

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re:

CASE NO. 01-24426

NORMAN E. ELLERSICK and
BEATRICE ELLERSICK,

Debtors.

DECISION & ORDER

BACKGROUND

On November 19, 2001, a voluntary petition was filed on behalf of Norman Earl Ellersick and Beatrice Jane Ellersick (the "Debtors") in an attempt to initiate a voluntary Chapter 7 case. The petition was signed on behalf of each of the Debtors by Gerald D. Ellersick, as power of attorney, and it included copies of New York Individual Statutory Short Form Durable General Powers of Attorney, executed by each of the Debtors on November 5, 2001, pursuant to New York General Obligations Law, Article 5, Title 15, Sections 5-1502(a) through 5-1503 (the "Power of Attorney General Obligations Law"). Each of the powers of attorney authorized Gerald D. Ellersick to act as an attorney-in-fact in connection with various transactions, including "claims and litigation matters" and "all other

BK. 01-24426

matters," but they did not specifically authorize him to file a bankruptcy petition.¹

On January 11, 2002, the Debtors' Trustee (the "Trustee") filed a motion to dismiss the Debtors' case (the "Dismissal Motion") which alleged that: (1) neither of the powers of attorney executed by the Debtors specifically authorized Gerald D. Ellersick to file a petition in bankruptcy; (2) the Power of Attorney General Obligations Law set forth specific constructions for the various categories of transactions covered by the Statute and included on the Short Form Power of Attorney as utilized by the Debtors, and none of those constructions included the specific power or authorization to file a bankruptcy petition; and (3) although the schedules filed on behalf of the Debtors showed unsecured claims in the face amount of \$49,594.56, the Debtors' gross monthly income of \$2,666.89 was from the receipt of exempt pension and social security payments, and their only non-exempt asset was an automobile valued at \$9,262.00 which had a lien against it for in excess of \$14,000.00.

¹ The powers set forth in the Power of Attorney General Obligations Law are not exhaustive, so that an attorney-in-fact can be authorized to file a bankruptcy petition for an individual.

BK. 01-24426

On the February 13, 2002 return date of the Dismissal Motion, the Trustee advised the Court that Beatrice Ellersick, who had been in a nursing home at the time of the filing of the voluntary petition, had since passed away, and that even though there was life insurance payable to Norman Ellersick which would be property of the estate to be administered for the benefit of creditors if the Court did not grant the Dismissal Motion, he was not withdrawing the Motion because he believed that the filing of the petition was unauthorized, and the Court had no jurisdiction.

Understandably, as a result of these post-petition events, neither Norman Ellersick, Gerald Ellersick nor the Debtors' attorney interposed opposition to the Dismissal Motion.

DISCUSSION

In *In re Curtis*, 262 B.R. 619 (Bankr. D. Vt. 2001), Bankruptcy Judge Colleen A. Brown noted that there was a split among the Bankruptcy Courts as to the requisite indicia of authority needed to allow an attorney-in-fact to commence a bankruptcy case on behalf of a debtor. In her decision, Judge Brown set forth what appears to be the three principal positions of the Bankruptcy Courts which have allowed attorney-in-fact

BK. 01-24426

petitions, along with citations to various published decisions that support each view.

Courts that permit them, allow attorney-in-fact filing when: (1) the debtor subsequently ratifies the filing, preferably in writing; (2) the written power of attorney specifically authorizes the filing of a bankruptcy case; or (3) the attorney-in-fact was court appointed.

Since, neither the language set forth on the power of attorney utilized by the Debtors in this case,² nor the detailed constructions contained in the Power of Attorney General Obligations Law for the various transactions described on the power of attorney specifically authorized Gerald D. Ellersick to file a bankruptcy case, the petition was not properly authorized and must be dismissed.

In the future, in order for a voluntary petition for an individual to be filed by an attorney-in-fact in the Rochester Division of the United States Bankruptcy for the Western District of New York, the following three requirements must be met, or the Clerk of the Court is authorized to reject the filing: (1) the debtor must be represented by an attorney; (2)

² The Power of Attorney General Obligations Law expressly permits the use of any other or different form of power of attorney.

BK. 01-24426

the attorney-in-fact must file an original or a copy³ of a power of attorney which specifically authorizes that attorney-in-fact to file a bankruptcy petition on behalf of the debtor; and (3) the attorney for the debtor or the attorney-in-fact must file a statement that the power of attorney was not rescinded or otherwise revoked prior to the filing of the voluntary petition.⁴

CONCLUSION

The Dismissal Motion is in all respects granted, and the petition of Norman E. Ellersick and Beatrice Ellersick is hereby dismissed without the need for further Court order.

IT IS SO ORDERED.

HON. JOHN C. NINFO, II

³ The copy must be certified, which can be attorney certified, or, in the alternative, the filer may present the original and a copy to the Clerk's Office for comparison and filing of the copy.

⁴ Nothing in this Decision & Order is intended to limit the rights of the Office of the United States Trustee or a Panel Trustee from filing a motion to dismiss an attorney-in-fact filed case because the case cannot be properly administered in accordance with the Bankruptcy Code and Rules. For example, a debtor in an attorney-in-fact case still must testify at a Section 341 Meeting of Creditors if required to do so by the Trustee.

BK. 01-24426

CHIEF U.S. BANKRUPTCY JUDGE

Dated: February 15, 2002