UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re

Donald Harold Johns and
Patricia Margaret Johns

Case No. 99-10140 K

Debtors

OPINION AND ORDER

On May 10, 2005, the Court took under submission the Chapter 13 Trustee's Motion Seeking an Order to Compel the return of certain attorney's fees ($1900) paid by error to the Debtors' attorney. The attorney has opposed the motion on the basis that the additional fees should be allowed to him, and his argument that such fees would have been allowed to him had he made timely application therefor instead of relying on the fact that his request for additional fees was being honored by the Chapter 13 office.

The Debtors have personally appeared to vigorously oppose those additional fees.

The Court has examined the file in considerable detail. The Debtors' attorney correctly remembers a substantial amount of work that he did on the case in 1999. However, the Court finds that that work was largely misguided, unnecessary, and ultimately of no benefit to the clients.

The schedules are indeed somewhat more complicated than the usual Chapter 13 schedules because the Debtors had a number of different small businesses, and some parcels of land that they were selling on a "rent-to-own" basis. Additionally, the petition was an emergency filing in the face of a foreclosure by the mortgage bank, which had already obtained a judgment of foreclosure and sale.

However, the "false starts" began with an Objection that Debtors' counsel filed to the mortgage bank's Proof of Claim. It turned out that the amount sought in the proof of claim was the amount of the Judgment of Foreclosure and Sale, and so there was no merit to the Objection. A March 1, 1999 letter to Debtors' counsel from the bank's counsel so stating said "If you would have been so kind and called me, I would have given you a detailed amount."

Next, counsel brought Objections to the claims of two judgment creditors, asserting that those judgments had been foreclosed by the bank's Judgment of Foreclosure and Sale. This turned out to be contrary to law, as was argued by the attorneys for one of the judgment creditors who had to retain a lawyer to make that point. He explained that extinguishment of junior liens by a senior lienor's foreclosure requires that there have been a foreclosure sale; there was no sale in this case because the Chapter 13 petition was filed to prevent it. Apparently there was some back and forth regarding settlement of one of these claims, but ultimately the Debtors' counsel withdrew his Claims Objections.

Then he sought to set the juniormost judgment lien aside under 11 U.S.C. § 522(f). However, he utilized a form of notice that by its own language applies only in Rochester and Watkins

Glen, and either for that reason, or for some other reason, he did not appear to present the motion and the motion was denied. (The motion would not have been sustainable in any event because in arguing that the Debtor was entitled to "selling costs credit against the home," Debtors' counsel was in error under the law; the U.S. District Court for the Western District of New York ruled many years ago in the case of *In re Wilk*, 1992 WL 165770 that no such credit can be taken in connection with a motion under § 522(f).)

Lastly, though it is true that the Wyoming County Bank filed a Motion to Lift Stay in October of 1999 because the Debtors had not paid their school taxes on the mortgaged property for the tax years 1999-2000, this was resolved when the Debtor paid those taxes on November 1 and caused their attorney write a letter to the bank's attorney so advising. The bank's counsel withdrew the Motion, and no court appearance was necessary.

In sum, the "unusual" and "substantial" legal work that the Debtors' counsel recalls now, six years later, was well-intentioned, but was premised on faulty legal bases.

The Court accepts Debtors' counsel's ardent representation that while he was collecting these additional fees from the Chapter 13 Trustee he was not aware that he had failed to seek approval for those fees when he should have. But having now examined the matters that the Court would have examined had he timely sought approval for the collection of additional fees, the Court has no doubt it would have denied that request had it been timely made. Consequently, he is ordered to disgorge the $1900 in additional fees that has been erroneously paid to him. He shall make that check

payable directly to the Debtors and shall transmit it promptly.[1]

SO ORDERED.

Dated: Buffalo, New York
June 10, 2005

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U.S.B.J.

[1]The Court notes, but does not rely upon, the fact that only $950 was disclosed at the time of the bankruptcy filing in the attorney's Rule 2016(b) statement, when in fact he had received $1900 plus filing fees from the Debtors on a pre-petition basis. The Court accepts what seems to be the explanation - that some of what the attorney collected was unrelated to the actual preparation and filing of the bankruptcy case.