

**United States Bankruptcy Court
Northern District of Illinois
Eastern Division**

Transmittal Sheet for Opinions

Will this opinion be published? No

Bankruptcy Caption: In re ROLAND SANDERS and GLENNIS SANDERS

Bankruptcy No. 99 B 09876

Adversary Caption:

Adversary No.

Date of Issuance: March 2, 2000

Judge: Susan Pierson Sonderby

Appearance of Counsel:

Attorney for Movant or Plaintiff: Katie Gleason, U.S. Attorney

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Trustee or Other Attorneys:

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

In re:)	99 B 9876
)	
ROLAND SANDERS and)	
GLENNIS SANDERS,)	Chapter 11
)	Hon. Susan Pierson Sonderby
Debtors.)	

**FINDINGS OF FACT AND CONCLUSIONS OF LAW RESOLVING THE MOTION FOR
THE APPOINTMENT OF A TRUSTEE**

This matter came before the Court on the motion of the United States Trustee for the appointment of a trustee pursuant to 11 U.S.C. § 1104. The Court conducted an evidentiary hearing on November 17, 1999. After having heard the testimony of the witnesses, having reviewed the documents received into evidence, having heard the arguments of counsel and having reviewed the proposed findings of fact and conclusions of law submitted by the parties on December 3, 1999, the Court makes the following findings of fact and conclusions of law pursuant to Rule 7052 and Rule 9014 of the Federal Rules of Bankruptcy Procedure.

Findings of Fact

The Debtors

1. Roland Sanders and Glennis Sanders (“Debtors”) filed a petition for relief under Chapter 11 of the Bankruptcy Code on March 29, 1999.
2. On November 17, 1999 Mrs. Sanders testified that she had fifteen years of formal education including one and a half years of business college.
3. In his testimony before this Court, Mr. Sanders testified that he completed four years of college and was employed as a peace officer by the Cook County Sheriff.

4. On April 23, 1999 the Debtors filed their Schedules and Statement of Financial Affairs. Each of the Debtors executed the declarations at the conclusion of the documents, declaring under penalty of perjury that the answers were true and correct. Movant's Exs. 4 and 5.

5. In their Statement of Financial Affairs, the Debtors listed three businesses in which they had an ownership interest or a management position on the date the petition was filed. Movant's Ex. 5.

6. The Debtors listed ownership of four parcels of real property including two single family homes, one "two flat" and one commercial property with a combined market value of \$1,555,000.00 on Schedule A of the their Schedules.

The People v. Sanders Lawsuit

7. On December 12, 1996 Mrs. Sanders entered into an agreed order in People v. Glennis L. Sanders, Case No. 96 CH 10309 in the Circuit Court of Cook County. Movant's Ex. 2.

8. The December 12, 1996 order entered by the Honorable Lester D. Foreman found Mrs. Sanders "guilty of Indirect Criminal Contempt of Court for conducting the unauthorized practice of law by having her mortgage foreclosure avoidance clients authorize her to prepare and file court pleadings on their behalf." Movant's Ex. 2.

9. The December 12, 1996 order permanently enjoined Mrs. Sanders from any further unauthorized practice of law and from seeking authorization from any member of the public to prepare or file court documents on their behalf. Movant's Ex. 2.

10. The December 12, 1996 order also required Mrs. Sanders to make restitution to Kenneth Swanigan in the amount of \$1,200. Movant's Ex. 2.

11. On March 18, 1999 an order was entered by Judge Lester D. Foreman finding Mrs. Sanders

guilty of indirect civil contempt of court for violation of the December 12, 1996 order after a two day bench trial. Movant's Ex. 3.

12. The March 18, 1999 order permanently enjoined Mrs. Sanders from giving advice for compensation to people who had existing foreclosure proceedings and from giving advice regarding forbearance plans, mortgage reinstatements and bankruptcies. Movant's Ex. 3.

13. The March 18, 1999 order also required Mrs. Sanders to make restitution to Jimella Fowler in the amount of \$1,100 and to Lorena McBride in the amount of \$1,000. Movant's Ex. 3.

14. The restitution payments were to be made through the Cook County State's Attorney's Office, Consumer Fraud Division. Movant's Ex. 3.

15. Question 4 of the Statement of Financial Affairs requires a debtor to list all lawsuits and administrative proceedings to which the debtor is or was a party within one year of filing the bankruptcy case. The Debtors listed three pending lawsuits but neglected to list People v. Sanders. Movant's Ex. 5.

16. Mrs. Sanders testified at the hearing that she did not list People v. Sanders in response to question 4 of the Statement because she did not think to list it and because she thought that it did not pertain to the bankruptcy case.

Misrepresentations Concerning Restitution Payments

17. Schedule F of the Debtors' Schedules lists Jimella Fowler as having a claim in the amount of \$1,100 based on a "client refund." Movant's Ex. 4.

18. Schedule F lists Lorena McBride as having a claim in the amount of \$1,000 based on a "client refund." Movant's Ex. 4.

19. Pursuant to the March 18, 1999 order these claims were ordered as restitution. Movant's Exhibit 3.

Misrepresentations Concerning Occupation and Income

20. Schedule I of the Debtors' Schedules lists Mrs. Sanders' occupation as a Foreclosure Specialist with Network Enterprises for 14 years.

21. The Debtors listed Network Enterprises as one of their businesses on the their Statement of Financial Affairs, and it is described as providing "Foreclosure Services". The dates of operation are listed as "1985 to Present".

22. On April 29, 1999 a meeting pursuant to 11 U.S.C. § 341 was held. Mrs. Sanders testified at that meeting. She testified that she was a mortgage and foreclosure consultant.

23. Movant's Ex. 1 is the transcript of the meeting. The relevant colloquy went as follows:

Assistant United States Trustee: Okay. Mrs. Sanders, what do you do for a living?

Mrs. Sanders: I'm a mortgage and foreclosure consultant.

AUST: Okay. And is that your own business or are you with a company.

Mrs. Sanders: No. It's my own business.

AUST: Okay. How long have you been in that line of business?

Mrs. Sanders: Approximately 14 years.

AUST: And what's the name of the business?

Mrs. Sanders: Network Enterprises and Associates.

* * *

AUST: Okay. And what is a typical monthly income from that business?

Mrs. Sanders: It is a range of approximately 4 to 7 thousand dollars per month.

AUST: And what exactly do you do?

Mrs. Sanders: I arbitrate or negotiate with the mortgage company to reinstate clients who are facing a foreclosure and [inaudible] them get current with their mortgage.

24. On July 27, 1999 the Debtors filed their Disclosure Statement. Movant's Ex. 6.

25. In the Disclosure Statement the Debtors state that "Glennis Sanders will continue her efforts in assisting clients who have problems with foreclosure [sic] on their residences by secured lenders."

Movant's Ex. 6 at page 8.

26. At trial on November 17, 1999 Mrs. Sanders testified that she is not a mortgage and foreclosure consultant. She also testified that she was not a mortgage and foreclosure consultant on March 29, 1999, the date the case was filed, on April 23, 1999, the date the Debtors' Schedules were filed or on April 29, 1999, the date of the § 341 meeting.

27. Mrs. Sanders failed to explain the discrepancy between her sworn statements filed with the Court and her testimony at trial. She said only that she did not understand the questions posed to her and that she did not intend to mislead anyone.

Conclusions of Law

1. 11 U.S.C. § 1104(a) provides as follows:

(a) At any time after the commencement of the case but before confirmation of a plan, on request of a party in interest or the United States trustee, and after notice and a hearing, the court shall order the appointment of a trustee--

(1) for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, either before or after the commencement of the case, or similar cause, but not including the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor; or

(2) if such appointment is in the interests of creditors, any equity security holders, and other interests of the estate, without regard to the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor.

2. Pursuant to 28 U.S.C. §157(b)(2)(A), the Court has core jurisdiction over the issue of the appointment of a trustee.

3. The moving party has the burden of proving grounds that justify the appointment of a chapter 11 trustee and that party must overcome a strong presumption that the debtor is to remain in possession. In re Madison Management Group, Inc., 137 B.R. 275, 281 (Bankr. N.D. Ill. 1992)

(Sonderby, J.).

4. The appointment of a trustee is an extraordinary remedy that requires proof by clear and convincing evidence. In re Bellevue Place Assocs., 171 B.R. 615, 623 (Bankr. N.D. Ill. 1994) (Schmetterer, J.); Madison Management Group, 137 B.R. at 281.

5. "At the same time, 'section 1104 represents a protection that the Court should not lightly disregard or encumber with overly protective attitudes towards debtors-in-possession.'" Bellevue Place, 171 B.R. at 623 (quoting In re V. Salvino Oil & Heating, 99 B.R. 518, 525 (Bankr. E.D.N.Y. 1989)).

6. The Court must make this fact-sensitive determination on a case-by-case basis. Bellevue Place, 171 B.R. at 622-23; Madison Management, 137 B.R. at 281. In making its determination, the court may examine both pre- and post-petition conduct. Oklahoma Refining Co. v. Blaik (In re Oklahoma Refining Co.), 838 F.2d 1133, 1136 (10th Cir. 1988). "A determination of whether cause exists to appoint a Chapter 11 Trustee is within the discretion of the court and due consideration must be given to the various interests in the bankruptcy proceeding." Bellevue Place, 171 B.R. at 623.

Section 1104(a)(1)

7. § 1104(a)(1) provides for the appointment of a trustee when the moving party has demonstrated "cause".

8. Cause was found when a DIP failed to keep adequate records, failed to file reports, and engaged in a history of questionable transactions with affiliated companies. In re Oklahoma Refining Company, 838 F.2d 1133 (10th Cir. 1988). Cause was found when a DIP had an irreconcilable conflict of interest with an estate because he had an interest in a company attempting to acquire

technology of the debtor and had engaged in self dealing. In re Embrace Systems Corp., 178 B.R. 112, 128-129 (Bankr. W.D. Mich. 1995). Cause was found when prospects for the rehabilitation of a debtor were extremely remote and the continuation of DIP management would result in serious potential conflicts of interest in the collection of money due the debtor from related corporations. In re L. S. Good & Co., 8 B.R. 312 (Bankr. N.D. W. Va. 1980). Cause was found where a DIP was looting the estate through "kickbacks" the DIP received from the company the DIP hired to manage the debtor. Fukutomi v. United States Trustee (In re Bibo), 76 F.3d 256 (9th Cir. 1996).

9. Debtors-in-possession are fiduciaries of the estate and a breach of their fiduciary duties may constitute cause. A trustee will be appointed when the debtor-in-possession is incapable of performing his fiduciary duties. In re Russell, 60 B.R. 42 (Bankr. W.D. Ark. 1985); In re Ford, 36 B.R. 501, 504 (Bankr. W.D. Ky. 1983). See also 11 U.S.C. §§ 1106 and 1107.

10. Inherent in any fiduciary's obligations is the duty to tell the truth. Where a debtor fails to disclose material information to the Court and to creditors, the appointment of a chapter 11 trustee is appropriate. In re Petit, 182 B.R. 64 (D. Me. 1995)(citing In re Savino Oil & Heating Co., 99 B.R. 518 (Bankr. E.D.N.Y. 1989)). Misrepresenting the facts of a debtor's financial situation constitutes grounds for the appointment of a trustee. See In re Foundry of Barrington Partnership, 129 B.R. 550 (Bankr. N.D. Ill. 1991).

11. Here, there is cause to appoint a chapter 11 trustee. The Debtors completed five and half years of college education between them. They own or hold management positions in three businesses. They own \$1.5 million worth of real estate. Yet, they would like this Court to believe that they did not understand the question on the Statement of Financial Affairs which required them to list "all lawsuits

and administrative proceedings to which the debtor is or was a party within one year of filing the bankruptcy case.” The Debtors listed three pending lawsuits but neglected to list People v. Sanders in which an order had been entered two weeks prior to the filing of the petition.

12. The Debtors characterized Court-ordered restitution payments as “client refunds.”

13. Mrs. Sanders testified on November 17, 1999 that she was not violating the March 19, 1999 state court order on April 23, 1999 when the Debtors filed their Schedules and Statement of Financial Affairs and listed Network Enterprises as one of their businesses and described it as providing “foreclosure services.” The dates of operation are listed as “1985 to Present”. She offered no adequate explanation for the discrepancy between stating under oath in the early months of this case that she was providing foreclosure services for compensation and her later testimony that she never violated the March 19, 1999 order which prohibited her from providing foreclosure services.

14. Mrs. Sanders testified on April 29, 1999 at the § 341 meeting that she was a mortgage and foreclosure consultant and that she had been in that business for fourteen years. She described her income as four to seven thousand dollars per month from that business and described the work as negotiating with mortgage companies to reinstate her clients’ mortgages that were facing foreclosure. This was exactly the type of work that she was prohibited from doing in the state court orders. At the November 17 hearing, Mrs. Sanders was questioned about her earlier testimony. She backtracked and said that she thought that she was being asked at the § 341 hearing what work she had done in the past. A review of the transcript shows clearly that she was asked “what do you do for a living?”

15. Three months later, the Debtors stated in their Disclosure Statement that “Glennis Sanders will continue her efforts in assisting clients who have problems with foreclosure [sic] on their residences by

secured lenders.”

16. The lack of truthfulness demonstrated by Mr. and Mrs. Sanders leads this Court to the conclusion that the Debtors should not be in the position of fiduciaries of this bankruptcy estate. Creditors, potential lenders and anyone else who might do business with this estate have to be able to rely on the truthfulness and accuracy of the information provided in the Debtors’ filings and in the Disclosure Statement and Plan on which creditors will be voting. From the evidence presented this Court is not confident that the Debtors will provide truthful and accurate information. Therefore, the United States Trustee’s motion is granted under 11 U.S.C. § 1104(a)(1).

Section 1104(a)(2)

17. A Court may also appoint a Chapter 11 trustee “(2) if such appointment is in the interests of creditors, any equity security holders, and other interests of the estate, without regard to the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor.” 11 U.S.C. § 1104(a)(2).

18. Whether appointment of a chapter 11 trustee is in the interest of the creditors, equity holders and other interests of the estate is also very fact specific and requires a balancing of the interests and costs. The standard under § 1104(a)(2) is within the sound discretion of the bankruptcy judge and the standards are even more flexible than those under § 1104(a)(1). Bellevue Place Assocs., 171 B.R. at 623. Appointment of a chapter 11 trustee must be in the interest of the estate generally, which can mean that there may be competing interests that weigh for and against the appointment.

19. The traditional factors used to determine whether appointment of a chapter 11 trustee is in the best interest of the creditors include (a) the trustworthiness of the debtor; (b) the debtor's past and

present performance and prospects for rehabilitation; (c) whether the business community and creditors of the estate have confidence in the debtor and (d) whether the benefits outweigh the costs. Madison Management, 137 B.R. at 282 (citations omitted).

20. Here, the evidence shows that the Debtors are not trustworthy. See paras. 11 - 16 supra. In addition, the case has been pending for close to a year without any significant progress. The plan which was filed contemplates liquidation and a trustee is as capable of conducting a liquidation as a debtor-in-possession. Accordingly, the United States Trustee's motion is granted under 11 U.S.C. § 1104(a)(2).

21. To the extent necessary, findings of fact shall be deemed conclusions of law, and conclusions of law shall be deemed findings of fact.

CONCLUSION

For the reasons stated above, the motion for the appointment of a trustee pursuant to 11 U.S.C. § 1104(a) is granted.

ENTERED:

Date:

SUSAN PIERSON SONDERBY
United States Bankruptcy Judge