

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

In Re:

**TODD W. CARR
SHAWNEY L. CARR,**

Debtors.

BK. NO. 87-20453

DECISION AND ORDER

BACKGROUND

On April 2, 1987 the debtors, Todd W. Carr and Shawney L. Carr (the "Debtors"), filed a voluntary petition initiating a Chapter 13 case. On June 8, 1987 an Order confirming the Debtors' Chapter 13 plan was entered which provided that the secured claim of Intercounty Mortgage Corporation, representing arrearages on a first mortgage on the Debtors' residence in the amount of \$6,734.68, would be paid in the plan with interest at the rate of 9% per annum.

By motion dated September 24, 1991, made returnable on October 7, 1991, the Debtors requested an order: (a) requiring Constellation Mortgage Company ("Constellation"), the assignee after the plan confirmation from Intercounty Mortgage Corporation, to prove an alleged post-petition escrow deficiency; (b) requiring Constellation to accept all previously tendered mortgage payments; (c) denying any late charges claimed by Constellation; and (d) awarding to Debtors reasonable attorneys' fees. From the Debtors' motion it appears that although they were current on their post-petition monthly mortgage payments through October of 1990 Constellation demanded an escrow deficiency of \$2,845.23 and refused to accept regular monthly payments until the alleged deficiency was cured. The Debtors suspected that this claimed escrow deficiency consisted in part of amounts that would be paid to Constellation under the confirmed plan as part of its arrearages. However numerous calls and correspondence by the Debtors' then attorneys did not result in a satisfactory resolution of the issue. Some of the confusion may have been the result of the assignment of the mortgage.

On November 26, 1991 after a hearing on the Debtors' motion an Order was entered requiring

Constellation to accept mortgage payments in the amount of \$567.00 per month "until such time as Constellation Mortgage Company proves to the satisfaction of the Court that there is an escrow deficiency in the amount which they claim." The Order further required Constellation to fully and finally prove its escrow deficiency by January 31, 1992 or any such deficiency would be deemed waived and it failed to grant the Debtors reasonable attorneys' fees.

By motion dated January 22, 1992 made returnable on February 3, 1992, Constellation, by its West Islip, New York attorneys, requested an order directing the Debtors to pay a revised monthly mortgage payment as determined by the Court. It appears that the attorneys for the parties had agreed that the filing of this motion would be sufficient to meet the Court's January 21, 1992 deadline for the determination of any escrow deficiency.

On February 3, 1992 Constellation appeared by a local counsel. The matter was adjourned to February 24, and thereafter to March 2, 1992, in each case by consent, to afford the parties and their respective attorneys the opportunity to determine any actual escrow deficiency and the ongoing mortgage payment which the Debtors would be required to make.

On March 2, 1992 attorneys for the parties appeared and advised the Court that the matter of the escrow deficiency and the required ongoing mortgage payment had been determined and settled and that an Order would be submitted to the Court. The Court acknowledged that it would sign the Order setting forth the agreement of the parties.

Subsequent to March 2, 1992 an Order was submitted to the Court by the Debtors' attorney providing that commencing March 1, 1992 the Debtors' mortgage payment would be in the amount of \$771.46 per month and setting forth in detail the breakdown of that agreed upon monthly payment. Since the Court mistakenly believed that the Order had been submitted by Constellation's attorney as the attorney for the moving party, the Court sent the Order back to obtain the consent of the Debtors' attorney. The Order was finally entered on April 28, 1992.

By motion dated April 28, 1992 and returnable May 11, 1992, the Debtors requested an Order

holding Constellation in contempt for violation of the Court's November 26, 1991 Order. The motion papers on behalf of the Debtors indicated that the Debtors' March 27, 1992 check in the amount of \$567.00 was forwarded to Constellation in payment of the April 1992 mortgage payment and was returned by Constellation. The motion papers further indicated that the Debtors had received an April 6, 1992 letter from Constellation indicating that the Debtors were delinquent in their payments outside the Chapter 13 plan and that payments of \$3,831.36 were to be forwarded and received prior to April 20, 1992.

DISCUSSION

The history of this case indicates that the Debtors must be extremely frustrated at their inability to resolve the confusion with Constellation about the amount of their ongoing mortgage payment. This confusion extended over a long period of time, despite what appears to be the good faith and intensive efforts of both the Debtors and their attorneys, and had caused the Debtors to incur substantial attorneys' fees and other expenses.

However, on the facts and circumstances of this case, the Court can not find that Constellation should be held in civil contempt for failure to comply with the provisions of this Court's November 26, 1991 Order. It is well settled in the Second Circuit that a party may be held in contempt for failure to comply with an order of the court if the Order being enforced is clear and unambiguous, the proof of noncompliance is clear and convincing, and the defendants have not been reasonably diligent and energetic in attempting to accomplish what was ordered. **Powell v. Ward**, 643 F.2d 924, 931 (2d Cir. 1981) cert denied 454 U.S. 832 (1981). It is also necessary to show that the party to be held in contempt had knowledge of the order but disobeyed it. **Matter of Kalpana Electronics, Inc.**, 58 B.R. 326, 337 (Bankr. E.D.N.Y. 1986). However, it is not necessary to prove that the party wilfully disobeyed the Order. **Donovan v. Sovereign Security, Ltd.**, 726 F.2d 55, 59 (2d Cir. 1984). When all the elements are present, civil contempt is established. **Matter of**

Kalpana, 58 B.R. at 337.

The November 26, 1991 Order provided that Constellation was directed to accept payments of \$567.00 per month until such time as Constellation proved to the satisfaction of the Court that there is an escrow deficiency. Since: (1) it was determined and agreed among the parties on or before March 2, 1992 that there was such a deficiency and that the ongoing monthly mortgage payment would be \$771.46; (2) such revised monthly mortgage payments were to begin in March, 1992; and (3) the Court acknowledged on March 2, 1992 to the attorneys for the parties that it would sign a settled Order containing the agreement of the parties, as of March 2, 1992 the Court was satisfied as to the matters required to be accomplished by the November 26, 1991 Order.

It appears that the lack of failure of communication continued even after March 2, 1992. Full details of the parties' agreement may not have been clearly conveyed to the Debtors or all of the employees of Constellation before the letter of April 6, 1992 and the rejection of the Debtors' April payment (clearly if the agreement had been conveyed fully to the Debtors that their payments were to be \$771.46 and begin as of March 1, 1992 they would not have sent an April payment of \$567.00, and if the agreement had been fully conveyed to all of Constellation's employees the April 6 letter would not have been sent). As the attorney for Constellation expressed on May 11, 1991, there appears to have been continued lack or failure of communication as between Constellation, its general counsel and its local counsel, and between the Debtors and their counsel as to when the agreed mortgage payments were to begin, irrespective of when the settled order was finally signed and entered. It appears that based upon the parties' agreement, Constellation's attorneys and Constellation believed that the Debtors would start the \$771.46 monthly mortgage payment with the March 1991 payment and therefore rejected the April payment which was for an incorrect amount. On the other hand, the Debtors may have believed that the agreed monthly payment would begin only after the Court entered the settled Order. In light of the apparent confusion involved in the signing of the April 28, 1992 Order and when its provisions would take effect, the Court can not find

