UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re

FRANK T. TRIPI
KATHLEEN M. TRIPI
d/b/a LANPLAN DESIGN

Case No. 92-13238 K

Debtors

DANIEL E. BRICK, TRUSTEE

Plaintiff

-vs-

AP 94-1024 K

HOWARD L. KUSHNER and JAMES C. ROSCETTI,
A/T/F KUSHNER, KUSHNER & ROSCETTI, P.C.,
PROFIT SHARING PLAN

Defendants

Daniel E. Brick, Esq.
Brick, Brick, Elmer & Belczak, P.C.
91 Tremont Street
P.O. Box 604
North Tonawanda, New York 14120

Trustee

Damon A. DeCastro, Esq.
Kushner, Kushner & Roscetti, P.C.
730 Main Street
Niagara Falls, New York 14301

Attorney for Defendant

The Affidavit of Damon DeCastro of October 24, 1995,

correctly points out an error of each of the Court's two Orders of October 2, 1995.

The Order of that date in Adversary Proceeding 94-1094 denying the Trustee's Motion for Summary Judgment is hereby amended and deemed to reflect that Defendants did re-assign the mortgage to the Trustee during the pendency of this Adversary Proceeding, and therefore they did not fail and refuse to do so after they were sued for such relief, but they have failed and refused to turn over to the Trustee such portion of the proceeds of said mortgagee interest that they received that is necessary for the Trustee to pay all creditors in full, with interest, and all administrative expenses.

The Order of that date denying the Debtors' Motion to Dismiss contained a typographical error by which it was stated that the Motion for Summary Judgment had been "granted" when in fact it had been denied. That Order too is hereby deemed suitably amended.

The Court demanded Mr. DeCastro's affidavit in connection with his statement to the Court and to his opponent, by telephone on or about October 19, 1995, that neither the Debtors' Motion to Dismiss nor the Trustee's Motion for Summary Judgment was ever heard. Consequently, he argued, the Defendants' failure to interpose any opposition thereto other than the affidavit of his "other" client, Debtor Frank Tripi,

(who is not a party to this litigation) should not now prejudice the right of the Defendants to defend. And further, he argued, the Order denying the Debtors' Motion to Dismiss the case should be reconsidered.

Whether or not the Court considers Mr. DeCastro's considerable confusion surrounding the procedural posture of his Motion and the Trustee's Motion as of the date of his most recent failure to appear -- September 6, 1995 -- to be justified, the interests of justice warrant a further and final opportunity for him to address the merits of the Trustee's Motion for Summary Proceeding in A.P. 94-1024. This is so because with each successive submission, Mr. DeCastro moves closer and closer to saying something that actually sounds like something relating to law (in the midst of obfuscatory rhetoric).

Thus, for example, in the Answer to the initial Complaint, Mr. Roscetti admitted that there was an assignment, but not that it was an assignment as security. And in the Answer to the Amended and Supplemental Complaint, he stated that Defendants believe, in any event, on behalf of Debtors, "that there is a question as to whether or not the assets involved are assets of the Debtors' estate." (Whatever that means.) And now finally, in paragraph 22 of Mr. DeCastro's affidavit, he states that the mortgage "was not an asset of the estate, as the

mortgage was assigned more than one (1) year prior to the date of filing bankruptcy, which assignment contained no Right of Revision [sic] or proprietary interest of the Debtors in this mortgage."

Although Mr. DeCastro has not offered a scintilla of evidence (as opposed to argument) to confront the *prima facie* case set forth by the Trustee (evidence of the $30,000 loan, evidence of the date of the transactions, the admission of the Defendants (in paragraph 2 of the "Answer to Amended and Supplemental Complaint") that the assignment was "security" and "was more the consideration for the loan," and evidence that the loan was paid off), he has at least finally posited some sort of theory of law, though it is not clear what that theory is or what the relevance is of "one year" having elapsed. (Is he claiming that the assignment was something like a "loan origination fee"?

Thus, if there is any possibility that he was justified in his belief that the time has not yet come to offer some evidence to demonstrate at least a triable issue of fact, the interests of justice dictate that his clients be given that opportunity.

He will have until November 15, 1995 to appropriately respond to the Summary Judgment Motion under Rule 56, F.R.Civ.P., and the Motion will be argued at 2:00 p.m. on

November 22, 1995, at Part I, 310 U.S. Courthouse Buffalo, New York.

Mr. DeCastro is admonished that the legal and factual merits of the Adversary Proceeding have nothing to do with the merits of his efforts to settle with creditors and obtain dismissal of the bankruptcy case. He has been given several months in which to obtain settlements with creditors, and he may continue his efforts in those regards. But those efforts will no longer be allowed to delay consideration of the merits of the Adversary Proceeding. Hence, the Order denying the Debtors' Motion will not be vacated. The denial of same was without prejudice, and the Debtors may make a new motion

to dismiss if they are successful in negotiating a resolution with each of these creditors during the course of the litigation.

SO ORDERED.

Dated: Buffalo, New York
October 30, 1995

/s/Michael J. Kaplan
_____
U.S.B.J.