

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re

JORGE M. PARDO, M.D.

Case No. 91-10680 K

Debtor

ORDER AND
MEMORANDUM OF DECISION

This matter turns upon the effect of two identical Orders, signed seven days apart. It is not at all clear why two Orders were entered. Each of the two originals contained in the Court's file is contained in a blue backing. This would seem to belie the possibility that the Court signed both an original and a copy, several days apart. It is possible that counsel submitted two originals, several days apart. It is also possible that because this was a Judge Creahan case and Judge Creahan had retired, counsel simultaneously submitted one original to Judge Creahan's law clerk for review and another to Judge McGuire's chambers for review.

However the error occurred, the fact that two Orders were entered is dispositive of this matter and obviates the need to address the other arguments raised by counsel.

Under this highly unusual circumstance, it was reasonable for the party who was not the party who submitted the Order(s) to presume that the second superseded the first as a matter of law. I consequently reject the last sentence of paragraph 13 of HFC's Opposing Affidavit arguing the contrary. The consequence of HFC's argument in this regard would be to treat the second Order as a

nullity, and it is not. The first Order had vitality for seven days, and then became a nullity because HFC drafted the Order(s) in question and chose that the ordering language measure the sixty days from the date of the Order, rather than from September 18. HFC received both Orders, and if it was concerned about the seven-day difference in signing dates it was free to seek clarification from the Court.

HFC makes a great deal of the perceived lack of good faith demonstrated by the debtor's payment history between March 1, 1991 and November 25, 1991. Counsel's emphasis on the March date somewhat distorts the true picture. In fact the debtor made no payments at all from March 1 until HFC filed its motion on August 6. The debtor then made two payments before September 18. If HFC was concerned that the debtor might not make regular payments between September 18 and the 60th day, it was free to bargain for or fight for, an Order setting forth a schedule of payments to cure arrears over the course of the 60-day period. It did not do so. The Order which was tendered to the Court gave the debtor up to the 60th day (at least) in which to cure all arrears. Even then, the debtor did make two full monthly payments and one partial one (which was dishonored through bank error) during the course of the 60 days, and tendered full payment of all remaining arrears before the 60th date following the signing of the second Order.

Thus the debtor's payment record in fact demonstrates that during the three-month period from August 21 to November 25,

the debtor made four "valid" payments of \$624.00 and, a payment of \$500.00 as well (which bounced through no fault of the debtor). Contrasted with the period from March 1 to August 21 (during which no payments had been made) it appears that HFC is in error in asserting that "clearly, this is not a case of the debtor making a good faith effort to cure the post-petition arrears."

This present motion must be resolved in favor of the debtor. I treat this as a motion under F.R.Civ.P. Rule 60(a) to correct Court error. This also affords an opportunity to afford HFC appropriate protections.

It is hereby ORDERED that the Order dated October 3, 1991, superseded the Order dated September 26, 1991. Consequently, the November 29, 1991 tender (by overnight delivery) of a \$3120.00 official check was timely satisfaction of the 60-day provision of said Order. Similarly, the December 4, 1991 tender of a \$624.00 check (in addition to the re-tender of the \$3120.00 check) was timely as to \$624.00 of December rent. (The mortgage amount was supposed to increase to \$638.00 in that month.)

I presume that January and February payments have not been tendered because of HFC's refusal to accept the above payments. In order that the debtor not be in automatic default as to January and February under the terms of the October 3 Order, I have today conferred with both counsel. The debtor shall have until Friday, February 28, 1992 to cure all post-petition arrears as of that date.

All other provisions of the October 3 Order remain in full force and effect. HFC has leave to apply for attorney's fees.

SO ORDERED.

Dated: Buffalo, New York
February 19, 1992

/S/ MICHAEL J. KAPLAN
U.S.B.J.