

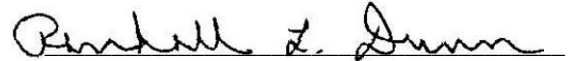
UST v Caron, Adversary No. 08-3065-rld
Valeri G. Caron, Case No. 07-33796-rld7

12/2/2008 RLD

Unpub.

The United States Trustee ("UST") filed an adversary proceeding seeking denial of debtor's discharge on multiple grounds. After trial, the court ruled that the UST had presented adequate evidence to support a denial of debtor's discharge under § 727(a)(3) for failing to keep and preserve adequate business and financial records to allow creditors and the chapter 7 trustee to ascertain and evaluate debtor's financial condition and material business transactions. Most significantly, during the two-year period beginning September 2005, debtor deposited large sums of money totaling \$805,187.22 in a number of different bank accounts. The deposits were commingled without any accounting. The UST's expert was unable to reconstruct debtor's business transactions from documentation provided or otherwise, especially debtor's large currency transactions allegedly made with Russian clients/customers/friends. From the evidence, the court was unable to determine debtor's prepetition income and expenses. The court found no justification for the failure to keep adequate records. Debtor's discharge was denied under § 727(a)(3). The court did not rule on the UST's other causes of action.

Below is an Opinion of the Court.



RANDALL L. DUNN
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re:) Bankruptcy Case
Valeri G. Caron,) No. 07-33796-rld7
Debtor.)
United States Trustee,)
Plaintiff,) Adversary Proceeding 08-03065-rld
v.) MEMORANDUM OPINION
Valeri G. Caron,)
Defendant.)

This adversary proceeding was tried before me (the "Trial") on November 12, 2008. In its Complaint, the United States Trustee ("UST") sought to deny a discharge to the debtor, Valeri G. Caron ("Mr. Caron"), pursuant to Sections 727(a)(2)(B), (a)(3), (a)(4)(A), and (a)(5) of the Bankruptcy Code.¹

¹Unless otherwise indicated, all chapter, section and rule (continued...)

1 "Hair in Time," in San Diego, while he was in college, that he ran for
2 about two and a half years. He sold the beauty salon for approximately
3 \$76,000, paying off the business loan and netting approximately \$26,000.

4 He moved to Oregon and worked for a while as a bus driver for
5 Raz Transportation. Then he went into business with Michael Mitchell and
6 IBD, Inc., a construction company. Mr. Caron's parents refinanced their
7 home, and he and his parents loaned IBD, Inc. \$127,378.12. Mr. Caron
8 later discovered that Mr. Mitchell was embezzling money from the
9 corporation. On or about September 26, 2005, Mr. Caron and his parents
10 obtained a confession of judgment against Mr. Mitchell in the amount of
11 \$147,087.17 that was to be paid in installments. Mr. Mitchell paid the
12 first installment of \$35,000 when the confession of judgment was signed
13 but has made no other payments. Mr. Caron listed a \$100,000.00 judgment
14 claim against Mr. Mitchell in his Schedule B. See Exhibit 1, at p. 14.

15 Meanwhile, Mr. Caron moved on. On August 19, 2004, Mr. Caron
16 incorporated Royal Air Cargo, P.C., a trucking company ("Royal Air
17 Cargo"). He was identified in filings with the Oregon Corporation
18 Division as its president and registered agent. His partner in Royal
19 Air Cargo was Vasiliy Semeniakin. In the Pretrial Order, the parties
20 have stipulated that Mr. Caron understood "what was involved in the day
21 to day running of the trucking company, including supervision of the
22 truckers who worked as independent contractors." Pretrial Order, Exhibit
23 1, at p. 2. The parties further have stipulated that Mr. Caron "knew and
24 understood how the trucking company obtained orders, how it handled
25 receipts and disbursements, obtained financing from its factoring
26 company, and paid the truckers." Id. However, the books and records for

1 Royal Air Cargo were maintained by Mr. Semeniakin's wife, Mariam. Mr.
2 Caron testified that he received no documentation as to Royal Air Cargo's
3 finances, and he never reviewed the books. However, Mr. Caron testified
4 at his § 341(a) meeting that he refinanced a house and invested \$119,000
5 in Royal Air Cargo. See Exhibit 3 at p. 18. Later, he borrowed an
6 additional \$60,000 from his parents to invest in Royal Air Cargo. See
7 id.

8 On October 6, 2005, Mr. Caron and Mr. Semeniakin registered two
9 additional businesses, Royal Air Cargo Freight, LLC, which was to
10 function as a freight brokerage, and Royal Air Cargo Import Export, LLC,
11 which was to conduct an import/export business. Mr. Caron attempted to
12 import mineral and other bottled waters into the United States for
13 distribution, but that venture proved unsuccessful.

14 By late 2006, Royal Air Cargo and its affiliated enterprises
15 were experiencing grave financial difficulties. In December 2006, Mr.
16 Semeniakin and his wife skipped town, leaving Mr. Caron holding the bag.
17 The Semeniakins' present whereabouts are unknown. Royal Air Cargo's
18 trucks were repossessed in January 2007. Mr. Caron testified at Trial
19 that he attempted thereafter to liquidate the remaining inventories of
20 the Royal Air Cargo enterprises; so, it is unclear from the record when
21 Royal Air Cargo actually ceased operations. No Royal Air Cargo financial
22 records were submitted in evidence, either for the period when Mrs.
23 Semeniakin kept the books or thereafter. In his Schedule B, Mr. Caron
24 listed a "business debt owed" from Mr. Semeniakin in the amount of
25 \$119,000.00 as an asset.

26 At his Rule 2004 examination, Mr. Caron testified that since

1 December 1, 2007, he has been employed by CWF, Co., a clothing import
2 business owned by his mother, Vera Caron ("Mrs. Caron"). See Exhibit 4
3 at pp. 4-5. According to Mr. Caron, CWF, Co. was formed in September or
4 October 2007, and his mother was active in the business as a designer.
5 See Exhibit 4 at p. 6. At her Rule 2004 examination, Mrs. Caron
6 testified that she worked as a care giver, and she had not done any
7 design work in the United States. See Exhibit 5 at p. 4. CWF, Co. has
8 no store or other retail space, and the only funds contributed to CWF,
9 Co. "consist of a few hundred dollars provided by Vera and Kenneth Caron
10 [her husband] for the business registration fee." Pretrial Order,
11 Exhibit 1, at p. 3. However, Mrs. Caron and her husband have been
12 providing Mr. Caron with approximately \$3,000 a month to cover his
13 living/business expenses. See Exhibit 5 at pp. 8-9.

14 During the Trial and in the exhibits, there are limited
15 references to Mr. Caron trying to start up a deli business in the spring
16 and early summer of 2007 and to import medical equipment to the United
17 States, but apparently neither enterprise has proved viable.

18 However, in addition, there are numerous references and
19 exhibits concerning services performed by Mr. Caron to facilitate
20 currency transactions for Russian friends, acquaintances and/or business
21 associates. Mr. Caron testified during his Rule 2004 examination that he
22 invested some of the money he received and made payments back, but he
23 also used it for business and personal expenses:

24 Some of the money--I took it out from there and put in
25 a money market--well, again, it's a mess up, I tell
26 you. I will be honest. It's a mess up because I kind
of spread the money because we need for the company,
and I would need for my personal use. I used his

1 money for that, and we just would--money went around.

2 Exhibit 4 at p. 73.

3 In his Schedule F, Mr. Caron lists undisputed debts to Feder
4 Trikur in the amount of \$15,000, to Slava Sinchuk in the amount of
5 \$4,000, and to Igor Smirnov in the amount of \$20,000, without providing
6 any address or other contact information. Ms. Tammy Combs, the UST's
7 bankruptcy analyst with over twenty years' experience working with large
8 and small businesses as an accountant, testified that the bank statements
9 and financial records that were obtained for Mr. Caron reflected
10 unexplained deposits to his accounts totaling \$375,208.02. The only
11 accounting of his currency transactions that Mr. Caron supplied was a
12 two-page, handwritten listing of payments, prepared after the fact, with
13 no dates of transactions and no real accounting as to who was paid and
14 what the listing of transactions meant. See Exhibit 17 at pp. 2-3. Ms.
15 Combs testified that she could not ascertain from the Exhibit 17
16 accounting when various funds were received, where they were held or how
17 funds were repaid.

18 In his Statement of Financial Affairs, Mr. Caron listed income
19 from employment or operation of a business of \$1,200,000.00 for 2005,
20 \$1,600,000.00 for 2006, and \$4,000.00 for 2007 up to the date of his
21 bankruptcy filing. Yet, at his § 341(a) meeting, he testified that he
22 did not have to file a 2006 income tax return because he made less than
23 \$10,000, explaining that the \$1,600,000.00 figure he used in the
24 Statement of Financial Affairs represented his estimate of Royal Air
25 Cargo's gross income for the year. See Exhibit 3 at pp. 21 and 29.
26 However, in a residential loan application that Mr. Caron signed on or

1 about May 12, 2007, Mr. Caron stated that he was employed as the
2 president of Royal Air Cargo, with gross income of \$10,159.00 per month.
3 See Exhibit 13 at pp. 1, 2 and 3.

4 Mr. Caron acknowledges that he has not kept track of money that
5 he has borrowed from his parents, although he estimates he owes them
6 approximately \$280,000-\$300,000, "something like that." See Exhibit 4 at
7 p. 100. His parents do not keep track of his borrowings either. See
8 Exhibit 5 at p. 16.

9 Ms. Combs focused her review and analysis of Mr. Caron's
10 financial information and business transactions on the two-year period
11 from September 2005 through September 2007, the month of Mr. Caron's
12 bankruptcy filing. She testified that after reviewing and analyzing all
13 of the documentation received from Mr. Caron with respect to his
14 financial condition and business affairs, she could not reconstruct his
15 business transactions for 2006 and 2007 and could not reconcile his
16 income and expenses for that period. See Exhibit 25.

17 Jurisdiction

18 I have jurisdiction over this adversary proceeding as a core
19 matter under 28 U.S.C. §§ 1334 and 157(b)(2)(J).

20 Discussion

21 I. Generally Applicable Legal Standards

22 In light of the Bankruptcy Code's objective to provide a "fresh
23 start" for debtors overburdened by debts they cannot pay, I start from
24 the proposition in cases such as this that the provisions of the
25 Bankruptcy Code providing for a denial of discharge are to be construed
26 narrowly in favor of the debtor.

1 A denial of a discharge is an act of mammoth
2 proportions, and must not be taken lightly. In light
3 of this gravity, this Court and many others have
stated that Section 727 must be construed liberally in
favor of the debtor and against the objector.

4 In re Goldstein, 66 B.R. 909, 917 (Bankr. W.D. Pa. 1986). See First
5 Beverly Bank v. Adeeb (In re Adeeb), 787 F.2d 1339, 1342 (9th Cir. 1986);
6 Devers v. Bank of Sheridan, Montana (In re Devers), 759 F.2d 751, 754
7 (9th Cir. 1985).

8 The party seeking to deny a discharge to the debtor generally
9 bears the burden of proof. In re Johnson, 68 B.R. 193, 198 (Bankr. D.
10 Or. 1986). Since the Supreme Court's decision in Grogan v. Garner, 498
11 U.S. 279 (1991), the burden of proof standard for denial of discharge
12 actions under § 727 is preponderance of the evidence. Id. at 286-91.

13 The relatively lenient burden of proof standard compared with
14 the consistent admonition to interpret the standards for denial of
15 discharge strictly in favor of debtors creates a tension that informs the
16 decision making of bankruptcy courts in § 727 cases. However,
17 ultimately, in spite of whatever weight on the scale favors the debtor's
18 discharge, a party seeking to deny the debtor a discharge under § 727
19 likely will prevail if the evidence establishes that it is more likely
20 than not that the objecting party's case is justified.

21 II. Section 727(a)(3)

22 Section 727(a)(3) denies a discharge to a debtor who "has
23 concealed, destroyed, mutilated, falsified, or failed to keep or preserve
24 any recorded information, including books, documents, records, and
25 papers, from which the debtor's financial condition or business
26 transactions might be ascertained, unless such act or failure to act was

1 justified under all of the circumstances of the case." Unlike many of
2 the other discharge denial provisions of § 727, § 727(a)(3) does not
3 require that the party seeking to deny the debtor a discharge establish
4 that the failure to keep or maintain adequate financial records was
5 "knowing" or "fraudulent." "What constitutes adequate books, documents,
6 and records must be decided on a case-by-case basis, depending on the
7 Debtors' business operations and sophistication." See In re Hirengen,
8 112 B.R. 382, 385 (Bankr. D. Mont. 1989), and cases cited therein.

9 Most of the debtors who appear before me are not great record
10 keepers. In fact, in many cases, debtors' failure to maintain clear and
11 complete records is a factor driving their need to file for relief in
12 bankruptcy. Consequently, § 727(a)(3) is not appropriately used as a
13 trap to deny a discharge to consumer debtors or business operators who
14 through inadvertence, lack of competence, or both, maintain less than
15 pristine business records. However, the Bankruptcy Code does not condone
16 a complete default in maintaining and preserving records from which basic
17 information regarding a debtor's business and financial affairs can be
18 obtained. As stated by the Ninth Circuit, most recently in Caneva v. Sun
19 Communities Operating Limited Partnership (In re Caneva), __ F.3d __,
20 2008 WL 4791680 (9th Cir. Nov. 5, 2008), "the purpose of § 727(a)(3) is
21 to make discharge dependent on the debtor's true presentation of his
22 financial affairs." See Cox v. Landsdowne (In re Cox), 904 F.2d 1399,
23 1401 (9th Cir. 1990) ("Cox I"), reiterated in Landsdowne v. Cox (In re
24 Cox), 41 F.3d 1294, 1296 (9th Cir. 1994) ("Cox II"). "'Creditors are not
25 required to risk the withholding or concealment of assets by the bankrupt
26 under cover of a chaotic or incomplete set of books or records.'"

1 Burchett v. Myers, 202 F.2d 920, 926 (9th Cir. 1953), cited in Caneva, __
2 F.3d __, 2008 WL 4791680 (9th Cir. Nov. 5, 2008), and in Cox I, 904 F.2d
3 at 1401.

4 The plaintiff in a § 727(a)(3) action bears the initial burden
5 of proof to establish "(1) that the debtor failed to maintain and
6 preserve adequate records, and (2) that such failure makes it impossible
7 to ascertain the debtor's financial condition and material business
8 transactions." Cox II, 41 F.3d at 1296, citing Meridian Bank v. Alten,
9 958 F.2d 1226, 1232 (3d Cir. 1992). Once plaintiff makes such a prima
10 facie case, the burden shifts to the debtor defendant to justify the
11 inadequacy or nonexistence of the records. Id., and cases cited therein.
12 See Caneva, __ F.3d __, 2008 WL 4791680 (9th Cir. Nov. 5, 2008).

13 III. The UST's Case

14 During the period from September 2005 through September 2007,
15 Mr. Caron deposited large sums of money, totaling \$805,187.22 according
16 to Ms. Combs, in a number of different bank accounts. See Exhibit 25.
17 From Mr. Caron's testimony and from the admitted exhibits, I find that
18 some of those deposits represented income to Mr. Caron, but other
19 deposits were of funds from his parents, either loaned to Mr. Caron or
20 considered to be his parents' money held with joint access, and funds
21 from individuals from Russia who did business with Mr. Caron in currency
22 transactions. Other deposits were made of funds received from Mr.
23 Caron's other business enterprises. These deposits apparently were
24 commingled indiscriminately, without any accounting being provided. From
25 his various accounts, Mr. Caron made a number of transfers and paid
26 business as well as personal expenses. Mrs. Caron made withdrawals from

1 Bank of America account no. 6832 totaling \$39,468 during May and June
2 2007, some of which were used to make repairs to her home. Ms. Combs
3 testified that her review of Mr. Caron's account statements showed
4 \$130,584.21 in account transfers and \$375,208.02 in unexplained deposits.

5 Mr. Caron testified that he made numerous trips to Russia in
6 2006 and 2007 to further and explore business opportunities. He
7 testified that he carried cash with him to cover his expenses. However,
8 as stipulated by the parties in the Pretrial Order,

9 The only records of his travels in 2006 and 2007 which
10 [Mr.] Caron provided to document his use of cash
11 consist of photocopies of a jumble of invoices and
12 receipts arranged haphazardly, some of which are
13 wholly or partially illegible and from which no
14 coherent transactional history may be determined.

15 Pretrial Order, Exhibit 1, at p. 8.

16 Ultimately, Ms. Combs testified that she could not reconstruct
17 Mr. Caron's 2006 and 2007 business transactions from the documentation he
18 provided, or otherwise. In particular, she could not trace or reconcile
19 Mr. Caron's large currency transactions with Russian
20 clients/customers/friends. There is no way from the evidence before me
21 that I can determine what Mr. Caron's income and expenses were for 2006
22 and 2007. I find from the evidence presented that the UST has met its
23 burden of proof to establish that Mr. Caron has not prepared and/or
24 preserved adequate business records to make it possible to ascertain with
25 any degree of accuracy Mr. Caron's financial condition and material
26 business transactions during 2006 and 2007 leading up to his bankruptcy
filing in September 2007.

IV. Mr. Caron's Justifications

1 During the Trial, Mr. Caron and his counsel presented three
2 justifications for the clear inadequacy of his business and financial
3 records.

4 First, with respect to Royal Air Cargo and its related business
5 enterprises, Mr. Caron testified that his partner's wife, Mariam
6 Semeniakin, maintained the Royal Air Cargo books. He was not given
7 access to Royal Air Cargo's financial records. According to Mr. Caron,
8 financial records for Royal Air Cargo were kept by Ms. Semeniakin on her
9 computer. When she and her husband disappeared in December 2006, her
10 computer disappeared with her, leaving inadequate records to prepare tax
11 returns.

12 I am concerned by the facts that the Royal Air Cargo trucks
13 were not repossessed until January 2007, and Mr. Caron testified that he
14 stored and disposed of Royal Air Cargo inventory thereafter. Yet, no
15 records were presented in evidence with respect to financial transactions
16 for the account of Royal Air Cargo during the period after the
17 Semeniakins left town, when Mr. Caron was in control. I have no clear
18 idea from the evidence presented as to when all Royal Air Cargo business
19 activity ceased, and I note that as late as May 12, 2007, Mr. Caron
20 signed a loan application stating that as president of Royal Air Cargo,
21 his gross income was \$10,159.00 per month. See Exhibit 13.

22 With all that said, if the financial activities of Royal Air
23 Cargo and its affiliated enterprises were the only transactions in issue
24 in this case, I might be inclined to find that adequate justification for
25 Mr. Caron's lack of records for the Royal Air Cargo business was provided
26 from the uncontradicted evidence of the absconding of his business

1 partner, Mr. Semeniakin, and his record-keeping wife. However, Mr.
2 Caron's business activities, particularly with respect to his currency
3 transactions, encompassed large sums of money independent of Royal Air
4 Cargo that cry out for further justification.

5 Mr. Caron's second justification argument is that he is not an
6 accountant, and he ought not to be held responsible for his inadequate
7 record-keeping in light of his lack of an accounting background. As I
8 noted at the outset of the Discussion, most chapter 7 debtors who come
9 before me are deficient record keepers, and their record-keeping problems
10 often contribute to their need to seek bankruptcy protection. Section
11 727(a)(3) should not be used to deny discharge to the garden variety poor
12 record keeper. However, my analysis as to the application of § 727(a)(3)
13 is fact dependent in each case and focuses in large part on the relative
14 business sophistication of the debtor whose discharge is challenged.

15 In this case, Mr. Caron obviously is intelligent, and he has an
16 undergraduate degree in business consulting, import laws and logistics.
17 He ran one small business that he bought during his student years in San
18 Diego, and he ultimately sold that business, paying off his business loan
19 and generating a profit of approximately \$26,000. In spite of Mr.
20 Caron's apparent bad judgment in selecting business partners thereafter,
21 he has engaged in a number of different business enterprises and has
22 substantial experience in working to put together export/import business
23 transactions. While the evidence before me with respect to Mr. Caron's
24 currency transactions with Russian clients who emigrated to the United
25 States generally does not provide any clear record as to their timing,
26 structure or terms, what is clear is that Mr. Caron handled tens of

1 thousands of dollars in such transactions during the period from
2 September 2005 up to his bankruptcy filing in 2007, and the after-the-
3 fact purported accounting for such transactions in Exhibit 17 is woefully
4 inadequate.

5 One does not have to be an accountant to be able to prepare and
6 maintain a ledger, showing 1) when and how much money was received from a
7 particular customer, 2) how the funds were handled or invested, 3) when
8 and how much money was repaid to each customer, and 4) how much
9 compensation Mr. Caron received for his services. I find that a person
10 as entrepreneurial as Mr. Caron would not perform such services for free.
11 I further find the virtually complete lack of such records to be
12 astonishing and ultimately not credible. Ms. Combs testified that she
13 found \$375,208.02 in unexplained deposits flowing into Mr. Caron's bank
14 accounts. His lack of an accounting background does not provide a
15 justification for his lack of financial records that would allow tracing
16 of those deposits back to their sources, or to reconcile those deposits
17 with Mr. Caron's disbursements. Of particular note in this regard is the
18 evidence that \$117,000 or \$126,000 of funds from the sale of a Moscow
19 apartment by Mr. Feder Trikur was transferred to Mr. Caron through a
20 Seventh Day Adventist Conference account. See Exhibit 4 at pp. 60-61. I
21 do not find credible the lack of adequate financial records to document
22 Mr. Caron's currency transactions, and I find that his lack of an
23 accounting background does not justify the lack of such records.

24 Finally, in closing argument, counsel for Mr. Caron suggested
25 that the lack of financial records to document Mr. Caron's business
26 transactions and his income and expenses might be "cultural." I note

1 that Mr. Caron did not submit any evidence, in his testimony or
2 otherwise, tending to indicate that an inability or aversion to
3 maintaining business records was a part of Mr. Caron's cultural
4 background. In the absence of any such evidence, I am unaware generally
5 of any culture that conducts commerce without some means of recording
6 business transactions. The practice of keeping records of business
7 transactions goes back at least to pre-cuneiform script on clay tablets
8 in ancient Sumer. See the entry on "Sumer" in Wikipedia. I find, based
9 on the record before me, that Mr. Caron's cultural background as a Kazakh
10 emigrant to the United States does not justify his failure to keep and
11 preserve adequate financial and business records in this case.

12 Conclusion

13 Based on the foregoing findings, I conclude that the UST has
14 presented adequate evidence to support its case under § 727(a)(3) to deny
15 Mr. Caron a discharge for failing to keep and preserve adequate business
16 and financial records to allow creditors and the chapter 7 trustee to
17 ascertain and evaluate Mr. Caron's financial condition and material
18 business transactions. I further conclude that Mr. Caron has not met his
19 burden of proof to justify the lack of adequate business and financial
20 records. Accordingly, the UST may present, and I will enter a judgment
21 denying a discharge in chapter 7 to Mr. Caron pursuant to § 727(a)(3).
22 Because I have concluded that Mr. Caron should be denied a discharge for
23 failing to keep and preserve adequate business and financial records, I
24 will not consider or rule on the UST's alternative causes of action to

25 / / /

26 / / /

1 deny Mr. Caron a discharge under §§ 727(a)(2)(B), (a)(4)(A), and (a)(5).

2 Ms. Popperl should submit the judgment within ten (10) days
3 after entry of this Memorandum Opinion.

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6 cc: M. Vivienne Popperl
7 Michael A. Day

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