

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

PATRICK R. BENNETT

CASE NO. 97-65399

Debtor

APPEARANCES:

THOMAS P. HUGHES, ESQ.
Attorney for Chapter 7 Trustee
23 Oxford Road
New Hartford, NY 13413

PATRICK R. BENNETT
Pro Se
F.C.I. Loretto
P.O. Box 1000
Loretto, PA 15940

GWEN BENNETT
Pro Se
3827 Peterboro Road
Oneida, NY 13421

WANDA KOEN, as Trustee
Andrick Irrevocable Trust
RD Creek Road
Oneida, NY 13421

Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

**MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER**

The Court had under consideration six different motions filed in the chapter 7 case of Patrick R. Bennett ("Debtor"). The first was filed on April 5, 2007, by Thomas Hughes, Esq. ("Hughes"), the chapter 7 trustee ("Turnover Motion") (Docket No. 183). Hughes' motion seeks

an order requiring turnover of real property located at 3837 Peterboro Road and 3695 Peterboro Road, (“Peterboro properties”) both located in Oneida, New York, and currently occupied by the Debtor’s former wife, Gwen Bennett (“G. Bennett”). In his Turnover Motion, Hughes also seeks an order requiring turnover of real property located at 308 Ransom Avenue, Sherrill, New York (Ransom Avenue property) (collectively, the “Properties”), titled in the name of the Andrick Irrevocable Trust (“Andrick Trust”). Objections were filed by both G. Bennett and Wanda Koen (“Koen”), mother of G. Bennett and trustee of the Andrick Trust, on April 16, 2007.

On April 18, 2007, the Debtor filed a motion requesting dismissal of the Turnover Motion (“Dismissal Motion I”). Also on April 18, 2007, the Debtor filed a motion seeking to intervene in the Turnover Motion on behalf of his children, Andrew and Patrick M. Bennett, the sole beneficiaries of the Andrick Trust (“Intervention Motion”) (Docket No. 193). On May 11, 2007, the Debtor filed a second motion (Docket No. 205) to dismiss the Turnover Motion (“Dismissal Motion II”) based on to his assertion that Hughes, as well as Richard C. Breeden (“Breeden”), chapter 11 trustee in the case of The Bennett Funding Group, Inc. (“BFG”) as well as other substantively consolidated debtors, lacked standing to enter into a stipulation in connection with forfeiture proceedings in the Debtor’s criminal case in the United States District Court for the Southern District of New York (“District Court”). Also on May 11, 2007, the Debtor filed another motion (Docket No. 208) seeking dismissal of the Turnover Motion based on an alleged violation of the automatic stay by Breeden in filing a petition in the forfeiture proceedings and in entering into the subsequent stipulation (“Stay Violation Motion”). The Debtor filed another motion on May 11, 2007 (Docket No. 211) in which he requests that Hughes be removed as chapter 7 trustee pursuant to § 324 of the U.S. Bankruptcy Code, 11 U.S.C. §§ 101-1532

(“Code”) based on allegations of the violation of his fiduciary duties and pursuant to 18 U.S.C. § 1519¹ (“Removal Motion”). Opposition to all five of the Debtor’s motions were filed by Hughes.

All of the motions were heard at the Court’s regular motion calendar in Binghamton, New York. Hughes’ Turnover Motion was first heard on April 24, 2007, and adjourned to May 15, 2007, when the Court also heard the Debtor’s Intervention Motion, as well as the Dismissal Motion I. All six motions were heard jointly on June 19, 2007. The Court indicated that it would take three of them under submission on that date, namely the Turnover Motion, the Dismissal Motion I and the Dismissal Motion II.² With respect to the Intervention Motion, the Stay Violation Motion and the Removal Motion, the Court afforded the parties until July 31, 2007, to file memoranda of law.³

¹ Section 1519 is entitled “Destruction, alteration, or falsification of records in Federal investigations and bankruptcy.” It provides that “[w]hoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any cases filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.” 18 U.S.C. § 1519.

² The Debtor, a pro se litigant, appeared telephonically at the hearings from the Federal Correctional Institution in Loretto, Pennsylvania, where he is currently incarcerated.

³ On August 9, 2007, the Debtor filed his Second Supplemental Memorandum in Support of Motion to Dismiss Trustee Hughes and His [Trustee’s] Turnover Motion. In the document, the Debtor asks that the Court consider the late submission on the basis that he had filed his original Memorandum on July 27, 2007, which gave Hughes an opportunity to respond by the deadline. Simply because the Debtor opted to file his original Memorandum four days before the deadline set by the Court is not a basis for the Court to consider the Debtor’s late submission.

JURISDICTIONAL STATEMENT

The Court has core jurisdiction of the parties and subject matter of these contested matters pursuant to 28 U.S.C. §§ 1334, 157(a), (b)(1) and (b)(2)(A), (E) and (O).

FACTUAL BACKGROUND

For purposes of background, the Court sets forth the following facts as found in several decisions issued by the District Court involving the Debtor:

1. In 1997 the Debtor was charged with criminal activities arising from a massive fraud and money laundering scheme involving BFG, an office equipment leasing company run primarily by the Debtor. *See U.S. v. Bennett*, Case No. 97-CR 639, 2004 WL 829015, at *1 (S.D.N.Y. April 15, 2004) (“Judge Scheindlin’s 2004 Decision”).
2. On June 10, 1999, a jury convicted the Debtor of various counts of securities fraud, bank fraud and money laundering. The jury returned a special verdict requiring the Debtor to forfeit \$109,088,889.11. *Id.*
3. U.S. District Judge John S. Martin conducted a hearing concerning the Debtor’s interest in the Properties. On October 6, 2000, Judge Martin entered a First Amended Order of Forfeiture against the Debtor. *See U.S. v. Bennett*, Case No. 97 CR 639, 2000 WL 1505986 (S.D.N.Y. Oct. 6, 2000) (“Forfeiture Order”).⁴
4. On October 31, 2000, Lee E. Woodard, Esq., then trustee in the Debtor’s chapter 7 case, filed a Notice of Claim and Petition on behalf of creditors in the case in the forfeiture proceedings.
5. On November 9, 2000, Breeden filed a Notice of Claim and Petition on behalf of the creditors in the BFG case, as well as the other consolidated debtors.

⁴ According to Judge Scheindlin’s 2004 Decision, the Court of Appeals for the Second Circuit affirmed the Debtor’s conviction and sentence “and rejected each of his challenges to the Forfeiture Order.” *See Judge Scheindlin’s 2004 Decision at *2, citing United States v. Bennett*, No. 02-1379 (2d Cir. Sept. 19, 2003).

6. Also on November 9, 2000, G. Bennett filed a Notice of Petition for a hearing pursuant to 21 U.S.C. § 853(n)(2), asserting a financial interest in the Properties.
7. On February 6, 2001, Koen, as trustee for the Andrick Trust, filed a similar notice.
8. An ancillary hearing was conducted by Judge Martin on August 14 and August 18, 2001. G. Bennett testified at the hearing. The court “found that her testimony concerning her extensive role in acquiring these properties and the lack of involvement of Patrick Bennett was not worthy of belief.” *See U.S. v. Bennett*, Case No. 97 CR 639, 2003 WL 22208286, *1 (S.D.N.Y. Sept. 24, 2003) (“Judge Martin’s 2003 Decision”).⁵ The court indicated that “[n]othing presented at the August hearings on this claim persuades the Court to change its findings that these properties were originally purchased and financed with funds provided by Patrick Bennett that he procured by fraud and that these properties were placed in Mrs. Bennett’s name in an attempt to defraud creditors of Patrick Bennett.” *Id.* Judge Martin determined that “all the properties had been purchased with funds belonging to Patrick Bennett and that the properties were put into the name of his wife Gwen Bennett ‘pursuant to a scheme and conspiracy in which he and his wife engaged to defraud potential creditors Money that was derived through his illegal venture was turned over and used by his wife to purchase a home.’” *Id.* With respect to the transfer to the Andrick Trust, the court found that while made after the Debtor was indicted, there was “no question that this was a fraudulent conveyance. Accordingly, the District Court dismissed the claims of both G. Bennett and the Andrick Trust.” *Id.*⁶
9. The District Court also concluded that the Government had been unable to locate the \$109,088,899 in the exercise of due diligence and “Bennett’s right, title and interest in these properties were forfeited to the United States as substitute assets.” *Id.*
10. In a decision addressing a motion filed by G. Bennett to alter or amend the Forfeiture Order, the District Court (Scheindlin, D.J.) described the prior findings of Judge Martin,

⁵ By Amended Opinion and Order, Judge Martin’s 2003 Decision was corrected. It stated that the forfeiture provision of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, *et seq.* governed the forfeiture of the Properties. It was corrected to delete the reference to that statute and to “state that the forfeiture of the properties at issue is pursuant to 21 U.S.C. § 853(n)(6).” *U.S. v. Bennett*, Case No. S1 97CR. 639k, 2003 WL 22400751 (S.D.N.Y. Oct. 21, 2003) (Preska, D.J.).

⁶ According to the Stipulation and Final Order of Forfeiture, dated December 7, 2006, allegedly the appeals of G. Bennett and the Andrick Trust with respect to Judge Martin’s 2003 Decision were dismissed on or about June 15 and August 3, 2005, respectively. At the hearing before this Court on June 19, 2007, the Debtor clarified that they had been dismissed as premature since, at the time, there were other petitions in the ancillary proceeding still being considered.

namely, that “Bennett had an ownership interest in properties held in the name of Gwen Bennett, Bennett’s wife, and one property held in the name of the Andrick Irrevocable Trust (the “Properties”). The Forfeiture Order vested all of Bennett’s rights to the Properties in the United States of America and, pursuant to 18 U.S.C. § 982(b)(1), authorized the recovery of any substitute assets necessary to complete the forfeiture. The Forfeiture Order further provided that the court enter a final order of forfeiture pursuant to 21 U.S.C. § 853(n) ‘[u]pon adjudication of all third-party interests.’” *See* Judge Scheindlin’s 2004 Decision at *1. Ultimately, the District Court denied G. Bennett’s motion pursuant to Rules 59 and 60 of the Federal Rules of Civil Procedure to alter or amend Judge Martin’s 2003 Decision. *Id.*

11. On December 5, 2005, Hughes was appointed chapter 7 trustee as successor to Woodard by the U.S. Trustee.
12. On December 7, 2006, the Hon. Paul A. Crotty, U.S. District Judge for the Southern District of New York, “So Ordered” a Stipulation and Final Order of Forfeiture, resolving the petitions filed by the chapter 7 trustee and the chapter 11 trustee (“Bankruptcy Trustee Petitioners”) in which the United States Government recognized the superior right, title and interest of the Bankruptcy Trustee Petitioners to the Properties, as representatives of the victims and creditors of the Debtor.
13. According to the terms of the Stipulation and Final Order of Forfeiture, the Bankruptcy Trustee Petitioners were deemed to have clear title to the Properties and were given permission to liquidate the Properties. Included in the document is a provision whereby

[i]n the event that the criminal forfeiture against the Defendant is vacated prior to a Net Proceeds Distribution as a result of the Defendant’s appeal of the denial of his habeas petition, and all retrials involving said forfeiture have been completed and all appeals therefrom exhausted, if said forfeiture remains vacated, then the Bankruptcy Trustee Petitioners shall cause any net proceeds they received from the sale of the Subject Properties that are still in the possession of the Bankruptcy Trustee Petitioners on the date said final appeal is exhausted to be paid to the Defendant, and neither the Bankruptcy Trustee Petitioners nor the Defendant shall have any further remedy.

See Paragraph 3 of the Stipulation at page 8.

Also relevant to the motions under considerations is information provided in the various papers submitted to the Court. Although not provided in the context of a trial or evidentiary hearing, the Court finds it appropriate to include other facts, over which there does not appear

to be any dispute, in order to present a coherent decision. They are as follows:

1. By deeds dated October 13, 1992 and April 29, 1994, title to the Peterboro properties was transferred to G. Bennett. *See* Docket No. 196. The Debtor alleges that title to the Ransom Avenue property was transferred to G. Bennett in 1991.
2. A final Judgment of Divorce was executed by the New York State Supreme Court, Madison County, on December 11, 2006, dissolving the marriage of the Debtor and G. Bennett.⁷ The Judgment of Divorce was filed in Madison County on December 21, 2006, and recorded in Oneida County on February 26, 2007. *See* Final Judgment of Divorce, attached to Intervention Motion. (Docket No. 196). Under the terms of the Judgment of Divorce, “pursuant to the Separation Agreement, the marital property located on Peterboro Road in the Town of Verona is hereby declared the separate property of the Wife, Gwen Bennett.” *See* Judgment of Divorce at 3.
3. The Judgment of Divorce incorporated a Separation Agreement, dated November 6, 2006. *Id.* The Separation Agreement provides that “the parties recognize, agree and consent that the marital residence on Peterboro Road and a lot across the road in the Town of Verona, is currently separate property of the Wife and in her sole name. The parties also acknowledge that this property is encumbered by litigation and/or liens filed by the U.S. Attorney for the Southern District of New York and the Trustees in Bankruptcy of Mr. Bennett’s personal bankruptcy and the bankruptcy of the Bennett Companies. That if any monies are ever realized from the sale of said property, the Wife will split same evenly with The Patrew Irrevocable Trust (attached) . . . * * * Notwithstanding the status of this property as separate property of the Wife, the Wife agrees as part of the consideration for this Separation Agreement that the Patrew Irrevocable Trust shall be added to the title of the property as a co-owner . . . *See* Separation Agreement at ¶ 3.A.
4. Hughes, on December 12, 2006, took a certified copy of the Stipulation and Final Order of Forfeiture to the Office of the Oneida County Clerk for filing. *See* Affidavit of Thomas P. Hughes, sworn to on June 11, 2007, in opposition to Debtor’s Removal Motion at ¶ 3.
5. According to Hughes, after having presented the document to the clerk for filing and explaining that he wanted it indexed against G. Bennett, the Andrick Irrevocable Trust and Koen as a “miscellaneous deed,” he was instructed to add those names to the caption of the document. *Id.* (*See* attachment to Affidavit of G. Bennett, sworn to April 30, 2007, filed on June 13, 2007. The caption, as “edited” reads “United States District Court, Southern District of New York, United States of America v. Patrick Bennett, Gwen

⁷ This occurred four days after the Stipulation and Final Order of Forfeiture was signed by Judge Crotty.

*Bennett Andrick Trust Wanda Koen*⁸ Defendant.)

ARGUMENTS

Hughes argues that under the terms of the Stipulation and Final Order of Forfeiture legal title to the Properties was transferred to the Bankruptcy Trustee Petitioners on behalf of their respective bankruptcy estates. Hughes contends that by virtue of the rulings in the District Court, specifically the Judge Martin's 2003 Decision and the Judge Scheindlin's 2004 Decision, neither G. Bennett nor the Andrick Trust have any further interest in the Properties based on the finding of the District Court that they were purchased using funds provided by the Debtor that he had procured by fraud. It is Hughes' position that the Forfeiture Order vested all of the Debtors' rights to the Properties in the United States. In turn the Stipulation and Final Order of Forfeiture transferred those rights to the Bankruptcy Trustee Petitioners.

Hughes takes issue with the arguments made by the Debtor, G. Bennett and Koen that they were denied property without due process because they were not provided notice of the Stipulation and Final Order of Forfeiture and given the opportunity to assert their interests. In addition, G. Bennett contends that the Judgment of Divorce provides that the Peterboro properties were her separate property and that the District Court should defer to the New York State Supreme Court with respect to property rights in the two parcels.⁹

⁸ The italicized words are those that Hughes hand wrote into the certified document after Patrick Bennett's name in the caption.

⁹ By letter dated July 25, 2007 (Docket No. 248), the Debtor indicated that in the divorce proceedings he disclosed to the State Court the fact that he was currently a debtor, having filed a chapter 7 petition in September 1997. Debtor alleges that in response to an inquiry by the State

The Debtor raises the argument that the Turnover Motion should have been brought as an adversary proceeding pursuant to Rule 7001(1) of the Federal Rules of Bankruptcy Procedure, (“Fed.R.Bankr.P.”) because Hughes, as the chapter 7 trustee, is seeking to recover property from a non-debtor. As a result, the Debtor contends that the Court lacks jurisdiction over the property rights of G. Bennett and the Andrick Trust. The Debtor also raises the defenses of laches and untimeliness of the Turnover Motion.

In response, Hughes questions the Debtor’s standing to oppose the Turnover Motion on the basis that neither the Debtor, nor G. Bennett nor the Andrick Trust have any interest in the Properties based on the orders of the District Court. Hughes contends that the Forfeiture Order, dated October 6, 2000, is binding on the Debtor, as well as on G. Bennett and Koen, who participated as petitioners at the subsequent ancillary hearing conducted before Judge Martin on August 14 and 18, 2001, and whose claims were ultimately dismissed. Hughes also contends that the doctrine of laches is inapplicable given that Woodard, as the original chapter 7 trustee in the case, had commenced adversary proceedings in January 1999 seeking to recover the Properties based on allegations that their transfer to G. Bennett and the Andrick Trust were fraudulent conveyances.¹⁰ Adjudication of the adversary proceedings was delayed while the

Court concerning who the title owner of the Peterboro properties was, one of the parties responded that it was G. Bennett.

¹⁰ Adv. Pro. No. 99-80005 was commenced on January 7, 1999, against the Debtor and G. Bennett, seeking to avoid the transfer of the Peterboro properties. Adv. Pro. No. 99-80012 was commenced on January 14, 1999, against the Debtor, G. Bennett, and Koen, as trustee of the Andrick Trust, seeking to avoid the transfer of the Ransom Avenue property. Both adversary proceedings sought turnover of the Properties. This initial pretrial conference was held on December 16, 1999, and has been adjourned several times. Currently, they are both scheduled for a pretrial conference on December 20, 2007.

criminal/forfeiture proceedings were being conducted in District Court. In addition, Hughes asserts that even if the Court were to find that there had been an unreasonable delay, the Debtor had not established any undue prejudice as a result of the delay.

At the hearing on June 19, 2007, Hughes indicated that although he captioned his motion, filed back in April 2007 as one seeking turnover, he actually is not interested in ousting G. Bennett from possession of the Peterboro properties at this time. He merely seeks her cooperation in allowing a real estate appraiser access to the property. With respect to the Ransom Avenue property, Hughes explained that the tenant residing there is paying rent to Hughes. Therefore, he has no need at this time to have the property physically turned over to him. Instead, it appears that he is suggesting that at some point he will make a motion for summary judgment in the adversary proceedings commenced in 1999 based on collateral estoppel and will then be seeking turnover of the Properties in the context of those adversary proceedings. Hughes concurs with the view of this Court that one would be elevating form over substance to require him to commence a separate adversary proceeding, particularly since the relief he is actually seeking at this time is not for turnover of the Properties, which has already been directed by the District Court for all intents and purposes when it authorized the Bankruptcy Trustee Petitioners to liquidate the Properties.

The Debtor's Dismissal Motion II seeking dismissal of the Turnover Motion alleges that neither of the Bankruptcy Trustee Petitioners had any standing to file their Notices of Claim and Petition in the ancillary proceeding in the District Court. The Debtor also contends that the Final Order of Forfeiture was invalid because neither G. Bennett nor Koen were parties to the Stipulation. He also argues that in the event that he is successful with his petition for habeas

corpus relief, which is currently pending appeal with the United States Court of Appeals for the Second Circuit, the Properties would arguably be returned to him. He also raises the argument that the forfeiture of “substitute property”¹¹ is a concept applicable in cases involving drug money pursuant to the Drug Abuse Prevention and Control Act, 21 U.S.C. § 848, *et seq.*, not in cases of money laundering pursuant to the Racketeer Influenced and Corrupt Organizations Act (“RICO”), 18 U.S.C. § 1961, *et seq.* The same argument was made before the District Court by the Debtor without success, and this Court is without authority to revisit the issue. *See* Forfeiture Order at *1-2.

Hughes argues that as a chapter 7 trustee he is authorized to bring fraudulent conveyance actions on behalf of the estate, thereby giving him standing to file a claim in a criminal forfeiture proceeding. He also points out that there was no need for either G. Bennett or Koen to be made parties to the Stipulation because their claims in the forfeiture proceedings had been dismissed by the District Court.

In response to Hughes’ assertion that the Debtor lacks standing to oppose the Turnover Motion given that the Properties were never legally titled in the Debtor’s name, the Debtor seeks to intervene on behalf of his minor children as their father and as trustee of the Patrew Irrevocable Trust. He also makes the argument that his two sons are the beneficiaries of both the Patrew Irrevocable Trust and the Andrick Trust, thereby giving them a beneficial interest in the Properties.

¹¹ According to Judge Scheindlin’s 2004 Decision, “it is not entirely clear that the Properties were forfeited as substitute assets rather than ‘as property traceable to money laundering in violation of 18 U.S.C. § 1956 *and/or* as substitute assets pursuant to 18 U.S.C. § 982(b)(1).’” *See* Judge Scheindlin’s 2004 Decision at *4, quoting Forfeiture Order at 3-4.

Hughes responds that any interest the children might have to the Ransom Avenue property will be protected by Koen, as trustee of the Andrick Trust. In addition, Hughes points out that the children have no right to the Ransom Avenue property under the Andrick Trust in light of the District Court's ruling. With respect to any interest in the Peterboro properties and the provisions of the Judgment of Divorce, Hughes notes that the Judgment of Divorce was not recorded in the Oneida County Clerk's office until February 25, 2007, a date subsequent to the recording of the Final Order of Forfeiture in the Oneida County Clerk's office on December 12, 2006.

The Debtor also contends that the Stipulation and Final Order of Forfeiture, on which Hughes relies in seeking turnover of the Properties, is void based on allegations that Breeden failed to seek relief from the automatic stay before filing his Notice of Claim and Petition in the forfeiture proceedings in the District Court. In response, Hughes points out that criminal proceedings are excepted from the application of the automatic stay. At the hearing on June 19, 2007, the Debtor argued that pursuant to Rule 32.2(c) of the Federal Rules of Criminal Procedure, the ancillary forfeiture proceeding is actually a civil proceeding. In addition, Hughes also argues that the Forfeiture Order, issued on October 6, 2000, divested the Debtor of any interest in the Properties in favor of the United States, and it was the Stipulation and Final Forfeiture Order which effected the transfer of that interest to the Bankruptcy Trustee Petitioners.

Finally, the Debtor argues that Hughes should be removed as chapter 7 trustee from the case based on allegations that he violated his fiduciary duties. It is the Debtor's contention that Hughes intentionally altered and falsified court documents by adding the names of G. Bennett, Koen and the Andrick Trust to the caption of the Stipulation and Final Order of Forfeiture before

filing it with the Oneida County Clerk's office. It is the Debtor's position that those parties have been injured as a result of being identified in the caption as criminal defendants.

According to Hughes, he added the names in response to instructions given to him by a clerk in the Oneida County Clerk's office. He contends that it was never his intent to represent that G. Bennett, Koen and the Andrick Trust were criminal defendants. He simply wished to have the Stipulation and Final Order of Forfeiture docketed under their names, as the title owners of the Properties, in order to give notice to prospective purchasers that the three no longer had any interest in said Properties.

DISCUSSION

Debtor's Motions

As an initial matter, Hughes takes the position that the Debtor is without standing to bring any of his motions. Whether the Debtor has standing depends on whether he has a personal stake in the outcome of the controversy and will suffer actual injury if the relief sought is granted. *See In re Balanced Plan, Inc.*, 257 B.R. 921, 923 (Bankr. W.D.Mo. 2001). The Debtor has filed five motions for which the Court must determine whether he has standing.

In Dismissal Motion I the Debtor contends that the Turnover Motion should be dismissed because the relief sought by Hughes should have been requested by means of an adversary proceeding. The Debtor also argues that there is no statutory authority allowing a chapter 7 trustee in a ten year old case from seeking turnover based on laches. The Debtor also contends that neither he, nor G. Bennett, nor Koen were served with the proposed Stipulation and Final

Order of Forfeiture, which affected the rights of G. Bennett, Koen and the Debtor's children with respect to the Properties, thus denying them due process of law.

The Debtor appears to recognize that his standing to file the Dismissal Motion I, as well as the other motions, may be in question since his interest in the Properties was voided by the District Court once he was convicted on various criminal charges. Thus, he also filed the Intervention Motion on the same day as the Dismissal Motion I, seeking to intervene on behalf of his two sons who he argues have a beneficial interest in the Properties by virtue of the Patrew Trust and the Andrick Trust.

“RICO forfeiture is an in personam sanction against the individual, not an in rem action; so § 1963 forfeiture reaches only the criminal defendant's interest in the property.” *United States v. Totaro*, 345 F.3d 989, 993 (8th Cir. 2003). In this case, the District Court in its Forfeiture Order of October 6, 2000, vested all of the Debtor's rights to the Properties in the United States.¹² The District Court then provided any parties asserting an interest in the Properties with notice and an opportunity to be heard at the ancillary forfeiture proceeding held on August 14 and 18, 2001 pursuant to 18 U.S.C. § 1963(l). It was at that proceeding that G. Bennett, Koen and the Andrick Trust, as well as the Bankruptcy Trustee Petitioners, had an opportunity to challenge the Forfeiture Order by establishing that they had a superior legal right or title to the Properties at the time the criminal activities occurred. *Id.* at 993-94.

Following the ancillary proceeding, the District Court in Judge Martin's 2003 Decision dismissed the claims of G. Bennett, Koen and the Andrick Trust based on a finding that the

¹² Pursuant to 19 U.S.C. § 1963(c) the property actually vested in the United States “upon the commission of the act giving rise to forfeiture . . .” rather than on the day that the Forfeiture Order was signed.

conveyances of the Properties had been financed with funds procured by fraud as part of an illegal venture, and that the transfers themselves were fraudulent. This was reaffirmed by the District Court in Judge Scheindlin's 2004 Decision in which she denied G. Bennett's motion pursuant to Rules 59 and 60 of the Federal Rules of Civil Procedure, which sought to alter or amend Judge Martin's 2003 Decision. Accordingly, neither the Debtor nor his sons have any interests in the Properties and lack standing to have the Turnover Motion dismissed.

With respect to the Dismissal Motion II, the Debtor argues that the Bankruptcy Trustee Petitioners lacked standing to file their Notice of Claim and Petition in the ancillary forfeiture proceedings in the District Court. In support of this argument, the Debtor directs the Court to *U.S. v. Ribadeneira*, 105 F.3d 833 (2d Cir. 1997). The relevance of the *Ribadeneira* decision was an issue for the District Court to address. As this Court noted at the hearing on June 19, 2007, this Court has no jurisdiction to collaterally attack the Stipulation and Final Order of Forfeiture and any issue concerning the standing of the Bankruptcy Trustee Petitioners is for the District Court to have addressed..

Nor does the Debtor have standing in Dismissal Motion II to assert that due process was denied to G. Bennett, Koen and the Andrick Trust. Even if the Court were to find that the Debtor has standing to make that argument on their behalf, it is clear that they were provided with notice and an opportunity to petition the District Court to amend its Forfeiture Order. Once the petitions were dismissed following the ancillary hearing on August 14 and 18, 2001, they no longer had any rights or interest in the Properties.

The final two motions of the Debtor that must be addressed are the Stay Violation Motion and the Removal Motion. The Debtor certainly has standing to assert a violation of the automatic

stay under appropriate circumstances. However, under the facts now before this Court, such circumstances do not exist. The Debtor contends that Breeden should have sought relief from the automatic stay before filing his Notice of Claim and Petition in the ancillary forfeiture proceeding in the District Court and later entering into the Stipulation. Neither the Notice of Claim and Petition nor the Stipulation involved property of the Debtor. Indeed, the Debtor, having been convicted on criminal charges, was expressly prohibited from filing a petition in the ancillary proceedings. *See* 18 U.S.C. § 1963(l)(2). The District Court had already found the Properties vested in the United States. It was only following the dismissal of G. Bennett and Koen/Andrick Trust's petitions and the issuance of the Stipulation and Final Order of Forfeiture that the property interests were transferred to the Bankruptcy Trustee Petitioners on behalf of their respective estates. Therefore, the Court finds that Breeden did not violate the automatic stay in participating in the ancillary forfeiture proceedings and in entering into the Stipulation.¹³

With respect to the Removal Motion, the Debtor has standing as a chapter 7 debtor and a party-in-interest to seek Hughes' removal. In the Second Circuit, removal of a trustee requires a showing of actual injury to the estate or fraud. *See In re Freeport Italian Bakery, Inc.*, 340 F.2d 50, 54 (2d Cir. 1965). Consideration must also be given to whether "the administration of the estate in bankruptcy would suffer more from the discord created by the present trustee than would

¹³ With respect to the Debtor's assertion that the exception to the automatic stay made applicable to criminal proceedings is inapplicable because the ancillary forfeiture proceeding was actually a civil proceeding pursuant to Rule 32.2(c)(1)(B) of the Rules of Criminal Procedure, the Court does not agree. The Advisory Committee Notes to that particular rule simply indicate that in such proceedings "procedures akin to those available under the Federal Rules of Civil Procedure should be available to the court and the parties to aid in the efficient resolution of the [third party] claims. * * * Because an ancillary hearing is connected to a criminal case, it would not be appropriate to make the Civil Rules applicable in all respects."

be suffered from a change of administration” necessitated by removal of the trustee. *Id.* at 55. In other words, the Court is given broad discretion in considering what is in the best interest of the estate. *See In re Lundborg*, 110 B.R. 106, 108 (Bankr. D. Conn. 1990).

In this case, the Debtor contends that Hughes intentionally altered and falsified court documents by adding the names of G. Bennett, Koen and the Andrick Trust to the caption of the Stipulation and Final Order of Forfeiture before filing it with the Oneida County Clerk’s office. The Court may question the chapter 7 trustee’s judgment in complying as he did with the instructions given him by the individual at the Oneida County Clerk’s office in an effort to have the Stipulation and Final Order of Forfeiture included in the chains of title of the Properties. However, mistakes in judgment, especially where “that judgment was discretionary and reasonable under the circumstances,” is not a basis for removal of a trustee. *In re Equimed, Inc.*, 267 B.R. 530, 534 (D.Md. 2001); *Lundborg*, 110 B.R. at 108, citing *In re Haugen Const. Serv., Inc.*, 104 B.R. 233, 240 (Bankr. D.N.D. 1989). In addition, the Court finds no fraudulent intent on the part of Hughes in “altering” the document for ease of filing in the chains of title of the Properties.

The Debtor argues that Hughes should be removed based on allegations that he breached his fiduciary duty. The Debtor contends that the provisions in the Stipulation are void given Hughes’ actions in connection with the alteration of the caption of the Stipulation and Final Order of Forfeiture at the direction of someone in the Oneida County Clerk’s office. It is the Debtor’s position that if Hughes were removed as chapter 7 trustee and the Stipulation and Final Order of Forfeiture determined to be a nullity, the Judgment of Divorce would then have priority with respect to interests in the Properties.

The Debtor argues that the State Court was aware of the proceedings in the District Court at the time it issued the Judgment of Divorce, awarding the Peterboro properties to G. Bennett on December 11, 2006. However, it does not appear that the State Court was informed that any interest the Debtor had in the Properties was extinguished pursuant to the Forfeiture Order on October 6, 2000, and any rights G. Bennett had in the Peterboro properties had been extinguished following the dismissal of her petition in the forfeiture proceedings. The District Court in its Forfeiture Order in 2000 specifically found that all rights to the Peterboro properties, as well as the Ransom Avenue property, were vested in the United States. Any claims that G. Bennett and the Andrick Trust asserted were dismissed by the District Court in Judge Martin's 2003 Decision. Thus, at the time that the divorce proceeding was commenced in November 2005, the Peterboro properties were not marital property subject to equitable distribution between the two parties.

The Debtor also fails to recognize that if the Stipulation and Final Order of Forfeiture were found to be a nullity by this Court as the Debtor requests, arguably the rights in the Properties would simply revert in the United States, not the Debtor, nor G. Bennett, Koen or the Andrick Trust.

With respect to the Removal Motion itself, the Court finds that the Debtor has no standing to assert a breach of fiduciary duty because Hughes owes no fiduciary duty to the Debtor. His duty is to the creditors of the Debtor's estate. *Id.* at 239. Furthermore, the Debtor has not alleged any injury to himself or to the estate as a result of the alteration of the caption.¹⁴ With respect to

¹⁴ A motion was recently filed by G. Bennett and Koen seeking relief from the automatic stay in order to proceed in State Court against Hughes. They allege damage to their credit rating and their ability to obtain consumer loans based on being listed in the caption of the Stipulation and Final Order of Forfeiture in the criminal case in the District Court. The motion was heard on August 21, 2007, and adjourned on the consent of all parties to September 18, 2007.

the Debtor's allegations pursuant to 18 U.S.C. § 1519, that particular statute is a criminal statute for which this Court has neither jurisdiction to address nor authority to grant any relief. *See In re Szabo Contracting, Inc.*, 283 B.R. 242, 255 (Bankr. N.D. Ill. 2002).

Accordingly, the Court must also conclude that the Debtor lacks standing to assert the Dismissal Motion II, as well as the Removal Motion. As discussed above, he did have standing to file the Stay Violation Motion. However, as indicated above, the Court finds no basis to grant that motion.

Chapter 7 Trustee's Motion

As discussed above, at the hearing on June 19, 2007, Hughes clarified that he is not actually seeking turnover of the Properties at this time. Under those circumstances, the Court agrees that requiring him to commence an adversary proceeding would elevate form over substance. There are two adversary proceedings pending against the Debtor, G. Bennett, Koen and the Andrick Trust seeking avoidance of the transfers of the Properties and their turnover. Hughes has indicated that, if necessary, he certainly could file a motion seeking summary judgment in those proceedings based on the findings of the District Court on estoppel grounds. The Court deems it appropriate to grant the Turnover Motion to the extent that it seeks authorization for Hughes' real estate appraiser to be given access to the Properties.

Based on the foregoing, it is hereby

ORDERED that the Debtor's Dismissal Motion I is denied; it is further

ORDERED that the Debtor's Intervention Motion is denied; it is further

ORDERED that the Debtor's Dismissal Motion II is denied; it is further

ORDERED that the Debtor's Stay Violation Motion is denied; it is further

ORDERED that the Debtor's Removal Motion is denied; and it is finally

ORDERED that the Turnover Motion filed by the chapter 7 Trustee is granted to the extent that he seeks an Order directing G. Bennett and Koen to allow Galliher Appraisal Service, appointed by Order of this Court dated December 21, 2006, access to the Properties in order to conduct appraisals of them.

Dated at Utica, New York

this 28th day of August 2007

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge