UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	:	
	:	Chapter 11
DAVID SCHICK and VENTURE	:	Case Nos.: 96-42902(SMB)
MORTGAGE CORP.,	:	96-43969(SMB)
	:	
Debtors.	:	

MEMORANDUM DECISION AND ORDER DENYING MOTION TO REOPEN CASE AND COMPEL TRUSTEE TO ACT

A P P E A R A N C E S:

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STUART M. BERNSTEIN
Chief United States Bankruptcy Judge:

David Schick moved to reopen this involuntary chapter 11 case and compel his former trustee to administer a heretofore undisclosed asset, or else, abandon it. I denied the motion from the bench, and this memorandum explains my reasons more fully.

BACKGROUND

The Schick saga has been the subject of over 20 published opinions in the federal and state courts. In brief, Schick orchestrated a multi-million dollar scheme that defrauded investors by inducing them to make so-called risk free investments, many of which Schick subsequently pocketed. See Diller v. Schick, No. 96 Civ. 4140 (AGS), 1998 WL 635539, at *1 (S.D.N.Y. Sept. 16, 1998). On May 29, 1996, several of Schick's creditors filed an involuntary chapter 11 petition in this Court. The Court ordered relief and Aurora Cassirer, Esq. was appointed chapter 11 trustee. Cassirer subsequently filed a chapter 11 petition on behalf of an affiliated entity, Venture Mortgage Corporation, and the two cases were administratively consolidated.

Venture Mortgage Corporation was the general partner of Venture Mortgage Fund L.P. ("Venture Partnership"). On June 28, 1996, Venture Partnership filed a voluntary chapter 11 petition in the Delaware Bankruptcy Court, and that Court appointed John F. Schmutz, Esq. to serve as chapter 11 trustee. The Venture Partnership case was subsequently transferred from Delaware to this Court.

At the time that his case was being administered, Schick was under investigation by federal authorities. He did not file schedules or a statement of financial affairs, and invoked his Fifth Amendment privilege when called upon to provide information. E.g.,

In re Schick, 215 B.R. 4, 7 (Bankr. S.D.N.Y. 1997)(asserting the "act of production" privilege against a demand for the production of a laptop computer). On November 12, 1997, the United States Attorneys for the Southern and Eastern Districts returned criminal felony information against Schick. While his bankruptcy case was still open, Schick pleaded guilty to one count of bank fraud, and was eventually sentenced to 70 months imprisonment. In addition, he received a consecutive sentence of 27 months based upon the commission of an offense while on release. See United States v. Schick, No. 04-4762CR, 2007 WL 4480666, at *1 (2d. Cir. Dec. 21, 2007).

The Schick and Venture Partnership trustees confirmed separate but interrelated plans on April 24, 2001. The confirmation order denied a discharge to the debtors, including Schick, and the plans established a liquidating trust (the "Trust") to liquidate and distribute the estates' pooled assets. Ms. Cassirer and Martin S. Siegel, Esq. were designated co-trustees of the Trust. The assets were fully administered, and the Court entered a final decree on December 19, 2003, closing the Schick case.

The Undisclosed Asset

Approximately four years later, Schick moved to reopen his case. According to the affirmation that he submitted with the motion, Schick had invested $400,000 in an entity known as Venture 86 Associates L.L.C. ("Venture 86") prior to 1996.[1] Robert Rothenberg, who managed Venture 86, was entitled to receive 25% of the net profits, after Venture 86 returned Schick's $400,000 capital contribution and a 12% annual cumulative preferred return.

[1] Schick used the name "Venture" in several of his companies, and Venture 86 has no apparent connection to the debtors Venture Mortgage Corporation or Venture Partnership.

According to Schick, Rothenberg did not advise him of the status of his investment for several years. Recently, however, he sent Schick a number of Schedule K-1s dating from 1995 to 2001. The K-1s reported "withdrawals and distributions" of $718,589 in 2001, none of which had been paid to Schick. Believing that Rothenberg diverted the money, Schick and SRT Holdings, LLC ("SRT"), Schick's assignee, sued Rothenberg and Venture 86 in New York Supreme Court for an accounting, and to recover the diverted sums. The state court defendants moved to dismiss the complaint, arguing that Schick and SRT lacked the capacity to sue because of Schick's bankruptcy.

The Pending Motion

Schick then returned to this Court, and moved to reopen his case and compel his case trustee to act. In addition to certain procedural irregularities, Ms. Cassirer noted two practical problems that the motion presented. First, she had been discharged as trustee several years ago, lacked the duty or authority to act, and was not volunteering to do so. Second, there were no longer funds available to investigate or pursue the claim asserted by Schick and SRT. Her co-trustee, Mr. Siegel, joined in the objection.

The Court conducted the first of two hearings on October 11, 2007. Schick's attorney initially represented that Schick had made full disclosure of the Venture 86 investment during the bankruptcy, (Transcript of hearing, held Oct. 11, 2007, at 4)(ECF Doc. # 1013), but the statement was incorrect; it appeared that Schick had never disclosed this asset. I directed Schick's attorney to locate a copy of the order for relief (to see if it directed Schick to file schedules, as such orders generally do), and if he did not file schedules, I directed Schick to provide evidence that he had disclosed this asset to his trustee while his case was still open and the asset could have been administered. (Id. at

6-7.) I adjourned the matter to give Schick the chance to cure the procedural problems with his motion, and to supply the missing information.

The Court conducted the second hearing on March 11, 2008. Schick never procured the order for relief or provided evidence that he had disclosed this asset to his case trustee. His attorney now concedes that Schick did not disclose the investment, suggesting that he did not know about it until recently. Schick's affirmation, however, never stated that he had forgotten about his $400,000 investment until after his bankruptcy case was closed.

DISCUSSION

The Court may reopen a closed case "to administer assets, to accord relief to the debtor, or for other cause." 11 U.S.C. § 350(b); see FED. R. BANKR. P. 5010. The decision whether to reopen a case is committed to the Court's discretion. 3 ALAN N. RESNICK & HENRY J. SOMMER, COLLIER ON BANKRUPTCY ¶ 350.03[5], at 350-13 (15th ed. rev. 2007)("COLLIER"). Here, the co-trustees have been discharged, and lack the financial wherewithal to administer this asset. Thus, the only reason to reopen the case is to force them to abandon the claim to Schick so that he can pursue his state court lawsuit.

Schick's predicament is one of his own making. Scheduled assets that the trustee does not administer are deemed abandoned to the debtor when the case is closed. 11 U.S.C. § 554(c). Conversely, unscheduled property remains property of the estate even after the case is closed. 3 COLLIER ¶ 350.03[1], at 350-7. If Schick had filed schedules listing this asset and the co-trustees had failed to administer it, he would now have standing to assert his cause of action in state court. Instead, he failed to file schedules or

even disclose the asset when the case was still open, and as a result, it never revested in Schick.

Furthermore, his delay in disclosing the Venture 86 investment has prejudiced his creditors. If he had revealed the asset while the case was still open and his case trustee or the co-trustees had the money to investigate and pursue it, they might have done so. Now, even if the case is reopened and they are reinstated (or another trustee is appointed), that fiduciary will lack the financial means to administer the asset. Consequently, reopening the case at this point will reward Schick for his earlier non-disclosure. Under the circumstances, I decline to grant his motion.

So ordered.

Dated: New York, New York
March 19, 2008

/s/ *Stuart M. Bernstein*
STUART M. BERNSTEIN
Chief United States Bankruptcy Judge