



Honorable Mike K. Nakagawa
United States Bankruptcy Judge



Entered on Docket
May 25, 2017

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

* * * * *

In re:)	Case No. 16-12755-MKN
)	Chapter 7
FRED CHARLES ROSEN,)	
)	Date: May 23, 2017
Debtor.)	Time: 10:30 a.m.
)	

ORDER ON MOTION TO COMPEL DEBTOR TO TURN OVER VALUE OF SCHEDULED NONEXEMPT PROPERTY OF THE ESTATE¹

There is one bad actor in this case and he does not work for Bank of America.²

BACKGROUND

On May 19, 2016, a voluntary Chapter 7 petition was filed by Fred Charles Rosen (“Debtor”). (ECF No. 1). Debtor was represented by attorney Robert C. Graham (“Attorney Graham”), doing business as Robert Graham & Associates and as Lawyers West. The case was assigned to Brian D. Shapiro, as a panel Chapter 7 trustee for this judicial district (“Trustee”).

On August 19, 2016, the Trustee filed a motion to compel the Debtor to turn over various

¹ In this Order, all references to “ECF No.” are to the numbers assigned to the documents filed in the above-captioned case as they appear on the docket maintained by the clerk of the court. All references to documents filed in other bankruptcy cases will be preceded by the name associated with the particular case. All references to “Section” are to the provisions of the Bankruptcy Code, 11 U.S.C. §§ 101-1532. All references to “FRE” are to the Federal Rules of Evidence.

² Compare In re Erik and Renee Sundquist, 566 B.R. 563, 570 (Bankr. E.D. Cal. 2017) (“Franz Kafka lives. This automatic stay violation case reveals that he works at Bank of America.”).

1 non-exempt assets valued at \$10,052.00, as well as \$16,153.71 in funds from a bank account that
2 allegedly were used to make prepayments on various living expenses (“Turnover Motion”).
3 (ECF No. 82). On September 2, 2016, Attorney Graham filed a partial opposition to the
4 Turnover Motion on behalf of the Debtor. (ECF No. 93). On September 13, 2016, the Trustee
5 filed a reply. (ECF No. 95).

6 On October 13, 2016, the Trustee filed a motion to approve a settlement (“Settlement
7 Motion”) that he had reached with the Debtor with respect to the Turnover Motion. (ECF No.
8 108).

9 On November 17, 2016, an order was entered approving the Settlement Motion
10 (“Settlement Order”). (ECF No. 118).³ The Settlement Agreement attached to the Settlement
11 Order required the Debtor to pay \$21,000 to the bankruptcy estate instead of the \$26,205.71
12 sought in the Turnover Motion.⁴

13 On December 1, 2016, Debtor received his discharge. (ECF No. 134).

14 On January 17, 2017, the Trustee filed a motion to enforce the Settlement Agreement
15 (“Enforcement Motion”). (ECF No. 146). Attorney Thomas H. Fell of the law firm of
16 Fennemore Craig, P.C., appeared in the proceeding on behalf of the Debtor. (ECF No. 154).
17 Attorney Fell filed opposition (ECF No. 165) and the Trustee filed a reply (ECF No. 167).

18 On March 22, 2017, an order was entered denying enforcement of the Settlement
19 Agreement, but vacating the Settlement Order. (ECF No. 168).

20 On April 20, 2017, the Trustee filed the instant Motion to Compel Debtor to Turn Over
21 Value of Scheduled Nonexempt Property of the Estate (“Motion”), renewing his original request,
22 but limited to turn over of non-exempt assets, i.e., the value of \$10,052.00. (ECF No. 171).
23 Debtor filed opposition (ECF No. 175) along with his supporting declaration (ECF No. 176).
24 The Trustee filed a reply. (ECF No. 178).

25 On May 23, 2017, the court heard the Motion. The appearances of counsel for the
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27 ³ In light of the settlement, an order was entered denying the Turnover Motion. (ECF No.
28 119).

⁴ The Settlement Agreement was initialed and signed by the Trustee on October 10, 2016.

1 Trustee and the Debtor, as well as counsel for the Debtor's former spouse, were noted on the
2 record. After arguments were presented, the matter was taken under submission.

3 DISCUSSION

4 There is no dispute that the Debtor deposited the full amount of the settlement funds with
5 Attorney Graham payable to the Lawyers West Trust Account. See Proof of Claim 1-1, filed
6 December 27, 2016, in In re Robert C. Graham, Ltd., dba, Rob Graham & Associates, and dba
7 Lawyers West, Case No. 16-16655-BTB ("Graham Bankruptcy"). There is no dispute that the
8 Debtor's check was dated October 6, 2016, and was deposited by Attorney Graham on October
9 11, 2016. Id. at Part 3. There is no dispute that the Graham Bankruptcy was commenced by the
10 filing of an involuntary Chapter 11 proceeding on December 15, 2016. (Graham ECF No. 1).
11 There is no dispute that on December 22, 2016, an order for relief was entered and that the
12 Graham Bankruptcy estate is now liquidating in Chapter 7. (Graham ECF No. 21).

13 There is no dispute that Attorney Graham shuttered the operations of the law firm on or
14 about December 5, 2016. See Exhibit "6" to Declaration of Joseph S. Kistler attached as Exhibit
15 "A" to Emergency Ex Parte Application to Expand the Relief of the Temporary Restraining
16 Order Granted on December 5, 2016, attached as Exhibit "D" to Motion to Appoint Interim
17 Trustee in Involuntary Case. (Graham ECF No. 3). There is no dispute that the funds deposited
18 into client trust accounts and other financial accounts maintained by the law firm are missing.
19 See Schedule A/B: Assets - Real and Personal Property, Part 1, No. 3, and Statement of
20 Financial Affairs, Part 11, No. 21. (Graham ECF No. 175). There is no dispute that Attorney
21 Graham is currently incarcerated pending state criminal prosecution, and that his law license has
22 been suspended by the State Bar of Nevada. See Exhibits "1" and "2" to Motion of Markel
23 Insurance Company for Relief from Stay Pursuant to 11 U.S.C. 362 to Proceed in Non-
24 Bankruptcy Forum. (Graham ECF No. 169). There is no dispute that Attorney Graham's spouse
25 has moved to Colorado and has filed a personal Chapter 7 proceeding. See In re Linda Marie
26 Graham, Case No. 16-22532-CDP (Bankr. D. Colo. December 31, 2016).⁵ There is no dispute

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28 ⁵ Attorney Graham's spouse received her Chapter 7 discharge on May 10, 2017. (Linda
Graham ECF No. 52).

1 that the Debtor filed a proof of claim in the Graham Bankruptcy proceeding in the amount of
2 \$21,000, representing the funds that had been paid to satisfy the Settlement Agreement.

3 There is no dispute in the Debtor's bankruptcy proceeding that the Trustee took
4 appropriate steps to seek recovery of assets of the estate, see Turnover Motion at ¶¶ 10 to 12, and
5 further took appropriate steps to reach a settlement once doubts were raised as to the probability
6 of success on the merits of certain aspects of the initial Turnover Motion. See Declaration of
7 Brian D. Shapiro in Support of Motion to Approve Settlement Agreement at ¶¶ 7 to 10. (ECF
8 No. 109). There is no dispute that the Debtor took appropriate steps to satisfy the terms of the
9 court-approved Settlement Agreement. See Declaration of Fred Charles Rosen in Support of
10 Debtor's Opposition to Trustee's Motion to Compel Debtor to Turn Over Value of Scheduled
11 Nonexempt Property of the Estate at ¶ 6. (ECF No. 176). There is no dispute that neither the
12 Trustee nor the Debtor had any reason to suspect or believe that the settlement funds would be
13 misappropriated from the Lawyers West Trust Account by Attorney Graham.⁶

14 In his renewed Motion, the Trustee relies on the language of Section 542(a), which
15 requires an entity in possession of property of the estate to deliver such property or its value to
16 the trustee, unless the property is of inconsequential value or benefit to the estate. There is no
17 question that the Debtor is in possession of nonexempt property of the bankruptcy estate
18 consisting of funds held in various financial accounts. While the Debtor requests a finding that
19 those accounts are now of inconsequential value or benefit under the circumstances, that request
20 is wishful thinking at best since the subject nonexempt assets are in liquid form.

21 In this case, the previous Settlement Agreement reflected a combined settlement value of
22 both the non-exempt assets and the Trustee's claim to recover the alleged prepayments of living
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24 ⁶ The matters described by the court as without dispute are based on a review of the
25 materials appearing on the dockets maintained for cases pending before this court, as well as the
26 bankruptcy court for the District of Colorado, and the Eighth Judicial District Court for Clark
27 County, Nevada. Pursuant to FRE 201, the court takes judicial notice of the documents filed in
28 the public records of those proceedings. See generally United States v. Wilson, 631 F.2d 118,
119 (9th Cir. 1980); Gree v. Williams, 2012 WL 3962458 at * 1 n.1 (D. Nev. Sep. 7, 2012). The
court's description of the events may be disputed by parties who are not before the court in this
proceeding and would not be binding on such parties.

1 expenses. The Debtor already delivered that settlement value to Attorney Graham and the
2 Trustee now seeks to compel the Debtor to turn over half of that settlement value again. There
3 is, however, only one intervening bad actor in this proceeding: Attorney Graham.⁷

4 Having considered the entire record as well as the arguments and representations of
5 counsel, in addition to the equities in the case, the court will require the Debtor to turn over to
6 the Trustee the cash amount of \$10,052.00, representing the value of the nonexempt property
7 that is the subject of this Motion. Alternatively, the Debtor will be permitted to assign the proof
8 of claim he filed in the Graham Bankruptcy proceeding in the amount of \$21,000, as well as any
9 and all other claims against Attorney Graham and his business entities, in full satisfaction of the
10 \$10,052.00 amount requested in the present Motion. Debtor will be required to deliver the cash
11 payment, or, the foregoing assignments to the Trustee's counsel no later than **June 9, 2017**.

12 Upon the Debtor's compliance with either of these alternatives, the Trustee shall file a statement
13 of such compliance with the court. In the event Debtor fails to timely deliver the cash payment
14 and also fails to timely deliver the assignments, the Trustee may submit an ex parte application
15 for entry of a judgment against the Debtor in the amount of \$10,052.00.

16 **IT IS THEREFORE ORDERED** that the Motion to Compel Debtor to Turn Over
17 Value of Scheduled Nonexempt Property of the Estate ("Motion"), Docket No. 171, be, and the
18 same hereby is, **GRANTED AS PROVIDED HEREIN**.

19 **IT IS FURTHER ORDERED** that no later than **June 9, 2017**, Fred Charles Rosen
20 ("Debtor"), shall tender payment of the amount of \$10,052.00 to the Chapter 7 trustee, Brian D.

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22 ⁷ Unfortunately, this proceeding has devolved somewhat into finger-pointing between the
23 parties, all of which is a distant second to the intervening bad acts of Attorney Graham. It is
24 immaterial whether the Debtor engaged in lavish spending before he filed for bankruptcy
25 protection inasmuch as the original Turnover Motion raised that very issue, the Settlement
26 Motion minimized the prospect of the Trustee prevailing on that issue, and the instant, renewed
27 Motion no longer seeks relief with respect to those expenditures. Similarly, Debtor's assertion
28 that the Trustee and his counsel misrepresented the actual receipt of the settlement funds from
Attorney Graham assumes that the Trustee and his counsel were in any position to suspect, much
less know, that Attorney Graham had stolen the funds from the client trust account. Finally, the
attack on the Debtor's character and resources brought by the Debtor's former spouse is
irrelevant inasmuch as the deadline for any objections to the Debtor's exemptions or his
discharge has long passed.

1 Shapiro (“Trustee”), representing the value of the non-exempt assets that are subject of the
2 instant Motion. In the alternative, Debtor may assign Proof of Claim No. 1-1, that was filed by
3 the Debtor on December 27, 2016, in the matter of Robert C. Graham, Ltd., Case No. 16-16655-
4 BTB, in addition to any and all other claims against attorney Robert C. Graham and his business
5 entities, in full satisfaction of the amount requested by the instant Motion. The payment or
6 assignments must be delivered in care of the Trustee’s counsel of record. Upon the Debtor’s
7 compliance with either of these alternatives, the Trustee shall file a statement of such compliance
8 with the court.

9 **IT IS FURTHER ORDERED** that in the event the Debtor fails to timely deliver the
10 cash payment and fails to timely deliver the assignments set forth in the preceding paragraph of
11 this Order, the Trustee may submit an ex parte application for entry of a judgment against the
12 Debtor in the amount of \$10,052.00.

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14 Copies sent to all parties via CM/ECF ELECTRONIC FILING

15 Copies sent via BNC to:

16 FRED CHARLES ROSEN
17 7880 BARNTUCKET AVENUE
18 LAS VEGAS, NV 89147-4728

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