

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

In re:

JAMES I. WYNN, SR.,

CASE NO. 94-22611

Debtors.

DECISION & ORDER

BACKGROUND

On October 11, 1996, the Court filed a Decision & Order (the "Source One Decision") in this Chapter 13 case.¹ The Decision determined that the post-petition mortgage arrearages due from March 1995 through October 1995 on the Plymouth Avenue Mortgage were \$7,329.31, rather than the \$1,326.26 which had been set forth in the December 5, 1995 Conditional Order submitted by Source One pursuant to the Court's default procedures in connection with the November 1995 Empire Motion. That Motion had requested an order for relief from the automatic stay to allow mortgage foreclosure proceedings to continue in state court because the Debtor had not made all of his post-petition mortgage payments.

The Debtor appealed the Source One Decision to the United States District Court for the Western District of New York (the "District Court"), which affirmed the Decision (the "District Court Decision").² On December 18, 1997, a Judgment (the "District Court Judgment") was entered by the Clerk of the District Court in furtherance of the District Court Decision which provided that,

¹ A copy of the Source One Decision is annexed hereto. The terms defined in the Source One Decision shall have the same meaning when used in this Decision & Order as in the Source One Decision.

² This Court has not seen a copy of the Decision of the District Court affirming the Source One Decision.

“IT IS ORDERED AND ADJUDGED that the Decision and Order of Bankruptcy Judge John C. Ninfo, II, dated October 11, 1996 awarding, inter alia, Source One Mortgage Services Corp a judgment for \$7,329.31 is affirmed in all respects.”

The Debtor appealed the District Court Decision, but never obtained a stay of the Source One Decision.

The automatic stay was terminated as to Source One and it continued its mortgage foreclosure proceedings in connection with the Plymouth Avenue Mortgage because the Debtor failed, as required by the Conditional Order to pay his November 1995 monthly mortgage payment by November 22, 1995,³ and, as required by the Source One Decision, to pay a total amount of \$7,329.31 in post-petition arrearages on or before January 30, 1997.⁴

In order to avoid a foreclosure sale of Plymouth Avenue, and so that he could complete his Chapter 13 plan, the Debtor entered into a contract to sell the property. At a February 9, 1998 closing of the sale of Plymouth Avenue, the Debtor paid Source One \$44,811.70, the amount Source One demanded as the payoff balance on the Plymouth Avenue Mortgage.⁵

On February 25, 1999, the Second Circuit filed a Summary Order, a copy of which is attached (the “Summary Order”). The Summary Order: (1) indicated that counsel for Source One

³ The Debtor had defaulted under the Conditional Order before the Source One Decision was filed.

⁴ The Debtor had voluntarily paid \$1,326.26 for the post-petition arrearages in accordance with the December 5, 1995 Conditional Order.

⁵ Notwithstanding that the Source One Decision, as affirmed by the District Court, was on appeal to the United States Court of Appeals for the Second Circuit (the “Second Circuit”), it does not appear that a formal agreement was entered into between the Debtor and Source One to provide for a refund to the Debtor should the Second Circuit determine that the post-petition arrearages due for March 1995 through October 1995 were in an amount less than the \$7,329.31 as determined by the Bankruptcy Court in the Source One Decision.

had filed no opposing brief in connection with the appeal, but instead informed the Second Circuit that in light of “the size of the judgment,” appellee wishes to “withdraw any opposition to” appellant’s request for vacatur of the judgment and to “conclude this matter without any further proceedings”; (2) vacated on consent of Source One the District Court Judgment; and (3) directed that if the Debtor had satisfied all or any part of the Judgment he would be entitled to relief *pro tanto* in the Bankruptcy Court.

On April 28, 1999, the Debtor brought a motion (the “Payment Motion”) which requested that the Court order Source One to pay him \$16,206.37. This represented: (1) \$7,329.31, the amount of the District Court Judgment; (2) interest at 10.5%, the interest rate on the Plymouth Avenue Mortgage, from March 1995 to May 1999, totaling \$3,847.50; and (3) interest at 9%, the New York State judgment rate, on a combination of the \$7,329.31 and the \$3,847.50, for an additional \$5,029.56.

After a number of oral arguments and submissions, the final positions of the Debtor and Source One can be summarized as follows:

The Position of Source One:

- a. The Source One Decision was simply a determination by the Bankruptcy Court, in connection with a motion for relief from the automatic stay, of the post-petition mortgage arrearages due on the Plymouth Avenue Mortgage from March 1995 through October 1995, and did not constitute a separate money judgment in favor of Source One against the Debtor;

- b. The post-petition mortgage arrearages determined by the Court in the Source One Decision were for monthly payments that included principal, interest, real estate tax escrow payments and late charges;
- c. Source One withdrew its opposition to the Debtor's appeal pending at the Second Circuit because it believed the matter was moot. The Debtor had paid off all of the amounts due on the Plymouth Avenue Mortgage without objection at the February 9, 1998 closing of Plymouth Avenue, which included the then unpaid portion of the post-petition mortgage arrearages for the period from March 1995 through October 1995;
- d. Source One did not believe that the result of its withdrawal from the Debtor's appeal pending at the Second Circuit would be a requirement that the Debtor be refunded the \$7,329.31 incorrectly awarded as a separate judgment by the District Court;
- e. In the proceeding which resulted in the Source One Decision, the Debtor did not deny that at least \$1,326.26, the amount of the post-petition mortgage arrearages set forth in the Conditional Order, was due as arrearages for the period from March 1995 through October 1995, so the only claim for damages that the Debtor could have as the result of any possible overpayment should not exceed the principal amount of \$6,003.05 (\$7,329.31 - \$1,326.26) (the "Disputed Arrearages");⁶

⁶ At Page 21 of the Source One Decision the Court indicated that at the hearings that it conducted which resulted in the Source One Decision, the Debtor had indicated that he could not say for certain that he made the July, August, September or October payments although he believed that he was at most three post-petition mortgage payments in arrears in October 1995. Three mortgage payments would be a minimum of \$2,655.54 (\$885.18 x 3).

- f. If the Disputed Arrearages had been factored out of the payoff balance demanded by Source One in connection with the February 9, 1998 closing of the sale of Plymouth Avenue, the payoff balance would have been reduced by \$6,394.99. See Myraline Armstrong Affidavit of August 2, 1999 (the “Armstrong Affidavit”).

The Position of the Debtor, James I. Wynn, Sr.:

- a. The mandate of the Second Circuit was clear that if any part of the \$7,329.31, as set forth in the Source One Decision and the District Court Judgment, had been paid by the Debtor, it was to be refunded to him.
- b. The amount the Debtor should receive from Source One was \$21,289.23, computed as follows:
1. The \$7,329.31 determined by the Bankruptcy Court in the Source One Decision as the post-petition mortgage arrearages due from March 1995 through October 1995, and as set forth in the District Court Judgment and the Second Circuit Summary Order;
 2. \$2,693.25, which represented interest at 10.5% (the Plymouth Avenue Mortgage rate) from March 1995 to February 1998 on the \$7,329.31, which is additional interest that the Debtor alleged Source One charged him;
 3. \$1,533.40, which represented interest at the New York State judgment rate of 9% on the combination of Items 1. and 2., above, from February 1998 to July 1999;

4. \$1,520.86 which the Debtor alleged were additional late charges on the \$7,329.31 which Source One included in the payoff balance paid by him on February 9, 1998;
5. \$2,606.62, which the Debtor alleged he paid to Source One by Rochester Community Savings Bank checks dated December 13, 1995, copies of which were attached to one of the Debtor's submissions, and which the Debtor alleged Source One failed to give him credit for;
6. \$1,450.61, which represented interest at 10.5% on Item 5., above, which the Debtor alleged Source One charged him and included in the payoff balance paid by him on February 9, 1998;
7. \$422.28, which represented interest at 9% per annum for eighteen months [this does not represent 9% on either \$2,606.62 (Item 5.) or the sum of \$2,606.62 plus \$1,450.61 (Item 6.)];
8. \$3,732.90, which represented the difference which the Debtor alleged Source One added to the Plymouth Avenue Mortgage as a result of the Source One Decision, as evidenced by a Supplemental Affidavit of attorney R. Stephen Reilly in connection with the foreclosure of the Plymouth Avenue Mortgage, a copy of which was attached to one of the Debtor's submissions, rather than the \$7,329.31 determined by the Court to be the arrearages, together with interest at 10.5% per annum to February 9, 1998, and interest at the New York State judgment rate of 9% from February 9, 1998.

DISCUSSION

It is unfortunate that the District Court Clerk entered the District Court Judgment in furtherance of the Decision of the District Court which affirmed the Source One Decision. The Judgment mistakenly ordered the Debtor to pay Source One a judgment in the amount of \$7,329.31, when the Source One Decision simply determined that the amount of post-petition mortgage arrearages due from the Debtor for the period from March 1995 through October 1995 was the \$7,329.31. When Source One withdrew from the appeal, the Second Circuit in its Summary Order understandably focused on the language of the District Court Judgment rather than on the actual determination that had been made by the Bankruptcy Court in the Source One Decision, as affirmed by the Decision of the District Court.

I believe that when Source One withdrew from the appeal pending in the Second Circuit, it was the intention of the Second Circuit in its Summary Order to: (a) treat the matter as if the appeal had been fully prosecuted and the Debtor had been completely successful, which, in this Court's opinion, would have resulted in the \$7,329.31 in post-petition mortgage arrearages, as determined by the Bankruptcy Court, being found to have been paid or otherwise not due, and reduced to \$6,003.05, the amount of the Disputed Arrearages, since the Debtor did not dispute that the post-petition arrearages were at least the \$1,326.26 as set forth in the Conditional Order which he had paid without objection to Source One on or about December 13, 1995; and (b) require that if the Debtor had paid any portion of the Disputed Arrearages, judgment should be entered in the Bankruptcy Court to compensate him for his resulting damages.

I also believe that: (1) the letter from Source One's counsel withdrawing its opposition to the Debtor's appeal pending at the Second Circuit did not advise that Court that: (a) the Plymouth

Avenue Mortgage had been paid off, which might make the appeal moot, since the payoff balance had included the Disputed Arrearages; or (b) the District Court Judgment was not consistent with the Source One Decision as affirmed by the District Court, so that Source One should have anticipated the actions taken by the Second Circuit in its Summary Order; and (2) if the amount the Debtor paid to Source One on February 9, 1998 when he paid off the Plymouth Avenue Mortgage was incorrect for reasons other than the inclusion of the Disputed Arrearages plus any resulting interest or charges on the Disputed Arrearages, that is not an issue for the Bankruptcy Court to address, since it was not an issue dealt with by the Source One Decision, the Summary Order or any of the appeals of the Source One Decision.⁷

CONCLUSION

Based upon the foregoing, I find that judgment should be entered, pursuant to the direction of the Second Circuit in the Summary Order, against Source One and in favor of the Debtor for the sum of \$7,294.01. This represents the \$6,394.99 which, by the Armstrong Affidavit, Source One has represented would have been the difference in the payoff figure on February 9, 1998 for the Plymouth Avenue Mortgage had the Debtor been completely successful on his appeal pending in the Second Circuit, so that the Second Circuit would have determined that the Disputed Arrearages of \$6,003.05 had been paid and were not otherwise due, together with interest at the New York State judgment rate of 9%⁸ on the \$6,394.99 from February 9, 1998 through the date of this Decision &

⁷ This would be a matter that the Debtor can seek recourse for in New York State Supreme Court. This matter would include Items b. 5, 6, 7 and 8 of the Debtor's alleged damages (see Pages 6 and 7).

⁸ The awarding of prejudgment interest is a matter of discretion. See e.g. Wickham Contracting Co. v. Local Union No. 3, Intern., Broth. of Electrical Workers, 955 F.2d 831 (2nd Cir.) cert. denied, 506 U.S. 946 (1992). I believe

Order (569 days x 1.58 per day = \$899.02). Once judgment is entered for this amount, it will bear interest at the Federal Judgment Rate until paid in full.

IT IS SO ORDERED.

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

Dated: September 1, 1999

that interest at the New York State judgment rate on these damages, which are related to a New York real property mortgage, is an appropriate rate.