

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

In Re:

HUGO J. ZAJIA and ROSA ZAJIA,

BK. NO. 91-20156

CHAPTER 7

DECISION AND ORDER

Debtors.

BACKGROUND

On January 22, 1991 the debtors, Hugo J. Zajia and Rosa Zajia (the "Debtors"), filed a voluntary petition initiating a Chapter 7 case. The Debtors' Schedules indicated that Hugo Zajia was employed by Eastman Kodak Company as a film tester. The Trustee's minute report of the Section 341 hearing held on February 26, 1991 indicated that the Debtor, Hugo Zajia, might be entitled to an Eastman Kodak Company bonus, the exact amount of which was unknown. On April 30, 1991 a discharge order was entered by the Court.

On November 21, 1991 the Trustee made a second written demand upon the Debtors' attorney (a prior written demand was made on June 14, 1991 and a copy was attached to the November 1991 demand) requiring that the Debtors turn over to the Trustee the \$1,859.32 Eastman Kodak Company bonus actually received by Mr. Zajia. The Trustee's demand stated that "if I fail to receive the estate assets within that time, I will have no choice but to immediately commence an adversary proceeding in the United States Bankruptcy Court, seeking turnover of the estate assets, as well as reimbursement to the bankruptcy estate for all attorney's fees, costs and disbursements incurred herein."

By motion dated November 26, 1991 and returnable on December 9, 1991 the Debtors moved to amend their schedules to list the Eastman Kodak Company bonus as an asset and claim the same as exempt. On or about December 2, 1992 the Trustee interposed an affidavit in opposition to the motion to amend citing two prior cases of this Court, In re Hess Dell Joiner, 52 B.R. 41 (Bankr.

W.D.N.Y. 1985) and In re Doyle, 42 B.R. 615 (Bankr. W.D.N.Y. 1984), determining that Eastman Kodak bonuses were not exempt property under the applicable New York State exemption statutes and Section 522 of the Bankruptcy Code. By letter dated December 4, 1991 to the Bankruptcy Court the attorney for the Debtors indicated that "after reflection, the motion to amend the bankruptcy petition in the above-captioned matter, which was returnable Monday December 9, 1991 at 9:30 a.m. is being withdrawn."

By motion dated June 9, 1992 and returnable July 13, 1992 the Trustee, pursuant to Section 542(a) of the Bankruptcy Code and Rule 7001(1) of the Rules of Bankruptcy Procedure, requested an order directing the Debtors to turn over the Eastman Kodak Company bonus and awarding attorney's fees, costs and disbursements and/or sanctions as a result of Debtors' unjustifiable and continued refusal to cooperate with the Trustee in turning over the asset which necessitated the motion. The Debtors failed to interpose any response to the Trustee's motion and failed to appear on the July 13, 1992 return date. The Court reserved on the issue of the Trustee's request for attorney's fees, costs, disbursements and/or sanctions.

DISCUSSION

Rule 7001 of the Rules of Bankruptcy Procedure includes in the definition of an adversary proceeding a proceeding "(1) to recover money or property, except a proceeding to compel the debtor to deliver property to the Trustee. . . ." Therefore, the Trustee's request for an order to compel the delivery of the Eastman Kodak Company bonus does not require the commencement of an adversary proceeding but can be brought on by motion as a contested matter in accordance with Rule 7001. However, the Trustee's request for attorney's fees, costs and disbursements would be a proceeding to recover money which is not covered by this exception and thus requires the commencement of an adversary proceeding. It is clear that the Trustee is aware of this important distinction, since his November 21, 1991 written demand on the Debtors' attorney indicated that the failure to turn over

the Eastman Kodak Company bonus would result in the commencement of an adversary proceeding which would also request attorney's fees, costs and disbursements.

The granting of sanctions, presumably pursuant to either Rule 9011 of the Rules of Bankruptcy Procedure or 28 U.S.C. § 1927, does not appear to be warranted in this case. Sanctions under Rule 9011 generally result from the interposing of unfounded pleadings and 28 U.S.C. § 1927 is directed against conduct of attorneys which unreasonably and vexatiously multiplies proceedings in any case. In this case no response to the Trustee's turnover motion was interposed and in fact no action whatsoever was taken by the Debtors' attorney in connection with the motion.

Section 521 of the Bankruptcy Code sets out various duties of the debtor in a bankruptcy case including the duties to "(3) . . . cooperate with the trustee as necessary to enable the trustee to perform the trustee's duties under this title; and (4) . . . sur-render to the trustee all property of the estate . . ." This Court is very concerned, as is the Trustee, about debtors who unjustifiably fail to comply with their duties under Section 521, and who necessitate additional expense to the estate which ultimately reduces the distribution to creditors. As pointed out by the Trustee, in this case the creditors have lost the interest which would have been accruing on the proceeds of the Eastman Kodak Company bonus if it had been received by the Trustee pursuant to his June 1991 demand and deposited by him, as required by law, into an interest-bearing account. In addition, the Trustee asserts that the ultimate distribution to creditors will be reduced by the attorney's fees, costs and expenses unnecessarily incurred by the Trustee in having to bring this proceeding to obtain a turnover order after it became clear in December that the bonus was non-exempt property of the estate. Such losses to the creditors may be recoverable in a proper case in an adversary proceeding commenced by a Trustee for turnover when there has been prior unjustifiable refusals to turn over non-exempt property of the estate. The Court is also aware that the right of a debtor to a discharge may be affected by a failure to turn over estate assets pursuant to Court order.

CONCLUSION

The Trustee's motion for an order requiring the Debtors to turn over the Eastman Kodak Company bonus in the amount of \$1,859.32 is granted. The Trustee's motion for attorney's fees, costs and disbursements incurred in connection with the motion and for sanctions is denied.

IT IS SO ORDERED.

/s/

HON. JOHN C. NINFO, II
UNITED STATES BANKRUPTCY JUDGE

Dated: July 17, 1992