UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re:

CASE NO. 05-22840

DONALD ALVES (dba Alves Realty),

Debtor. **DECISION & ORDER**

BACKGROUND

On June 7, 2005, Donald Alves (the "Debtor") filed a petition initiating a Chapter 7 case and Kenneth W. Gordon, Esq. (the "Trustee") was appointed as his Trustee.

On May 6, 2005, prior to the filing of the Debtor's petition, Justice Harold L. Galloway ("Justice Galloway") of the New York State Supreme Court (the "State Court") entered a Supplemental Decision (the "State Court Supplemental Decision") in an action commenced in 1994, which included a nine-day non-jury trial (the "State Court Action"), between Cosmo Plantone, Inc., Cosmo Plantone and Thomas Plantone (collectively, the "Plantones"), as Plantiffs, against the Debtor and Louis Bianchi ("Bianchi"), as Defendants, that awarded damages to the Plantones in the amount of $655,307.00.

On November 12, 2004, the State Court had entered a Decision (the "November Decision") that granted the Plantones the replevin from the Debtor of the stock which represented their 60% ownership in Rock Springs Development Corporation and other relief, but it did not make an award of damages.

On October 11, 2005, Cosmo Plantone filed a claim for $641,785.05, which indicated that it represented $610,332.05, the amount alleged to have been awarded by the November Decision, together with additional interest through the date of the petition, and Thomas Plantone filed an identical claim for $641,785.05 (collectively, the "Plantone Claims").

On October 5, 2005, the Plantones filed a motion (the "Stay Relief Motion"), which requested that this Court enter an order terminating the automatic stay. The Motion asserted and requested that:

> the Plantones should be given relief from the stay in order to finalize the State Court order as it pertains to their stock in Rock Springs Development Corporation.
>
> WHEREFORE, Cosmo A. Plantone, Thomas R. Plantone and Cosmo A. Plantone, Inc., by their attorneys, Panzarella & Coia, P.C. respectfully requests that the Court issue an Order granting them a lift of the stay and declaring that they are 60% owners of the stock of Rock Springs Development Corporation or alternatively enabling them to obtain a signed Order from Judge Galloway in the State Court matter of Plantone v. Alves, Index No. 09530/94 with respect to his decision that awards them their 60% ownership interest in Rock Springs Development Corporation, awarding them legal expenses and costs incurred in connection with this Motion and for such other and further relief that to the Court seems just and equitable.

The Stay Relief Motion also alleged that a State Court Order and Judgment, attached as Exhibit "B" to the Stay Relief Motion (the "State Court Order and Judgment"), was settled prepetition but not signed or entered by the State Court because of the filing of the Debtor's petition and the imposition of the automatic stay.[1] The State Court Order and Judgment also provided for replevin of the Rock Springs Development Corporation stock, but it also provided for a judgment against the Debtor for the sum of:

> $598,773.00 plus interest thereon from May 20, 1993 until November 12, 2004 in the sum of $617,293.94 (CPLR §5001) for a total sum of $1,216,065.50 plus interest thereon from November 12, 2004 to the date the judgment is entered (CPLR §5002) plus costs and disbursements of $4,598.65 for a total award of $1,220,664.10 which said amount shall be allocated one-half each to Cosmo A. Plantone, individually and Thomas R. Plantone, individually.

The unsigned State Court Order and Judgment, attached as Exhibit "B" to the Stay Relief Motion, was also attached to each of the Plantone Claims, and it apparently was the computational basis for the Claims, even though not signed nor entered, rather than the November Decision, which was incorrectly stated as the computational basis for the Claims.

---

[1] At an oral argument conducted in connection with the Trustee's objections to the Plantone Claims, the attorney for the Plantones advised the Court that the handwritten additions and corrections to the State Court Order and Judgment were those of Justice Galloway.

On October 19, 2005, this Court entered a Stay Relief Order, which provided:

> ORDERED, that the Automatic Stay instituted upon the filing of the petition for an Order for Relief by the Debtors above named, be, and the same hereby is, modified in that it shall not apply to any action by creditors, Cosmo A. Plantone and Thomas R. Plantone, to finalize the order of Justice Harold L. Galloway in the New York Supreme Court action of Plantone, et al v. Alves, et, Index No. 09530/94 and to recover possession and dispose of its stock ownership interest in Rock Springs Development Corporation: namely to seek and obtain an Order and Judgment from the Honorable Harold L. Galloway that declares the Plantones 60% owners of the stock of Rock Springs Development Corporation and/or orders Alves to return said stock to the Plantones or any other act that the State Court deems necessary in furtherance of the recovery of the Plantone's interests in Rock Springs Development Corporation, is hereby GRANTED.

On October 21, 2005, a Decision and Order (the "State Court Decision and Order") was signed by Justice Galloway. Except for being retyped and designated as a Decision and Order, it was identical to the unsigned State Court Order and Judgment that was attached to the Stay Relief Motion and the Plantone Claims. On October 26, 2005, the State Court Decision and Order was filed with the Clerk of the County of Monroe and on October 27, 2005, a notice of entry was served upon the Trustee.

By a Decision & Order dated February 8, 2006, this Court determined that the debts due to the Plantones from the Debtor were nondischargeable pursuant to Section 523.

On April 11, 2006, the attorneys for the Plantones filed a proposed Order Terminating the Automatic Stay of Non-Bankruptcy Lawsuit (the "Second Stay Order"), along with a March 29, 2006 letter, which had been sent to the Trustee, the Office of the United States Trustee and the Debtor's attorneys explaining the request for the entry of the proposed Order. The March 29, 2006 letter indicated that: (1) although the State Court Decision and Order had been signed by Justice Galloway and filed in the Monroe County Clerk's Office for the purpose of confirming the Plantones' right to 60% of the stock of Rock Springs Development Corporation, because of the automatic stay, no final monetary judgment had been entered by the State Court against the Debtor and; (2) in view of the determination of nondischargeability, the proposed Order should be entered to allow the State Court to enter a complete and final monetary judgment in favor of the Plantones against the Debtor.

On April 11, 2006, the Court, which had not received any objections from the Trustee, the Office of the United States Trustee or the Debtor's attorneys, signed and entered the Second Stay Order, which provided that:

> ORDERED, that pursuant to 11 U.S.C. Section 362(d)(1)(2) and 11 U.S.C. Section 362(f), the Automatic Stay instituted upon the filing of the petition for an Order for relief by the Debtor above named, be and the same hereby is modified to the extent that it shall not apply to any action by Creditors' Cosmo A. Plantone and Thomas R. Plantone, to enter a money judgment against the debtor, Donald Alves, in the office of the Clerk of Monroe County, State of New York upon the Decision and Order of the Honorable Harold L. Galloway, dated October 21, 2005, in the New York State Supreme Court Action of Plantone, et al v. Alves, et al, Index No.: 09530/94; it is hereby GRANTED.

On May 12, 2006, the State Court signed an Order and Judgment (the "Final Judgment"), which, as provided for in the Second Stay Order, included the same principal, interest and cost awards included in the State Court Order and Judgment and State Court Decision and Order.

On September 5, 2006, the Trustee filed Objections to the Plantone Claims (the "Plantone Claim Objections"). The Objections were scheduled for Trial on May 15, 2007.

On April 10, 2007, the Plantones filed a Motion for Summary Judgment (the "Motion for Summary Judgment"), which requested that the Court enter an order dismissing the Plantone Claim Objections, and on April 19, 2007, the Trustee filed a Cross-Motion for Summary Judgment (the "Cross-Motion"), which requested that the Court enter

an order disallowing the Plantone Claims in part, but allowing them in part.

The Cross-Motion asserted that: (1) to the extent that the Plantone Claims included interest from the commencement of the State Court Action on May 20, 1993 to the date of the filing of the Debtor's petition, that interest was unmatured interest on the date of the filing of the petition and not allowable under Section 502(b)(2)[2], because: (a) it was not awarded by the State Court prior to the filing of the Debtor's petition; and (b) that interest, ultimately awarded by the State Court in the Final Judgment, was discretionary interest rather than mandatory interest because it was awarded in connection with the Plantone's several equitable rather than legal causes of action; (2) to the extent that the prepetition interest was awarded to the Plantones post-petition by the State Court Decision and Order, that portion of the Decision and Order was null and void because it was in violation of the automatic stay that had not been terminated by the Bankruptcy

---

[2] Section 502(b)(2) provides that:

> (b) Except as provided in subsections (e)(2), (f), (g), (h) and (i) of this section, if such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition, and shall allow such claim in such amount, except to the extent that --
>
> (2) such claim is for unmatured interest[.]

11 U.S.C. § 502 (2007).

Court for the purpose of having the State Court award the Plantones prepetition interest; (3) the State Court Supplemental Decision, entered on May 6, 2005, was a preferential transfer;[3] (4) the Plantone Claims were required to be reduced pursuant to New York State General Obligations Law Section 15-108(a),[4] by the value of the settlement entered into between the Plantones and Bianchi (the "Bianchi Settlement"), the Debtor's co-defendant in the State Court Action, prior to the trial of the State Court Action, which included Bianchi's surrender to the Plantones of 30% of the stock of Rock Springs Development Corporation; and (5) the claim of Thomas Plantone should be reduced by the amount of a third-party judgment against Thomas Plantone that had been filed with the Trustee.[5]

---

[3] The Court does not believe the issuance of the State Court Supplemental Decision and Order was a transfer under Section 547.

[4] NYS GOL 15-108(a) provides that, "When a release...is given to one of two or more persons liable or claimed to be liable in tort for the same injury,...it reduces the claim of the releasor against the other tortfeasors...in the amount of the released tortfeasor's equitable share of the damages..."

[5] The Court will not address this matter in this Decision & Order. To the extent that the Trustee has been served with an Execution by a proper authority to pay over any proceeds that might otherwise be distributed to Thomas Plantone, an order from this Court is not required for him to honor the Execution. In addition, the Trustee does not need an order from this Court to be able to pay the Judgment with the consent of Thomas Plantone, which would eliminate the need to pay poundage fees in connection with an Execution.

DISCUSSION

I. Prejudgment Interest Determined but Awarded Post-Petition

To the extent that the Plantone Claim Objections asserted that the Claims should be reduced by prejudgment interest determined by the State Court prepetition, but awarded post-petition after this Court had terminated the automatic stay for the award to be made, and then computed through the date of the filing of the Debtor's petition, they are in all respects denied.

The parties do not dispute that prepetition Justice Galloway made a determination to award prejudgment interest in the State Court Action. Prejudgment interest was computed and included in the State Court Order and Judgment that was presented to him and extensively marked-up by him for retyping and resubmission, but the computation and award provisions were not changed by his handwritten corrections and additions.

That prejudgment interest, determined but not formally awarded prepetition by a signed order or judgment because of the filing of the Debtor's petition, is not unmatured interest for purposes of Section 502(b)(2). This Court believes that unmatured interest is interest that has not been earned, such as accelerated interest, not prejudgment interest that was determined by a state court prepetition but not included in a signed order or judgment because a petition was filed.

Furthermore, if as the result of the proceedings in this case, the Final Judgment had not been entered, this Court would have allowed the prejudgment interest as computed and determined by the State Court in the State Court Order and Judgment, as the same was attached to the Plantone Claims, or, in the alternative, if the parties had insisted, it would have referred the matter back to Justice Galloway for him to formalize the award of prejudgment interest.

In addition, for the purposes of whether it is matured or unmatured interest, it makes no difference whether it was mandatory or discretionary interest. In this case, because Justice Galloway had determined the prejudgment interest prepetition, it is not relevant whether he believed it was mandatory or discretionary under the New York Civil Practice Law and Rules.

II. <u>Reduction for the Value of the Bianchi Settlement</u>

To the extent that the Plantone Claim Objections assert that the Claims should be reduced by the value of the Bianchi Settlement, they are in all respects denied, without prejudice to the Trustee moving in the State Court by June 25, 2007 to obtain an order from the State Court reducing the amounts due the Plantones by the value of the Bianchi Settlement, for the following reasons: (1) the Trustee knew at the latest in October 2005, because a copy of the State Court Order and Judgment was attached to the Plantone

Claims and he had been served with a copy of the State Court Decision and Order, that the State Court had addressed the question of a reduction for the alleged Bianchi Settlement, and it had determined that, because no evidence of the value of that settlement or its details were presented to it, a final judgment in favor of the Plantones would not include any reduction; (2) notwithstanding this knowledge as of October 2005, the Trustee did nothing to move in the State Court for a reduction of the ultimate damage amounts that might be found to be due the Plantones as a result of the Bianchi Settlement, nor did he do anything in this Court prior to the entry of the May 12, 2006 Final Judgment to specifically preserve his right to so move in the State Court for such a reduction; (3) all parties, including the Trustee, were on notice in April 2006, that: (a) the Final Judgment would be entered when the proposed Second Stay Order was filed and not objected to; and (b) the Final Judgment, which would be in the form of the Decision and Order, did not include a reduction in damages for the value of the Bianchi Settlement; (4) the Plantone Claim Objections, which for the first time formally asserted that the Claims should be reduced by the Bianchi Settlement, were filed after the Final Judgment, which was entered with the knowledge of the Trustee and the knowledge and permission of this Court; (5) the matter of whether there should have been or should be a reduction

in damages is one best addressed by the State Court under New York law; and (6) the matter of a reduction in damages because of the alleged Bianchi Settlement could have been addressed in the State Court before the entry of the Final Judgment if the Trustee had requested that this Court condition the Second Stay Order on his being permitted to move for a such reduction in State Court, but he did not make such a request.

However, to the extent that the Trustee can still pursue a reduction in damages in the State Court, this Decision & Order is without prejudice to that right.

CONCLUSION

The Motion for Summary Judgment is granted and the Plantone Claim Objections are in all respects denied, but without prejudice to the Trustee bringing a proceeding by June 25, 2007, if it is available, in the State Court to have the Final Judgment reduced by the value of the Bianchi Settlement, in which case the Plantone Claims shall be so reduced.

IT IS SO ORDERED.

/s/
HON. JOHN C. NINFO, II
U.S. BANKRUPTCY JUDGE

Dated: May 25, 2007