

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

In re

Case No. 05-15053-A-7

PATRICK RANDALL McCALL

Debtor.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW REGARDING
TRUSTEE'S (1) MOTION TO HOLD
FILED DOCUMENTS UNDER SEAL;
(2) MOTION TO AUTHORIZE
TRUSTEE TO ENTER DEBTOR'S
RESIDENCE AND FOR OTHER
MATTERS; AND (3) APPLICATION
FOR EMPLOYMENT OF PRIVATE
INVESTIGATOR

On or about February 23, 2006, the court received from
Michael T. Hertz, attorney for Sheryl Strain, chapter 7 trustee,
the following documents:

- Motion of Trustee to Hold Filed Documents Under Seal; Motion
to Authorize Trustee to Enter Debtor's Residence and for
Other Matters;
- Application for Employment of Private Investigator;
- Supplement to Trustee's (1) Motion to Hold Filed Documents
Under Seal; (2) Application for Employment of Private
Investigator; and Related Documents;
- Declaration of Richard Barnes in Support of Application for
Employment of Private Investigator;
- Supplemental Declaration of Dionna M. Paris;
- Declaration of Michael Terry Hertz in Support of Motion of

1 Trustee to Hold Filed Documents under Seal.

2 The trustee requests that all of the documents be filed
3 under seal. The trustee also requests employment of a private
4 investigator, Richard Barnes. The trustee requests that the
5 court enter an order allowing her and Mr. Barnes to enter the
6 debtor's residence at 577 West Keats, Clovis, California, and to
7 enter and open a trailer, known as a "toy hauler," belonging to
8 Dionna M. Paris, with her consent. The trustee believes that the
9 debtor is concealing property of the estate, including a Harley
10 Davidson motorcycle and other vehicles. According to the
11 declarations provided to the court, the debtor has denied
12 possession of or knowledge about the vehicles in question. The
13 trustee and her counsel "are convinced that the only way in which
14 the estate would ever recover any of the vehicles is to hire an
15 investigator and to search, without forewarning to the Debtor,
16 any likely location where the vehicles might be hidden." The
17 trustee believes, based on the information she presently has,
18 that the debtor's residence is one likely location and that the
19 toy hauler trailer is the other likely location. The trustee
20 believes that the debtor has taken the toy hauler and put it in
21 the possession of a Frank E. Voita, who she asserts is acting as
22 the debtor's agent.

23 Additionally, the trustee has filed an adversary proceeding
24 against the debtor, asking that his discharge be denied. A
25 pretrial conference in that adversary proceeding is set for June
26 28, 2006.

27 Request to File Documents Under Seal.

28 The trustee asserts that the court possesses inherent power

1 to seal all or part of its records. The trustee observes that
2 under Bankruptcy Code § 107(b)(1), the court may protect an
3 entity with respect to a trade secret, or confidential research,
4 development, or commercial information.

5 There are two lines of cases about whether the bankruptcy
6 court may go outside the scope of § 107(b) to seal documents. In
7 re Robert Landau Associates, Inc. holds that the bankruptcy court
8 has inherent authority to seal documents, even outside the scope
9 of § 107(b). 50 B.R. 670, 675 (Bankr. S.D.N.Y. 1985). Other
10 courts have held that § 107 limits a bankruptcy court's ability
11 to enter orders sealing documents. Gitto Global Corp., 422 F.3d
12 1, 7-8 (1st Cir. 2005).

13 "Together, the two components of § 107-the broad right of
14 access created in § 107(a) and the exceptions set forth in §
15 107(b)-create a framework for determining whether a paper
16 filed in a bankruptcy case is available to the public or
17 subject to protection. Absent § 107, this question would be
18 addressed by reference to the common law. Because § 107
19 speaks directly to the question of public access, however,
it supplants the common law for purposes of determining
public access to papers filed in a bankruptcy case. . . .
Therefore, issues concerning public disclosure of documents
in bankruptcy cases should be resolved under § 107, . . .
not under the common law." Id. (citations and internal
quotations omitted).

20 Section 107(b) of the Bankruptcy Code does not provide
21 support for the trustee's request to seal documents here. The
22 trustee wants the documents she filed sealed because she is
23 concerned that if the debtor learns of the trustee's efforts to
24 find the vehicles, he will either "be circumspect and not go near
25 them for a good period of time" or will "cause their removal to a
26 place where Trustee cannot find them."

27 The trustee and the debtor are involved in an adversary
28 proceeding. The amended complaint refers at ¶ 19 to certain

1 vehicles that the trustee has been unable to locate that the
2 trustee asserts remain in the control or possession of the
3 debtor. Thus, the subject of the trustee's motion here is
4 related to the adversary proceeding pending in this court.

5 Bankruptcy Code § 107(a) is rooted in and recognizes a broad
6 right of public access to judicial proceedings and to documents
7 filed in the bankruptcy court. In re Gitto Global Corp., 422
8 F.3d at 7. Additionally, in the context of ongoing litigation,
9 this broad right of access becomes even more central. By way of
10 example, Fed. R. Bankr. P. 7026(b)(1) provides that parties "may
11 obtain discovery regarding any matter, not privileged, that is
12 relevant to the claim or defense of any party" Rule 7034
13 contemplates inspection of property.

14 The trustee's request that the documents submitted in
15 connection with her motion be filed under seal will be denied.
16 The request is outside the scope of Bankruptcy Code § 107(b).
17 Particularly in the context of the pending litigation between the
18 parties, this court is not of the view that Bankruptcy Code § 105
19 warrants any expansion of § 107(b).

20 Requests to Enter Debtor's Residence to Search for Property of
21 the Estate and to Open and Enter into the Toy Hauler Trailer the
22 Trustee Believes is in the Debtor's Possession, Custody or
23 Control.

24 Here, the court is guided by a decision of the United States
25 District Court for the Eastern District of California in a
26 similar case. See, In re Truck-A-Way, 300 B.R. 31 (E.D. Cal.
27 2003). In the Truck-A-Way case, two chapter 7 trustees filed
28 with the bankruptcy court an ex parte application for order

1 authorizing the immediate entry, search and seizure of property.
2 No notice was given to either debtor. The proposed order
3 "purportedly authorized the search and seizure of property
4 allegedly belonging to the bankruptcy estate." Id. at 33. The
5 bankruptcy court granted the ex parte application without notice.
6 The order allowed the trustees for the James Burke and Truck-A-
7 Way bankruptcy estates, along with designated professionals, to
8 enter the residences of James Burke and any storage units at the
9 residence locations. It also authorized searches of the premises
10 and removal of items that were property of either bankruptcy
11 estate, along with other relief. The order also directed the
12 United States Marshal to accompany the trustees on their
13 searches.

14 The matter came before the district court in a motion by
15 Linda Burke, the spouse of debtor James Burke, a defendant in the
16 district court proceeding, to disqualify the counsel for the
17 plaintiff trustee of the Truck-A-Way bankruptcy estate for
18 violations of ethical and professional standards.

19 The district court observed that counsel for the trustee, in
20 obtaining the ex parte bankruptcy court order and carrying it
21 out, had "acted in a manner that degraded the integrity of the
22 court and interfered with the administration of justice." Id. at
23 35. The district court observed that counsel for the Truck-A-Way
24 trustee never provided the bankruptcy court any statutory or case
25 law authority other than Bankruptcy Code § 105(a) to support a
26 warrantless search and seizure.

27 The District Court then observed that the Fourth Amendment
28 of the Constitution protects the right of people to be secure

1 against unreasonable searches and seizures. "Civil search
2 warrants and bankruptcy court 'search and seizure orders' are not
3 exempted from the principles of the Fourth Amendment or the
4 Federal Rules of Criminal Procedure." Id. at 36. Searches of
5 private property without consent are generally unreasonable
6 unless authorized by a valid search warrant. Id. at 37.
7 According to the district court, "the explicit requirements of
8 Rule [of Criminal Procedure] 41 reflect the exacting mandate of
9 the Fourth Amendment and cannot be circumvented by the statutory
10 structure created by the Bankruptcy Code." Id. at 38.

11 Two bankruptcy courts have also considered the Fourth
12 Amendment to the Constitution in the context of a search by the
13 bankruptcy trustee of property of a debtor. In In re Barman, 252
14 B.R. 403 (Bankr. E.D. Mich. 2000), the court held that the Fourth
15 Amendment did apply to an inspection by a chapter 7 trustee of a
16 debtor's residence. The bankruptcy judge in Barman concluded
17 that the trustee acted under authority of law when inspecting a
18 residence of a debtor to search for property of the estate. The
19 trustee is appointed and supervised by an official of the
20 Department of Justice. According to the Michigan bankruptcy
21 court, every aspect of a trustee's position and function is
22 subject to either statutory obligation or to federal, executive,
23 or judicial branch control.

24 "Accordingly, the court concludes that these circumstances
25 surrounding the status and function of a trustee in a
26 chapter 7 case all suggest a sufficient nexus to the
27 government and its power that it is necessary and
28 appropriate to apply to the trustee the Fourth Amendment
limits on government power." Id. at 412-413.

The next step, according to the Michigan bankruptcy court,

1 is to determine whether the search requested by the trustee is
2 reasonable.

3 More recently, a bankruptcy court in the Central District of
4 California came to the conclusion that a chapter 7 bankruptcy
5 trustee is a private party, not acting as an instrument or agent
6 of the government. In re Kerlo, 311 B.R. 256, 265 (Bankr. C.D.
7 Cal. 2004). Thus, according to the Central District bankruptcy
8 court, the Fourth Amendment is not implicated when a trustee
9 proposes to search for property of the estate.

10 When the Fourth Amendment of the Constitution meets the
11 Bankruptcy Code, uncertainty abounds. How does a court square a
12 debtor's right against unreasonable search and seizure with the
13 fact that upon filing a bankruptcy case, all the debtor's
14 property becomes property of the bankruptcy estate, which it is
15 the trustee's duty to administer? Many questions remain
16 unanswered as the differing decisions in Truck-A-Way, Barman, and
17 Kerlo reflect. However, as this court is in the Eastern District
18 of California, this court will defer to the district court's
19 decision in Truck-A-Way. Applying the reasoning in that decision
20 to the facts here, the Fourth Amendment of the Constitution is
21 implicated by a chapter 7 trustee's request to search a debtor's
22 residence. The red flags raised by the Truck-A-Way decision are
23 particularly important when the search is requested not only on
24 an ex parte basis, which the Truck-A-Way court found offensive,
25 but completely under seal, as here. The Truck-A-Way decision
26 mandates issuance of a search warrant. Criminal search warrants
27 are issued in aid of criminal prosecution. A chapter 7 trustee
28 is, of course, not authorized to conduct such a prosecution.

1 Rather, if the trustee has reasonable grounds for believing that
2 a bankruptcy crime has been committed, it is the trustee's duty
3 to report all the facts and circumstances to the appropriate
4 United States Attorney. 18 U.S.C. § 3057(a).

5 Application to Employ Investigator.

6 In and of itself, the application to employ an investigator
7 is a straightforward request by the trustee to employ a
8 professional. Based on the evidence provided, it appears to the
9 court appropriate that the trustee employ an investigator to
10 discover assets of the estate; determine whether the debtor or
11 third parties have possession of or have taken property of the
12 estate; and to provide reports and declarations with respect to
13 the foregoing to the trustee. However, there is no evidence of
14 service of the application on the United States Trustee. The
15 court will defer entering an order on the Application to Employ
16 Investigator for ten days to allow time for service on the United
17 States Trustee.

18 Therefore, by separate order filed herewith, the motion to
19 file documents under seal and to authorize trustee to enter
20 debtor's residence will be denied. Counsel for trustee, after
21 service of the application to employ private investigator on the
22 United States Trustee, shall submit an appropriate form of order
23 granting said motion.

24 DATED: March 6, 2006.

25
26 /S/
27 WHITNEY RIMEL, Judge
28 United States Bankruptcy Court