S JUSTIFICATION BASED ON THE RULES GOVERNING SUMMARY JUDGMENT AND STATUTORY STANDARD OF "ALL THE CIRCUMSTANCES OF THE CASE."

The rules governing summary judgment are clear: facts alleged by the non-moving party in a summary judgment motion are to be accepted as true. *McClellan v Smith,* (439 F3d 137, 144 [2d Cir. 2006]). Both the Bankruptcy Court and the District Court recite that rule in their decisions. [267] Dkt 1-2 p 3; [270] Dkt 16 p 7. The Bankruptcy Court then states: "For purposes of this motion for summary judgment, we accept the credibility of the defendant's representation of facts. We must therefore decide whether these facts, if true, can justify the debtor's failure to produce business records." [267] Dkt 1-2 p 3.

Nevertheless, Section 727 (a) (3) stands that rule on its head. The statute

shifts the burden of proof from the party moving for summary judgment based on the failure to provide financial records to the debtor who must prove facts and circumstances justifying such failure. (Practical aspects: proving absence is easy, proving justification for absence may be hard—or require a lot of explaining.)

Most of the numerous cases cited by the parties, the Bankruptcy Court, and the District Court that deal with § 727 (a) (3) are not the result of summary judgment motions. Typically, the debtors who lack financial records, have gone through depositions and/or a trial, often with extended post-trial discovery activities in which debtors have sought to find or reproduce business records to either fulfill their discovery obligations or to demonstrate that the loss of records was adequately explained. Admittedly, if records appear to be lacking, it is easy for an objecting creditor to move right away for summary judgment, but there are two factors that militate against the use of summary judgment to dispose of § 727 (a) (3) cases. The language of the statute itself that allows the debtor relief from the loss of their discharge due to their act or failure to maintain records ". . .unless such act or failure to act was justified under all of the circumstances of the case." The claim that records are lacking is simple; the facts and arguments derived from all the circumstances of the case that would or could excuse or justify the lack of business records is often complex. It certainly was for Richard Legenza. The

complexity of justification is reflected in the range of factors noted in *Cacioli* including "the education, experience, and sophistication of the debtor; the volume of the debtor's business; the complexity of the debtor's business; the amount of credit extended to debtor in his business; and any other circumstances that should be considered in the interest of justice." *(Cacioli* quoting *Meridian Bank).*Mr. Legenza asked for his day in court, but it fell on deaf ears.

CONCLUSION

A grant of summary judgment resulting in the denial of a debtor's Chapter 7 discharge is a harsh remedy that should not be imposed without careful consideration. A thorough analysis of all circumstances is baked into the statute that specifically provides for a debtor's claim of justification and the requirement that "all the circumstances of the case" be considered. The Bankruptcy Court should have given a closer examination—a trial—in order to properly consider whether an across-the-board denial of a discharge was a fair and just remedy. Instead, it yielded to the demand of the Plaintiff who wanted a date set for a summary judgment motion.

The court should have applied the standards outlined in *In re Brenes,* 261 BR 322, 329 (Bankr Ct. D Conn [2001]). The cases offered by the Plaintiff in support of her motion for summary judgment were distinguishable from Mr. Legenza's

situation in virtually every respect. The Order of the Bankruptcy Court and the District Court should be reversed.

October 21, 2024

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October 21, 2024

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