

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK**

IN RE:

**DAVID G. DeLANO and
MARY ANN DeLANO,**

CASE NO. 04-20280

Chapter 13

Debtors.

DECISION & ORDER

BACKGROUND

On January 27, 2004, David G. DeLano ("DeLano") and Mary Ann DeLano (collectively, the "Debtors") filed a petition initiating a Chapter 13 case (the "DeLano Case").

On May 19, 2004, Richard Cordero ("Cordero") filed a proof of claim in the DeLano Case (the "Cordero Claim"). The Claim asserted that Cordero was a creditor of DeLano by reason of a cross-claim that Cordero had asserted against DeLano, individually and in his capacity as an officer of M&T Bank, in an Adversary Proceeding (the "Premier AP") filed and pending in this Court in the Premier Van Lines, Inc. ("Premier") Chapter 7 case #01-20692 (the "Premier Case").

On October 23, 2003, the Court entered a Scheduling Order (the "Premier Scheduling Order") in the Premier AP in Connection with: (1) the Remaining Claims of the Plaintiff, James Pfunter ("Pfunter"); and (2) Cordero's Cross-Claims, Counterclaims and Third-Party Claims (the "Cordero Premier Claims"), a copy of which

BK. 04-20280

is attached in order to provide a detailed background of the Premier Case from the beginning of Cordero's involvement, including the decisions made by the Court and the current status of the Case.

On July 22, 2004, the Debtors commenced a Claim Objection Proceeding by filing an Objection to the Cordero Claim.

On August 30, 2004, the Court entered an Interlocutory Order in the DeLano Case (the "August 2004 Interlocutory Order"),¹ a copy of which, without the Premier Scheduling Order and its attachments, is attached in order to provide a detailed background of the DeLano Case from the beginning of Cordero's involvement, including the decisions made by the Court through that date. The August 2004 Interlocutory Order: (1) gave the Debtors and Cordero until December 15, 2004 to complete any and all discovery that they wished to conduct in connection with the Claim Objection Proceeding; and (2) Ordered that the Claim Objection Proceeding would be called on the Court's December 15, 2004 Evidentiary Hearing Calendar when it would be scheduled for an evidentiary hearing.

On November 8, 2004, Cordero filed a motion to enforce the August 2004 Interlocutory Order and for discovery (the "Cordero Discovery Motion").

¹ The terms defined in the August 2004 Interlocutory Order shall have the same meaning when used in this Decision & Order.

BK. 04-20280

On November 10, 2004, the Court entered a further Interlocutory Order (the "November 2004 Discovery Order"), a copy of which is attached, that denied the relief requested in the Cordero Discovery Motion to the extent that Cordero made demands of DeLano for documents that: (1) were unrelated to the Claim Objection Proceeding; (2) DeLano did not have in his possession and were not his documents, but were the documents of M&T Bank or other parties to the Premier AP; and (3) Cordero had the ability to obtain directly from those parties.

On December 15, 2004, the Court scheduled the Claim Objection Proceeding for an Evidentiary Hearing (the "Trial") on March 1, 2005, and a Scheduling Order to that effect was signed and entered on December 21, 2004.

On February 23, 2005, Cordero filed a Notice of Motion which requested that Judge John C. Ninfo, II, Recuse Himself Under 28 U.S.C. § 455(a) Due To His Lack Of Impartiality (the "Recusal Motion"), which was made returnable on the date and time of the Trial.

At the commencement of the Trial, the Court questioned Cordero in connection with the attached New York State Attorney Directory Westlaw Search (the "Search"), which indicated that he was a licensed (No. 2269389) attorney currently registered with the New York State Office of Court Administration, having: (1) graduated

BK. 04-20280

from the University of Cambridge, England; and (2) been admitted in the Appellate Division Second Department in 1989. The Search also indicated that, at least as of the date of his last registration, Cordero was associated with the law firm of Heller, Jacobs & Kamlet, LLP, doing business at 261 Madison Avenue, New York, New York, a firm that the Search described as having ninety-eight percent (98%) of its practice devoted to litigation.

At the Trial, Cordero confirmed that he was a licensed and currently registered attorney, but denied that he had ever been associated in any way with the firm of Heller, Jacobs & Kamlet, LLP. Cordero further asserted that he had advised the Court that he was an attorney in one of his initial appearances in the Premier Case.²

At the Trial, which lasted nearly six hours, the Court first addressed the Recusal Motion and then proceeded with the Claim Objection Proceeding.

² Although Cordero asserted that he advised the Court that he was an attorney in one of his initial appearances in the Premier Case, neither the Court nor any of the courtroom staff recalls such an admission. The Search was made by the Court's Confidential Law Clerk after Cordero had a discussion with a Deputy Clerk about obtaining a CM/ECF password during which he indicated that he was an attorney. Many of the pleadings, statements, actions and inactions of Cordero in and in connection with the Premier and DeLano Cases, in which he makes much of his *pro se* litigant status, can be seen in a far different light when one is aware that he is a licensed, experienced and registered attorney.

DISCUSSION

I. The Recusal Motion

At the Trial, the Court denied the Recusal Motion, for the reasons that were set forth on the record, and indicated that it reserved the right to further detail and supplement the reasons in this Decision & Order.

The Court denied and hereby denies the Recusal Motion in all respects for the following reasons:

1. As determined in its October 16, 2003 Order that Denied Cordero's Recusal and Removal Motions in the Premier Case, the Court does not believe that any reasonable person, fully familiar with the facts and circumstances of the DeLano Case and the related pleadings, proceedings and correspondence, including any statements and decisions made by the Court in the DeLano or Premier Cases, would or could question the Court's impartiality, or believe that it was biased or prejudiced toward Cordero. Although Cordero may believe that the Court is biased against him, based upon various decisions and statements it made in the Premier and DeLano Cases, whether orally or in writing, the Court does not believe that any reasonable person would conclude that any of

them demonstrate any actual bias, prejudice or impartiality, or even the appearance of such.

2. Like so many *pro se* litigants, Cordero has filed a great number of motions and made numerous requests for relief that had very little to do with the merits of the Cordero Premier Claims, including those against DeLano. As every Court knows, many of these typical *pro se* procedural and tangential motions and requests would never be made if the *pro se* litigant was represented by and required to pay counsel for pursuing them. As a result, the Court often is required to make many more decisions in a case where there is a litigious *pro se* litigant than if all of the parties were represented. When the Court fails to grant that litigious *pro se* litigant the relief they have requested, rather than fully analyzing the merits of the request and the actual decision of the Court, they often attribute their lack of success to the Court being biased or prejudiced. This appears to be exactly what Cordero has done. However, knowing that Cordero is a licensed, experienced and registered attorney in the State of New York, and given the facts, circumstances and events that have taken place in the Premier AP and the DeLano Case,

it is difficult to believe that his allegations of bias, prejudice and impartiality are genuine.

3. If one looks objectively at the involvement of Cordero in the Premier and DeLano Cases, it becomes clear that the focus of Cordero and the Court have been very different. On the one hand, the Court has consistently attempted to focus Cordero on what it considers to be the critical issues relating to his involvement with these Cases. These issues are the status of Cordero's stored personal property (the "Cordero Property"), his need to take possession and control of the Property in order to assure that there is no damage or further damage to it, his need to determine if there has in fact been any damage to it, and, if there has been damage, the nature and extent of any damage, when the damage occurred and who may have been responsible for it. The Court has tried to focus on these issues so that Cordero could have his "Day in Court" and have these issues tried and determined by the Court. On the other hand, Cordero appears to have had a very different focus; one that is primarily on collateral and tangential issues, form over substance, and the desire to litigate for the sake of litigating without ever addressing these critical issues that would

establish the merits, if any, of the alleged Cordero Premier Claims and move these Cases forward. Once again, Cordero interprets this fundamental difference in focus as an expression of bias, prejudice and impartiality on the part of the Court. However, as a Court of Equity, this Court is not about litigating for the sake of litigating. It is about providing litigants, whether they are *pro se* litigants or those represented by counsel, their "Day in Court" so that their issues can be justly, speedily and inexpensively determined.

II. The Claim Objection Proceeding

Section 502(a)³ provides that once a proof a claim is filed, it is deemed allowed unless a party in interest objects, and Rule 3001(f) provides that a correctly filed proof of claim is *prima facie* evidence of the validity and amount of the claim.⁴ Case law

³ Section 502(a) provides that:

(a) A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest, including a creditor of a general partner in a partnership that is a debtor in a case under chapter 7 of this title, objects.

11 U.S.C. § 502 (2005).

⁴ Rule 3001(f) provides that:

A proof of claim executed and filed in accordance with these rules shall constitute prima facie evidence of the validity and amount of the claim.

Federal Rules of Bankruptcy Procedure, Rule 3001 (2005).

BK. 04-20280

in the United States Court of Appeals for the Second Circuit (the "Second Circuit") makes it clear that the ultimate burden to prove a valid and allowable claim rests with the creditor.⁵

In its August 2004 Interlocutory Order, the Court stated that:

The Claim objection on its face is compelling, because the Cordero Claim and its attachments set forth no legal or factual basis that demonstrates that DeLano has any legal responsibility or liability to Cordero, and the Court is not otherwise aware of any factual basis for such a claim from the proceedings in the Premier AP or the DeLano Case.

Since Cordero failed to attach to the Cordero Claim those pages of the Cordero Premier Claims that specifically dealt with his alleged claims against DeLano, the Court made this statement only after it had reviewed in detail the Cordero Claim, DeLano's Objection to the Claim and the Cordero Premier Claims.

⁵ *In re Youroveta Home & Foreign Trade Co. Inc.*, 2 Cir., 297 F. 723 (1924); *In re George R. Burrows, Inc.* 156 F.2d 640 (2d Cir. 1946). The Second Circuit has clearly ruled that once the objecting party introduces substantial evidence in opposition, the burden shifts to the claimant to establish by a preponderance of the evidence that their claims are allowed under the law. Furthermore, it is well established by case law in a host of jurisdictions that after the objecting party introduces evidence sufficient to rebut the presumption of validity, the burden of proof shifts to the claimant. See Alan N. Resnick and Henry J. Sommer, 9 Collier on Bankruptcy § 3001.09[2] at 3001-27 - 3001-28; Joseph M. Bassano, et al, 9C Am.Jur 2d Bankruptcy § 2368; and William L. Norton, Jr., 2 Norton Bankr. L & Prac. 2d § 41:7. Most significantly, the Supreme Court has held in *Raleigh v. Illinois Dept. Of Revenue*, 530 U.S. 15 (2000), that the burden of proof in bankruptcy cases should be applied in the same manner as in non-bankruptcy law in a non-bankruptcy forum, since the burden is a substantive aspect of the claim.

BK. 04-20280

Paragraphs 70, 71 and 72 of the Cordero Claims that were not attached to his filed Proof of Claim, read as follows:

70. Mr. DeLano was reckless or negligent when on June 18, 2002, he stated to Dr. Cordero that he had seen storage containers bearing the label 'Cordero' in the Jefferson-Henrietta warehouse, if he did not actually see any such containers there.
71. Mr. DeLano, as the M&T Bank officer in charge of the Premier Case, was reckless or negligent when he failed to inventory Premier's assets and equipment on which his Bank held a lien and which were stored in the Jefferson-Henrietta warehouse, although he knew that some or all of Premier's storage containers held third-parties' property, such as that of Dr. Cordero; failed to give them notice of M&T Bank's intended sale of such containers to Champion Moving & Storage and to obtain the consent of those parties, such as Dr. Cordero, for their removal to Champion's warehouse; and failed to monitor such removal so that now Champion can plausibly claim that it never took possession or delivery of Dr. Cordero's property.
72. By proceeding so recklessly or negligently, Mr. DeLano has caused the loss of some or all of Dr. Cordero's property, has for months caused Dr. Cordero an enormous waste of time, effort, and money as well as an enormous amount of aggravation in his as yet unsuccessful search for his property, has deprived him of the enjoyment of his property, and has caused him to be dragged into these most confusing adversary proceedings among multiple parties with a welter of claims.

Having reviewed the relevant portions of the Cordero Premier Claims, the Court made the foregoing statements in the August 2004 Interlocutory Order for the following reasons:

BK. 04-20280

1. Although paragraphs 70, 71 and 72 of the Cordero Cross-Claims may have been sufficient for basic pleading purposes in the Premier AP, for the purpose of determining the validity and allowability of the Cordero Claim in the DeLano Case, there was nothing in the allegations which demonstrated that: (1) either M&T or DeLano had any legal duty to Cordero with respect to the Cordero Property; (2) DeLano was at any time acting other than as an employee of M&T Bank and within the scope of his employment; (3) M&T Bank or DeLano, as an officer and employee of M&T Bank, ever took possession of or exercised control over the Cordero Property, whether at the former Premier Jefferson-Henrietta Warehouse (the "Warehouse") or at any other location; (4) M&T Bank or DeLano, as an officer and employee of M&T Bank, had any obligation to inventory the contents of the containers at the Warehouse that might contain the stored personal property of third parties, including Cordero; (5) anything that DeLano did, individually or as an officer and employee of M&T Bank, caused the loss of or damage to some or all of the Cordero Property; or (6) there was any loss of or damage to the Cordero Property.

BK. 04-20280

By reason of the August 2004 Interlocutory Order, it was clear to Cordero, or it should have been clear to him as a licensed, experienced and registered attorney, that at the Trial he would be required to meet his ultimate burden of proof as an alleged creditor to demonstrate, by a preponderance of the evidence, that he had a valid claim against DeLano individually that was allowable in the DeLano Case.

At the Trial, Cordero called DeLano as his only witness and he did not offer any documents for admission into evidence. Further, Cordero did not file a Pretrial Memorandum of Law or make any other written submission regarding the merits of the Cordero Claim.

At the conclusion of the Trial, it was clear that Cordero completely failed to meet his burden of proof by a preponderance of the evidence. In fact, Cordero failed to introduce any credible evidence which demonstrated that he held a valid claim against DeLano individually that could be allowed in the DeLano Case.

At the Trial, DeLano testified, in part, as follows: (1) after the conversion of the Premier Case from a Chapter 11 case to a Chapter 7 case, the Premier Chapter 7 Trustee, Kenneth Gordon (the "Trustee"), when he felt that he could no longer assist Cordero in locating the Cordero Property, referred Cordero to DeLano, in his capacity as relationship manager for M&T Bank that held a security interest in the Premier assets; (2) DeLano, while at all times

BK. 04-20280

acting in his capacity as an officer and employee of M&T Bank, advised Cordero, by telephone, that he had seen one or more storage containers at the Warehouse which bore Cordero's name; (3) after: (a) the Premier loans to M&T Bank went in default; (b) the Premier Case converted to a Chapter 7 case; and (c) the Trustee abandoned any interest that he had in the property of Premier that was subject to the M&T Bank lien, M&T Bank sold the Premier assets located at the Warehouse, including ten storage containers, at a private sale, pursuant to its rights under the New York Uniform Commercial Code to a buyer arranged for by Reynolds Auction Company; (4) although DeLano could not remember the name of the purchaser of the containers (the "Purchaser"), he knew that it was a reputable storage company; (5) although DeLano and M&T Bank believed that one or more of the containers sold to the Purchaser contained the Cordero Property, it turned out that at the time of the sale by M&T Bank the containers with the Cordero Property were at a storage facility in Avon, New York maintained by Pfuntner (the "Avon Storage Facility"), a location where they had been previously stored by Premier; (6) M&T Bank, as a secured creditor, never took possession of or exercised any control over any of the Premier storage containers at the Avon Storage Facility, including those in which Premier had stored the Cordero Property, rather, M&T Bank abandoned any interest that it had in those containers; (7) he

BK. 04-20280

believed that, at all times when he dealt with the Premier Case, the Premier assets and Cordero, he acted within the scope of his employment as an officer and employee of M&T Bank, and that he was not really certain as to why Cordero believed that he had a claim against him individually in connection with the Cordero Property stored at the Avon Storage Facility which M&T had abandoned any interest in and had never exercised possession or control over.

Although, as an experienced attorney, Cordero was successful in confusing DeLano during his testimony and in eliciting from DeLano some most interesting statements as the result of that confusion, and even though DeLano insisted that he was not confused, what is clear from the Trial and DeLano's testimony at the Trial is that: (1) DeLano consistently asserted that: (a) in his interaction with Cordero, he was at all times acting within the scope of his employment as an officer and employee of M&T Bank; and (b) Cordero had no claim against him individually; and (2) there was nothing in DeLano's testimony at the Trial that demonstrated that Cordero had any valid claim or cause of action against him individually for negligence, recklessness or otherwise.

The Court finds that Cordero has no valid Claim against DeLano individually that it could allow in the DeLano Case, by reason of negligence, recklessness or otherwise, for the following reasons: (1) although M&T Bank had a security interest in the assets of

BK. 04-20280

Premier, including the containers in which the personal property of a number of its customers was stored, including the Cordero Property, M&T Bank never took possession of or asserted control over the containers at the Avon Storage Facility where the Cordero Property was stored; (2) since M&T Bank never took possession of or asserted control over the containers in which the Cordero Property was stored, neither M&T Bank nor DeLano, as an officer and employee of M&T Bank, had any duty to Cordero with respect to the Cordero Property; the duty to properly store and care for the Cordero Property at all times remained with Premier, or perhaps Pfuntner; (3) Cordero has produced no credible evidence to demonstrate that DeLano was not acting at all times in question within the scope of his employment as an officer and employee of M&T Bank; (4) there is nothing in DeLano's testimony at Trial which indicates that there were not one or more storage containers at the Warehouse that bore Cordero's name, so there is no evidence that the statements DeLano made to Cordero, in his capacity as an officer and employee of M&T Bank, were not true; (5) at Trial, Cordero indicated that David Dworkin, the landlord of the Warehouse, had also indicated to him that there were one or more containers at the Warehouse that bore Cordero's name; (6) Cordero did not demonstrate at Trial that there is any requirement, under New York State or Federal Law, that imposes upon a secured creditor that sells a storage container,

BK. 04-20280

such as those sold by M&T Bank at its private sale, a duty to inventory the contents of the containers or confirm the ownership of the contents and notify the owner of the contents, prior to a private sale of the containers under the Uniform Commercial Code to an otherwise reputable local storage company; (7) any confusion as to where the containers that contained the Cordero Property were actually located was the result of the actions or inactions of Premier, not DeLano, individually or as an officer and employee of M&T Bank, and to the extent that Cordero expended time, energy or funds in attempting to determine the actual location of his stored personal property, that is not the legal responsibility of M&T Bank or DeLano, even if they innocently and mistakenly believed that some or all of the Cordero Property was at the Warehouse; (8) the Court is aware from its involvement in the Premier AP that even when Cordero learned of the actual location of the Cordero Property at the Avon Storage Facility, he did not take immediate steps to: (a) arrange for the Property to be removed; or (b) inspect the Property in order to determine if there had been any damage to it, and if there had been damage, to determine the nature and extent of the damage, when the damage occurred, and who might be responsible for it; (9) Cordero has failed to produce any evidence to demonstrate that there has been any damage to the Cordero Property; and (10) to the extent that there may be any damage to the Cordero

BK. 04-20280

Property at the Avon Storage Facility, Cordero produced no evidence at Trial to indicate that DeLano was in any way responsible for such damage, in whole or in part.

III. Renewed Cordero Discovery Motion

As a licensed, experienced and registered attorney, Cordero knew that March 1, 2005 was his "Day in Court" and his only opportunity to prove that he had a valid claim against DeLano individually that could be deemed allowed in the DeLano Case. At the end of the Trial when asked if he had any further evidence to present, Cordero renewed the Cordero Discovery Motion, which the Court once again denied and indicated that it would set forth its reasons for denying the renewed motion in this Decision & Order.

The Court hereby in all respects denies the renewed Cordero Discovery Motion for the following reasons: (1) as a licensed, experienced and registered attorney, Cordero knew that he had been afforded sufficient time between the August 2004 Interlocutory Order and December 15, 2004, to do any discovery that he required, including obtaining, voluntarily or through the subpoena process, any and all documents that he deemed to be relevant to the Claim Objection Proceeding from M&T Bank or other parties to the Premier AP, yet he apparently took no steps to: (a) obtain those documents other than to request them from DeLano; or (b) otherwise conduct

BK. 04-20280

discovery of any of the parties in the Premier AP prior to November 8, 2004, when he filed the Cordero Discovery Motion; (2) even after November 10, 2004 when the Court entered the November 2004 Discovery Order denying his Discovery Motion with respect to documents that: (a) were unrelated to the Claim Objection Proceeding; (b) DeLano did not have in his possession and were not his documents, but were the documents of M&T Bank or other parties to the Premier AP, there is no indication that Cordero made any attempt to obtain those documents from M&T Bank or other parties to the Premier AP, or to otherwise conduct discovery of those parties for the three and a half months between the November 2004 Discovery Order and the Trial; (3) Cordero at all times had the ability to obtain the requested documents directly from the parties in the Premier AP other than DeLano; (4) although the August 2004 Interlocutory Order cut off discovery on December 15, 2004, that was between Cordero and DeLano, and, as a licensed, experienced and registered attorney, Cordero knew that nothing in that Order prevented him from obtaining relevant discovery from M&T Bank or other parties to the Premier AP as part of the Premier AP.

IV. Cordero's Involvement in the DeLano Case Going Forward

Having determined that Cordero has no valid claim against DeLano individually that is allowable in the DeLano Case, Cordero

BK. 04-20280

shall have no further standing in that Case, including participating in any further hearings conducted by the Court in the DeLano Case. Cordero indicated that he would appeal the Court's Decision & Order in the Claim Objection Proceeding if it determined that he had no valid and allowable claim in DeLano Case. In view of that anticipated appeal, and in the interests of judicial economy, in accordance with Rule 8005, the Court hereby denies Cordero any stay of the effectiveness of this Decision & Order pending any appeal that he may take of the Decision & Order. The Court denies such a stay because: (1) it does not believe that there is any possibility that Cordero could prevail on the merits of any such appeal; (2) there is no public interest involved in this matter; and (3) the detriment and prejudice to the DeLanos and their creditors from any further delay in their being able to present a final Chapter 13 Plan and have the Court determine whether it is confirmable, having already been in Chapter 13 for more than one year, far outweighs any possible prejudice to Cordero, who has no valid and allowable claim and who has yet to even address the critical issues that the Court has previously outlined in this Decision & Order and in numerous prior orders and decisions.

BK. 04-20280

CONCLUSION

The Court finds that Cordero: (1) has no valid claim against DeLano individually which can be allowed in the DeLano Case; (2) has no standing to participate in any further Court proceedings in the DeLano Case; and (3) is denied any stay of the provisions of this Decision & Order pending any appeal.

IT IS SO ORDERED.

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

Dated: April 4, 2005