UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re

ERNESTO MATA, SR. and
ANGELA MATA — Case No. 98-11893 K

Debtors

The question before the Court is whether it should reconsider its dismissal of this Chapter 13 case and require that the Debtors pay certain administrative expenses: to wit $3,065 sought by the Trustee who served in this case before the Debtors converted their Chapter 7 case to Chapter 13.

This is an unusual case. These Debtors are a mature couple who, like many other such couples, have reciprocal "whole life" life insurance policies for each other's benefit. They and their counsel thought the cash surrender value of these policies to be exempt under state law. The Chapter 7 Trustee here, however, challenged the exemption. This was an issue of first impression, and this Court ruled in favor of the Trustee. See *In re Mata* 244 B.R. 580 (Bankr. W.D.N.Y. 1999).

The Debtors filed an appeal from that decision, but at about that time their then-counsel was suspended from the practice of law for matters completely unrelated to this case, and the appeal was abandoned and the Debtors converted their case to Chapter 13 in an attempt to determine how to pay the value of the life insurance policies by means of a Chapter 13 plan.

The Chapter 13 case did not progress and the Chapter 13 Trustee moved to dismiss the case. The Debtors appeared *pro se* before the Court on one or two occasions.

The Chapter 7 Trustee was not served with the Chapter 13 Trustee's motion to dismiss the case, and was unaware that the Court was considering dismissal of the case. This Judge was unaware that the Chapter 7 Trustee had, in the meantime, filed an administrative expense claim for attorney's fees incurred in the successful effort to have the cash surrender value declared an asset of the estate for the benefit of creditors. (He did so on a "proof of claim" form, rather than as a "Fee Application." Claims that are asserted on "proof of claim" forms are not docketed on the proceeding docket, but rather are docketed on the claims docket. Hence the Court, when looking at the proceedings docket in connection with the motion for dismissal, would not be aware that a proof of claim asserting "administrative status" had been filed.)

At one *pro se* appearance by the Debtors, the Court, on the record in open court, invited the Debtors to seek substitute counsel, and to discuss with substitute counsel the possibility of permitting the Chapter 13 case to be dismissed. The Court informed the Debtors that it is not common for the Court to permit dismissal of a case in which non-exempt assets have been discovered, but that it would do so under the circumstances of this case, if the Debtors, in consultation with substitute counsel, were to conclude that dismissal would be in their best interest. In reliance on the Court's offer, the Debtors obtained substitute counsel who, after consultation with his clients, accepted the Court's invitation, and asked the Court to dismiss the case. The Court did so by Order dated March 3, 2000. Before the case could be administratively

closed, however, the Chapter 7 Trustee, on June 16, 2000, brought a motion "to have Trustee's fees approved." The Debtors opposed through counsel, and the matter was taken under submission by the Court.

This Court has previously examined the rule of "the law of the case." See *In re Gold and Silversmiths, Inc.*, 170 B.R. 538 (Bankr. W.D.N.Y. 1994). Quoting from a different court, this Court adopted this statement of the applicable rule:

> The rule of 'the law of the case' is one largely of convenience and public policy, both of which are served by stability in judicial decisions and it must be accommodated to the needs of justice by the discriminating exercise of judicial power. Thus there is an abundance of authority to the effect that where a prior decision is palpably erroneous, it is competent for the court, not as a matter of right but of grace, to correct it upon a second review where no wrong or injustice will result thereby, where no rights of property have become vested, where no change has been made in the status of the parties in reliance upon the former ruling, and where [the earlier error has been made evident by an intervening decision of another court or in another case].[1]

In the *Gold and Silversmiths* case, this Court emphasized that the doctrine of the law of the case presupposes that the Court made a mistake. If the Court's earlier decision was a correct one, there is no occasion to invoke a doctrine that would permit revisiting it. The doctrine itself can have no meaning unless it is made to apply with regard to an erroneous decision.

The Court finds here that its earlier decision promising dismissal of the case

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[1]Quoting from *In re Reamers' Estate,* 200 A. 35, 37 (1938). [Underline added.]

without having addressed the pending administrative expense claim was "palpably erroneous."[2] But under the circumstances of this case, there can be no question but that the Debtors made the decision (1) to retain new counsel, and (2) NOT to seek to reinstate the appeal, and (3) to withdraw their case, all in reliance on this Court's promise. Together these constitute detrimental reliance.[3]

It is regrettable that diligent, capable, and productive effort by the Trustee and his counsel in this case, undertaken for the benefit of creditors, will go uncompensated in this case. But there occasionally are cases in which professionals such as appraisers, brokers, accountants, lawyers, or others, are employed by bankruptcy estates pursuant to 11 U.S.C. § 327, and are left at the end with no funds from which to be compensated. This is a risk that all professionals who serve bankruptcy estates are aware of, understand, and accept. Though the absence of funds here results from a "palpably erroneous" decision by the Court, the result would have been the same had the Debtors successfully pursued the appeal from this Court's decision that had been filed by their first attorney. It is not unheard-of for brokers, appraisers, or other professionals to be retained to pursue what is thought to be a "sure thing" in terms of producing a fund of unencumbered money from which to pay professional fees, only to be left out in the cold (despite

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[2]This writer has never knowingly dismissed an asset case without assuring that all administrative expenses have been paid, whether or not claims for such expenses had yet been filed in proper form.

[3]Dismissal of the case must not be viewed as a "win-win" result for these Debtors. Dismissal ended the protection of the court and the prospect of discharge. The Debtors (and their insurance policies) are again at the mercy of their creditors.

the best efforts of the Court and others to assure that this does not happen). There never is a "sure thing."

The underpinnings of the doctrine of "law of the case" and other similar doctrines of judicial finality are not to be eroded when it is an erroneous ruling, rather than some twist of fate, that converts the cash surrender value of these policies from a "sure thing" to a lost opportunity.

The Trustee's motion is denied. This case stands dismissed.

SO ORDERED.

Dated: Buffalo, New York
September 19, 2000

/s/ Michael J. Kaplan

Michael J. Kaplan, U.S.B.J.