UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In Re:

PETER ZINKIEVICH and
GAIL L. ZINKIEVICH — Case No. 94-13662 K

Debtors

On January 4, 1995, after two hearings on the Motion of Wyoming County Bank seeking dismissal of this Chapter 13 case, the parties stipulated in part as follows, on the record in open Court:

1. The case would be dismissed as of January 4, 1995.

2. Any new bankruptcy filing within 180 days after February 15, 1995 would not reinstate the automatic stay as to the Bank's efforts to foreclose its judgment lien.

3. The Debtors would within 10 days, sign a stipulation discontinuing the lawsuit they brought against the Bank in Supreme Court, Wyoming County (Index #27791).

4. No sale of their land by the Sheriff would occur before February 16, 1995.

5. They would be given a right to redemption up to and including February 15, 1995. (Otherwise, the Court was informed, there is no right of redemption from a Sheriff's sale.)

At the date and time set for the "Meeting of Creditors" at Batavia, New York (January 20, 1995), and for a hearing on

the Trustee's Motion to Dismiss and on the Debtors' application to pay the filing fee in installments it was reported to the Court by the Debtors, their counsel, and counsel for the Bank, that the Debtors had decided that they "erred," that they refused to sign the documents to implement the stipulation. They instead proposed a "sale plan" giving themselves up to five years to pay off the bank and reserving the right to continue their lawsuit against the Bank.

Said Plan cannot be confirmed under 11 U.S.C. §1325(a)(3) and shall not be set for hearing. The Plan is not proposed "in good faith," and confirmation must be denied. The Debtors cannot stipulate to put an end to litigation and then "in good faith" propose a contrary Plan in which they promise further delay and further vexatious conduct, including maintenance of the State Supreme Court action.

Moreover, the Debtors have acted in bad faith throughout this case and their prior Chapter 13. Only on January 19, 1995 and in response to a direct Order of this Court did these Debtors obey any Statute, Rule, or previous Order directing the filing of Schedules and Statements, despite their having enjoyed the protection of this Court for most of the previous seven months.

They deceived the Court, first stating that this farm is their livelihood, and later admitting that they wished to sell

the farm and move to "someplace warm." In their earlier case and this case the Debtors claimed inability to afford counsel; now they confess a positive net worth of nearly $200,000. (Had the Debtors' several misrepresentations to the Court been under oath, I would now be referring them for criminal prosecution.) Having enjoyed yet another 16 days of protection since they reached the stipulation, they renege on it, saying "we erred." (Their use of this phrase mimics my ruling in their favor on December 23, 1994, when I decided, that I had "erred" in shortening time on the bank's motion to dismiss the case; said ruling had the practical effect of saving their land for what the Court then believed to be a minimum of three months.)

For these and the other reasons set forth on the record in open court on January 19, 1995, January 4, 1995 and December 23, 1994, this Court is reluctant to relieve the Debtors of their stipulation.

However, a transcript of the pertinent portions of the proceedings of January 4, 1995 (attached) demonstrate that the possibility that the Debtors might default on the stipulation was considered, and it was agreed that in that event (1) the sale would go ahead with all due speed and (2) the Bank would not agree to any right of redemption of the land by the Debtors. This "fallback" position by no means constituted a "right" of the Debtors to change their mind as they now have done. Rather it

was a clear statement of the consequences of defalcation by them.

Now, in open Court in Batavia on January 20, 1995, the Bank renewed its 11 U.S.C. § 109(g) Motion to Dismiss in order to give effect to the "fallback" position contemplated on January 4.

This Court has been reluctant to address the questions of "disobedience" and "voluntariness" that are implicit in some § 109(g) Motions.

This Court believes that justice is better served (now that the Debtors do not stipulate to dismissal) by retaining the case in this Court and enforcing the Bank's rights in its "fallback" position.

The Court will deem the Bank's renewed motion as a Motion to Lift Stay under 11 U.S.C. § 362(d), and it is now Ordered that the stay is lifted to permit the Sheriff's sale "for cause" under 11 U.S.C. § 362(d), said cause consisting of the Debtors' bad faith dealing and lack of fundamental fairness in their dealing in this Court since June of 1994, with their obligations to the Bank.

It is now ORDERED, that

(1) The automatic stay of 11 U.S.C. § 362 is lifted in favor of the Bank.

(2) The Court finds for the reasons expressed on the record on various dates set forth, and for the reasons stated above, that Debtors' refusal to execute the documents necessary

to implement the settlement that was fully reached and placed upon the record in open Court on January 4, 1995 is in bad faith, vexatious, and for purpose of delay and harassment. The Bank should have compensation for the expense of counsel's appearance at Batavia on January 20, 1995 and for the burden of having to make a motion to dismiss the State Court action, rather than having a signed stipulation of discontinuance that it could merely file. The Debtors' abusive attitude toward the sanctity of the processes of this Court and toward the sanctity of the promises and agreements they make under the protection of this Court cannot be visited upon their opponent in the form of added costs and expenses. To order any further hearings in this Court in this regard would simply multiply such costs and expenses. Hence, the Court further Orders, that

(3) Attorney's fees of $350 are assessed against the Debtors for the January 20, 1995 appearance by Bank's counsel, to be added to the amount collectible from the sale of the liened property, if not otherwise paid, and

(4) Additional attorney's fees of $600 are similarly assessed for the need for the Bank to prepare and prosecute a Motion to Dismiss the State Court Action.

These attorney fee awards are assessed upon authority of *Chambers v. Nasco, Inc.*, 501 U.S. 32 (1991), in light of Debtors' bad faith and vexatious actions committed in the

presence of the Court in this case and their prior case, for the purpose of delaying the Bank and for the purpose of multiplying proceedings.

The Trustee's Motion to dismiss the case is continued to the March 14, 1995 Batavia calendar at 2:00 p.m., at which time the case might be dismissed if the Sheriff's sale has been concluded.

SO ORDERED.

Dated: Buffalo, New York
January 26, 1995

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