UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In Re:

JAMES I. WYNN, SR., **CASE NO. 94-22611**

Debtor(s). **DECISION & ORDER**

BACKGROUND

On December 5, 1994, James I. Wynn, Sr. (the "Debtor") filed a petition initiating a Chapter 13 case. On his Schedule A of Real Property the Debtor showed that: (1) he owned eight investment properties in the City of Rochester, including a two-family income property at 183 Wellington Avenue ("Wellington Avenue"), two vacant lots in a suburban township, and a residence at 7 Kencrest Circle, Rochester, New York ("Kencrest"); and (2) he believed that these parcels of real property had an aggregate value of $760,000.00 and were subject to unpaid mortgages and real estate taxes with an aggregate balance of approximately $520,000.00.

Along with his petition, the Debtor filed a Chapter 13 Plan (the "Plan") in which the Debtor proposed to: (1) pay the Trustee $50.00 per month from his disposable income of approximately $75.00 per month (the Debtor's income is primarily pension and rental income); and (2) sell within two years (by January 30, 1997) various of his investment properties and use the proceeds to pay in full his unpaid mortgage arrearages, mortgages on sold properties, real estate taxes, unsecured creditors, estimated at approximately $8,500.00, administrative expenses and Trustee commissions.

At a confirmation hearing conducted on January 30, 1995, the Court confirmed the Plan conditioned upon: (1) the Debtor using all income generated from each individual investment property for the expenses of that property until the property was sold or the Plan completed; (2)

unsecured creditors, who were to receive payment in full plus a 9% value added factor because of the estimated non-exempt equity in the Debtor's assets, were to be paid first out of any unsecured proceeds of individual property sales before secured creditors with liens on other properties; and (3) the Debtor was to provide proof of insurance on all of the properties before an order of confirmation would be entered. On May 18, 1995, an Order Confirming the Plan was entered.

On May 18, 1995, the Chapter 13 Trustee ("Trustee") filed a motion (the "Modification Motion"), pursuant to Section 1329[1], to increase the Debtor's plan payments by the proceeds of the settlement of a discrimination action (the "Discrimination Suit") brought by the Debtor against his former employer, A.C. Delco Systems ("Delco"), then pending in the United States District Court for the Western District of New York (the "District Court"). The Motion indicated that: (1) the Debtor was the plaintiff in the pending Discrimination Suit; (2) with the approval of the District Court the Suit had been settled for $54,000.00 with the approval of the District Court; (3) the

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[1] Section 1329 (a) provides:

> At any time after confirmation of the plan but before the completion of payments under such plan, the plan may be modified, upon request of the debtor, the trustee, or the holder of an allowed unsecured claim, to–
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> (1) increase or reduce the amount of payments on claims of a particular class provided for by the plan;
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> (2) extend or reduce the time for such payments; or
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> (3) alter the amount of the distribution to a creditor whose claim is provided for by the plan to the extent necessary to take account of any payment of such claim other than under the plan.

settlement was being held in escrow by the attorneys for Delco; (4) the Debtor had not disclosed the Discrimination Suit or the settlement in his schedules or at his Section 341 Meeting of Creditors; (5) the Debtor's attorney in the Discrimination Suit was not his bankruptcy attorney, and in late March, 1995 his bankruptcy attorney had been suspended from the practice of law; (6) the Debtor had appealed to the United States Court of Appeals for the Second Circuit (the "Second Circuit") the denial of his request to the District Court that it vacate the settlement; (7) the Debtor's attorney in the Discrimination Suit had a claim to a contingent fee based upon the settlement; (8) the net proceeds of the settlement of the Discrimination Suit would allow the general and priority unsecured creditors to be paid immediately in full with a value added factor and also allow a substantial payment to be made towards the secured claims to be paid under the Plan. Therefore, the Trustee requested that the Plan be modified to provide for the payment to the Trustee of the proceeds of the settlement of the Discrimination Suit, after the deduction for attorney's fees and expenses in prosecuting the Suit. On June 14, 1995, the Debtor, who since his bankruptcy attorney was suspended from the practice of law has been prosecuting his Chapter 13 case "pro se", interposed a Response to the Modification Motion which indicated that: (1) he believed from his former bankruptcy attorney that the Court was aware of the settlement and that the settlement funds were being held in escrow by the attorneys for Delco; (2) he had appealed the denial by the District Court of his request to vacate the Court approved settlement because he no longer agreed with the settlement; and (3) he did not wish the Bankruptcy Court to modify the Plan as proposed by the Trustee.

At the return date of the Modification Motion on June 19, 1995, the Court granted the Motion, contingent on the Debtor's appeal to the Second Circuit being denied or dismissed. On August 28, 1995, after the Debtor's appeal to the Second Circuit had been denied, the Court entered an Order modifying the Plan (the "Modification Order"). The Order directed that the net proceeds of the settlement of the Discrimination Suit be turned over to the Trustee for distribution first to pay general unsecured claims, which were to be paid in full plus a value-added factor of 9%, next to pay priority claims in full plus a value-added factor of 9% and then to pay all or a portion of the secured claims to be paid under the Modified Plan.

By motion (the "Turnover Motion"), made returnable on September 6, 1995, the Trustee requested that the Court enter an Order: (1) directing that the settlement proceeds of the Discrimination Suit being held in escrow by the attorneys for Delco be paid over to him, as Trustee; (2) authorizing him, as Trustee, to pay $14,000.00 from the proceeds to the Debtor's attorney in the Suit, which was the balance of her contingent fee; and (3) directing the Trustee to distribute the remaining proceeds pursuant to the terms of the Modified Plan. By letter dated September 1, 1995, the Debtor advised the Court in response to the Turnover Motion that he had applied for a rehearing before the Second Circuit and requested that the net proceeds of the settlement of the Discrimination Suit, if they were paid over to the Trustee, be distributed to him to pay his current bills, including various mortgage arrearages, rather than to unsecured creditors as required by the Modified Plan. On the return date of the Turnover Motion the Court granted the Motion but directed that the turnover of the settlement proceeds would be contingent upon the denial of the Debtor's application

to the Second Circuit for a rehearing or the Second Circuit once again affirming the settlement if a rehearing was granted. An order was entered on September 26, 1995 (the "Turnover Order").

On October 19, 1995, Delco filed a motion (the "Delco Motion") which requested that the Turnover Order be amended. The Motion alleged that on or about September 1, 1995, in violation of the terms of the District Court approved settlement in the Discrimination Suit, the Debtor commenced a discrimination action in New York State Supreme Court. Thereafter, Delco filed a motion in the District Court which requested that the Court enforce the Court approved settlement. Delco requested that its attorneys not be required to turn over the settlement proceeds until a final order was entered by the District Court enforcing the settlement. On the November 1, 1995 return date of the Delco Motion, the attorneys for Delco also indicated that as part of the enforcement proceeding the District Court might award some of the settlement proceeds to Delco as damages. The Court granted the Delco Motion in part. It directed that there immediately be paid over to the Trustee so much of the settlement proceeds as he would require to pay the Debtor's attorney in the Discrimination Suit the balance due on her contingent fee and all general and priority unsecured creditors in full, as provided for under the Modified Plan. The Court determined in connection with its ruling that a sufficient amount would remain in escrow with the attorneys for Delco to cover any reasonable damages the District Court might award Delco. On December 14, 1995, an order was entered in connection with the Delco Motion (the "Amended Turnover Order").

On November 1, 1995, the Debtor filed a Notice of Appeal from the Court's August 28, 1995 Modification Order and September 26, 1995 Turnover Order. The appeal was dismissed on

November 9, 1995 because of the failure of the Debtor to pay the required filing fee.

On December 28, 1995, the Debtor appealed the Amended Turnover Order to the District Court. No stay pending appeal was requested. Thereafter, the Trustee, pursuant to the Turnover and Amended Turnover Orders, received enough of the settlement proceeds so that in January, 1996 he was able to pay the general and priority unsecured creditors provided for under the Plan and the Modified Plan in full with a value added factor of 9%. On August 7, 1996, the appeal of the Amended Turnover Order was dismissed by the District Court.

From the date of the filing of the Debtor's Petition on December 5, 1994, through May 1, 1996, there were seven (7) motions to modify the stay provided by Section 362 filed by secured creditors with liens against one or more of the parcels of real property owned by the Debtor. These motions resulted in various orders being entered. However, no motions have been filed by the Debtor or the Trustee to approve the sale of any of the Debtor's parcels of real property.

On May 6, 1996, the Debtor filed a copy of his May 3, 1996 letter to the Trustee (the "Jackson Letter") wherein he attached a copy of a January 31, 1996 judgment in favor of Trenton J. and Pamela M. Jackson of 177 Wellington Avenue, Rochester, New York (the "Jacksons"), entered against him in the Rochester City Court (the "Jackson Judgment"). The Jackson Judgment was for the total amount of $7,372.73 and was signed by the Honorable Ann E. Pfeiffer ("Judge Pfeiffer"). The Jackson Letter indicated that: (1) on November 12, 1992, some bricks fell from the chimney of the Debtor's 183 Wellington Avenue property and damaged the Jackson's adjoining property on Wellington Avenue; (2) the Debtor thought the matter was being resolved by his

insurance company and the Jackson's insurance company, but then he was sued by the Jackson's attorney for a sum that was far in excess of what his insurance company had indicated to him the repairs would cost; and (3) executions on the Jackson Judgment had resulted in monies from the Debtor's checking account and rent checks from the Department of Social Services being paid over to Nationwide Insurance ("Nationwide") the then holder of the Jackson Judgment.

Thereafter, the Trustee filed a copy of his May 9, 1996 letter to the Debtor regarding the Jackson Letter and the Jackson Judgment which indicated that before executing against property of the estate, including monies in the Debtor's checking account and rent payments, the holder of the Jackson Judgment should have requested an order of the Bankruptcy Court granting it relief from the stay. In his letter, the Trustee acknowledged, however, that it appeared that the holder of the Jackson Judgment had not been made aware of the Debtor's bankruptcy before the initial enforcement proceedings had been undertaken.

On May 24, 1996, the Debtor filed a copy of his May 23, 1996 letter to Judge Pfeiffer in response to an Order which she had entered denying the Debtor's motions requesting relief from the restraining notices, garnishments and executions in connection with the Jackson Judgment.

On June 12, 1996, the Debtor filed a motion entitled "Violation of Debtor Chapter 13 Rights, Illegal Garnishee of Debtor Funds, Reimburse Debtor $4,912.00 Taken As a Result of Garnishee Plus Expenses and 50% Interest Monthly Starting March 12, 1996" (the "Enforcement Motion"). The Supporting Affidavit of the Debtor indicated that: (1) the Debtor had initially been served in the City Court action (the "Jackson Action") on March 7, 1995; (2) on July 26, 1995 Arbitrator Robert

Michel[2] ("Arbitrator Michel"), after an arbitration proceeding in which the Debtor appeared and participated, made an award (the "Arbitration Award") to the Jacksons of $5,578.00 plus interest from July 26, 1995; (3) on August 28, 1995, the Debtor had demanded a trial *de novo* in City Court; (4) on January 5, 1996, Judge Pfeiffer conducted a trial, on January 17, 1996 issued a written decision and on January 31, 1996 signed the Jackson Judgment for $7,372.72; (5) prior to the entry of the Jackson Judgment on January 31, 1996, the Debtor had not indicated to the Jacksons, their attorney, Arbitrator Michel or Judge Pfeiffer that he was involved in a pending Chapter 13 case that had been filed on December 5, 1994; (6) on February 6, 1996, the Debtor appealed Judge Pfeiffer's Decision and the Jackson Judgment, but did not apply for a stay pending appeal; and (7) $4,912.00 had been obtained from the Debtor on executions which he requested be returned to him, along with $850.00, the out-of-pocket expenses he alleges that he incurred in connection with this matter.

On June 14, 1996, Nationwide interposed opposition to the Enforcement Motion. The Affidavit of Nationwide's attorney indicated that: (1) there was an appeal of the Pfeiffer Decision and the Jackson Judgment pending in State Court; (2) under New York Civil Practice Law and Rules (the "CPLR") Section 3211, by failing to include any discharge in bankruptcy as an affirmative defense, the Debtor had waived that defense[3]; (3) prior to May 6, 1996, the Debtor had never advised

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[2] Robert Michel is an attorney and a several term elected Town Justice in the Town of Pittsford, New York.

[3] CPLR Section 3211 provides in pertinent part:

(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

the parties in the Jackson Action of his pending bankruptcy proceeding; (4) had the other parties in the Jackson Action known of the Debtor's bankruptcy, they would have moved in Bankruptcy Court to be allowed to proceed in City Court; (5) Nationwide would be severely prejudiced if the expenses they had incurred in the various stages of litigation, including pleadings, discovery, arbitration, trial, enforcement, post-trial motions and the appeal, were invalidated because the Debtor purposefully failed to advise them of his bankruptcy; (6) the Court should equitably annul the automatic stay, either to the extent of the Judgment Creditor's actions taken to date, or until such time as the Jackson Judgment has been paid in full[4]; and (7) any violation of the stay by Nationwide or the Jacksons was not wilful, so that no award should be made pursuant to Section 362(h).

At the June 19, 1996 return date of the Enforcement Motion: (1) the Court learned for the

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> 5. the cause of action may not be maintained because of arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability of the moving party, payment, release, res judicata, statute of limitations, or statute of frauds.
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> (e) Number, time and waiver of objections; motion to please over. At any time before service of the responsive pleading is required, a party may move on one or more of the grounds set forth in subdivision (a), and no more that one such motion shall be permitted. Any objection or defense based upon a ground set forth in paragraphs one, three, four, five and six of subdivision (a) is waived unless raised either by such motion or in the responsive pleading.

[4] The Court has considered the Nationwide opposition to also be a cross-motion for relief from the stay under Section 362(d) (the "Stay Motion").

first time that the Debtor had transferred title to at least three of his investment properties to his son in an attempt to avoid their being the subject of property executions in connection with the enforcement of the Jackson Judgment; (2) the Debtor advised the Court that he did not list the Jacksons as creditors on his bankruptcy schedules because between November, 1992, when the damages occurred, and March, 1995, when he was served in the Jackson Action, he believed that the matter was being taken care of by his insurance company; (3) the Debtor failed to ever satisfactorily explain why between March, 1995, when he was served in the Jackson Action, and April, 1996, when he alleges he first advised Judge Pfeiffer of his bankruptcy proceedings, he did not advise the Jacksons, their attorney, Arbitrator Michel, Judge Pfeiffer or the attorneys for Nationwide of his pending bankruptcy which has been a very time consuming matter for the Debtor; and (4) the Debtor failed to ever satisfactorily explain why between March, 1995 and May, 1996 he did not advise the Trustee or the Bankruptcy Court of the Jackson Action, especially between September, 1995, which was after the Arbitration Award, and January, 1996 in connection with the Turnover and Delco Motions, when the Debtor knew that all of his unsecured creditors like the Jacksons were going to be paid in full by the Trustee from the settlement proceeds of the Discrimination Suit. The Court expressed to the Debtor its concern that the Jackson Judgment would have been paid in full along with the Debtor's other unsecured claims in January, 1996 if he had advised the Trustee and the Court of the Judgment, and adjourned the Enforcement Motion to July 17, 1996 in order to afford the Debtor the opportunity to negotiate with the attorneys for Nationwide to see if a satisfactory agreement could be entered into for the Debtor to pay of the balance due on the Jackson Judgment.

On the July 17, 1996 adjourned date of the Enforcement Motion, the Court was advised that no agreement had been reached for the payment of the balance due on the Jackson Judgment. The Court heard final arguments and allowed the parties until August 24, 1996 to file any optional submissions with the Court.

On September 20, 1996, the Court filed a Decision & Order (the "Jackson Order") which: (1) annulled the stay as to the Jackson Action and the enforcement of the Jackson Judgment to the date of the Order; (2) provided that Nationwide could retain the amounts collected through the date of the Order and apply them to the Jackson Judgment in accordance with New York State law; and (3) modified and conditioned the stay in a way the Court felt would ensure, to the extent possible, that the balance due on the Jackson Judgment, unless vacated on appeal, would be paid in full, while at the same time enforcing the stay going forward and affording the Debtor an opportunity to complete the Modified Plan as proposed and confirmed on January 30, 1995, which would result in the payoff of the balance due on the Jackson Judgment, if not otherwise paid as provided for in the Jackson Order.

On October 2, 1996, the Debtor filed a Notice appealing the Jackson Order.

As set forth above, between the date of the filing of the Debtor's Petition on December 5, 1994 and May 1, 1996, there were seven motions to modify the stay filed by secured creditors with liens against one or more of the parcels of real property owned by the Debtor. Between May 1, 1996 and September 20, 1996, there were three additional motions to modify the stay filed by secured

creditors with liens against one or more of the parcels of real property owned by the Debtor. One of these motions (the "RCSB Motion") was filed by Rochester Community Savings Bank ("RCSB"), which holds a mortgage on 3840 Lake Avenue, Rochester, New York ("Lake Avenue"). The RCSB Motion was filed in accordance with the Court's default procedure for motions to modify the stay in Chapter 13 cases, and was made returnable on September 18, 1996 in the event that timely opposition was interposed. Even though the Debtor filed late opposition, the Court allowed him to be heard on September 18, 1996. At that time: (1) the Debtor admitted that he was not current on his post-petition mortgage payments when the RCSB Motion was filed; (2) it was agreed that the Debtor would make regular mortgage payments going forward plus one-half of a mortgage payment each month until the post-petition arrearages were paid in full; and (3) the Court granted RCSB's request at the hearing for attorney's fees and costs incurred in connection with the RCSB Motion in the amounts the Court regularly awards as attorney's fees and costs to oversecured mortgage holders when a Debtor has failed to make post-petition mortgage payments.

On September 26, 1996 an Order (the "RCSB Order") was entered in connection with the RCSB Motion, and on October 7, 1996 the Debtor filed a Notice appealing the Order.

On November 1, 1995, Empire of America Realty Credit Corp. ("Empire") filed a motion (the "Empire Motion") to modify the stay to permit it to foreclose its mortgage (the "Plymouth Avenue Mortgage") on the Debtor's real property located at 1069 South Plymouth Avenue, Rochester, New York ("Plymouth Avenue"). The Empire Motion was filed in accordance with the Court's default procedure. In the October 23, 1995 Affidavit of one of the attorneys for Empire and

on the Cover Sheet required by the Court, the Motion alleged that: (1) the Debtor had not paid his post-petition mortgage payments for the months of March, 1995 through October, 1995; (2) the total post-petition arrearages were $8,326.26; and (3) the Debtor lacked equity in Plymouth Avenue. The Empire Motion was made returnable on November 15, 1995 in the event that timely opposition was interposed. The Debtor filed a November 9, 1995 letter in response to the Empire Motion which stated that:

> "I have made several payments this year at $885.18 monthly. My record shows that I am also in the arrears by several payments. I would like to know the exact amount from Empire of America because I do plan to make up the arrears payments. The reason it is in the arrears is it is a two family dwelling in a very bad neighborhood which makes it hard to rent or get tenants to pay when they rent. I have had one apartment vacant off and on all year. I have applied for my retirement pay. I expect to receive a lump sum of approximately $23,000.00 by the end of December, 1995. I am hereby requested that my stay be put off until December 30, 1995. This would give me a chance to receive my retirement check."

On the November 15, 1995 return date of the Empire Motion, at which the Debtor did not appear, the attorney appearing for Empire indicated that a conditional order would be submitted in response to the Debtor's November 9, 1995 letter which would provide that the Debtor would be required to pay the November and December, 1995 regular mortgage payments on or before the 22nd day of those months, and then would have until December 31, 1995 to bring all post-petition arrearages current.

On December 5, 1995, the Court entered a Conditional Order submitted by the attorneys for Empire (the "Empire Order") which provided in one of its ordering paragraphs that:

> "ORDERED, ADJUDGED AND DECREED, that the debtor will pay the petitioner the November Mortgage payment by November 22, 1995 and the December Mortgage payment by December 22, 1995. In additional all post-petition Mortgage arrears from March, 1995 through October 1, 1995 in the amount of $1,326.26 be paid by December 30, 1995 together with petitioner's Attorney's fees in the amount of $250.00 and Disbursements in the amount of $60.00, and it is further..."

On July 29, 1996, Source One Mortgage Service Corp. ("Source One"), the assignee of Empire, filed a Motion to Correct Conditional Order (the "Source One Motion") which alleged that: (1) there had been an inadvertent typographical error in the Conditional Order when it stated that the total post-petition mortgage arrearages were $1,326.26 rather than the correct amount which was $8,326.26; and (2) an attached October 13, 1995 document labeled bankruptcy proof of claim (the "Empire Computation") correctly showed the computation of the $8,326.26 due as of that date. The Empire Computation showed eight payments of $1,005.59 as being due, along with seven late charges of $40.22, totaling $281.54, for a total amount due of $8,326.26.

On August 16, 1996, the Debtor filed an Affidavit in Opposition to the Source One Motion which alleged that: (1) on December 5, 1995, the Conditional Order was entered for $1,326.26 plus $250.00 in attorney's fees and $60.00 in disbursements, which was what Empire had submitted to the Court; (2) the $8,326.26 was put in to make it look like a typo; (3) Empire had sold the Debtor's mortgage to Source One which the Debtor started to pay on December 1, 1995; (4) the Debtor did not have any intention of paying Empire any more than was ordered by the Court to be paid in the Conditional Order; (5) the Debtor did not have $7,000.00 to give Empire, and he did not owe them any more than he had already paid them; and (6) all of the receipts which Debtor had concerning his payments to Empire were destroyed in a flood in his basement.

At hearings conducted by the Court on August 21, September 4 and September 11, 1996: (1) the Court advised the parties that from its review of the pleadings, it appeared to the Court that the Conditional Order did contain an inadvertent typographical error, so that grounds appeared to exist for the Court to grant the Source One Motion in accordance with the provisions of Rule 60(b)(1) and Rule 60(b)(6) of the Federal Rules of Civil Procedure; (2) the Court expressed a concern that the arrearages claimed in the Empire Motion were correct because there appeared to be a discrepancy between the mortgage payments of $1,005.59 set forth in the Empire Computation, and the $885.18 mortgage payments the Debtor indicated he had been making in 1995; (3) the Debtor alleged that he had not missed all of the payments from March, 1995 through October, 1995, but had not pursued the matter further because of the amount of arrearages set forth in the Conditional Order; (4) the Court instructed the Debtor to obtain copies of proofs of mortgage payments made between March, 1995 and October, 1995 from the respective banks or issuers of money orders used to make the payments he alleged that he had made; and (5) the Court encouraged the parties to attempt to arrive at a settlement of this matter. On September 11, 1995, the Court scheduled a final hearing on the Source One Motion for October 10, 1996.

On October 9, 1996, the Debtor filed an additional Affidavit in Opposition to the Source One Motion which alleged that: (1) Empire of America is no longer in business and it is not right by the law or accepted by Debtor/Defendant that Source One...defend Empire of America who is no longer in business; (2) the Debtor's monthly payment is $885.18, not $1,005.59 as indicated on the Empire Computation; (3) Source One is trying to get the Court to force the Debtor to pay for Empire of

America's poor record-keeping; (4) the Empire Motion did not state or have attached what Debtor's arrears were or what the Debtor's monthly payments were; (5) the Debtor had a flood in his basement and the receipts for Empire of America were destroyed; and (6) in a conversation in the Fall of 1995 with the attorney for Empire, that attorney acknowledged that Empire did not know the correct amount of post-petition arrears due from the Debtor.

At the October 10, 1996 Evidentiary Hearing, the Court heard the testimony of the Debtor, William Kruse, a bankruptcy administrator from the principal office of Source One in Michigan ("Kruse"), and Ronald W. Zackem, Esq., the attorney for Empire and Source One who filed the Empire Motion and the Source One Motion ("Zackem").

On October 11, 1996, the Court filed a Decision & Order (the "Source One Order") which: (1) pursuant to Section 105 and Rule 60(b)(1) and 60(b)(6) of the Federal Rules of Civil Procedure, granted the Source One Motion to correct the Conditional Order to provide that the correct amount of the post-petition mortgage arrears due from March, 1995 through October, 1995 on the Plymouth Avenue Mortgage was $7,329.31; (2) provided that the stay would not be modified to permit Source One to begin or continue a mortgage foreclosure action against Plymouth Avenue because of the failure of the Debtor to pay the now determined correct amount of post-petition mortgage arrears ($7,329.31) before January 30, 1997, the date when under the Modified Plan all of the Debtor's creditors, including all secured creditors, were to be paid in full or otherwise brought current on their secured obligations; and (3) provided that the Conditional Order would not be modified as to the Order's provisions for the modification of the stay for reasons other than the Debtor failing to pay

the now determined correct amount of the post-petition arrearages due through October, 1995.

On October 7, 1996, the Debtor filed a Motion, pursuant to Rule 8005, requesting a stay of the enforcement of the RCSB Order until a final resolution of his appeal of the Order (the "RCSB Stay Motion"). On October 7, 1996, the Debtor also filed a Motion, pursuant to Rule 8005, requesting a stay of the enforcement of the Jackson Order until a final resolution of his appeal of that Order (the "Jackson Stay Motion"). The RCSB Stay Motion and the Jackson Stay Motion were each made returnable on October 16, 1996.

On October 10, 1996, one of the attorneys for Nationwide filed an Affidavit which asserted that not only had the Debtor failed to meet his burden of providing satisfactory evidence of the four factors which the Court must take into consideration when determining whether to grant a request for stay pending appeal pursuant to Rule 8005, but the Debtor did not even address any of the factors in the Jackson Stay Motion.

DISCUSSION

At the hearing on the return date of the RCSB Stay Motion and the Jackson Stay Motion, the Court requested that the Debtor address the four factors which the Court must consider in deciding whether to exercise its discretion when a request is made for a stay pending appeal, which factors are:

(1) The likelihood that the party seeking the stay will prevail on appeal;

(2) The prospect of irreparable injury to the moving party which might result without the stay;

(3) The relative certainty that no substantial harm will come to other parties if the stay were issued; and

(4) The relative absence of harm to the public interest if the stay were granted. *See Hirschfield v. Board of Elections,* 984 F.2d 35, 39 (2d Cir. 1993).

I. THE RCSB STAY MOTION.

When it considered the four required factors in connection with the RCSB Stay Motion, the Court believed that because of his significant equity, the potential harm and prejudice to the Debtor from Lake Avenue being foreclosed over the payment of $350.00 in attorney's fees and costs, notwithstanding the Court's assessment of the likelihood of the Debtor's success on appeal, constituted sufficient potential irreparable harm to the Debtor that it required the Court to grant a stay pending appeal. The attorney for RCSB acknowledged this and consented to a limited stay pending appeal.

On the factor of likelihood of success on appeal, the Court reminded the Debtor that the standard of review on appeal was abuse of discretion and that it was unlikely that the reviewing court would find that there had been an abuse of discretion because: (1) the Debtor had acknowledged that he was in default with regard to the payment of his post-petition mortgage payments on the RCSB Mortgage at the time of the RCSB Motion (his excuse was that the Court did not return to him the money which Nationwide had collected on the Jackson Judgment); and (2) he had received at his confirmation hearing the lecture which the Court gives to all Chapter 13 debtors at the time of their confirmation hearings:

"If your mortgage holder makes a motion to lift the stay because of your non-

> payment, even if you can cure the default and the Court allows you, which it might not, you will likely have to pay the mortgage holder's filing fee and attorney's fee, as well as additional attorneys fees for your attorney. That can be quite costly and time-consuming. To avoid all of that, pay your mortgage payments when they are due.";

(3) RCSB's Motion requested such other and further relief and at the hearing which the Court conducted, even though the Debtor filed untimely opposition, it made a motion pursuant to Rule 9013 for attorney's fees and disbursements as routinely granted by the Court; and (4) in this Chapter 13 case, there have been a total of six (6) conditional orders modifying the stay with respect to parcels of the Debtor's real property where attorneys fees of $250.00 and disbursements of $60.00 were awarded, and seven (7) conditional orders where a provision that the stay would terminate in the event any future payments were missed was included in the Order or had been granted by the Court at the respective hearing, so that the Debtor is familiar with the policy of the Court to award attorney's fees and costs when a debtor has failed to keep his post-petition mortgage payments current and to generally provide in conditional orders for automatic terminations of the stay for missed future payments.

II. THE JACKSON STAY MOTION.

In reviewing the Jackson Stay Motion, when the Court considers the four factors required in connection with such a Motion, all of the factors must be resolved against the Debtor.

1. LIKELIHOOD OF SUCCESS.

The Court believes there were more than sufficient grounds for it to have exercised its discretion under Section 105 and Section 362(d) to annul the stay in part and condition it in the

future as it did in the Jackson Order.

2. RELATIVE HARM BETWEEN THE PARTIES (FACTORS 2 AND 3).

The Court believes that it already properly balanced the potential harm and irreparable injury to the Debtor and the potential harm and further prejudice to Nationwide by the detailed provisions it set out in the Jackson Order conditioning the stay going forward.[5]

4. PUBLIC INTEREST.

The Court believes that there is no compelling public interest involved in this case which would require it to exercise its discretion and grant a stay in view of its analysis of the other factors.

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[5] The Court directs the following: (1) the stay will terminate as to the enforcement of the Jackson Judgment unless within ten (10) business days from the date of the entry of this Decision & Order, the Debtor provides the Trustee and the attorney for Nationwide with documentary proof that all of the parcels of real property owned by him at the time of the filing of the petition, unless a parcel has been foreclosed upon and a referee's deed of foreclosure recorded, are still owned and titled to the Debtor; (2) if it has not already properly transcripted the Jackson Judgment to the Monroe County Clerk's Office so that it has become a lien on all of the Debtor's real property, the stay is modified to allow Nationwide to do so, and the lien of the Jackson Judgment shall remain as a lien on all real property now owned or hereinafter acquired by the Debtor, including Kencrest and 3840 Lake Avenue ("Lake Avenue"), until the balance due on the Jackson Judgment is paid in full, unless such lien is otherwise foreclosed on any particular parcel of property in a State Court mortgage foreclosure proceeding or removed by this Bankruptcy Court; (3) the balance due on the Jackson Judgment together with continuing interest under New York State Law is found by this Court to be an allowed claim in the Debtor's bankruptcy case, and all monthly payments being made by the Debtor under the Plan, after deduction for commissions of the Trustee, shall be paid to Nationwide until the balance due on the Jackson Judgment plus all accruing interest is paid in full; (4) Nationwide shall take no further steps to enforce the Jackson Judgment until after January 30, 1997, at which time the stay will terminate as to the enforcement of the Judgment, unless it has previously terminated by a further order of this Court, an additional provision of this Decision & Order, or the dismissal of this Chapter 13 case; (5) the stay is or will immediately terminate as to the enforcement of the Jackson Judgment with respect to any parcel of real property owned by the Debtor where the stay has been or is hereinafter terminated for any mortgage holder on the property or where title to the property is transferred by the Debtor without the permission of this Court; (6) without the consent of Nationwide or any then holder of the Jackson Judgment, no request by the Debtor to further modify the Modified Plan will be granted by this Court unless the balance due on the Jackson Judgment plus all accruing interest has been paid in full; and (7) the stay will immediately terminate as to the enforcement of the Jackson Judgment against Lake Avenue and Kencrest in the event that after October 1, 1996 the Debtor fails to make any monthly mortgage payment or real estate tax payment when due on these properties, and the mortgage holders of these properties and all real estate taxing authorities are authorized to confirm to the holder of the Jackson Judgment if any payment has not been made when due.

CONCLUSION

The Debtor's Motion for a stay pending his appeal of the RCSB Order to the extent that the Order would allow RCSB to foreclose its mortgage because of the failure of the Debtor to pay the $350.00 awarded to RCSB for attorney's fees and disbursements is granted. However, to the extent that the Debtor's Motion requests a stay pending appeal of the provisions of the Order which would allow the stay provided by Section 362 to be modified and terminated in the event that he fails to pay when due any of the mortgage payments required by the RCSB Order or the RCSB Mortgage after the date of the Order, the Motion is denied.

The Debtor's Motion for a stay pending his appeal of the Jackson Order is in all respects denied.

IT IS SO ORDERED.

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

Dated: October 21, 1996