UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In re	:	Chapter 7
FRANK MONTIQUE, INC. a/k/a FRANK MONTIQUE, MD d/b/a CHELTENHAM BACK CLINIC	:	
Debtor	:	Bankruptcy No. 97-12086F

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MEMORANDUM

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By BRUCE FOX, Chief Bankruptcy Judge:

Before me is the motion of Autherine B. Smith, Esquire to "reopen" the above-captioned chapter 7 bankruptcy case in order for her "to seek an order directing debtor Frank Montique, M.D. and Paul Dandridge, Esquire to disgorge fees from an undisclosed prepetition asset."

The instant motion alleges that a lawsuit against Mr. Dwain E. Hill and Mrs. Janet Hill was commenced in the Philadelphia Court of Common Pleas on December 27, 2000, by Frank Montique, M.D. for breach of contract. Paul A. Dandridge, Esquire, was counsel for the plaintiff in that action. Ms. Smith asserts that this lawsuit (which, it was revealed at a hearing, was later settled) represents a prepetition claim of the former debtor which was not identified in its earlier bankruptcy case. In essence, she requests that the bankruptcy case be "reopened" and that the state court plaintiff and Mr. Dandridge "disgorge" all proceeds of the litigation, presumably to a bankruptcy trustee.

The respondents, Frank Montique, M.D. and Mr. Dandridge, both contend, inter alia, that the former debtor was a corporation, while the state court plaintiff is an

individual. Thus, they maintain that the proceeds of this litigation could not be property of the corporation, and accordingly were never property of the bankruptcy estate under section 541(a). See generally In re Cassis, 220 B.R. 979, 983 (Bankr. N.D. Iowa 1998); In re Murray, 147 B.R. 688, 690 (Bankr. E.D. Va. 1992); In re Linderman, 20 B.R. 826, 829 (Bankr. W.D. Wash. 1982).[1]

Preliminarily, the respondents also maintain that this court has no subject matter jurisdiction over this motion, as there is no pending bankruptcy case.

As I discussed in a memorandum dated November 22, 2002, the respondents' jurisdictional contention is imprecise, as is the movant's request for "reopening" of the case.

I.

There is no question of proper bankruptcy court subject matter jurisdiction over this motion. While the respondents are correct that a bankruptcy court may not have subject matter jurisdiction over a dispute when there is no pending bankruptcy case, see, e.g., Walnut Associates v. Saidel, 164 B.R. 487, 491 (E.D. Pa. 1994), bankruptcy courts generally have the power to decide whether undisclosed estate property should be administered upon discovery, even after the case has been concluded, by reopening the case under section 350(b). See Neville v. Harris, 192 B.R. 825, 829 (D.N.J. 1996).

[1]Mr. Dandridge also suggests that the asset arose postpetition, and thus was not property of the estate.

Based upon the totality of the circumstances, a bankruptcy court may or may not choose to exercise its power over the asset by reopening the case. See id.

As I considered in the earlier memorandum, although section 350(b) provides the statutory right to "reopen" a bankruptcy case, as a matter of statutory construction, the reopening provisions of section 350(b) cannot apply in this instance because the underlying case was never "closed."

On February 20, 1997, "Frank Montique, Inc., a/k/a Frank Montique, MD, d/b/a Cheltenham Back Clinic" filed a voluntary petition in bankruptcy under chapter 11. The chapter 11 debtor was represented by Autherine B. Smith, Esquire, the present movant. The debtor was unable to reorganize, and on September 18, 1997, that chapter 11 case was converted to chapter 7 pursuant to 11 U.S.C. § 1112.[2]

The docket entries reflect that the chapter 7 trustee thereafter concluded that there were no assets available for distribution to creditors. The docket also discloses that the debtor failed to appear for the meeting of creditors, scheduled pursuant to 11 U.S.C. § 341(a). As a corporate debtor does not receive any discharge in chapter 7, see 11 U.S.C. § 727(a); In re Goodman, 873 F.2d 598, 602 (2d Cir. 1989); N.L.R.B. v. Better Building Supply Corp., 837 F.2d 377, 378-79 (9th Cir. 1988), as the debtor did not comply with its obligations under section 341(a), and as the bankruptcy trustee was of the opinion that there were no assets available for distribution to creditors, a hearing was held to

[2]I take judicial notice, under Fed. R. Evid. 201 (incorporated into bankruptcy cases by Fed. R. Bankr. P. 9017), of the docket entries of this case. See Maritime Electric Co., Inc. v. United Jersey Bank, 959 F.2d 1194, 1200 n.3 (3d Cir. 1991); Levine v. Egidi, 1993 WL 69146, at *2 (N.D. Ill. 1993); In re Paolino, 1991 WL 284107, at *12 n.19 (Bankr. E.D. Pa. 1991); see also generally In re Indian Palms Associates, Ltd., 61 F.3d 197 (3d Cir. 1995).

determine whether the then chapter 7 case should be dismissed pursuant to 11 U.S.C. § 707(a).

Without opposition from any party in interest, and after notice, this case was dismissed on June 25, 1998. Prior to dismissal, Ms. Smith had been awarded chapter 11 administrative fees, in the amount of $31,500.00, under 11 U.S.C. § 330(a). Apparently, Ms. Smith seeks to "reopen" the prior bankruptcy case so that she can collect upon her unpaid fee award from the proceeds of the Hill litigation through the efforts of a bankruptcy trustee.

Section 350(a) of the Bankruptcy Code provides that "[a]fter an estate is fully administered and the court has discharged the trustee, the court shall close the case." Further, section 350(b) states that a "case may be reopened in the court in which such case was closed."

The above-captioned 1997 bankruptcy case, however, was never "closed" under section 350(a); instead, it was "dismissed" under section 707(a). Although a dismissed case may be reported to the judiciary's Administrative Office as "closed" for statistical purposes, see In re Lewis & Coulter, Inc., 159 B.R. 188, 191 n.4 (Bankr. W.D. Pa. 1993), virtually all courts have recognized that a bankruptcy case that has been dismissed is not treated as if it were closed under section 350(a). As one commentator has noted:

> The Court of Appeals for the Ninth Circuit and other courts have held that a case cannot be reopened unless it was closed pursuant to section 350(a) after it has been administered, so a dismissed case could not be reopened under section 350(b). Therefore, a dismissal could be undone only through an appeal or a motion under Federal Rule of Bankruptcy Procedure 9023 or 9024.

3 Collier on Bankruptcy ¶ 350.03, at 350-5 (L. King et al. eds., 15th ed. rev. 2001) (footnote omitted).

Indeed, the Ninth Circuit Court of Appeals case referred to in the treatise quoted above is In re Income Property Builders, Inc., 699 F.2d 963 (9th Cir. 1982) (per curiam). That appellate court held:

> The word "reopened" used in Section 350(b) obviously relates to the word "closed" used in the same section. In our opinion a case cannot be reopened unless it has been closed. An order dismissing a bankruptcy case accomplishes a completely different result than an order closing it would and is not an order closing.

Id. at 965; accord In re King, 214 B.R. 334, 336 (Bankr. W.D. Tenn. 1997).

The Ninth Circuit thus recognized that an order dismissing a bankruptcy case and an order closing a bankruptcy case accomplish two different things. The court reasoned that, once an order for dismissal is entered, "the debtor's debts and property are subject to the general laws, unaffected by bankruptcy concepts." In re Income Property, 699 F.2d at 964. However, it continued,

> a bankruptcy is normally closed after the bankruptcy proceedings are completed. At that time the debts of the bankrupt are usually discharged and the proceedings of debtor's nonexempt assets divided among creditors. A bankruptcy is reopened under [section] 350(b), not to restore the prebankruptcy status, but to continue the proceeding.

Id. Because of this difference, the court interpreted the term "reopened," as it is used in section 350(b), to relate to section 350(a)'s use of the word "closed." Therefore, it concluded that, for a case to be properly reopened under section 350(b), it must first have been closed under section 350(a). Id.; see also Vergos v. Gregg's Enterprises, Inc., 159

F.3d 989, 991 n.1 (6th Cir. 1998) (explaining that "conversion," "dismissal" and "closure" are all distinct statutory "terms of art employed in the Bankruptcy Code").

As noted in my earlier memorandum, I agree with this reasoning. A bankruptcy court has no authority to "reopen" a case that was previously "dismissed," as such a case was never "closed" within the meaning of section 350(a). See, e.g., In re Flores, 271 B.R. 213, 2001 WL 543677, at *3 (10th Cir. BAP 2001) (Table); In re Critical Care Support Services, 236 B.R. 137, 140-41 (E.D.N.Y. 1999); In re King, 214 B.R. at 336; In re Woodhaven, Ltd., 139 B.R. 745, 747-48 (Bankr. N.D. Ala. 1992); Matter of Garcia, 115 B.R. 169, 170 (Bankr. N.D. Ind. 1990). But see In re Ross, 278 B.R. 269 (Bankr. M.D. Ga. 2001).

Therefore, I am unable to "reopen" the bankruptcy case of Frank Montique, Inc. so that a bankruptcy trustee might administer the proceeds of the Hill litigation because that case was dismissed in 1998 and was never fully administered and closed. This conclusion is not based upon a lack of subject jurisdiction; rather, there is no statutory basis to grant reopening relief in this instance. See generally In re ASUSA, Inc., 47 B.R. 928, 930 (S.D.N.Y. 1985).

II.

As I also discussed in my earlier November 2002 memorandum, many courts have recognized that, when faced with a motion to reopen a previously dismissed bankruptcy case, the proper question is whether the dismissal order entered should be

"vacated." Therefore, although relief under section 350(b) is not permitted, in appropriate circumstances some relief may be warranted.

In general, federal courts have the power to revisit prior orders. See generally Cavalliotis v. Salomon, 357 F.2d 157 (2d Cir. 1966); In re ASUSA, Inc., 47 B.R. at 930. When confronted with a mis-styled motion to "reopen" a bankruptcy case that had been previously dismissed, many courts have opted to simply recharacterize the motion as one seeking to vacate the dismissal order pursuant to Fed. R. Bankr. P. 9024 (which incorporates Fed. R. Civ. P. 60(b)). See, e.g., In re Flores, 2001 WL 543677, at *3 ("Debtor's motion to reopen could be construed as one . . . under Rule 9024 and Rule 60(b)"); In re Critical Care, 236 B.R. at 140 ("[T]he Bankruptcy Court correctly held that, inasmuch as [the] motion to 'reopen' was in reality a motion to set aside the Bankruptcy Court's . . . Order, the motion was properly analyzed under Bankruptcy Rule 9024, which makes Rule 60(b) applicable to bankruptcy cases"); In re King, 214 B.R. at 336; In re Lewis & Coulter, Inc., 159 B.R. at 191; In re Woodhaven, Ltd., 139 B.R. at 749; In re Garcia, 115 B.R. at 170.

Therefore, in November 2002, I informed all parties in this dispute that I would consider the instant motion filed by Ms. Smith as a request to vacate the dismissal order entered on June 25, 1998. I also informed the parties, however, that (having transformed the movant's request) I would consider the respondents' "jurisdictional" challenge as an assertion that Ms. Smith has failed to state a cause of action to justify vacating the dismissal order. I then requested that the parties submit memoranda

supporting their respective positions. They have done so,[3] thereby rendering this matter ripe for resolution.[4]

As I understand Ms. Smith's present position, she contends that the dismissal order should be vacated pursuant to Fed. R. Bankr. P. 9024, or Fed. R. Bankr. P. 9011, or under 11 U.S.C. § 105(a). For the following reasons, I find all three contentions unpersuasive.

III.

A.

I first turn to the movant's reliance upon Fed. R. Bankr. P. 9024, which states in full:

> Rule 60 F. R. Civ. P. applies in cases under the Code except that (1) a motion to reopen a case under the Code or for the reconsideration of an order allowing or disallowing a claim against the estate entered without a contest is not subject to the one year limitation prescribed in Rule 60(b), (2) a

[3]Mr. Dandridge has not made any submission, but Ms. Smith and Dr. Montique have filed memoranda addressing the relevant issues.

[4]Ms. Smith argues that a full evidentiary hearing is needed in order to develop facts to support the relief she seeks. I held a partial hearing and realized that the evidentiary issues were quite extensive - e.g., an alter ego claim - and could be expensive for the parties. Therefore, I considered it advisable - in light of the respondents' "jurisdictional" challenge - to first determine whether the movant could possibly obtain the relief she sought, assuming the facts she alleged in her motion were true. See United States v. 8136 S. Dobson Street, Chicago, Illinois, 125 F.3d 1076, 1086 (7th Cir. 1997) (federal court has "substantial discretion in determining whether to conduct an evidentiary hearing on a Rule 60(b) motion"), cert. denied sub nom. Anderson v. United States, 523 U.S. 1111 (1998); Atkinson v. Prudential Property Co., Inc., 43 F.3d 367, 374 (8th Cir. 1994) (same).

> complaint to revoke a discharge in a chapter 7 liquidation case may be filed only within the time allowed by § 727(e) of the Code, and (3) a complaint to revoke an order confirming a plan may be filed only within the time allowed by § 1144, § 1230, or § 1330.

Fed. R. Civ. P. 60(b), in turn, provides in relevant part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

Thus, Rule 9024 permits an order dismissing a bankruptcy case to be vacated on the basis of, inter alia, newly discovered evidence (Rule 60(b)(2)), or fraud (Rule 60(b)(3)), or "any other reason justifying relief from the operation of the judgment" (Rule 60(b)(6)). See Stradley v. Cortez, 518 F.2d 488, 493 (3d Cir. 1975); In re ASUSA, Inc., 47 B.R. 928, 930 (S.D.N.Y. 1985).

In general, motions under Rule 60(b) must be made within a "reasonable time," see, e.g., Matter of Garcia, 115 B.R. 169, 170 (Bankr. N.D. Ind. 1990), and motions under either Rule 60(b)(1), (2) or (3) must be brought within one year after the

order in question is entered.[5] See, e.g., In re Woodhaven, Ltd., 139 B.R. 745, 749 (Bankr. N.D. Ala. 1992).

As mentioned above, Ms. Smith avers that the debtor engaged in improper conduct by failing to disclose the existence of the claim it held against Mr. and Mrs. Hill. Moreover, she claims to have discovered the lawsuit brought by Dr. Montique only recently, and only after the bankruptcy case had been dismissed. She further implies that this claim has value and assumes that, had the true facts about this asset been known, she (and possibly the chapter 7 trustee) would have opposed dismissal. If proven, such allegations could possibly offer grounds for relief under subsections (2) or (3) of Rule 60(b).[6] See generally Serzysko v. Chase Manhattan Bank, 461 F.2d 699, 702 (2d Cir.)

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[5]As with a motion to reopen under section 350(b), trial courts have discretion under Rule 60(b), and their decisions are reviewed for abuse of discretion. See, e.g., Griffin v. Swim-Tech Corp., 722 F.2d 677, 680 (11th Cir. 1984); In re Flores, 2001 WL 543677, at *4; Hartford Accident & Indemnity Co. v. Smeck, 78 F.R.D. 537, 540 (E.D. Pa. 1978).

[6]At this point in the dispute, I am willing to accept arguendo the implications and assumptions made by the movant that, had all the facts been known in 1998, the dismissal order might not have been entered. Furthermore, I will assume that Ms. Smith's lack of information about the debtor's purported claim against Mr. and Mrs. Hill arose from the debtor's "fraud" or, if not fraudulent, was newly discovered. Thus, relief under Rule 60(b)(2) or (3) could be warranted.

I must note, though, that this result is not free from doubt.

First, whether relief under Rules 60(b)(2) or (b)(3) should be granted would depend, at least in part, upon whether "intervening vested rights" have arisen. See In re ASUSA, Inc., 47 B.R. at 930.

Second, it appears that the value of Dr. Montique's claim against Mr. and Mrs. Hill was conditioned upon the Hills' success in their own litigation against a third party. In June 1998, as the Hills had not yet succeeded in their own lawsuit, the value of the debtor's claim may have appeared to a bankruptcy trustee to be too speculative to warrant opposing dismissal, even if the existence of this asset had been known.

Third, the failure of a debtor to fully disclose assets may itself justify the dismissal of a chapter 7 case. See, e.g., In re Moses, 792 F. Supp. 529 (E.D. Mich. 1992). Had all the facts now known been disclosed at the June 1998 hearing, an order of dismissal may have been entered (quite possibly with the support of the chapter 7 trustee) and creditors of the

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(per curiam), cert. denied, 409 U.S. 883 (1972); Kurzweil v. Philip Morris Companies, Inc., 1997 WL 167043, at *4 (S.D.N.Y. 1997); Mylotte, David & Fitzpatrick v. Pullman, 1993 WL 306109 (E.D. Pa. 1993), aff'd, 19 F.3d 643 (3d Cir. 1994) (Table).[7]

However, the order dismissing the bankruptcy case of Frank Montique, Inc. was entered on June 25, 1998. Ms. Smith filed the instant motion on October 1, 2002, over four years after the bankruptcy case was dismissed. Clearly then, Ms. Smith's request to vacate the order of dismissal, if premised upon Rule 60(b)(2) or (3), would be untimely. See, e.g., In re Woodhaven, Inc., 139 B.R. at 749; Gonzalez v. Walgreens Co., 918 F.2d 303, 305 (1st Cir. 1990); Insurance Co. of North America v. Ahuja, 1991 WL 249978, at *3 (E.D. Pa. 1991).

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[6](...continued)
debtor left to exercise their state law rights, as their claims would not have been discharged.

[7]However, the allegations made by Ms. Smith, even if proven, would not suggest that the June 1998 dismissal order was "void" under Rule 60(b)(4); nor that it was entered by "mistake, inadvertence, surprise, or excusable neglect" under Rule 60(b)(1). Moreover, Rule 60(b)(5) is obviously inapplicable to this dispute.

The decision of In re ASUSA, Inc., 47 B.R. at 928, is distinguishable from the present dispute in that there, certain creditors sought, in part, to vacate a prior bankruptcy dismissal order as "void" under Rule 60(b)(4) because it was entered without notice to them. See id. at 931 ("They contend that the court's failure to give proper notice of the dismissal to the creditors violated due process and was thus void within the meaning of 60(b)(4)"); see generally United States v. Boch Oldsmobile, Inc., 909 F.2d 657, 661 (1st Cir.1990) ("A judgment is void, and therefore subject to relief under Rule 60(b)(4), only if the court that rendered judgment lacked jurisdiction or in circumstances in which the court's action amounts to a plain usurpation of power constituting a violation of due process"); Gold Kist, Inc. v. Laurinburg Oil Co., Inc., 756 F.2d 14, 18 (3d Cir.1985).

Ms. Smith does not contend that, as counsel to the debtor, she was unaware of the motion to dismiss the case in June 1998 or of the entry of the dismissal order itself. Nor is there any doubt that a bankruptcy court has the power to dismiss a chapter 7 bankruptcy case for cause under section 707. Thus, in the instant motion, relief may not be sought under Rule 60(b)(4). See generally In re Woodhaven, Ltd., 139 B.R. at 749 ("The only tenable theory Movants could assert entitling them to relief from judgment [dismissing the bankruptcy case] because it is void is that it is void because they were not given notice of the bankruptcy proceedings").

Furthermore, Ms. Smith cannot utilize the "catchall" provision of Rule 60(b)(6) in order to circumvent the one-year limitations period applicable to Rule 60(b)(1)-(3). See generally Stradley v. Cortez, 518 F.2d at 493; Serzysko v. Chase Manhattan Bank, 461 F.2d at 699; United States v. Richlyn Laboratories, Inc., 365 F. Supp. 805, 808 (E.D. Pa. 1973). As I suggested in my November 2002 ruling, subsection (b)(6) applies only when the circumstances alleged would not be covered by one of the other five subsections of Rule 60(b). See Gonzalez v. Walgreens Co., 918 F.2d at 305; Hopper v. Euclid Manor Nursing Home, Inc., 867 F.2d 291, 294 (6th Cir. 1989); Stradley v. Cortez, 518 F.2d at 494; Gulf Coast Building & Supply Co, Inc. v. International Brotherhood of Electrical Workers, 460 F.2d 105, 108 (5th Cir. 1972).

As Ms. Smith recognized in her memorandum, the allegations she raised would, if proven, fall within the scope of either subsections (2) or (3) of Rule 60(b); thus, the language of Rule 60(b) precludes her reliance upon the catchall provision of subsection (b)(6).

Therefore, even if I accept as true all of the allegations raised in this motion, Ms. Smith has not stated a claim for relief under Bankruptcy Rule 9024 because her motion was filed over four years after the bankruptcy case of Frank Montique, Inc. was dismissed, and her reasons to vacate dismissal required an earlier request.[8] See In re

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[8]In her memorandum, the movant suggests that the one year limitations period of Rule 60(b) may not apply to her request to "reopen" the bankruptcy case of Frank Montique, Inc. I recognize that Bankruptcy Rule 9024 provides that "a motion to reopen a case under the Code . . . is not subject to the one year limitation prescribed in Rule 60(b)." Indeed, this exception found in Rule 9024 (and the absence of any deadline for reopening found in Bankruptcy Rule 5010) reflects a bankruptcy principle enunciated under the former Bankruptcy Act.

Under the former Act, courts were reluctant to reopen closed bankruptcy cases when the request was made by the debtor. See generally Saper v. Viviani, 226 F.2d 608, 610 (2d

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ASUSA, Inc., 47 B.R. at 931-32 (motion to vacate dismissal of bankruptcy case based upon a newly discovered asset could not be sustained under Rule 60(b)(2), as it was filed more than one year after dismissal); In re Woodhaven, Ltd., 139 B.R. at 752 (seeking to vacate a bankruptcy dismissal order entered two years earlier, in part because "an additional asset of the estate has been discovered" was not permitted under Rule 9024); see also In re Hunter, 66 F.3d 1002, 1005 (9th Cir. 1995) (motion to set aside settlement because the other party "fraudulently concealed" an asset could not be granted under Rule 60(b)(3) because it was filed more than one year after the settlement).

B.

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[8](...continued)
Cir. 1955). Typically, the only valid reason to reopen a case was for the trustee to administer a newly discovered asset. See In re Thomas, 204 F.2d 788 (7th Cir. 1953); In re Stein, 111 F. Supp. 327 (S.D.N.Y. 1953).

To the extent a bankrupt failed to disclose an asset in a closed case, courts generally viewed the imposition of a time limit to seek reopening as inequitable. See In re Thomas, 204 F.2d at 794. As the bankrupt had already obtained the benefits of bankruptcy, courts held it improper for the bankrupt to profit by his undisclosed asset in a fully administered, closed case. Id. Thus, the procedural rules, such as former Rules 515 and 924 (the predecessors of current Rules 5010 and 9024) contained no deadlines for a creditor or trustee to seek reopening. While section 350(b) now makes it clear that a closed case may be reopened for the benefit of the debtor, as well as to administer undisclosed assets, the current procedural rules recognize the earlier equitable concerns, and so establish no deadline for filing a motion to reopen.

In contrast, where, as in this instance, the bankruptcy case was dismissed and not closed, Rule 9024 does provide a firm deadline for action if the dismissal is to be vacated for a newly discovered asset. Since the debtor typically receives no benefit from the dismissed filing, and since all parties are restored to their pre-bankruptcy legal rights, the inequity sought to be prevented by the absence of a reopening deadline generally does not arise.

Therefore, the instant movant may not rely upon the exception to the one year deadline found in Rule 9024 because the instant bankruptcy case was dismissed and never closed. See In re Income Property Builders, Inc., 699 F.2d at 963; In re Flores, 2001 WL 543677, at *3; In re King, 214 B.R. at 336.

Next, Ms. Smith suggests that I may utilize my equitable powers under 11 U.S.C. § 105(a) to vacate the order of dismissal in this bankruptcy case. Pursuant to section 105(a):

> The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

However, it is well settled in this circuit that, although Section 105(a) may be used to address situations not covered by the provisions of the Bankruptcy Code, it cannot be used to "grant substantive rights that would otherwise be unavailable under the Code." In re Continental Airlines, 203 F.3d 203, 211 (3d Cir. 2000); see also Southern Railway Co. v. Johnson Bronze Co., 758 F.2d 137, 141 (3d Cir. 1985). A similar constraint arises from the rights and remedies specifically provided for by the Bankruptcy Rules of Procedure. Matter of Smith, 21 F.3d 660, 666 (5th Cir. 1994) ("Bankruptcy courts cannot use their equity powers under Section 105(a) to fashion substantive rights and remedies not contained in the Bankruptcy Code or Rules . . ."). Thus, for example, section 105(a) could not be utilized to extend the deadline for filing proofs of claim found in Rule 3003, see id., or to extend the deadline to file an objection to an exemption claim set by Rule 4003. See In re Boyd, 243 B.R. 756, 761-62 (N.D. Cal. 2000).

Here, the relief requested by Ms. Smith falls outside the scope of section 350(b), but is within the scope of Fed. R. Bankr. P. 9024, subject to the time restrictions included in that rule. Section 105(a) cannot be used to alter or expand either of those potential bases for relief. As one court has explained:

> [T]he bankruptcy court's inherent power to reconsider orders has been merged into the Federal Rules of Bankruptcy Procedure and the Federal Rules of Civil Procedure. Accordingly, final orders may be set aside only under FRCP 60(b) applicable via Rule 9024; the bankruptcy court may not use its inherent power [under section 105(a)] to circumvent the limitations of those rules.

In re Reinertson, 241 B.R. 451, 456 (9th Cir. BAP 1999); accord, e.g., Matter of Met-L-Wood Corp., 861 F.2d 1012, 1018 (7th Cir. 1988), cert. denied sub nom. Gekas v. Pipin, 490 U.S. 1006 (1989); In re Apex International Management Services, Inc., 215 B.R. 245, 250 (Bankr. M.D. Fla. 1997).

Consistent with this approach, the Bankruptcy Court for the Northern District of Alabama has expressly held that section 105(a) cannot serve as a basis to vacate an order dismissing a bankruptcy case where the request was not timely made under Rule 9024 and where the request did not fall within the reach of section 350(b). In re Woodhaven, Ltd., 139 B.R. at 748-49.

Accordingly, while Ms. Smith asserts that the June 1998 dismissal order should be vacated because of a newly discovered asset which was concealed by the debtor's fraud, she cannot rely upon section 105(a) to circumvent the limitations restrictions found in Rule 9024; nor may she use section 105(a) to expand the application of section 350(b) to dismissed as well as to closed cases.

C.

Finally, the movant contends that the debtor's alleged failure to disclose the claim against Mr. and Mrs. Hill violates Fed. R. Bankr. P. 9011, for which the appropriate sanction is to vacate the June 1998 dismissal order.

Bankruptcy Rule 9011, which is modeled upon Fed. R. Civ. P. 11, is primarily intended to "deter unnecessary filing with the court for the benefit of the judicial process." In re Nicola, 258 B.R. 329, 334 (Bankr. E.D. Pa. 2001); see also In re Hardee, 165 F.3d 18, 1998 WL 766699, at *2 (4th Cir. 1998); Lieb v. Topstone Industries, Inc., 788 F.2d 151, 157 (3d Cir. 1986) ("Rule 11 therefore is intended to discourage pleadings that are 'frivolous, legally unreasonable, or without factual foundation, even though the paper was not filed in subjective bad faith'") (quoting Zaldivar v. City of Los Angeles, 780 F.2d 823, 831 (9th Cir. 1986)). It accomplishes this goal by requiring an attorney (or a party who is unrepresented by counsel) to sign certain documents, including bankruptcy petitions. See, e.g., Lieb v. Topstone Industries, Inc., 788 F.2d at 157; In re Nicola, 258 B.R. at 334. In so doing, "the attorney is certifying to the court that, to the best of his or her knowledge, formed after reasonable inquiry, the document is not being presented for an improper purpose." Id.

For the following reasons, I find that Rule 9011 does not apply under these circumstances.[9]

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[9]Ms. Smith does not suggest which version of Rule 9011 is germane. Rule 9011 was significantly amended on December 1, 1997 - after the debtor filed his bankruptcy schedules in July 1997, but before the dismissal hearing and June 1998 order.

In general, when Rule 9011 sanctions are sought because of the filing of a particular pleading, the version of Rule 11 in effect when the pleading was filed would be relevant. See generally Jones v. Pittsburgh National Corp., 899 F.2d 1350, 1355 (3d Cir. 1990) (continued...)

First, respondent Dandridge had no connection with the debtor's earlier bankruptcy case. Accordingly, no possibility of sanctions against him are possible under Rule 9011.

Second, as to the debtor respondent, the language of Rule 9011 expressly excludes bankruptcy schedules from the documents which fall within its scope. Pursuant to Rule 9011(a), "[e]very petition, pleading, written motion, and other paper, except a list, schedule, or statement, or amendments thereto shall be signed by at least one attorney of record in the attorney's individual name" (emphasis added).[10]

Thus, since bankruptcy schedules expressly fall outside the scope of Rule 9011(a), the remaining provisions of Rule 9011 pertaining to representations made to the court and possible sanctions are inapplicable to information included in bankruptcy schedules. See, e.g., In re Hardee, 1998 WL 766699, at *2; In re Ostas, 158 B.R. 312, 319 (N.D.N.Y. 1993); In re Engel, 246 B.R. 784, 788-89 (Bankr. M.D. Pa. 2000); In re Remington Development Group, Inc., 168 B.R. 11, 15 (Bankr. D.R.I. 1994); In re Saturley, 131 B.R. 509, 518 (Bankr. D. Me. 1991); compare Cinema Service Corp. v.

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[9](...continued)
(the relevant date for Rule 11 purposes is the date that the complaint was signed). But when, as here, the conduct complained of continues beyond the date of the amendment and when the bankruptcy case is still pending at the time Rule 9011 is amended, courts have generally concluded that the amended version of Rule 9011 should apply. See In re Start the Engines, Inc., 219 B.R. 264, 268-69 (Bankr. C.D. Cal. 1998); In re Russ, 218 B.R. 461, 467 n.8 (Bankr. D. Minn.), aff'd, 221 B.R. 237 (8th Cir. BAP 1998), aff'd in part, 187 F.3d 978 (8th Cir. 1999); see also Ridder v. City of Springfield, 109 F.3d 288, 295-96 (6th Cir. 1997), cert. denied, 522 U.S. 1046 (1998).

Although I shall apply the post-1997 version of Rule 9011, I would reach the same conclusion even if the earlier version of Rule 9011 were to govern.

[10]Instead, such documents must be verified by the debtor pursuant to Fed. R. Bankr. P. 1008. See Fed. R. Bankr. P. 9011 advisory committee's note (1983).

Edbee Corp., 774 F.2d 584, 586 (3d Cir. 1985) (the bankruptcy petition is a document included within the scope of Rule 9011); but see In re Nicola, 258 B.R. at 336 ("The Debtor's signature on the patently false set of original bankruptcy schedules likewise violated Rule [9011]").

Ms. Smith further argues that the debtor violated Rule 9011 by failing to disclose its claim against the Hills on the corporate debtor's operating statements and by "execut[ing] a sworn statement in support of the Petition, Schedules, Operating Statements and 341(a) Testimony."

Although Rule 9011(a) seemingly exempts all "statements" from the scope of Rule 9011 sanctions, the 1991 Advisory Committee Note to the Rule states that:

> As used in subdivision (a) of this rule, "statement" is limited to the statement of financial affairs and the statement of intention required to be filed under Rule 1007.

See also In re Muscatell, 116 B.R. 295, 298 (Bankr. M.D. Fla. 1990).

This limitation, however, does not mean that Rule 9011 automatically applies to all other statements filed in a bankruptcy case. Rather, the rule only applies to documents that must be signed (and thereby certified) by a represented party's counsel. See In re Hardee, 1998 Wl 766699, at *2. Since none of these statements would need to be signed by a debtor's attorney, they are not within the scope of Rule 9011.[11]

[11]Ms. Smith also argues in her brief that Dr. Montique may be sanctioned under Rule 9011 because he allegedly "falsely testified about the asset in the bankruptcy proceedings." Such argument, however, is without merit, as Rule 9011 only applies to certain papers filed with the court. It does not apply to oral testimony. See In re Hardee, 1998 WL 766699, at *2; In re Nicola, 258 B.R. at 334.

In addition, even if the conduct of which Ms. Smith now complains fell within the scope of Rule 9011, her request for relief under this rule against the debtor would be untimely for two reasons.

First, the Third Circuit Court of Appeals has recognized that the standards adopted under Fed. R. Civ. P. 11 – which is almost identical in language to Fed. R. Bankr. P. 9011 – should be applicable to inquiries under Rule 9011. See Cinema Service Corp. v. Edbee Corp., 774 F.2d at 586; In re Nicola, 258 B.R. at 334. For sanctions to be imposed under Rule 11, the Third Circuit has held that the motion "must be filed before entry of final judgment." Landon v. Hunt, 938 F.2d 450, 453 (3d Cir. 1991) (per curiam); see also Mary Ann Pensiero, Inc. v. Lingle, 847 F.2d 90, 99 (3d Cir. 1988).

Since dismissal of a bankruptcy case constitutes a final judgment, a motion for sanctions under Rule 9011 should generally be filed before an order of dismissal is entered in a bankruptcy matter. See In re HSR Associates, 162 B.R. 680, 682 (Bankr. D.N.J. 1994). Here, any relief under Rule 9011 was sought more than four years after the entry of that final order.

Second, if Ms. Smith's lack of knowledge of the purported asset would justify the delay in this case, see generally Cambridge Products, Ltd. v. Penn Nutrients, Inc., 131 F.R.D. 464 (E.D. Pa. 1990) (applying the pre-1993 version of Rule 11), the December 1997 amendments to Rule 9011, specifically the safe-harbor provisions of Rule 9011(c), would still render this request untimely.

Under the version of Rule 9011 in effect in June 1998, before filing a Rule 9011 motion with the bankruptcy court, "the movant must serve the offending party with the Rule 9011 motion to afford the respondent an opportunity to correct the document.

This provision is known as the safe harbor provision of Bankruptcy Rule 9011(c)(1)(A)." In re Engel, 246 B.R. at 789. Ms. Smith obviously made no such advanced service here. Furthermore, given the dismissal of this bankruptcy case, there is no contention or pleading to be corrected. Thus, to consider a Rule 9011 motion at this time would deprive the respondent debtor of any safe-harbor, and, therefore, the motion is untimely. See, e.g., Kinney v. County of Hennepin, 2002 WL 31163092, at *3 (D. Minn. 2002); Harding University v. Consulting Services Group, L.P., 48 F. Supp. 2d 765, 771-72 (N.D. Ill. 1999); Brown v. Pierce Manufacturing, Inc., 169 F.R.D. 118 (E.D. Wisc. 1996).

Accordingly, for these various reasons, even if the facts alleged by the movant were proven, there could be no relief afforded under Rule 9011.

IV.

In conclusion, the movant is seeking to vacate the June 1998 dismissal order more than four years after it was entered. She contends that she has just discovered an undisclosed asset which can be administered in the debtor's bankruptcy case.

When a debtor has obtained the benefits of federal bankruptcy law and its case is completed, the "closing" of the case is no impediment to the later administration of a newly discovered asset. Section 350(b) permits the case to be reopened so that a trustee may recover and liquidate that asset for the benefit of creditors. See, e.g., Miller v. Shallowford Community Hospital, Inc., 767 F.2d 1556, 1559 (11th Cir. 1985); In re Arboleda, 224 B.R. 640, 644-45 (Bankr. N.D. Ill. 1998).

This provision, however, cannot apply in this dispute because this debtor's case was never completed: it was dismissed. Upon dismissal, all of its assets revested in the corporate debtor, and its creditors - including its former bankruptcy counsel - were then free to utilize state law to recover their unpaid claims. See generally Noble v. White, 2002 WL 378080 (Conn. Super. Ct. 2000) (attorney brought action for unpaid fees incurred in a bankruptcy representation); Stophel & Stophel, P.C. v. Kent, 1998 WL 156905 (Tenn. Ct. App. 1998) (same).

Although Rule 9024 may provide a basis to vacate a dismissal order in a bankruptcy case under appropriate circumstances, the movant's request in this instance comes well beyond the limitations period established by that procedural rule. Ms. Smith's attempt to skirt that limitations period through reliance upon the general equity powers found in section 105(a) is unavailing.

Finally, Bankruptcy Rule 9011, whose purpose is to prevent frivolous pleadings in litigation, is inapplicable in this instance by its own terms.

Therefore, there is no basis to vacate the June 1998 dismissal order in this case, and the parties to this motion are left to assert whatever rights they presently have in the state court system.

An appropriate order shall be entered.

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In re	:	Chapter 7
FRANK MONTIQUE, INC. a/k/a FRANK MONTIQUE, MD d/b/a CHELTENHAM BACK CLINIC	:	
Debtor	:	Bankruptcy No. 97-12086F

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ORDER

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AND NOW, this 31st day of January, 2003, for the reasons stated in the accompanying memorandum, it is hereby ordered that motion "to reopen case to seek an order directing debtor Frank Montique, M.D. and Paul Dandridge, Esquire to disgorge fees from an undisclosed prepetition asset" is denied.

_____

BRUCE FOX
Chief Bankruptcy Judge

IN RE: Chapter 7
FRANK MONTIQUE, INC. Bankruptcy No. 97-12086F

Copies of the Chief Bankruptcy Judge's Memorandum and Order dated January 31, 2003, were mailed on said date to the following:

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