

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 REPLY BRIEF FOR APPELLANT

October 22, 2024

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UNITED STATES COURT OF APPEALS
SECOND JUDICIAL CIRCUIT

IN RE RICHARD JOSEPH LEGENZA
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Docket #: 23-1322
REPLY BRIEF

RICHARD JOSEPH LEGENZA

Defendant-Appellant

Appellant Richard Joseph Legenza, a debtor, appealed 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, (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. Dkt 1-2. The Plaintiff-Appellee filed a Brief opposing this appeal. The within Reply Brief is addressed to the Plaintiff-Appellee's brief.

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.

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

FACTS

The Appellee's "counterstatement of facts" highlights the factual dispute between the parties. The Appellee recites a history of her lawsuit in Nevada and Mr. Legenza's failure to provide documents during discovery which the Appellee characterized as "refusal" but turned out to be inability due to the documents being lost by movers. She also attempts to cast doubt on whether Mr. Legenza ever had any business records arguing that the Bankruptcy Court and the District Court correctly found that Mr. Legenza was without justification for "failing to produce, maintain, and preserve any records" (Appellee Brief p.8). She claims that he decided against depositing any of Rosario's money in the bank, instead allegedly keeping it all inside of his house. This conduct was deemed unjustifiable under §727(a)(3)." Richard Legenza's habit of keeping funds in cash and maintaining a cash journal was not, per se, unjustifiable. He kept the money in a safe and recorded all his expenses in a journal. Had he claimed that the money was stolen, his all cash conduct could be regarded as irresponsible, but it was all maintained until the loan funds were exhausted over a 30 month period. Such insinuation was entirely inappropriate given that Mr. Legenza's factual allegations were taken as true by the Bankruptcy Court (Dkt 16 p8) and the same rule applies to his appeals. *McClellan u. Smith*, 439 F.3d 137, 144 (2d Cir. 2006)

The Appellee emphasizes that the missing business records leave the court and the trustee as well as the Plaintiff in the dark about the affairs of the business, but the trustee never objected to the lack of business documents, and the Court only was brought into the matter on the Plaintiff's motion.

What the Appellee skips over entirely is the fact that Mr. Legenza met regularly with the Plaintiff (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 (Dkt 6-10 ¶ 10) When marketing efforts in the western states were not successful, he made sales trips to Ontario, Canada, and 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. The Plaintiff denied Legenza's claim to have kept her fully informed, but his factual allegations must be taken as true in the context of both the Plaintiff's summary judgment motion as well as the appeals. *McClellan u. Smith*, 439 F.3d 137, 144 (2d Cir. 2006). Appellee simply dodges this issue, refusing to admit the nature and extent of the continual communication between the parties, making the Appellee fully aware of the financial circumstances of the business.

Neither the Bankruptcy court nor the District Court seemed to recognize or consider that the regular communication between the parties constituted part of “all the circumstances” of the case.

POINT 1

BOTH THE BANKRUPTCY COURT AND THE DISTRICT COURT FAILED TO CONSIDER ALL THE CIRCUMSTANCES OF THE CASE

As 11 USC §727 (a)(3) states:

(a)The court shall grant the debtor a discharge, unless--
(3) 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; [emphasis added]

“[A]ll of the circumstances” is a broad category of inquiry. It would encompass the issue of what records are necessary to advise a trustee, the Court, or a creditor as to the details of the business. Surely, such an inquiry would have to include some knowledge of what the creditor did or didn’t know in order to measure the insufficiency of records. And if it is the creditor who claims that the records are lacking, couldn’t such a claim be refuted if the debtor gives testimony that the creditor was fully informed? This question would precede the inquiry into

whether the loss of the records was unintentional or the result of an unexpected mishap such as the negligence of movers.

Neither the Bankruptcy Court nor the District Court appeared to be moved by clear language of the statute itself. If Mr. Legenza lacks financial records, he can seek to justify his act or failure by asking the court to consider “all of the circumstances of the case.”

POINT 2

MULTIPLE CASES RELIED ON BY THE DISTRICT COURT WERE DISTINGUISHED BY THE APPELLANT WITHOUT REFUTATION

The District Court cited numerous cases that demonstrate the enforcement of 11 USC § 727(a)(3): *In re Artura*, 165 BR 12 (Bankr Court ED NY [1994]); *In re Buzzelli* 246 BR 75, 97, 98 [Bankr. Court, WD PA 2000]; *In re Cacioli*, 463 F3d 229, 235 (2d Cir 2006); *Matter of Esposito*, 44 BR 817, 827 [Bankr. SD NY 1984]; *In re First*, 37 BR 275 [Bankr. Court, ED Wis 1983]; *In re Halpern*, 387 F.2d 312, 314 (2nd Cir.[1968]); *Matter of Martin* (554 F2d 55 [2nd Circuit 1977]; *In re Milano*, 35 BR 89 (Bankr SD NY [1983]); *In re Switzer*, 55 BR 991 [Bankr SD NY 1986]; *In re Underhill*, 82 F2d at 258 [2d Cir 1936]; *United States Fidelity & Guar v Delancey (In re Delancy)* 58 BR 762 (Bankr SDNY [1986]). The Appellant’s

Brief addressed these cases, comparing and distinguishing the factual basis in each one with Mr. Legenza's case. The Appellee's Brief is devoid of any substantive argument refuting the Appellant's arguments. Instead, the Appellee simply mentions the cases to which the District Court "considered" or "recognized" or "relied on," (Appellee Brf pp15-17) and concludes with " In its thorough analysis, the District Court examined a plethora of applicable legal precedents, including In re *Bujak* and In re *Artura.* " (p17) But what the District Court could not analyze was all the circumstances in Mr. Legenza's case since the court below had only relied on affidavits in deciding the summary judgment motion, depriving Mr. Legenza of his day in court.

Richard Legenza relied on his memory to explain the procedures of his sales and marketing of Wild Aces as well as the circumstance of the loss of his business records. His reliance on memory was held to be an inadequate substitute for physical records

The Appellee then addresses Mr. Legenza's effort to reproduce an accounting based on his recollection of his sales and marketing activities supported by limited documentary evidence. The District Court rejected this because a creditor is "not required to take the debtor's word as to his financial situation. In re Shapiro, 59 B.R. at 848." But the debtor's word still part of "all the circumstances"

referred to under the statute, and a court's thorough analysis should consist of taking the circumstances apart and determining whether each one, standing alone, can support a debtor's justification for having limited business records. Mr. Legenza's circumstances should be viewed as a whole, and this would require that he be given the opportunity to deliver the facts in person in court.

POINT 3

THE APPELLANT'S ARGUMENT CHALLENGING THE DISTRICT COURT'S REJECTION OF THE *BRENES* CASE WAS NOT REFUTED

The District Court rejected *In re Brenes* 261 BR 322, (Bankr. Court, D. Conn [2001]), because courts can “conflate” or “mix up” the burdens of proof in the two “prongs” of §723 (a)(3). “The case was important to Mr. Legenza’s appeal because it answered the central question: What are “all the circumstances of the case”? Not only *Brenes* but also *In re Frommann*, 153 BR. at 117 agree that the circumstances would at least include the following:

1. Whether the debtor was 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 books and 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. *Frommann*, 153 BR. at 117.

These categories of circumstances are broad and not exhaustive of “all the circumstances” in a particular case. Note that *Frommann* introduces this list with “In determining the adequacy of a debtor's financial records, courts have focused on numerous factors. The most significant factors include . . .” The *Brenes* case gives the same list, but introduces it thus: “In considering a debtor's justification for missing records, the court may consider . . .” So, apparently this non-exhaustive list of categories serves double duty and fits whatever “prong” of the statute is under consideration. The District Court in rejecting *Brenes* has taken too narrow a view and should have applied each of the categories of inquiry to Mr. Legenza’s situation. If it had, it might well have sent the case back to the Bankruptcy Court for a trial that would truly consider all the circumstances of the case.

The Appellee concludes her brief by referring to the District Court’s rejection of the *Brenes* case. Although Appellant’s brief deals with this issue extensively, the Appellee simply echoes the District Court’s dismissive footnote. To reject a test or set of criteria on the grounds of possible confusion in its

application seems less than judicious, and what the Appellee lauds as a “thorough analysis” by the District Court looks more like an empty gesture.

POINT 4

SUMMARY JUDGMENT WITHOUT ADDITIONAL DISCOVERY OR THE TESTIMONY OF THE DEBTOR WAS PREMATURE AND AN ABUSE OF DISCRETION

A distinctive characteristic of virtually all of the 723 (a)(3) cases cited is that the Bankruptcy Court in each case heard testimony from the debtor, something that Mr. Legenza was deprived of by summary judgment. FRCP 56 permits a court on a summary judgment motion to “determine what material facts are not genuinely at issue” and “must be treated as established in the action,” allowing the debtor more time to either recover lost documents or find alternative documents to establish more facts about his business history and aid in justifying the loss of records. The bankruptcy court’s granting of summary judgment was premature and an abuse of discretion

If Mr. Legenza had the opportunity to testify at trial or even at a deposition, he would be able to respond to the accusations of unjustifiable loss of financial records. Virtually all of the cases cited in support of Mr. Legenza and those cited

against him involve debtor's who have testified on their own behalf. In some, the debtor convinces the court of adequate justification. In other cases, the debtor is altogether unbelievable. But in all of them, the debtor had an opportunity to speak and did not have to rely on an affidavit to explain his circumstances.

CONCLUSION

What was lacking in this case at the trial court level was a trial in which the court could evaluate all of Mr. Legenza's circumstances before determining that his loss of business records was unjustifiable. What was lacking in the District Court level was the clarity of applying the multi-faceted test of the *Brenes* case to Mr.

Legenza's circumstances as a whole and recognizing that what was missing was a thorough rendition of those circumstances from the testimony of the debtor himself.

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