UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re

The Law Firm of Frank R. Bayger, P.C. Case No. 02-11538 K

Debtor

OPINION AND ORDER DENYING
RECUSAL MOTION FILED BY THE DEBTOR AND/OR PRINCIPAL

Relevant Parties and Counsel

This case, which began in Chapter11 and ends in Chapter 7, is twelve years old. Over the course of the twelve years, some of the parties and their bankruptcy counsel have changed from time to time. Two have not changed. The first is the principal officer, director and owner of the Debtor - - Frank R. Bayger, Esq. The second is the Debtor. It is "The Law Firm of Frank R. Bayger, P.C." The principal will be referred to below as "Bayger" and the Debtor as "the P.C."

This is a surplus money case, and so Bayger has received in excess of $165,000 after full payment (including post-petition interest) to all creditors of the P.C. Because of that, he has legal standing here for, and apart from, the P.C. (Otherwise, only the Chapter 7 Trustee would have standing to speak for P.C.) It is not clear what it is that he wishes to accomplish here with that standing, such that he wants a different judge.[1] Although there might eventually be no purpose for this Motion, the Court will

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[1]He said at one point (through counsel) that he might choose to sue the Chapter 7 Trustee. The Court has given him several months to commence such a suit, and none has been filed. This Court has been holding back the filing of this Decision because of Bayger appeals in the District Court. (Obviously, remand by the District Court would require a bankruptcy judge.) That Court has now dismissed those appeals. (Skretny, C.J.) Now that this Court's prior rulings have been affirmed, this Decision can be filed.

presume that there is a valid purpose. In that way, the Motion's lack of merit may be made clear.

When Bayger filed this case for the P.C. under Chapter 11 on March 15, 2002, it was asserted that the P.C. was represented by James A. Huber, Esq., but there was no Order appointing him or anyone else under 11 U.S.C. § 327. After conversion to Chapter 7 on July 3, 2002, the P.C. might have been represented by Joseph Keefe, Esq. (See docket # 85 regarding a 10/23/02 hearing) or by David Jay, Esq. (who died in May of 2010). (See Docket # 44 and # 233 and various court appearances in between.) It has not always been clear whether any particular lawyer or firm was representing only Bayger, only the P.C., or represented both. The law firm of "Feuerstein and Smith" (hereinafter "Feuerstein") made its first appearance in Court for the P.C. and/or Bayger on September 9, 2003, and it appeared regularly for ten years until last summer (2013). In 2007, Brian Fitzgerald, Esq., appeared for Bayger (see Docket # 359), but the Feuerstein firm also continued for the P.C. and/or Bayger. Sometimes the P.C. might have been representing Bayger or itself. Sometimes Bayger might have represented the P.C.

Just last year (2013), John Bartolomei, Esq. appeared for the first time in this case. He appeared for the P.C. and for Bayger. That came as a surprise on the record to Mark Gugliemi, Esq., of the Feuerstein firm which also purported to represent at least the P.C. at that hearing on July 24, 2013. Bayger was in Court on that day and discharged the Feuerstein firm on the record in favor of Bartolomei. But in April of this year (2014), a written appearance on behalf of Bayger was submitted by Fitzgerald, not

Bartolomei or Feuerstein. (See Docket ## 746, 755, 758.)

Turning away now from the Debtor and Bayger, there is the Buffalo office of the United States Trustee for Region 2, which also underwent change over the years. At the beginning of this case in 2002 the Assistant U.S. Trustee for this office was Christopher Reed, Esq. He became this writer's Career Law Clerk on April 14, 2008, and there has been an appropriate "wall" in chambers. His role in this case has been limited to matters of working with counsel on scheduling, taking of minutes, operating of the sound recording system, and assuring that proper notice has been given to all appropriate parties regarding any matter brought before the Court. This writer has not consulted with him (in this case) regarding any substantive matter upon which this writer has had to deliberate or rule. But his involvement in this case before he left the Department of Justice was significant. When this case was converted to Chapter 7, that was upon the motion of Mr. Reed on behalf of the United States Trustee for Region 2, who then was Carolyn Schwartz, Esq. On her behalf, he appointed Edwin R. Ilardo, Esq. as the Chapter 7 Trustee, and he might have provided guidance and supervision to Mr. Ilardo. Mr. Ilardo died in 2010 and the successor trustee, John H. Ring, Esq., was appointed by Assistant U.S. Trustee Joseph Allen, Esq. on behalf of the U.S. Trustee who then was Diana Adams, Esq.[2] Since then many appearances were made in this case by Mr. Allen (or his staff) on behalf of two successor U.S. Trustees, Tracy Davis,

[2]This case had its genesis in a Chapter 11 filing by Bayger in the Middle District of Florida. Ring represented a Florida trustee here for years before Mr. Ilardo died. Then Ring was appointed "case trustee" in this case.

Esq. and William Harrington, Esq.

Finally, there was Donald Dolson, who died in April of 2013. He was the only client of the P.C. whose claim against the P.C. was disputed by Bayger. The claim asserted legal malpractice, fraud and deceit, and breach of contract by Bayger and thus by the P.C. Mr. Dolson was originally represented here by Noemi Fernandez, Esq. Anthony Pendergrass, Esq. substituted here for her on behalf of Mr. Dolson in January of 2006 (see Docket #s 214, 215). He has advocated well here, as described below.[3]

THE MOTION

The recusal Motion was brought by Bayger pursuant to 28 U.S.C. § 455 which states, in relevant part, "any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." (There is much more detail in that statute.) The Motion further cites Canon 3C(1) of the Code of Conduct for United States Judges which states "A judge should disqualify [himself or herself] in a proceeding in which [his or her] impartiality might reasonably be questioned including but not limited to instances where . . . [he or she] has a personal bias or prejudice concerning a party or a personal knowledge of disputed evidentiary facts concerning the proceedings." The Motion is also based upon Canons 1, 2A, 3A(3), and 3A(4) of that Code.

Using those references, Bayger asserts that this writer has not been

[3]See footnote 5 below.

impartial and "cannot be impartial in this matter in that he has continuously shown, in open court and on countless occasions, his disdain and loathing for the Debtor, such that this predisposition on the part of Judge Kaplan against the Debtor has caused him to be less than impartial in this matter or at least has put his impartiality into reasonable question." [Paragraph 4 of the Affidavit of John P. Bartolomei, Esq.]

The Motion offers no illustrations, just Bartolomei's impressions and some quotes from certain letters written by Fitzgerald to Bayger.

The supporting Affidavit is that of Bartolomei; not that of his client or anyone else. At paragraph 7 of his Affidavit, and speaking for Bayger and the P.C., Bartolomei attests that "in each and every instance of appearance before Judge Kaplan during the course of this bankruptcy proceeding, Judge Kaplan has demonstrated his personal bias and/or prejudice against the Debtor and has continually applied that personal bias at every single hearing."

Bartolomei further attests under oath as follows, "I have been practicing law for 40 years and I am well experienced in litigation and motion practice. I have appeared before many Judges in numerous courts and have never seen a Judge who has directed and focused such an abusive, partial and predisposed attitude, demeanor and conduct towards a client that I represent." [Paragraph 11 of the Bartolomei Affidavit.]

The seven-hundred-plus entries on the docket of the record in this case make it clear that Bartolomei did not appear at any of the hearings in this case during the first eleven years of its twelve-year existence. The record also shows that no transcript was requested or produced for the vast majority of eleven years of hearings in

this case. Consequently there can be no doubt that Bartolomei has made his sworn attack upon this writer's impartiality, and has accused this writer of bias and prejudice, without any personal knowledge of the facts to which he has attested under oath.

Bartolomei is offered 14 days in which to cure **his oath** (if he wishes), but not to amend the Motion, its theories or support.[4] Today's decision denying the recusal request is final, subject only to appellate review.

The Bayger Arguments

Bartolomei (not Bayger) attests under oath (as his oath stands at this moment) that Bayger has suffered bias or prejudice at the hands of this writer, but offers no concrete illustration to which this writer might respond. If it is based upon adverse rulings or routine admonitions in this case, the Second Circuit has made it clear that such things alone cannot require § 455 recusal. See, for example *S.E.C. vs. Razmilovic* (2013, 2nd Cir.) 738 F.3d 14, stating ". . . [R]ecusal is not warranted where the only challenged conduct consist[s] of judicial rulings, routine trial administration efforts, and

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[4]If Bartolomei had actually been present to witness "every single hearing" in this case, he would have witnessed a hearing many years ago in this case at which Trustee Ilardo, with Bayger present, referred repeatedly on the record to "the judge." This writer asked " What judge are you talking about?" Mr. Ilardo stated "Judge Bayger. I was always taught to refer to a former judge by the title 'judge.'" This Court responded that there was only one judge there in Bankruptcy Court, and it was this judge. Perhaps it was then that Bayger decided that this writer was "hostile" to him. Perhaps he thought that he was due such deference. The fact is that this writer insisted upon proper ethics on the part of the Trustee. In federal court no former judge is ever to be referred to as "judge" in any litigation or documents except appearances for ceremonial purposes. In fact, it is unethical for this writer to permit others to pay such deference when adverse parties might be caused to believe that the former judge has some special place in the law (or the court) that might affect the result. (See U.S. Judicial Conference Committee on Codes of Conduct, Advisory Opinion No. 72. "[Federal] Judges should insure that the title 'judge' is not used in the courtroom or in papers involved in litigation before them to designate a former judge, unless the designation is necessary to accurately describe a person's status at a time pertinent to the lawsuit.")

ordinary admonishments . . . to counsel and to witnesses, where the conduct occurs during judicial proceedings, and where the judge neither (1) relie[s] upon knowledge acquired outside such proceedings nor (2) display[s] deep-seated and unequivocal antagonism that would render fair judgment impossible."

Not only did this writer never "rely" upon extra-judicial knowledge, this writer never even possessed any such knowledge. And if the Motion is premised on the second prong, Bartolomei offers not a single supposed illustration or example. If this writer is being accused by Bartolomei of having a "deep-seated and unequivocal antagonism" toward Bayger or the P.C., an example or two would be appreciated: indeed necessary if I am otherwise left to "shadow box" rather than having a chance to explain or defend, if necessary.

The Court will, therefore, move past the Bartolomei "impressions" (or whatever they are), and on to the "Fitzgerald letters." Those letters relate to the "Dolson claim."

Donald Dolson was a client of the Debtor. He was injured on an amusement park ride in the mid-1990s and he hired either Bayger or the P.C. as his counsel. (It might have been Bayger at first, then the P.C.)

Bayger alleged "substantial brain injury" on Dolson's behalf in a state court lawsuit against the amusement park and others. As noted elsewhere in this decision, no such evidence was offered in the state court, and so Dolson got a jury award of only $15,000.

Mr. Dolson appeared in this Court very often during the long duration of

this case and died only last year. In one or more affidavits and depositions, Dolson attested that Bayger told him that his case was "worth millions."

There came a time back in 1998 when either Bayger or the P.C. merged with another Buffalo law firm while he or it represented Mr. Dolson. A result was that Dolson became a client of the Lipsitz, Green law firm. That merger did not result in a lasting relationship among the lawyers. When the Debtor and Bayger and the other law firm extracted themselves from the relationship, it was the decision of Mr. Dolson (also preserved in testimony) to discharge Lipsitz, and stay with the Debtor and Bayger. Mr. Dolson's personal injury case against the amusement park went to trial in 2001 in a state court with Bayger as his trial lawyer. No medical evidence of the alleged long-term damages suffered by Mr. Dolson was presented to the state court jury, as discussed below. Consequently, the judgment in favor of Dolson was only $15,000. In this Court, Bayger argued, *inter alia*, that Dolson did not suffer the damages that Bayger told the state court Dolson suffered.

DISCUSSION

Dolson's Proof of Claim in this bankruptcy case ($ 3 million)[5] against the

[5]The claim was ultimately settled here for $97,500. It went to his decedent's estate and (the Court presumes) to some degree of payment to Pendergrass' well-earned fee. This Court commends Mr. Pendergrass. His offers of proofs were exemplary (by affidavit of persons with personal knowledge). His legal arguments were well-researched and were set forth in very good briefs. His demeanor in court against an impressive legal team amassed by a former judge was always respectful to all, but very firm and factual. Most of all, he and his client, Mr. Dolson, brought to this Court very reasonable approaches to the resolution of the Dolson claim. In this Court in this case, Mr. Pendergrass has reflected well upon the fact that the U.B. Law Faculty selected him as the student speaker for his class' commencement ceremony a few years ago.

Debtor (not the claim against the amusement park) was based upon many allegations as to what Bayger or the P.C,. said to Dolson and did or did not do for Dolson. Dolson's theories of recovery in this bankruptcy case were (1) that it was malpractice for the Debtor to have failed to compile, preserve, and present his case as to damages (his medical record, his experts, his prognosis, etc.) to the state court, (2) that the P.C. was liable in breach of contract, and (3) that the P.C. was liable in fraud and deceit.

The Dolson Efforts To Settle

Eventually it became clear to all of the many creditors and other parties who appeared in the case in this Court that if the Dolson claim could be settled at a reasonable amount, this could become a "surplus money case," meaning that Bayger might actually receive money after all of the P.C.'s debts were paid, with interest.[6]

To reach that point, Pendergrass had been very diligent and prolific in presenting and arguing Dolson's claim. It is of great importance that he and his client (1) were emphatic on the record that they wished to negotiate a settlement of the amount of the claim, and (2) were emphatic on the record that if the matter were settled on terms that might rest upon future revenues of the Debtor, Dolson would be willing immediately to subordinate his claim to the claims of other creditors so that those other creditors might receive payment in full of their claims (from money that the Trustee already had)

[6]An important point in that regard was the fact that future revenues for the Chapter 7 estate would flow from the resolution of the P.C.'s clients' cases, including cases that stayed with the Lipsitz firm, with a contractual obligation by the Lipsitz firm to the P.C. Another important point was the possibility that there might have been equity in the real property at 100 South Elmwood Avenue, Buffalo, N.Y., owned by the P.C.

as soon as possible. (In other words, Mr. Dolson stated years ago that he would accept a future stream of income from future resolutions of the P.C.'s cases and revenues, and in any possible equity of the P.C. in real estate, etc., and would permit all other creditors of the P.C. to be paid immediately while he would wait for payment.)

This Court was repeatedly informed in open court on the record by Mr. Pendergrass over a course of many months (in the presence of the Feuerstein firm which appeared for the P.C. and Bayger), that such overtures by Mr. Dolson had been repeatedly rebuffed by Bayger.[7] In fact, Bayger retained an additional firm to argue against the Dolson matter exclusively. That was that of Mr. Fitzgerald.

With Bartolomei's histrionics set aside, the Fitzgerald letters to Bayger are the only remaining bases for this recusal Motion. Those letters characterized this writer as "hostile" and "angry," and as "unlikely" to rule that the Dolson claim was worth "less than $97,500."[8] (Other colorful words and phrases were used.)

Our profession has its own vernacular. In the present case it may be said that every litigation lawyer seeks to "take the temperature" of the judge who will try the case, and every appellate lawyer seeks to find out who will be assigned to the appeal (or

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[7]Rule 408, Federal Rules of Evidence, was not violated; no dollar offer was ever disclosed. Only the proposed framework for a settlement was disclosed, and in order to assist, this writer conducted an *in camera* review as to the possible value of matters left with the Lipsitz firm but as to which the P.C. was entitled to a share. That enabled the Court to put the potential value of those cases into a useful perspective for the parties, even though this Court reported to them a very broad range.

[8]Apparently Dolson had offered to accept $97,500 to settle his claim, or perhaps Bayger made that offer. There was, in fact, a settlement in that amount and it was reported to the Court some time after the date of the Fitzgerald letters. The Court knew about the settlement when it was achieved, but the court still does not know (nor care) which side offered the agreed amount.

panel) and "take the temperature" of that judge or panel. That means to get a sense of what that judge or panel sees to be the strength or weakness of the client's position. If the lawyer succeeds in taking that temperature at a pre-trial conference or other appearance, the words that such a lawyer might use in a conversation or other communication to push the client toward or against a settlement (or in an expectation of a loss or a win) is a matter of that lawyer's experience, skill, and style, depending upon the lawyer's view of how to persuade that client. This writer is not offended if his statements or intentions are characterized in a derogatory way by a lawyer in a communication by the lawyer to his or her client. Some clients are very receptive and are cooperative with counsel, but some clients are difficult.

This writer has been a member of the Bar of this state since 1974 and has served over 22 years on the Bench. Some lawyers might have talked a client into a very good and favorable settlement by making a false assertion that an assigned judge had a hidden bias, prejudice, or personal interest. (Some clients simply will not accept the weight of evidence or the result required by law.)

If a judge must (or even "should") recuse whenever some lawyer tells the client that the judge seemed "hostile" or "angry," etc., then a well-funded litigant could be assured that there never will be a timely ruling by any judge. A litigant could hire an unethical lawyer who would provoke each judge, in succession, into something that "might" suggest anger, hostility, antagonism or bias by each judge, in succession.

Fitzgerald, in his letters, never accused this writer of bias or prejudice against Bayger or the P.C. Rather, he spoke of this Court's repeated and vigorous

expressions of frustration at having to reject their arguments and submissions.

If Bartolomei had studied the file and docket in this case before making his unfortunate oath, he would have learned the following facts. More than a year before Fitzgerald appeared for Bayger and/or the P.C., and while only the Feuerstein Firm was known to represent the P.C. or Bayger, Pendergrass had filed 95-paragraphs of submissions in support of the Dolson claim. (Docket # 220, 128 pages (including 20 exhibits.)) That was on March 13, 2006. (Over 8 years ago.) It made many allegations of fact that might have been decisive as to the claim of legal malpractice or the claim of breach of contract, or the claim of fraud and deceit, one way or the other. Fitzgerald first appeared here in this case on August 23, 2007. (Docket # 359.) There was much "back-and-forth" after his first appearance, but it is not clear to the Court that Fitzgerald even knew about Docket # 220 when he first appeared. It seemed to the Court that he was hired solely to argue the law of legal malpractice as if in an appellate court, and not to confront - - once and for all - - the sworn allegations of fact in Docket # 220 as to what Bayger said to Dolson or said and did in state court for Dolson, the P.C.'s client.

> **For example, the Pendergrass submission quoted Bayger from the record in the state court. In the case of *Dolson v. Darien Lake* the state court asked Bayger if he was going to be able to produce medical proof of Dolson's inability to work. Bayger responded (according to the transcript filed by Pendergrass back in 2006 (Docket # 220). "Judge, I'd be foolish if I didn't . . . I'd be a poor lawyer if I**

didn't."

That supposedly was recorded on August 22, 2001 in state court. And as noted above, no such proof of injury was presented by Bayger for Dolson at that trial.[9]

This Court was disappointed about the fact that the submissions by Fitzgerald were not responsive to such allegations of fact, made more than a year before Fitzgerald appeared. That allegation and other similar allegations were ignored repeatedly even after the Court expressed displeasure. What Mr. Fitzgerald perceived as "hostile," or "angry," etc. was directed at the fact that no submission by Bayger **ever** responded to such aspects of the Pendergrass submission, insofar as those allegations related to the breach-of-contract and fraud and deceit bases of the Dolson claim. Even as to the malpractice theory, the submissions by Bayger or the P.C. were not responsive to the Court's order. (The settlement mooted this Court's repeated demands for a suitable response.)

The Exhibits attached to this Decision make it clear that this Court has been as transparent and consistent as it could be about the fact that what had annoyed the Court for a very, very long time was the failure of Bayger or the P.C. to "join issue." (The reader of this Decision might take the "I'd be foolish, . . . I'd be a poor lawyer . . ." as an example. If such alleged statements to the state court in the personal injury case were to have been "admitted" by Bayger, then this Court could focus on the consequences of that admission as a matter of law as to Dolson's claim of malpractice,

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[9]Pendergrass also alleged here statements by Bayger in an effort to obtain appellate review in Dolson's favor in state court, also ignored here by Bayger.

breach of contract, and fraud and deceit. If "denied," then this Court would have ordered an evidentiary hearing as to Dolson's claim.)

Exhibit A below is a filed document in which Pendergrass asserted in 2009 that this Court "directed in 2007 and 2009 that counsel for Frank R. Bayger prepare a submission in response" to the Dolson submissions of March 10, 200**6** (Docket # 220) and July 15, 200**6** (Docket # 248). (Exhibit A, Paragraph 3.) The Court fully agrees with paragraphs 4, 5, 6, 7, 17, 18, 19 and 20 of that Pendergrass submission. This Court's directions and orders were not obeyed by Bayger and/or the P.C., and this Court could have denied Bayger's objection to the Dolson claim at any time. But this Court gave Bayger more time, again and again.[10]

In Exhibit B, Fitzgerald (on May 14, 2009) (two years after the court directed a response to Dolson's submissions)) filed a letter brief (but no oath from Bayger) that acknowledged the **allegations**, but set them aside. Indeed Bayger (through Fitzgerald) argued against the very damages that Bayger had asserted in state court on Dolson's behalf, when Dolson was his client.

In Exhibit C, this Court (on July 7, 2009) pointed out that "few of the 93 paragraphs have been responded to by Bayger." (That was in an Order that finally overruled Bayger's objections to the Dolson claims. That is "law of the case.")

Exhibit D is a May 10, 2014 decision of the U.S. District Court of this

[10]At the risk of being repetitive, the Court points out that Bartolomei's rants under his own oath are not just unwise; they are wrong. Over the course of the years, many rulings by the Court granted his clients' requests.

District (Arcara, J.) which, on page 2, memorialized this Court's findings of Bayger's disregard of this Court's Orders.

CONCLUSION

The Motion is denied.

It having been so ruled, and Bayger and the P.C. having been allowed many months to commence any further proceeding in this case, and their appeals now having been dismissed by the District Court, the Clerk is now directed to prepare the usual documents for a Chapter 7 case closing Order.

SO ORDERED.

Dated: Buffalo, New York
June 25, 2014

U.S.B.J.

Exhibit A

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re:

THE LAW FIRM OF FRANK R. BAYGER, P.C.

Debtor.

DONALD DOLSON'S RESPONSE TO SUBMISSION OF FRANK R. BAYGER

Case No. 02-11538K
Chapter 7

RESPONSE TO FRANK R. BAYGER, P.C.'S FURTHER SUMISSION IN OPPOSITION TO CREDITOR DONALD L. DOLSON'S CLAIMS 19 AND 34

Introduction

1. Donald L. Dolson, having duly filed a Proof of Claim in the above captioned matter pursuant to Title 11 United States Code §§ 501(a) & 502(a) and Fed R Bankr P § 3001(f), by his attorney Anthony L. Pendergrass, Esq., hereby submits his response to Frank R. Bayger, P.C.'s Further Submission in Opposition To Creditor Donald L. Dolson's Claims 19 and 34, dated April 30, 2009.

2. Notwithstanding the assertions set forth in the submission of Frank R. Bayger dated April 30, 2009, which are addressed herein, creditor Donald L. Dolson renew and continue his request that this Court dismiss the Trustee's objection to claims No. 19 and No. 34, holding that such claims are valid and allowable based on debtor's legal malpractice, breach of contract, and/or fraud and deceit, and granting such other and further relief as the Court deems just and proper.

I. Procedural Objections to Submission of Frank R. Bayger

3. That on January 10, 2007, and March 11, 2009, this Court directed that Counsel for Frank R. Bayger prepare a submission in response to the submissions of Creditor Donald L. Dolson dated March 10, 2006 (docket entry 220), and July 15, 2006 (docket entry 248), incorporated herein by reference.

4. On February 8, 2007, Frank R. Bayger, by and through his attorney Alan R. Feuerstein, Esq., submitted a motion that was utterly unresponsive to this Court's directive of January 10, 2007.

5. More than two years later, on March 11, 2009, Frank R. Bayger, by and through his attorney Brian P. Fitzgerald, Esq., requested and was afforded another opportunity to address the submissions of Donald L. Dolson dated March 10, 2006, and July 15, 2006.

6. However, on April 30, 2009, Frank R. Bayger submitted another submission that is again wholly unresponsive to this Court's directive arguing again, for the third time, what Dolson would have to prove in a malpractice case and how he cannot sustain his burden of proof (See, Submission of Trustee, dated July 11, 2006 (docket entry 247); and Motion of Frank R. Bayger in Support of A Liability and Damage Trial to Determine the Claim of Donald L. Dolson, dated February 8, 2007(docket entry 302)).

7. As with his February 8, 2007, submission, Frank R. Bayger's submission dated April 30, 2009, must be disregarded as it too falls outside the scope of this Court's directive of January 10, 2007, and March 11, 2009.

8. However, notwithstanding the above objections to Frank R. Bayger's April 30, 2009, submission, Donald L. Dolson will respond to the substantive issues raised by Frank R.

Bayger in his latest submission. After due consideration, for the reasons which follow, Frank R. Bayger's April 30, 2009, submission must fail as a matter of law.

II. Substantive Objections to Submission of Frank R. Bayger

9. Donald Dolson hereby incorporates, as if fully set forth herein, his earlier submissions of March 10, 2006 and July 15, 2006, respectively captioned as *Response to Trustee's Objection to Claim* and *Creditor Donald L. Dolson's Reply to Submission of Trustee.*

. 10. By his submission dated April 30, 2009, Frank R. Bayger has continued in his failure and refusal to substantively respond to the March 10, 2006 and July 15, 2006 submissions of Creditor Donald L. Dolson; this may be because there is no reasonable response for the manner in which Frank R. Bayger handled Mr. Dolson's legal matter.

11. Mr. Bayger continues in his attempts to obfuscate the issues before this Court. The issue is simply whether Claims No. 19 & 34 are valid under 11 U.S.C. § 502; and, pursuant to 28 U.S.C. § 157 (b) (1) & (2), this is a core proceeding within the jurisdiction of the Bankruptcy Court.

12. Creditor Donald L. Dolson continues to rely on the facts of the case as fully set forth in his submissions dated March 10, 2006, and July 15, 2006. However much, Frank R. Bayger wishes to argue that there is no circumstance under which Mr. Dolson can demonstrate that the debtor committed legal malpractice, the record is replete with overwhelming evidence of malpractice.

13. As previously set forth, the validity of Creditor Donald L. Dolson's claims—No. 19 & 34—is the issue presently pending before this Court—as these claims were objected to by the Chapter 7 Trustee, and to which Frank R. Bayger's Counsel was directed to pursue at his expense and respond accordingly.

14. As this Court is aware, and as has previously and repeatedly been argued by Mr. Dolson before this Court, under 11 U.S.C. § 502 (c) of the Bankruptcy Code, this Court is mandated to estimate for the purpose of allowance or disallowance, when liquidating any contingent claims would unduly delay the administration of the case.

15. At this, the allowance or disallowance, stage of these proceedings the Bankruptcy Court performs a separate and distinct function from liquidating or estimating a claim; and "having the bankruptcy court determine the validity of a claim as a matter of law during the allowance phase will prevent the district court from being inundated with hundreds, if not thousands, of additional motions and jury trials." *In re G-I Holdings, Inc.* at 613, citing *In re UAL Corp.*, 310 B.R. at 381.

16. In addition, Bankruptcy Court's jurisdiction over the claims allowance process is distinct from liquidation for purposes of distribution. *In re Standard Insulations, Inc.*, 138 B.R. 947, 953 (Bankr.W.D.Mo.1992). The allowance or disallowance of a claim is not identical to the liquidation of a claim for purposes of distribution. However, even the claim estimation proceeding under § 502(c) is within the province of the Bankruptcy Court when the purpose of the proceeding is to determine the allowance or disallowance of claims against the bankruptcy estate.

17. The issue of legal malpractice, as raised by Frank R. Bayger in his April 30, 2009, submission is neither dispositive of, nor probative to, the validity of Mr. Dolson's claims in this matter. However, arguendo it were, then as fully set forth in Mr. Dolson's March 10, 2006, *Response to Trustee's Objection to Claim*, and July 15, 2006, *Reply to Submission of Trustee.* the debtor, among other things, recklessly—failed to respond to defendant's expert disclosure request and crucial motions in limine—proceeded to trial without *any* expert witnesses, including

witnesses able to provide critical medical testimony—and, failed to perfect Mr. Dolson's appeal after requesting and being afforded numerous extensions by the Appellate Division, Fourth Department, New York State Supreme Court.

18. Based upon the un-rebutted record before this Court, this Court could find, as a matter of law, that the debtor P.C. committed malpractice in creditor Dolson's action against Darien Lake.

19. Moreover, to overcome the prima facie validity of Mr. Dolson's claim, Frank R. Bayger is required to present contradictory evidence to dispute either the amount of the claim or the fact that the claim is owed at all, evidence other than that which is capable of supporting inferences which may be drawn in favor of the claim as easily as against the claim (In re Frederes, 98 B.R.165,167 (WDNY 1989), citing, In re Equipment Serv., Ltd, 36 B.R. 241, 244 (D. Ala 1983). Here, on this record, Frank R. Bayger has presented no such evidence.

20. The submission of Frank R. Bayger dated April 30, 2009, must be disregarded and allowed no probative value in assessing the validity of Mr. Dolson's claims; it fails to address the arguments offered by Mr. Dolson in his March 10, and July 15, 2006, submissions and sets forth arguments that are irrelevant to the core issue before this Court.

CONCLUSION

WHEREFORE, for reasons set forth herein, creditor Donald L. Dolson prays that this Court reject the non responsive submission of Frank R. Bayger dated April 30, 2009, find that claims No. 19 and 34 are valid, overrule the Trustee's objections and further submissions in opposition to claims No. 19 and 34, and grant such other and further relief as the Court deems just and proper.

Dated: Buffalo, New York
May 10, 2009

/s/ Anthony L. Pendergrass

Anthony L. Pendergrass, Esq.
Attorney for Donald L. Dolson
Creditor in Chapter 7 Bankruptcy
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Exhibit B

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May 14, 2009

Hon. Michael J. Kaplan
United States Bankruptcy Court
Western District of New York
Olympic Towers, Part 1
300 Pearl Street, Suite 250
Buffalo, New York 14202

Via Electronic Filing

RE: The Law Firm of Frank R. Bayger, P.C., Debtor
Case No. 1-02-11538-MJK CH7
Donald Dolson Claim Nos. 19 and 34 and objections thereto
BPF File No. 5386

Dear Judge Kaplan:

During oral argument of this matter before your Honor on May 13, 2009, it became apparent that your Honor was focusing on statements made by Frank R. Bayger at the underlying trial Dolson v. Darien Lake which Donald Dolson has claimed are admissions of legal malpractice. Based upon Dolson's prior submissions to this Court, the alleged admissions of legal malpractice made by Frank R. Bayger are as follows:

- At a pretrial hearing on two motions in limine, one to exclude Dolson's wage claim and the other to exclude the notes of Dolson's treating physician, Dr. Brezing, when asked by Judge Lane if he had seen the motion papers, Frank R. Bayger responded "No, but its their motion." (See Motions, dated August 20, 2001, annexed to dkt 220 as Exhibit J.)

- At trial of the underlying action, Frank R. Bayger informed the court, as to the disclosure of an economist expert, Ron Reiber, Ph.D., who was going to testify about Dolson's future lost

wages, that "[he] didn't do that, or [his] office didn't do it" (referring to the expert disclosure). (See Trial Transcript, pp. 17-19, August 22, 2001, annexed to dkt 220 as Exhibit K.)

- The Court asked Frank R. Bayger if he was going to be able to present medical proof of Dolson's inability to work and Frank R. Bayger responded, "Judge, I'd be foolish if I didn't...I'd be a poor lawyer if I didn't." (See Trial Transcript, pp. 38, August 22, 2001, annexed to dkt 220 as Exhibit K.)

- In an Affidavit submitted to the Appellate Division, Fourth Department, sworn to March 30, 2002, Frank R. Bayger affirmed that "having preliminarily reviewed the records of this case, I verily believe there are good and meritorious issues to be raised in appealing...that the matter herein was a personal injury action in which Plaintiff-Appellant (Dolson) suffered serious personal injury...Plaintiff-Appellant seeks to appeal the judgment on the grounds that the amount awarded by the trial jury was wholly insufficient as a matter of law." (See Frank R. Bayger Affidavit, March 30, 2002, annexed to dkt 248 as Exhibit A.)

Assuming that these alleged admissions are sufficient to support Dolson's legal malpractice claim and thus that Dolson's claim of legal malpractice is prima facie valid, it became apparent at oral argument that the Court is concerned whether there has been a proper response to these claimed admissions of Frank R. Bayger.

Frank R. Bayger, P.C., through its further submission in opposition to Dolson's claims 19 and 34, adequately responded to these claimed admissions. Bayger, P.C. produced admissible evidence of at least equal probative value to Frank R. Bayger's statements in open court (now relied upon by Dolson to prove his prima facie claim) and produced admissible evidence sufficient to negate the validity of Dolson's claim. Thus, Bayger, P.C. met its burden to rebut Dolson's prima facie claim of legal malpractice.

As to Frank R. Bayger's alleged admissions of legal malpractice regarding the expert economist and future lost wages, Bayger, P.C. produced admissible evidence in the form of Dolson's sworn deposition testimony in which he admitted that he did not lose any time from work, except for a few

hours for attendance at physical therapy, from the date of incident at Darien Lake of July 5, 1993 through May, 2001 (just a few months before the trial started against Darien Lake in August, 2001) and that in May, 2001, before the trial, he filed for, and was awarded, social security disability benefits based upon a lower back condition and a hernia which he admitted were unrelated to the accident at Darien Lake. (See Dolson's deposition testimony, pp.131-138, annexed to Bayger, P.C.'s submission as Exhibit F). Bayger, P.C.'s submission established that Dolson's claims, in light of his own sworn testimony, are limited solely to claims for pain and suffering and disfigurement arising from a mere 3 cm laceration (slightly more than one inch) to the right side of his forehead and thus Dolson's prima facie case of malpractice based upon the alleged admissions of Frank R. Bayger regarding his failure to introduce lost wage evidence has clearly been rebutted. Although Frank R. Bayger may have made a mistake as to the motion in limine and expert disclosure in this regard, his mistake did not cause Dolson any actual damages, an essential element to any legal malpractice claim, because Dolson had no lost wage claim to present.

Moreover, as to Frank R. Bayger's alleged admissions regarding the submission of medical proof and proof of Dolson's inability to work, Bayger, P.C. produced admissible evidence that Dolson lacked any medical evidence whatsoever to support his alleged injuries and inability to work. Not only did Dolson testify that the Darien Lake incident caused him to miss essentially no time from work, Bayger, P.C. produced trial testimony from Dolson's own physician, numerous objective studies, and an affirmed physician report which all proved that Dolson was simply not injured in the manner that Dr. Brezing's inadmissible hearsay letter suggested that he was. Although your Honor was duly concerned with what the content of Dr. Brezing's testimony at the underlying trial would have been, Bayger, P.C. produced admissible evidence that Dolson himself swore in a Verified Complaint, filed against Dr. Brezing in Niagara County Supreme Court, that Dr. Brezing had lied to him about his injuries and the necessity for treatment and that his treatment for six years or more after the Darien Lake accident was unnecessary. (See Dolson Complaint against Dr. Brezing, annexed to Bayger, P.C. submission as Exhibit E.) Dolson cannot now rely on the fact that we don't know what Dr. Brezing would have testified to when he gave a sworn statement that Dr. Brezing was lying about his injuries. In this regard, during the February 21, 2007 arguments in this matter, your Honor even recognized that Dolson is not entitled to plead "alternative facts." Therefore, even if Frank R. Bayger

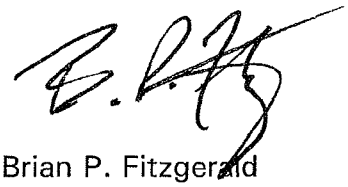
admitted that it would be a mistake to not submit medical proof and proof of Dolson's inability to work, there was no proof to submit aside from Dr. Brezing's testimony and, in the face of Dolson's own testimony, the testimony at trial from Dolson's own physician, numerous objective studies, and a physician's affirmed report, which all establish that Dolson had no injury, any claim that "but for" the failure to produce Dr. Brezing Dolson would have been more successful at the underlying trial is mere speculation and insufficient to establish a claim for legal malpractice.

Dolson's prima facie claim of legal malpractice based upon Frank R. Bayger's alleged admissions has clearly been rebutted by admissible evidence of more probative value than Frank R. Bayger's alleged admissions in open court. Bayger, P.C. produced admissible evidence sufficient to negate Dolson's prima facie claim and thus the burden now reverts to Dolson to prove the validity of his claim by a preponderance of the evidence because the burden of ultimate persuasion is always on the claimant. See *In re* Allegheny International, Inc., 954 F.2d 167, 173-174 (3rd Cir 1992)(which held that "the burden of proof for claims brought in the bankruptcy court...rests on different parties at different times. Initially, the claimant must allege facts sufficient to support the claim. If the averments in his filed claim meet this standard of sufficiency, it is '*prima facie*' valid...In other words, a claim that alleges facts sufficient to support a legal liability to the claimant satisfies the claimant's initial obligation to go forward. The burden going forward then shifts to the objector to produce evidence sufficient to negate the *prima facie* validity of the filed claim. It is often said that the objector must produce evidence equal in force to the *prima facie* case...In practice, the objector must produce evidence which, if believed, would refute at least one of the allegations that is essential to the claim's legal sufficiency. If the objector produces sufficient evidence to negate one or more of the sworn facts in the proof of claim, the burden reverts to the claimant to provide the validity of the claim by a preponderance of the evidence....The burden of persuasion is always on the claimant"). As set forth more fully in Bayger, P.C.'s submission, Dolson cannot meet his ultimate burden and, respectfully, the mere reliance on Frank R. Bayger's alleged admissions at trial does not prove an essential element of a legal malpractice claim, that Dolson would have been more successful at the underlying trial "but for" the alleged negligence.

Finally, in regard to your Honor's direction to settle Dolson's claims, Mr. Pendergrass made an offer to settle this matter on June 2, 2006 for $1,800,000.00 and then, by letter dated August 9, 2006, substantially increased his demand to $3,000,000.00. (See dkt 255). In light of the fact that Dolson's underlying case involves no provable lost wage claim and a mere 3 cm laceration of the forehead without any proof of causally related injuries, Dolson's demands are clearly unreasonable.

However, we are more than mindful of the Court's comments at the close of oral argument regarding settlement and we welcome Mr. Pendergrass to contact us in that regard if he would care to discuss settlement of Dolson's claim in a realistic fashion.

Very truly yours,



Brian P. Fitzgerald

BPF/djr

cc: Alan R. Feuerstein, Esq.
Edwin R. Ilardo, Esq.
Anthony L. Pendergrass, Esq.
Kenneth W. Knapp, Esq.
Lawrence C. Brown, Esq.

Exhibit C

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

NOT FOR PUBLICATION

In re

LAW FIRM OF FRANK R. BAYGER, P.C.

Case No. 02-11538 K

Debtor

ORDER AND OPINION

The Court finds, as argued by the claimant's counsel, that Mr. Bayger's Objection to Claims 19 and 34 are not fully responsive to the Court's directions,[1] and are overruled.

On March 13, 2006, claimant's counsel submitted a 20-page, 75 paragraph Opposition to the Objection[2] that appended hundreds of pages of properly-supporting documents. On July 18, 2006, he submitted six further pages, in 18 paragraphs, with further documents.

Few of the 93 paragraphs have been responded-to by Bayger. At the most, Bayger argues that Debtor did not commit legal malpractice, as a matter of law.

The claimant's claims, however, rest also in breach of contract and fraud and deceit.

In other words, this is not a simple case of a law firm which overstated the value

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[1]It is to be noted that current, substitute counsel for Mr. Bayger is relatively new to this case, and was not yet involved in the case when some of the Court's directions were issued to previous counsel.

[2]The initial objection was filed by the Trustee. The Court barred the Trustee from committing estate funds for such purpose until he performed his 11 U.S.C. § 704(a)(1) duty to convert the assets to cash. And the Court acknowledged that Bayger, as principal of the Debtor, could prosecute the Trustee's Objection at his own expense. He has done so, and that is the present posture. If the claimant's claim is disallowed, this is a "surplus money" case, in which the principal would receive the surplus.

of a plaintiff's claim or made a trial mistake. To take one example, it is not denied that while the Debtor represented the claimant, it entered into an affiliation with a larger, more-established law firm, requiring the claimant's consent to the substitution of that firm as his personal injury counsel; when that affiliation failed, Bayger, on behalf of the Debtor, induced the claimant to discharge that older, larger firm, Bayger making various representations that turned-out to be either false or mistaken.

Further, Bayger is now silent as to claimant's reliance on Bayger's own statements to the State Court during the personal injury suit about proper trial preparation; as to the comments that Bayger, on behalf of the Debtor, made to the State Court about the merits of a late appeal, if allowed; and as to the fact that though Bayger, in attempting to establish that the claimant could not prove that the attending physician would have testified (had his testimony been taken and preserved for trial) that claimant was seriously injured, the claimant has provided the physician's record of the claimant's treatment, over a course of six years, which record appears to be in the claimant's favor.

There are other failures, by Bayger, to address the Court's direction to address the 93 paragraphs.

The objection is overruled.

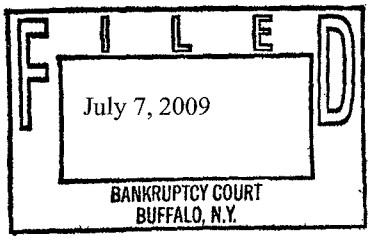
That is not to say that the claimant's original suit against the amusement park where he was injured was "worth millions" as Bayger is alleged to have said. Nor is it to say that

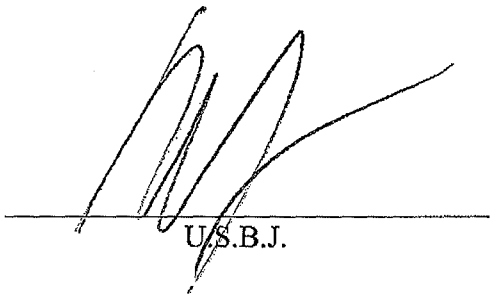
the claimant's claim against this estate is "worth millions."[3] It is greatly to this claimant's credit that he, through counsel, has repeatedly offered voluntarily to let all other non-insider claims in this case be fully paid immediately if his claim is settled, even if claimant is to be paid "over time." Given the passage of time in this case, that might well mean simply a share of the surplus that would be available to Bayger if the claimant's claim were to be disallowed. (As the Debtor's contingent fee cases have settled, etc., proceeds from its work as a law firm might have reached the end. There remain, however, issues about fixed assets, such as a valuable building in which the Debtor may have a substantial equity interest.)

As the Court has ardently insisted on the record in open court, this case cries-out for settlement. Though not a § 502 "estimation," the Court suggests a settlement that is somewhere between $100,000 and $999,999, and offers to remit the matter to arbitration or mediation. The matter is restored to the calendar for July 22, 2009 at 10:00 AM to discuss this offer.

SO ORDERED.

Dated: Buffalo, New York
July 7, 2009





U.S.B.J.

[3]Though this writer has been statutorily prohibited from practicing law for the past 28 years of the 35 years he has been a member of this State's Bar, he considers it a matter for the Grievance Committee if lawyers are throwing such numbers around. (That is not a reference to claimant's current counsel. It is rather a reference to Bayger, if the allegations are true.)

Exhibit D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

IN RE:

THE LAW FIRM OF
FRANK R. BAYGER, P.C.,

Debtor.

DECISION AND ORDER
09-CV-735A

INTRODUCTION

On August 20, 2009, the debtor in this case, The Law Firm of Frank R. Bayger, P.C. (the "debtor"), filed a notice of appeal from an order of the United States Bankruptcy Court for the Western District of New York (Kaplan, *J.*) filed on July 7, 2009 (the "Bankruptcy Order"). In the Bankruptcy Order, Judge Kaplan overruled objections to two claims filed by one of the debtor's former clients. The Court held oral argument for the appeal on May 17, 2010. Although the parties submitted thorough briefing regarding the underlying merits of those two claims, the Court's primary concern at oral argument was whether the Bankruptcy Order constitutes an appealable order within the meaning of 28 U.S.C. § 158(a). For the reasons below, the Court finds that it does not, and accordingly dismisses the appeal for lack of jurisdiction.

BACKGROUND

The events underlying the Bankruptcy Order trace back to a personal injury lawsuit that the debtor prosecuted in the late 1990s. In 1996, the debtor

commenced a personal injury lawsuit in state court on behalf of Donald L. Dolson ("Dolson"). In the lawsuit, Dolson alleged that he suffered injuries when his head struck a screw sticking out of the side of a water slide at a local theme park. In August 2001, a jury awarded Dolson $15,000. The debtor timely took an appeal with the New York State Supreme Court, Appellate Division. That appeal never was perfected.[1]

The debtor's management of Dolson's case became an issue in the bankruptcy proceedings that the debtor commenced in 2002. On January 27 and December 10, 2003, Dolson filed two claims against the debtor. Both claims concerned allegations of legal malpractice in the handling of Dolson's personal injury case. Dolson asserted that the two claims together were worth $11 million. On November 29, 2005, the bankruptcy trustee filed a motion to object to Dolson's claims. After Dolson responded to the trustee's motion, Judge Kaplan directed the debtor to address both the claims and the trustee's motion. In response, the debtor submitted a filing that Judge Kaplan deemed unresponsive. Judge Kaplan gave the debtor another opportunity to respond to Dolson's claims. The debtor again submitted a filing that Judge Kaplan deemed unresponsive. After reviewing all of the papers concerning Dolson's claims and after hearing oral argument, Judge Kaplan issued the Bankruptcy Order. In the Bankruptcy

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[1] The Court will not concern itself with the details in the parties' briefing concerning who may have had responsibility for perfecting the appeal or why the appeal was not perfected.

Order, Judge Kaplan noted that Dolson submitted a total of 93 paragraphs of text in opposition to the trustee's motion and that "[f]ew of the 93 paragraphs have been responded-to by Bayger. At the most, Bayger argues that Debtor did not commit legal malpractice, as a matter of law." Judge Kaplan stated later in the Bankruptcy Order that "[t]here are other failures, by Bayger, to address the Court's direction to address the 93 paragraphs." On this basis, Judge Kaplan overruled the objection contained in the trustee's motion. Notably, although Judge Kaplan concluded the Bankruptcy Order by urging the parties to settle the claim and suggesting a wide settlement range between $100,000 and $999,999, he did not determine the amount of the claim, as he could have done under 11 U.S.C. § 502(b).

This appeal followed the filing of the Bankruptcy Order.

DISCUSSION

"We have . . . recognized that Congress intended to allow for immediate appeal in bankruptcy cases of orders that finally dispose of *discrete disputes within the larger case*. By 'disputes' we do not mean merely competing contentions with respect to separable issues; rather, we apply the same standards of finality that we apply to an appeal under 28 U.S.C. § 1291. Given the strong federal policy against piecemeal appeals, a 'dispute,' for appealability purposes in the bankruptcy context, means at least an entire claim on which relief may be granted." *In re The Bennett Funding Group, Inc.*, 439 F.3d 155, 160 (2d

Cir. 2006) (internal quotation marks and citations omitted). The parties did not address the appealability of the Bankruptcy Order until the Court raised the issue at oral argument, but the Court has its own obligation to confirm its jurisdiction over its cases. *See United Food & Commercial Workers Union, Local 919, AFL-CIO v. CenterMark Props. Meriden Square, Inc.*, 30 F.3d 298, 301 (2d Cir. 1994) ("[I]n our federal system of limited jurisdiction any party or the court sua sponte, at any stage of the proceedings, may raise the question of whether the court has subject matter jurisdiction. Where jurisdiction is lacking, moreover, dismissal is mandatory.") (internal quotation marks and citations omitted); *see also Herrick Co., Inc. v. SCS Commc'ns, Inc.*, 251 F.3d 315, 322 (2d Cir. 2001) ("We cannot avoid addressing the threshold question of jurisdiction simply because our finding that federal jurisdiction does not exist threatens to prove burdensome and costly, or because it may undermine an expensive and substantially completed litigation.") (citation omitted).

Here, the Bankruptcy Order did not assign any value to Dolson's claims. *But cf. In re Moody*, 849 F.2d 902, 904 (5th Cir. 1988) (holding that any bankruptcy order that "effectively settles the amount due the creditor" is a final order). It did not affect the priority of Dolson's claims in any way. *But cf. In re Premier Operations*, 290 B.R. 33, 44–45 (S.D.N.Y. 2003) (holding that a bankruptcy order establishing priority of claims was a final order). Judge Kaplan held only that the debtor did not respond to Dolson's opposition to the trustee's

motion. Essentially, the Bankruptcy Order was the minimum action necessary for Judge Kaplan to allow Dolson's claims to survive for now, pending an evaluation on the merits. Because the parties in the bankruptcy proceedings are no closer to knowing the final value of Dolson's claims now than before the Bankruptcy Order issued, the Court does not consider the Bankruptcy Order a final order. For the same reason, the Bankruptcy Order also is not an interlocutory order that "involves a controlling question of law as to which there is substantial ground for difference of opinion [such] that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). Consequently, the Court lacks jurisdiction to review the other issues that the parties raised in this appeal.

CONCLUSION

For all of the foregoing reasons, the Court hereby dismisses the debtor's appeal for lack of jurisdiction. The Clerk of the Court is directed to close this case.

SO ORDERED.

s/ Richard J. Arcara
HONORABLE RICHARD J. ARCARA
UNITED STATES DISTRICT JUDGE

DATED: May 24, 2010