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Hon. Timothy Dore
Chapter 7
Hearing Date: December 14, 2012
Hearing Time: 9:30 a.m.
Response Date: December 7, 2012

4
5 UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

6 In re:
7 THOMAS R. HAZELRIGG, III,
8 Debtor.

NO. 11-22731-TWD

9
10 UNITED STATES TRUSTEE,
11 Plaintiff,

ADV. NO. 12-01966-TWD

12 vs.

BRIEF IN SUPPORT OF
DEFENDANT'S MOTION TO DISMISS

13 THOMAS R. HAZELRIGG, III,
14 Defendant.

15 1. FACTS

16 1.1 The complaint filed herein fails to show the existence of any property that the
17 debtor did not disclose.

18 1.2 The complaint filed herein fails to specify any item of property that the debtor
19 supposedly failed to disclose.

20 1.3 The debtor did respond to the untimely subpoena. Statements to the contrary are
21 not correct.

22 1.4 Contemporaneously to filing this complaint the U.S. Trustee turned over to the
23 debtor's counsel two DVD's containing in excess of 48,000 multi-page files. While it has been
24 impossible to go through all of the records, they appear to be financial records of the debtor and
25 various companies that were sought in the subpoena.

26 1.5 When the debtor left town, he took some art, some jewelry, and some clothing.
27 All of the valuable items have been turned over to SamE investments pursuant to the Order
28

BRIEF IN SUPPORT OF DEFENDANT'S
MOTION TO DISMISS - 1

MARC S. STERN
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(206)448-7996

1 Granting Relief from Stay herein. Virtually all of his other property, including records, were
2 levied upon by James Rigby, the trustee for Michael Mastro.

3 1.6 Unlike Mastro, Hazelrigg left his property when he left the area. He turned over
4 to the trustee the property he still had when the involuntary was filed and has not hidden any
5 assets.

6 2. ISSUES PRESENTED

7 2.1 Pursuant to *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1950 (2009), does a
8 complaint that does nothing more than recite the elements of a cause of action without any facts
9 state a claim for relief or which relief may be granted?

10 2.2 In order to state a claim for which relief can be granted, is the plaintiff required to
11 plead facts with particularity as required by F. R.Civ.P. 9(b)?

12 2.3 In order to state a claim, must the plaintiff set forth issues and facts that are
13 material?

14 3. LEGAL ARGUMENT

15 3.1 The complaint fails to state a cause of action for nondischargeability of debt
16 pursuant to § 727. The complaint should be dismissed because it fails to state a claim pursuant to
17 F.R.Civ.P. 12(b) and 12(c).

18 The complaint herein seeks to except from discharge the obligations to the plaintiff on the
19 basis of fraud § 727. The complaint fails to set forth sufficient facts to support any claim for
20 relief for concealment in the schedules or statements. A pleading that offers nothing more than
21 “threadbare recitals of a cause of action’s elements,” without supporting factual allegations, will
22 not suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1950 (2009) (citing *Twombly*, 550
23 U.S. at 555, 127 S.Ct.1955), *In re Henderson* 423 B.R. 598, 612 (Bkrtcy. N.D.N.Y., 2010.)

24 Bankruptcy Rule 7009 incorporates by reference Rule 9 of the Federal Rules of Civil
25 Procedure.(hereinafter CR). CR 9(b) requires that fraud must be pled with particularity. A
26 complaint for fraud or that sounds in fraud must be so pleaded. Each factual element must be
27 pleaded with specificity and plausibility. *Kearns v. Ford Motor Co.*, 567 F.3d. 1120 (9th Cir.
28 2009).

1 In order to comply with the requirements of CR 9(b), each of the facts showing the
2 misrepresentation must be set forth in detail. The court in *Ebeid ex rel. U.S. v. Lungwitz*, 616
3 F.3d 993 (9th Cir. 2010), addressed this particular issue holding:

4 [I]n alleging fraud or mistake,” [Rule 9\(b\)](#) requires a party to “state
5 with particularity the circumstances constituting fraud or mistake,”
6 including “the who, what, when, where, and how of the misconduct
7 charged.” [Vess v. Ciba-Geigy Corp. USA](#), 317 F.3d 1097, 1106
8 (9th Cir.2003) (internal quotation marks omitted). In addition,
9 “[t]he plaintiff must set forth what is false or misleading about a
10 statement, and why it is false.” *Id.* (quoting [Decker v. GlenFed,
11 Inc. \(In re GlenFed, Inc. Sec. Litig.\)](#), 42 F.3d 1541, 1548 (9th
12 Cir.1994) (en banc)).

13 *Eneid* was amplified by *Cafasso, U.S. ex rel. v. General Dynamics C4 Systems, Inc.*,
14 637 F.3d 1047 (9th Cir. 2011).

15 Until now, we have not had occasion explicitly to confirm that
16 [Iqbal's](#) plausibility requirement applies to claims subject to [Rule
17 9\(b\)](#). We have, however, said that complaints alleging fraud must
18 comply with both [[Federal Rules of Civil Procedure](#)] [8\(a\)](#) and
19 [9\(b\)](#).” [Wagh v. Metris Direct, Inc.](#), 363 F.3d 821, 828 (9th
20 Cir.2003), *overruled on other grounds by* [Odom v. Microsoft
21 Corp.](#), 486 F.3d 541, 551 (9th Cir.2007) (en banc). Because [Rule
22 8\(a\)](#) requires the pleading of a plausible claim, [Iqbal](#), 129 S.Ct. at
23 1949–50, we hold that claims of fraud or mistake—including FCA
24 claims—must, in addition to pleading with particularity, also plead
25 plausible allegations.

26 Here, the complaint is sadly lacking in any of these requirements. For example, ¶¶ 14 and
27 17 allege a plethora of categories of property that the plaintiff alleges the defendant concealed.
28 However, the plaintiff does not specify any specific item of property that the defendant owns that
he did not disclose. What the U.S. Trustee does in ¶ 14 is allege that the defendant did not
disclose the universe and then does not even identify the galaxy or solar system that was not
disclosed. In order to set forth a plausible claim, the trustee must do better. He must identify an
asset.

Undisclosed Pre-Petition Transfers.

Again, in ¶¶ 18 – 37, the plaintiff lists a series of alleged transfers to SamE Investments.
The debtor did disclose in the schedules that it granted a security interest in all of his assets to
SamE Investments. Although it is impossible to tell from the complaint what these alleged
transfers were, the underlying grant of security interest was disclosed. The validity of the grant

1 of the security interest was tested and SamE Investments won. The fact that specific payments
2 were exacted by SamE pursuant to a disclosed security agreement does not seem material. This
3 is especially so since there was ongoing litigation between SamE and the petitioning creditors in
4 this case.

5 More importantly, all of the allegations of the transfers were derived from records already
6 in the U.S. Trustee's possession. The trustee, after filing this complaint turned over two DVD's
7 containing in excess of 48,000 multi-page files that appear to be records of the debtor and
8 companies in which he had an interest.

9 The complaint fails wholly to set forth what item was transferred, its value, the date of the
10 transfer, the manner of the transfer or anything else germane that would allow the defendant to
11 identify the transaction. If the plaintiff cannot set forth, with specificity, exactly what was
12 transferred, the complaint fails the plausibility test required in *Iqbal, supra*. The hallmark of a
13 complaint to deny discharge based upon fraud or concealment is that the complaint set forth, with
14 specificity, the facts upon which it is based. The important reason of specifying facts, with
15 particularity, is to allow the defendant to understand what actions form the basis of the
16 complaint.

17 To satisfy [Rule 9\(b\)](#), a pleading must identify “**the who, what,**
18 **when, where, and how of the misconduct charged,**” as well as
19 **“what is false or misleading about [the purportedly**
20 **fraudulent] statement, and why it is false.”** [Ebeid ex rel. United States v. Lungwitz, 616 F. 3d 993, 998 \(9th Cir. 2010\)](#) (internal
quotation marks and citations omitted).

21 *Capasso, surpa*, at 1055.

22 In this case, all of these elements are missing. The pleading must state “enough fact[s] to
23 raise a reasonable expectation that discovery will reveal evidence of [the misconduct alleged].”
24 [Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 556, 127 S.Ct. 1955, 167 L.Ed.2d 929 \(2007\)](#). In
25 this case it is impossible to prognosticate what items of property the debtor allegedly has.

26 The debtor did disclose the grant of a security interest to SamE Investments. Given the
27 debtor's lack of records, records that it now appears are in the hands of the U.S. Trustee, it was
28 impossible to be more specific. However, the grant of the security interest was scheduled.

The failure to list these specific transfers to SamE is not material.

1 The court in *In re Maxey*, 410 B.R. 854 (Bkrtcy.W.D.Mo.,2009), discussed materiality:

2 In order to deny a discharge to a debtor under § 727(a)(4)(A), the
3 plaintiff must establish that: (1) debtor knowingly and fraudulently;
4 (2) in or in connection with the case; (3) made a false oath or
5 account; (4) regarding a material matter. *Korte v. United States of
6 America Internal Revenue Serv. (In re Korte)*, 262 B.R. 464, 474
7 (8th Cir. BAP 2001).

8 In the 9th Circuit, *In re Wills* 243 B.R. 58 (9th Cir. BAP, 1999), reached a similar result.

9 A false statement or omission that has no impact on a bankruptcy
10 case is not grounds for denial of a discharge under § 727(a)(4)(A).
11 6 Lawrence P. King et al., COLLIER ON BANKRUPTCY ¶
12 727.04[1][b] (15th ed. Rev.1998)(citing *In re Fischer*, 4 B.R. 517
13 (Bankr.S.D.Fla.1980)). As a result, omissions or misstatements
14 relating to assets having little or no value may be considered
15 immaterial. *See, e.g., In re Waddle*, 29 B.R. 100
16 (Bankr.W.D.Ky.1983). Likewise, omissions or misstatements
17 concerning property that would not be property of the estate may
18 not meet the materiality requirement of § 727(a)(4)(A). *See, e.g., In
19 re Swanson*, 36 B.R. 99 (9th Cir. BAP 1984). However, an
20 omission or misstatement relating to an asset that is of little value
21 or that would not be property of the estate is material if the
22 omission or misstatement detrimentally affects administration of
23 the estate.

24 3.2 The complaint fails to set forth a viable claim for concealment of books and
25 records.

26 It is true that on October 9, 2012 the trustee issued a subpoena. Significantly, what the
27 trustee fails to report is that subpoena was not timely served. The record does not show that the
28 trustee ever mailed the subpoena to the debtor. There is no declaration of service in the file. It
was not until October 22, 2012 that counsel obtained and agreed to accept service of the
subpoena. A copy of the email correspondence is attached hereto as **Exhibit 1**.

The trustee obtained an Order for 2004 Examination four months ago, on July 19, 2012
(DKT. #100). It was never served. The subpoena in question was not timely served.

What the trustee also conveniently fails to disclose is that its office was in possession of
more than 48,000 multi-page files of the debtor's records. After the complaint was filed, the
U.S. Trustee provided counsel for the debtor with two DVD's with the 4.4 GB (gigabytes) of
records. The files do not appear to be in any particular order and it will take a great deal of time
to even look at the documents

From: Marc S. Stern <marc@hutzbah.com>
To: Thomas.A.Buford@usdoj.gov
BCC: trh2@msn.com
Sent: 10/22/2012 02:31 PM
Subject: RE: Hazelrigg 11-22731

EXHIBIT 1

I have now had a chance to review the subpoena and have contacted my client. I am authorized to accept service. Please prepare an appropriate document for me to do so.

I have discussed subpoena with my client. Mr. Hazelrigg is unclear what some of the questions mean. Do you have a financial statement to which you are referring? He has no idea what the accounts receivable may be. Similarly, he has no idea where the lots are.

MSS

Marc S. Stern
1825 NW 65th St.
Seattle, WA 98117
206-448-7996

Pursuant to U.S. Treasury Department Circular 230, unless we expressly state otherwise, any tax advice contained in this communication (including any attachments) was not intended or written to be used, and cannot be used, for the purpose of (i) avoiding tax-related penalties or (ii) promoting, marketing or recommending to another party any matter(s) addressed herein.

Notice- This e-mail message is confidential, intended only for the named recipient(s) above and may contain information that is privileged, attorney work product or exempt from disclosure under applicable law. This does not constitute an electronic signature.

From: Buford, Thomas A. (USTP) [mailto:Thomas.A.Buford@usdoj.gov]
Sent: Thursday, October 18, 2012 11:42 AM
To: marc@hutzbah.com
Subject: FW: Hazelrigg 11-22731

Marc,

I have not heard back from you on this matter. Mr. Hazelrigg's docket address is a private mailbox store. The United States Trustee has provided a copy of this subpoena to you and mailed a copy to Mr. Hazelrigg after being unable to serve him personally at the docket address. The United States Trustee requests that either (i) you accept service of this subpoena; or (ii) you provide an address where Mr. Hazelrigg may be served.

Thanks,

Thomas

Thomas A. Buford III
Trial Attorney
United States Trustee Program
700 Stewart Street, Suite 5103
Seattle, WA 98101
206-553-2000 x229

From: Buford, Thomas A. (USTP)

Sent: Tuesday, October 09, 2012 3:25 PM
To: marc@hutzbah.com
Subject: Hazelrigg 11-22731

Marc,

Please see the attached subpoena for documents. Will you accept service of this subpoena on your client's behalf or shall the United States Trustee serve him personally?

Thanks,

Thomas

Thomas A. Buford III
Trial Attorney
United States Trustee Program
700 Stewart Street, Suite 5103
Seattle, WA 98101
206-553-2000 x229

From: Marc S. Stern <marc@hutzbah.com>
To: Thomas.A.Buford@usdoj.gov
BCC: trh2@msn.com
Sent: 10/29/2012 05:12 PM
Subject: Hazelrigg
Attachments: resp to 2004 subpoena.pdf

EXHIBIT 2

Attached please find our response to the subpoena. We are still attempting to get access to the boxes of records and other things in the possession of Trustee Rigby.

Marc S. Stern
1825 NW 65th St.
Seattle, WA 98117
206-448-7996

Pursuant to U.S. Treasury Department Circular 230, unless we expressly state otherwise, any tax advice contained in this communication (including any attachments) was not intended or written to be used, and cannot be used, for the purpose of (i) avoiding tax-related penalties or (ii) promoting, marketing or recommending to another party any matter(s) addressed herein.

Notice- This e-mail message is confidential, intended only for the named recipient(s) above and may contain information that is privileged, attorney work product or exempt from disclosure under applicable law. This does not constitute an electronic signature.

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6 EXHIBIT 3
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12 UNITED STATES BANKRUPTCY COURT
13 WESTERN DISTRICT OF WASHINGTON AT SEATTLE

14 In re:

15 THOMAS R. HAZELRIGG, III,
16 Debtor.

)
) NO. 11-22731-TWD

)
) RESPONSE TO 2004 SUBPOENA
)

17 The debtor, by and through counsel responds to the Subpoena for Bankruptcy Rule 2004
18 exam as follows:

19 1. On the advice of counsel, the debtor has not completed the 1040 tax returns for
20 2009, 2010 or 2011. The debtor asserts a 5th Amendment Privilege to the remainder of this
21 request.

22 1.1. The debtor does not have possession of the documents requested in this
23 paragraph. To the best of his knowledge, said documents are in the hands of James
24 Rigby, trustee, his attorneys or designees. Other documents were in the hands of Ann
25 Stockton and were destroyed when she died. A declaration from her surviving spouse
26 describes what happened to these records is on file herein.

27 2. See answer to 1.1. However, the debtor recalls the following receipts
28

- 1 2.1. 4 checks of \$25,000 in settlement with Pat McCort (early 2009)
- 2 2.2. Dan Chun - 135,000 May 13, 2010 - See ¶ 1.1
- 3 2.3. Dan Chun \$40,000 received. Date unknown. Apx early 2009
- 4 2.4. Same Investments - commissions Park 120 and Bastyr College Building
- 5 Amounts unknown early to mid 2009. Received apx 300,000 in fees. Some were applied
- 6 to debt. One-Half was given to Mastro.
- 7 2.5. Centurion Pacific, LLC Bank of the West Property in Albuquerque. Apx
- 8 300,000.
- 9 2.6. Others probably but the debtor cannot recall. See 1.1
- 10 3. See answers to ¶2. There is no documentation.
- 11 4. Said documents do not exist. The debtor incorporates the answer to ¶ 1.1
- 12 5. The debtor incorporates ¶ 1.1
- 13 5.1. All real property taken by lenders VI timeshare units in default. Over
- 14 2500 in annual dues owed.
- 15 6. The debtor has no records except 2008 PT Cruiser in his possession. A copy of the
- 16 registration will be forwarded.
- 17 7. The debtor has no insurance other than an automobile liability policy. A copy of
- 18 the automobile policy will be provided.
- 19 8. See answer to ¶ 1.1. Debtor has a few auto claims but no net funds received. All
- 20 the insurance proceeds went to repairs.
- 21 9. See ¶ 1.1 The debtor's best recollection is that the debtor had accounts with Bank
- 22 of the West, Compass Bank and Charles Schwab. The debtor does not have any records because
- 23 they were seized or were in Stockton's possession.
- 24 10. See ¶ 1.1
- 25 11. See ¶ 1.1 for records.
- 26 11.1. Art Collection - Two chandeliers retail 500 to 600k, 4 glass Chihuly pieces
- 27 worth retail aprox.200k. Two held in trust in Eric Ortiz's office, one given to Kwans
- 28 2010, one to Kirby per BK schedule. Rest of art given to Same, taken by trustee, or

1 creditors. No documents. Chandeliers were seized by Rigby, The other art is subject to
2 SamE investments.

3 11.2. Plasma Stock - Original shares given to SamE investments sometime in
4 late 2010. Market value at this time -0-

5 11.3. Vehicles - were sold. The debtor has no records. See ¶ 1.1.

6 11.4. Fees Receivable. See ¶ 1.1. Whatever there was was assigned to SamE
7 investments as collateral. SamE should have the records. All believed to be not
8 collectible. Exception for Northwest Quality - and Alegre paid. The debtor satisfied the
9 notes and has no further documentation. Liebson may have paid and the records marked
10 satisfied and destroyed..

11 11.5. Centurion Financial Group - subject to an involuntary Chapter 7. Records
12 in Bankruptcy Court for the W.D. WA

13 11.6. Mukilteo lots - foreclosed to the best of debtor's recollection this was a
14 junior interest. See ¶1.1

15 11.7. Dogwood Meadows - foreclosed to the best of debtor's recollection this
16 was a junior interest. See ¶1.1

17 11.8. Bontrager Judgment - assigned to SamE as part of collateral package.
18 Probably uncollectible.

19 11.9. Other Real estate - listed in this bankruptcy and foreclosed.

20 The debtor has looked for and is attempting to provide any documents. Many of the
21 documents were included in the records that Trustee Rigby took possession of when he levied on
22 the debtor's properties. The debtor's bookkeeper kept the debtor's records for several years. Her
23 death and the destruction of records by her surviving spouse make turn over of these records not
24 possible.

25 The records can probably be reconstructed from the banking sources. However, the
26 debtor does not have the money to pursue the parties in possession of the records. The debtor has
27 always had a book keeper and/or an accountant who maintained his records. Ms. Stockton's
28 death and the failure of her surviving spouse to maintain the records has been devastating to him.

1 He has declared all of his assets that he knows of. No one is holding any thing that might be
2 transferred back to him in the future.

3 This Subpoena was served less than 14 days ago. The U.S. Trustee has known for some
4 time that he was going to seek additional information. The debtor objects to the untimeliness of
5 this subpoena. Nevertheless the debtor has responded as best he could given the time constraints,
6 the seizure and destruction of records.

7 Response submitted this October 29, 2012

8 /s/ Marc S. Stern
9 Marc S. Stern
10 WSBA 8194
11 Attorney for Debtor
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