IT IS ORDERED as set forth below:

Date: April 11, 2014

Wendy L. Hagenau

Wendy L. Hagenau
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	)	CASE NO. 10-77369-WLH
	)	
MERRITT MAYNARD AMBROSE, JR.,	)	CHAPTER 7
	)	
Debtor.	)	JUDGE WENDY L. HAGENAU
	)	

ORDER ON MOTION TO RE-OPEN

This matter came before the Court on the Debtor's Motion to Reopen [Docket No. 21] filed on April 30, 2012 and the objection thereto filed by Erin Riggins ("Defendant"). The Court granted the Motion in an order dated July 17, 2012 [Docket No. 25]. The District Court reversed the Order and remanded for additional findings by an order filed at Docket No. 44 ("DC Order"). After notice, an evidentiary hearing was held before the Court on April 8, 2014, at which Richard K. Valldejuli, Jr. and D. Barton Black appeared on behalf of the Debtor and Brad C. Parrott and Jimmy C. Luke appeared on behalf of the Defendant. Robert Trauner, the Chapter 7 Trustee, also appeared. The Court heard testimony from the Debtor and from Brandon S. Verner, an accountant for the Defendant. After consideration of the evidence, the arguments of

the parties, and the order of the District Court, the following are the Court's Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

Merritt Ambrose ("Debtor") and Defendant previously worked together. In 2004, they started Pharmaceutical Grade Health Products, LLC ("PGHP") which sold on-line dietary and weight-loss supplements. In order to process the payment for the products sold by PGHP, the Debtor and the Defendant created Global Processing Systems, LLC ("Global"), which provided merchant accounts for PGHP and other companies that sold products via the internet. The Debtor originally thought his interest in both Global and PGHP were shared 50/50 with Defendant. Later, however, he was told he had only a 25% interest in both companies.

The Debtor worked with the companies, initially for no pay. Sometime in 2005, he began to receive some money on a weekly basis ($1,000 or so). In 2007, he received $5,000 a week. In September 2007, the Debtor contends the amount he was paid was reduced incrementally until, in November 2007, he received no more money from PGHP or Global. The Debtor did not receive a salary, and the money he received on a weekly or monthly basis was effectively an advance of the 25% distribution to which he would be entitled. The Debtor believed that the profit-sharing would be trued up on a quarterly basis. The Debtor had traditionally received a check from PGHP for the quarterly taxes that were due on the distributions received. At the end of 2007, though, Defendant declined to pay Debtor a distribution to pay his fourth quarter taxes. The Debtor received a K-1 from PGHP for 2007, which showed that his 25% share of the profits was over $564,000. The Debtor did not receive a K-1 for 2008 or later.

On February 20, 2008, the Debtor sent an e-mail to the Defendant stating he would return via FedEx his phone, office keys and computer monitor. The Debtor did not work for PGHP or Global after February 2008. The Debtor began an internet business of his own in May 2008

called Scyberhealth, LLC. It was operational at the time the bankruptcy case was filed. The Debtor's Statement of Financial Affairs reflects he received no income distribution from Scyberhealth after July 2009.

On March 1, 2010, Debtor's mother paid attorney's fees of $650, plus the bankruptcy filing fee to Debtor's counsel. On May 6, 2010, the firm of Joyce, Thrasher, Kaiser & Liss sent a letter to Defendant on behalf of the Debtor, demanding the Debtor's equitable share of all earnings of PGHP and Global to date. The letter also demanded an accounting from 2005 forward. Finally, the letter included a draft complaint which would purportedly be filed should the matter not be resolved. On June 4, 2010, Debtor's bankruptcy petition was filed. The petition listed the secured debt of the mortgagee, plus taxes owed to the IRS and the Georgia Department of Revenue of $34,563 for 2007 and unsecured claims of $78,377. On October 4, 2010, the Debtor received a discharge. On January 25, 2011, a lawsuit was filed by Joyce, Thrasher, Kaiser & Liss on behalf of the Debtor against the Defendant, seeking the 25% share of profits of PGHP and Global for all years, as well as an accounting.

The Debtor cannot state today the amount of his claim against Defendant. He does make several specific allegations, though. First, he contends that he did not receive the $564,000 identified in the 2007 K-1. Instead, he testified that he received $5,000 a week in 2007 up until September, at which point the amount began to decline and no further funds were received from November 2007 through the rest of the year. He therefore claims that he is owed the difference between $564,000 (what was identified in the 2007 K-1) and the amount he actually received. The Debtor also contends he is entitled to 25% of the distributable cash from both companies, although he does not know how much that may be, if any. Finally, the Debtor contends the distributable cash has been miscalculated because of the personal expenses which the company paid on behalf of the Defendant.

In response, Defendant's accountant, Brandon S. Verner, testified that PGHP had more losses than distributions from 2008 to date. Mr. Verner stated the distributions paid to the Defendant were net of any personal expenses that had been paid by the company on the Defendant's behalf. Mr. Verner was of the opinion that losses of the companies covered by Defendant would have been repaid to Defendant before calculating distributable cash. It is the Defendant's contention that no sums are owed to Mr. Ambrose because all amounts have been properly calculated and the companies did not have any cumulative distributable cash of which he would be entitled to 25%.

At the hearing, the Trustee stated his position, that he wanted the case to be reopened so he would have the right to fully investigate the claim and intervene in the state court action if appropriate. The Trustee stated he will initially seek a bar order, setting a deadline for the filing of proofs of claim in the Chapter 7 case.

LEGAL CONCLUSIONS

The right to reopen a bankruptcy case is set forth in 11 U.S.C. § 350(b) which provides, "A case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause." The Debtor seeks to have the case reopened to administer the claim against the Defendant as an asset. The Trustee concurs and also seeks to administer the asset.

The law surrounding the right to have a case reopened to identify a claim omitted in the original schedules was discussed at length in this Court's original oral ruling and in the DC Order reversing and remanding this Court's earlier decision. The Court will not belabor that analysis here. The DC Order sets forth the factors which this Court must consider in deciding whether to reopen the case.

> The power afforded to the court to reopen a case is great and the bankruptcy court contains broad discretion. "When considering whether to reopen a bankruptcy case in the context of an undisclosed cause of action, courts have [ ] considered the following three interests: 1) the benefit to the debtor; 2) the prejudice or detriment of the defendant in the pending litigation; and 3) the benefit to the debtor's creditors. Additionally, courts look to "whether the debtor was intentionally committing fraud". Bankruptcy courts in this district emphasize that, when the motion to reopen is to add an asset, the most important consideration is the benefit to creditors.

Riggins v. Ambrose, 500 B.R. 190, 195 (N.D. Ga. 2013) (citations omitted). It is for the purpose of analyzing these factors that the court remanded this case. The Defendant has focused primarily on the merits of the claim which the Debtor allegedly has against the Defendant and the alleged bad faith of the Debtor in not disclosing the asset at the time the bankruptcy case was filed.

The Defendant argues first that the Debtor has presented no evidence and could not quantify any claim that he may have against the Defendant. The Defendant therefore concludes the claim is of insufficient value to warrant reopening the case and allowing the Trustee to pursue it. It is true the Debtor does not articulate a specific amount which he seeks to recover in the litigation. The Debtor testified that the Defendant has produced a number of records that he has not reviewed that would allow him to quantify the amount of his claim, if any. The Debtor did testify, though, that he received $5,000 a week from PGHP in 2007 until September 2007, at which time the amount slowly declined. He received no money in November or December of 2007. If the Debtor received $5,000 a week, his receipts would equal roughly $20,000 a month. Even if he received $20,000 a month for 10 months, he would only have received $200,000, and not the $564,000 identified on his 2007 K-1. The Debtor also testified to a $150,000 check which was given to him by the Defendant in 2007 but then taken back. The Debtor testified that one element of his claim is the difference between what the K-1 reflects was his share of the distribution and what he actually received.

Debtor also claims a 25% share of distributable cash of the companies. The Defendant does not appear to contest that the Debtor was entitled to 25% of the distributable cash from PGHP, since the 2007 K-1 reflects that 25% distribution. The Defendant presented no evidence, or even argued, that Debtor's interest in the companies did not continue. The e-mail from the Debtor to the Defendant regarding the return of the phone, office keys and computer monitor reflect that the Debtor ceased working for PGHP in February 2008. The e-mail, though, is silent as to its effect on the Debtor's membership interest in either or both companies.

The Court understands the Defendant disputes the Debtor's testimony and the Defendant's accountant says all amounts due to the Debtor have been distributed. The fact that the parties have a dispute over the accuracy of the numbers, though, does not mean the Debtor does not have a claim or the Trustee should not be entitled to investigate and pursue that claim. The Debtor is not required to hire an accountant just to get the case reopened. The Court need not try the underlying claim and need not find as a matter of law that the claim will succeed. The Court need only conclude there is a "chance of any substantial recovery for creditors [that is not] too remote to make the effort worth the risk.'" In re Rochester, 308 B.R. 596, 600 (Bankr. N.D. Ga. 2004) (cites omitted). The Court notes that the underlying claim brought in the state court was brought by counsel who appeared at the hearing on April 8 and elicited testimony from the Debtor. The Court also notes the representation made to the Court that counsel was representing the Debtor on a contingent-fee basis. While these two facts do not automatically mean the Debtor wins his case, they contribute to the Court's opinion that the claim has merit because they reflect that an independent third party has evaluated the claim and is willing to spend his time and money in order to pursue it. In short, the Debtor's case is not one without merit. If the Debtor is only correct as to the underpayment in 2007, that claim could be worth over $300,000.

Noting that the priority and unsecured claims in the case are a little over $100,000, there is no doubt that this claim can have a substantial impact on the bankruptcy case.

Moreover, the Court finds no prejudice to the Defendant from allowing the case to be reopened, other than any effect that reopening may have on the Defendant's judicial estoppel argument in state court. The Court makes no finding and draws no conclusion as to the effect of reopening the bankruptcy case on the state law judicial estoppel argument. Even if reopening the case eliminates the Defendant's judicial estoppel argument, that is not detriment enough to counteract the right to reopen the case. If that were so, no bankruptcy case could ever be reopened. The Court notes the Defendant pointed to no reliance or extra damages or extra delay occasioned by the failure of the Debtor to disclose the lawsuit in his original schedules.

Finally, the Court must examine whether the Debtor acted intentionally, fraudulently or with bad faith. As the District Court said, "some lip service should be paid to the debtor's intent and … he should, at a minimum, be forced to appear and, under oath, explain himself." Riggins, 500 B.R. at 196. The Defendant pointed out that rarely does a debtor admit to acting in bad faith or acting intentionally, so the Court must consider the facts as a whole. There is no doubt the timing of the demand letter in May 2010, followed less than one month later by the filing of the bankruptcy case, and then the filing of the complaint only a few months after the Debtor received his discharge, are all very suspicious. The Debtor did, however, appear and under oath give his explanation. He stated he did not know he was supposed to disclose the potential interest he had in the companies or the potential claim he had. He testified he did disclose the interest he had in the one company that was operational (Scyberhealth), but, since he was no longer involved in PGHP and Global, he did not think to include his alleged interest in them in the bankruptcy schedules. The Chapter 7 Trustee and Debtor's counsel agree they did not know of the Debtor's claim. The Court notes it is not uncommon, unfortunately, for debtors to think they can

"bankrupt" against only certain debts or to say a certain asset is "not part of their bankruptcy". It is also not uncommon for debtors to omit intangible assets like claims when they are filling out their schedules as opposed to tangible assets like their car and their house. Nevertheless, the timing here is suspect and the Court finds it hard to believe the Debtor had no idea that he should have raised the issue with either his bankruptcy counsel or his state court counsel. The most suspicious fact is that the lawsuit was filed only after the discharge was obtained. The Debtor did not have a satisfactory explanation for the delay in filing the lawsuit between May 2010 when the demand was initially made and suit was threatened imminently and January 2011. Therefore, the Court concludes the Debtor did not act in good faith in making full disclosure to his bankruptcy counsel, the bankruptcy trustee, state counsel or to the Court.

As the District Court noted, the bankruptcy court must then weigh the various factors in making a decision to reopen the bankruptcy case. On one hand, the Court concludes the Debtor has a potential claim of enough value to make a substantial distribution to unsecured creditors in his bankruptcy case and that the Trustee now wants to, and is prepared to, administer this asset. The Court also notes there is no special harm to the Defendant in allowing the case to be reopened. On the other hand, the Court has concluded the Debtor did not act in good faith. The District Court noted, though, that a finding of bad faith does not require denial of a motion to reopen because '"a former debtor's alleged bad faith is never a sufficient basis by itself to deny a motion to reopen.' The bankruptcy court is also free to find that any bad faith on the part of the Debtor is outweighed by the consideration of other factors …". Id. (citations omitted). When considering the matter as a whole, the Court concludes the opportunity to make a substantial distribution to unsecured creditors outweighs the lack of good faith on the part of the Debtor. The Court also notes, as it has previously, that this Court is in a position to insure the Debtor does not benefit from his lack of good faith. For example, the Court can prohibit the Debtor

from retaining any recovery the Trustee makes on the claim, other than what is necessary to pay the claims and the bankruptcy expenses. Moreover, the Court can deny any request by the Trustee to abandon the claim back to the Debtor. For these reasons, it is hereby

ORDERED that the Motion to Reopen is GRANTED;

ORDERED FURTHER that the United States Trustee is to reappoint a Chapter 7 trustee to investigate the claim and take any further action as appropriate;

ORDERED FURTHER that the Debtor is to amend his schedules and statement of financial affairs to fully disclose his interest in the claims against Defendant and his alleged interest in PGHP and Global and any other matters that must be disclosed;

ORDERED FURTHER that the Trustee shall not abandon this claim to the Debtor without motion, notice to all including the Defendant, and an opportunity for hearing.

END OF ORDER

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