

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



U.S.B.J.

1 UNITED STATES BANKRUPTCY COURT
2 WESTERN DISTRICT OF NEW YORK

ORIGINAL

3 IN RE:

4 PETER & GAIL ZINKIEVICH,
5 Debtors.

BK #94-13662

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9 Excerpt of proceedings held before
10 the HONORABLE MICHAEL J. KAPLAN, United States
11 Bankruptcy Court Judge, taken in Room 310, Part I of
12 the United States Courthouse, 68 Court Street,
13 Buffalo, New York, on January 4, 1995, commencing at
14 2:07 P.M.

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16 APPEARANCES: WOODS, OVIATT, GILMAN,
17 STURMAN & CLARKE,
18 BY: ROBERT L. SERENKA, JR., ESQ.,
19 44 Exchange Street,
20 Rochester, New York 14614,
21 Appearing for Wyoming County Bank.

VINCENT O. LADD, ESQ.,
52 N. Main Street,
Warsaw, New York 14569,
Appearing for the Debtors.

22 PRESENT: BARBARA BUYERS,
23 Court Reporter.

24 ORIGINAL
25

FILED
1995 JAN 24 AM 10:29
WESTERN DISTRICT OF NEW YORK
BUFFALO

1 MR. SERENKA: Judge, if I
2 may, we've reached an accord, which I'd like to
3 put on the record.

4 THE COURT: Go ahead.

5 MR. SERENKA: The bankruptcy
6 motion, the bank's motion pursuant to 109-G-1
7 will be settled in the following manner:

8 Counsel will file with the Court a
9 stipulation and order dismissing the case
10 pursuant to Section 109-G-1 of the Bankruptcy
11 Code. The order will provide that this Court
12 will have jurisdiction over the case until
13 February 15th, 1995.

14 If a sale has been -- if good funds
15 have been tendered to the bank for the full
16 amount of the judgment, together with
17 disbursements, expenses, attorney's fees and so
18 forth as awarded by the state court, then the
19 bank will agree to accept those funds in payment
20 of the judgment.

21 If, however, good funds are not
22 received by said February 15th, then the bank
23 will be free to schedule a sale on or after the
24 following day, which will be February 16th, 1995,
25 as soon as it can arrange to have that sale

1 scheduled.

2 The Zinkieviches and counsel also
3 agree that in the state court action, which is
4 currently pending against the bank, the
5 stipulation settlement will be filed providing
6 that the Zinkieviches withdraw their claim
7 against the bank and also obtain a general
8 release running from the Zinkieviches to the
9 bank.

10 The stipulation of settlement will
11 be filed -- signed by both the debtors and
12 debtors' counsel and counsel for the bank and
13 also the stipulation will be filed with the state
14 court within ten days of today's date. If that
15 doesn't occur, then the sale will go forward as
16 previously described.

17 I believe that that encompasses the
18 agreement which was reached. I'd ask Mr. Ladd
19 and his clients if they would speak to that.

20 THE COURT: Clarification.

21 MR. SERENKA: Yes, Judge.

22 THE COURT: You say that if
23 the stipulation of settlement of the state court
24 action is not filed within ten days, then the
25 sale will proceed as you previously described.

1 MR. SERENKA: On the 15th.
2 In other words, that would also constitute a
3 violation of the terms of the stipulation of
4 settlement in the Bankruptcy Court.

5 THE COURT: Even if they
6 were to tender good funds, but not to a
7 withdrawal --

8 MR. SERENKA: Yes, because
9 Judge, part of the consideration of forbearance
10 by the bank of settling the motion in this
11 fashion is to have the state court action
12 discontinued and to have on -- and to have the
13 release running from the Zinkieviches. That
14 constitutes part of the consideration.

15 If that consideration does not come
16 across, then the bank is not in a position to
17 forebear at that point, and the sale will go
18 forward again on the 15th. So the consideration,
19 if I can clarify for the Court, consists of both
20 the funds being tendered by that date and the
21 stipulation of settlement of the state court
22 action. Those two things constitute the
23 consideration for the forbearance in this matter.

24 THE COURT: If they were to
25 tender good funds but not stipulate to the

1 dismissal of the state court action, would they
2 have the right to stop the sale? I'm not saying
3 under the terms of your agreement, I'm saying
4 under state law.

5 MR. SERENKA: In my
6 understanding, there is no right of redemption.

7 THE COURT: No right of
8 redemption?

9 MR. SERENKA: That's my
10 understanding.

11 THE COURT: Mr. Ladd?

12 MR. LADD: Your Honor, I
13 believe that would be correctly stated by
14 Mr. Serenka. The only other point would be that
15 that state court is in the New York State Supreme
16 Court, County of Wyoming under index number
17 twenty-seven thousand seven hundred ninety-one in
18 an action entitled Peter Zinkievich, Junior and
19 Gail Zinkievich against Wyoming County Bank.

20 That stipulation would discontinue
21 that without costs to any party and it would be a
22 stipulation of discontinuation on the merits
23 which would be with prejudice, so that it could
24 not be brought again.

25 MR. SERENKA: I would draft

1 the order, Judge.

2 THE COURT: All right. I'm
3 also -- the Court has an interest in this as
4 well, and I want to make it clear. I want that
5 order to say that if the case is dismissed
6 pursuant to the agreed-upon terms, then any new
7 bankruptcy filing by the Zinkieviches within a
8 hundred and eighty days thereafter will not
9 reinstate any automatic stays with regard to any
10 sale of property.

11 So that if there is -- if this case
12 is dismissed and if, perhaps state court blocks
13 the sale or something of that nature, that the
14 bankruptcy process is not going to get abused.

15 Additionally, I want schedules and
16 statements. This is the second petition that the
17 Zinkieviches have filed since last summer, and
18 I've never had a sworn statement as to what you
19 own and what you owe, and that is a horrendous
20 abuse of the bankruptcy process.

21 So I don't care what you've agreed
22 to with Wyoming County Bank, I want the schedules
23 and statements filed. Everybody else, of the
24 thousands of people who file for bankruptcy
25 relief in the Western District of New York are

1 required to do it; I don't know why you don't
2 have to. You've never told this Court what you
3 owe and what you own.

4 And I want -- now, when do you
5 think you can have those prepared, Mr. Ladd?
6 They're forms, you just fill out the forms.

7 MR. LADD: I believe I
8 have the forms, Your Honor. I would have to see
9 how long it would take you to get the information
10 to me. If you would come by my office tomorrow,
11 I'll show you what information I need to prepare
12 those forms, and I would think if they could get
13 that information back to me by next week, I will
14 try to have them filed by the end of next week.

15 THE COURT: The expenses
16 and time have been taken up and largely, it's
17 because they have represented to the Court that
18 they haven't been able to afford counsel, but
19 they have never signed a sworn statement that
20 tells this Court what they owe and what own.

21 For all I know, that farmland has
22 no mortgages on it. For all I know, you have
23 hundreds of thousands of dollars worth of equity
24 in that farm. I do not know -- you smile, but
25 what have you filed with this Court that tells me

1 your true financial picture, in the more than six
2 months that you've enjoyed the protection of this
3 court, from June through, I believe November, and
4 then since December 21st?

5 MR. LADD: Your Honor?

6 THE COURT: Yes.

7 MR. LADD: As far as the
8 values of their real property, I'm not sure that
9 they have an appraisal on that, but I would
10 attempt to secure the assessed valuations and the
11 equalization rates for their appropriate town. I
12 believe they have property in two towns.

13 THE COURT: That's fine.

14 Now, I don't know that I need that as a requisite
15 to the relief that has been agreed to with the
16 bank.

17 MR. SERENKA: If I understand
18 the Court correctly, you don't want that aspect,
19 the schedules and statements, to be part of the
20 order.

21 THE COURT: Well, I think
22 what I need is, I want a separate order directing
23 them to file schedules and statements, and I want
24 it to be understood, I want there to be some
25 language in the order that you're submitting,

1 Mr. Serenka, that the Court has the discretion to
2 issue an order lifting the stay rather than an
3 order of dismissal on the 15th of February, if
4 the Court's requirements have not been met.

5 Maybe there's a better way to do
6 that, but the point is that the sale -- if what
7 has been agreed with the bank is not forthcoming,
8 the bank should be permitted to go ahead and
9 sell. But I'm not certain that I want anybody
10 who files process -- who seeks the protection of
11 this court, but doesn't perform any duties of the
12 debtor in this court, to be able to say simply,
13 well, the case is dismissed and walk away.

14 MR. SERENKA: I understand.
15 If I may raise my concern with the Court. In
16 order to get the sale schedules for that date,
17 we'll need to take action now, which may violate
18 the stay, if the Court should decide rather
19 than --

20 THE COURT: I see. You
21 want the dismissal now?

22 MR. SERENKA: The dismissal
23 now, so we don't have to get into a situation to
24 define how the stay is modified to permit the
25 bank to go forward. If the dismissal is now, we

1 don't have to -- and I gave some thought to this
2 on the drive over, because I don't want to put
3 the Court in a position where we're trying to
4 define the modification of the stay.

5 THE COURT: Well, let me
6 just say, then, do the order the way you said,
7 but I want a separate -- and incorporating what I
8 said about any new filings within one hundred
9 eighty days after February 15th.

10 I want a separate order, it's my
11 own order, it's not going to have any effect on
12 whether the case is dismissed, I want schedules
13 and statements filed. The case is going to be
14 dismissed in the meantime, but I want compliance
15 with my order.

16 I don't permit people to go -- to
17 have the protection of this court month after
18 month after month and never sign anything that
19 tells the Court what it is that they owe and what
20 it is that they own. I do not know what
21 creditors there may be who have not received -- I
22 guess all -- do you know -- who did you notice in
23 this motion? You don't know who the creditors
24 are, do you?

25 MR. SERENKA: There's no

1 matrix. We noticed the debtors and the trustee.

2 THE COURT: See, we
3 don't -- a motion to dismiss a case should be on
4 notice to all creditors, but we don't even know
5 who they are. I don't know what I may be doing
6 here and blessing as between the Zinkieviches and
7 Wyoming County Bank that some other creditors may
8 be saying, well, what about us, how are we being
9 protected here.

10 They don't even know that any of
11 this is going on. They don't even know perhaps
12 that the Zinkieviches are in bankruptcy because
13 they never told us who their creditors are. So I
14 want an order directing them to file those
15 schedules and statements within fifteen days.

16 MR. SERENKA: I will prepare
17 two orders, Judge.

18 THE COURT: Thank you. The
19 Court is in recess.


20 MR. SERENKA: Thank you,
21 Judge.

22 (The proceedings concluded at 3:50
23 P.M.)

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I certify that the foregoing is a correct transcription of the proceedings recorded by me in this matter.



BARBARA BUYERS, CSR, RPR
Notary Public.