

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

In re:

MELVYN BENTLEY [Deceased],

Debtor.

Chapter 12
Case No.: 98-11908

SYLVIA J. BENTLEY, Administratrix of the
Estate of Melvyn Bentley,¹ and MARK W.
SWIMELAR, ESQ., as Chapter 12 Trustee of
the Estate of Melvyn Bentley,

Plaintiffs,

- against -

THOMAS G. CLEMENTS, ESQ. and THE
CLEMENTS FIRM,

Defendants.

Adv. Pro. No.: 02-90374

APPEARANCES:

MARK W. SWIMELAR, ESQ.
250 South Clinton Street
Suite 504
Syracuse, New York 13202

Chapter 12 Trustee

ROGER GROMET, ESQ.
Attorney for Sylvia J. Bentley
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Richard B. Thaler, Esq.

¹ By Order of this court dated December 6, 2004, Sylvia J. Bentley, Administratrix of the Estate of Melvyn Bentley, was substituted for the Plaintiff, Melvyn Bentley, in the above-captioned adversary proceeding. (No. 100.)

ROCHE, CORRIGAN, McCOY & BUSH
Attorneys for Defendants
The Wilem Van Zandt Building
36 S. Pearl Street
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Scott W. Bush, Esq.

The Honorable Robert E. Littlefield, Jr., United States Bankruptcy Judge

MEMORANDUM-DECISION AND ORDER

Before the court are competing motions for summary judgment with respect to legal malpractice and judiciary law violation claims by Sylvia J. Bentley, Administratrix of the Estate of Melvyn Bentley, and Mark W. Swimelar, Esq., Chapter 12 Trustee (the “Trustee”) to the Estate of Melvyn Bentley (the “Plaintiffs”) against Thomas G. Clements, Esq. and The Clements Firm (the “Defendants”), arising out of the post-petition legal services provided by Clements during his representation of Melvyn Bentley (the “Debtor”) and Annaquasicook Farm, Inc. (“AFI”), of which the Debtor was principal and sole shareholder, in connection with AFI’s and the Debtor’s Chapter 12 bankruptcy cases. The competing summary judgment motions were the subject of this court’s prior Memorandum-Decision and Order dated October 24, 2004 (the “Oct. 2004 Decision”) (No. 86), wherein the court determined that neither party was entitled to judgment as a matter of law because a question of fact existed as to when the attorney-client relationship terminated, and the answer to that factual question would be dispositive of the Defendants’ statute of limitations defense (Oct. 2004 Decision at 7). On December 14, 2004, the court held a limited evidentiary hearing on whether the case was time-barred by the three-year statute of limitations applicable to legal malpractice claims. By Order dated October 21, 2004 (No. 103), the court dismissed the Defendants’ statute of limitations defense and restored their motion for summary judgment (No. 51) and the Plaintiffs’ motion for summary judgment (No. 59) to its calendar. The court held a final

hearing on the competing motions on January 5, 2005, at which time the matters were taken under advisement.

JURISDICTION

The court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§ 157(a) and 1334(b). Although the adjudication of a legal malpractice claim involves state law, this adversary proceeding is a core proceeding under 28 U.S.C. §§ 157(b)(2)(A) and (O). *See In re SPI Communications & Marketing Inc. v. Sanders*, 114 B.R. 14, 18 (N.D.N.Y. 1990) (suit for legal malpractice deemed a core proceeding where the claims arose post-petition and they were therefore inextricably connected to the bankruptcy proceeding such that they would not have existed but for the bankruptcy petitions).²

² The court does not, however, assert jurisdiction over the alleged acts of malpractice which occurred in connection with the Defendants' representation of AFI, Chapter 12 Case No. 97-10023. The court takes judicial notice of the docket in AFI's case. *See* FED. R. EVID. 201; *see also In re Emmett*, Case No. 04-61064, Adv. No. 04-80148, slip. op. at 7 n.2 (Bankr. N.D.N.Y. Nov. 1, 2004) ("A bankruptcy judge may take judicial notice of the court's records.") (citing *Matter of Holly's Inc.*, 172 B.R. 545, 553 n.5 (Bankr. W.D. Mich. 1994); *In re Calder*, 907 F.2d 953, 955 n.2 (10th Cir. 1990)). AFI filed for Chapter 12 bankruptcy relief on January 3, 1997. Clements entered that case as substituted counsel on May 2, 1997. (*See* Ch. 12 Case No. 97-10023, No. 13.) The Plaintiffs' Second Amended Complaint (No. 21) states that "[t]his is a legal malpractice action arising out of and under Defendants' representation of Plaintiff *and Plaintiff's wholly owned corporation, AFI, in two bankruptcy proceedings . . .*" (Second Am. Compl. at 2) (emphasis added). Specifically, the Plaintiffs allege, *inter alia*, that (1) Clements submitted an improper Chapter 12 Plan for AFI (*id.* at 2), (2) Clements failed to object to the lift stay motion made pursuant to 11 U.S.C. § 362 by John Deere Co. against AFI (*id.* at 4); and (3) Clements improperly settled a collections action commenced by AFI against Cambridge Valley Eggs, Inc. to recover a \$70,000 account receivable (*id.*). Review of the docket in AFI's Chapter 12 case shows that AFI's case was dismissed upon the motion of the Trustee for failure to make plan payments by Order dated September 24, 1998. (Ch. 12 Case No. 97-10023, No. 88.) AFI's case was subsequently closed on October 20, 1999. The Plaintiffs' did not move to reopen AFI's case; thus, there cannot be any "related to" jurisdiction here, 28 U.S.C. § 1334(b) ("the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11 or arising in or related to cases under title 11"), since there is no longer any underlying bankruptcy estate. Furthermore, AFI filed a Certificate of Dissolution on March 5, 1999. (Ex. 10 to the *Gromet Aff. in Supp.*) For what it may be worth, the parties do not dispute that AFI executed a general release of all claims against the Defendants on or about March 29, 2000.

FACTUAL AND PROCEDURAL BACKGROUND³

On May 5, 1997, the Bentleys retained the Defendants to represent them and AFI by letter agreement which was executed by the Bentleys “individually” and “as officers of AFI.” (Engagement Letter, Ex. 1 to the *Aff. of Scott W. Bush in Supp. of Defs.’ Mot. for Summ. J.*, March 5, 2004 (“*Bush Aff. in Supp.*”) (No. 53).) At the time, the Debtor was primarily engaged in the business of planting and harvesting corn. The Bentleys owned and operated AFI for twenty-three years prior to filing their voluntary petition for bankruptcy relief on March 20, 1998.⁴ (No. 1.) At the peak of the Debtor’s farming business in the mid-1990’s, he farmed 1,000 acres of land. (*Pls.’ Answers to Defs.’ First Interrog. and Combined Disc. Demands* ¶ 38, Ex. 3 to the *Bush Aff. in*

Accordingly, the court references the AFI bankruptcy case only when the facts of that case are inextricably intertwined with the case *sub judice*.

³ In deciding the motions at hand, the court is cognizant of the severity of the accusations against Clements, *see, e.g., Rush v. Savchuk*, 444 U.S. 320, 331 n.20 (1980) (“Professional malpractice actions . . . question the defendant’s integrity and competence and may affect his professional standing.”), yet it must not lose sight of the rights of the client, whose trust may have been breached. Summary judgment, if granted, prevents the parties from having their day in court; given the high stakes of the case *sub judice*, the court has scoured the record to determine the merits of the pending summary judgment motions. The court’s findings of fact, therefore, are based on the parties’ voluminous submissions and the court’s independent examination of the record. The court notes that the parties did file statements of undisputed facts in support of their respective motions as required by Local Bankruptcy Rule 7056-1; while Clements’ statement (No. 55) is largely uncontroverted (*see Pls.’ Comments to Defs.’ Statement of Facts Not in Dispute* at 1 (No. 68) (“Plaintiff finds the Defendants’ ‘Statement of Facts Not in Dispute’ partially correct in Paragraphs 1 through 9. The statements are true, except that they do not all tell the whole story—present the facts in context.”)), all but one of the nine paragraphs included in the Plaintiffs’ statement (No. 62) are disputed (*see Response to Pls.’ Statement of Undisputed Facts and Setting Forth Disputed Facts* (No. 66)).

⁴ By Order dated November 23, 1998 (No. 29), the Debtor and Mrs. Bentley’s joint Chapter 12 case was severed and Mrs. Bentley’s case was converted to one under Chapter 7, Case No. 98-17667. The court takes judicial notice of the docket in Mrs. Bentley’s case pursuant to Federal Rule of Evidence 201. On April 6, 1999, the court granted Mrs. Bentley a discharge (Ch. 7 Case No. 98-17667, No. 6), and her case was subsequently closed on April 14, 1999.

Supp.) The Debtor's income stream was derived from the sale of corn, land rentals, harvesting, trucking, drying, and storing corn for other farmers, occasional lumber sales, and receipt of government subsidies. (*Id.* ¶ 59-60.) Beginning in 1997 or 1998, the Debtor also began to receive Social Security disability benefits in the gross approximate amount of \$770 per month; Mrs. Bentley also received monthly Social Security disability benefits. (*See Debtor's Dep.* at 18-19, Dec. 16-17, 2003, Ex. 7 to the *Bush Aff. in Supp.*)

The Debtor's severe financial difficulties began in 1995, the first of three consecutive disaster years, 1995 through 1997 (*id.* at 55), which were plagued by either excessive rainfall or drought. In 1995, the Debtor planted 100 acres less than he had in 1994; the lost acreage amounted to a monetary loss of \$100,000. (*Id.* at 55-56.) In 1996, the Debtor's estimated corn loss was \$198,000. (*Id.* at 59.) The figures for 1997 are unclear, but the Debtor testified that he could not satisfy all of his debt from the corn proceeds that year. (*Id.* at 69-73.) Specifically, the Debtor recalled that he could not pay Pioneer Seed Company or Agway Petroleum. (*Id.*)

In 1997, the Debtor's financial situation was so dire that he allegedly obtained counsel to assist him in obtaining a Farm Service Agency ("FSA") emergency loan through the United States Department of Agriculture FSA Emergency Program for Disaster Assistance (the "FSA Program") so that he could purchase crop inputs, fertilizer, and other supplies, as well as refinance his debts and reorganize the family farming operation. (*Id.* at 98.) The Debtor did not recall whether the Defendants had been retained at the time he first learned of the FSA loan availability (*id.*), and the record is unclear as to who prepared AFI's Request for Direct Loan Assistance (the "FSA Application"), which was dated January 3, 1997 (Ex. 9 to the *Bush Aff. in Supp.*). Under the "Applicant's Name" entry, Melvyn Bentley was crossed out and replaced with AFI. Pursuant to the

instructions that “[b]usiness organizations must provide individual members’ balance sheets” (*id.*), the Debtor’s personal information was also provided. AFI sought to borrow \$155,775 from the FSA despite that it was in bankruptcy. (*Id.*) AFI’s FSA Application was denied, however, for failure to meet the “management and credibility” requirements of the FSA Program. (*Debtor’s Dep.* at 104, Jan. 9, 2004, Ex. 7 to the *Bush Aff. in Supp.*)

According to the Debtor, Clements attempted to substitute the Debtor for AFI on the FSA Application. (*Id.* at 108.) When asked to explain the FSA process, the Debtor stated that the first attempt was rejected on the basis of management and credibility, the second attempt was rejected on the basis of an inadequate farm and home plan, and the third attempt was to substitute him in his individual capacity for AFI; after that, his recollection became “murky.” (*Id.* at 110.) The record in this case, however, includes the Executive Session Minutes of the USDA FSA, Washington County FSA Committee, for the September 4, 1997 hearing on the application of AFI for a \$155,000 emergency loan. (Ex. 15 to the *Gromet Aff. in Supp.*) The background provided therein is as follows:

[AFI] had applied for a \$100,000 operating loan during the spring of 1997. *On April 29, 1997*, the [County FSA Committee (“COC”)] determined that [AFI] was not eligible for FSA loan assistance for the following reasons:

1. Lack of credit-worthiness due to the current amount of liabilities.
2. Lack of reasonable prospects for success due to the financial deterioration of the farm business.

[AFI] is currently under Chapter 12 bankruptcy protection. Mr. Bentley is applying for a \$155,000 Emergency loan based on 1996 crop corn losses. Mr. Bentley and his attorney requested to meet with the COC to explain the financial condition of [AFI] and explain how the applicant would be able to repay the loan.

(*Id.*) (emphasis added.) The FSA stated that AFI’s cash flow projections assumed that AFI would receive the FSA loan, but also, notably for our purposes here, the FSA minutes stated that the Debtor “talked of generating cash by selling real estate, selling equipment, or selling timber.” (*Id.*)

Although the record fails to include the complete history of AFI or the Debtor's involvement with the FSA, it appears that two subsequent decisions were rendered by the FSA on October 29, 1997 and November 19, 1997, both of which were adverse to AFI. (See USDA, National Appeals Division (NAD) Jan. 30, 1998 Appeal Determination, Ex. 6 to the *Answering Aff. of Roger Gromet, Esq.*, Mar. 17, 2004 (“*Gromet Answering Aff.*”) (No. 70).) Although AFI appealed the FSA decisions to deny AFI emergency assistance (*id.*), it is undisputed that neither AFI nor the Debtor received the FSA loan despite the Defendants' best efforts.

The Defendants ultimately commenced a lawsuit on the Debtor's behalf against the United States Department of Agriculture (“USDA”) in relation to the FSA's denial of emergency relief to the Debtor (*id.* at 107).⁵ The Debtor was never aware of any proposals by the USDA or the FSA to resolve that litigation. (*Debtor's Dep.* at 111, Dec. 16-17, 2003.)

In addition to looking to the FSA for assistance in 1997, the Debtor and Clements approached Agway to extend credit to AFI and the Debtor for 1997 planting supplies. At the time, the Debtor owed Agway \$80,000 in unsecured debt in connection with the Debtor's purchases for the 1996 farming season. (*Id.* at 225.) AFI was already in bankruptcy when Clements began negotiations with Agway's counsel, Solomon & Solomon, P.C. (Douglas M. Fisher, Esq.). On May

⁵ Court records show that the Defendants commenced an adversary proceeding captioned *Melvyn Bentley v. Dan Glickman, a/k/a Secretary, USDA, and Christy Marshall, a/k/a FSA Agricultural Loan Officer*, Adv. Pro. No. 98-91380, on December 15, 1998, alleging that the USDA and the FSA had illegally and unfairly discriminated against the Debtor, resulting in the denial of a loan to either AFI or the Debtor. The United States District Court for the Northern District of New York withdrew its reference of the adversary proceeding to this court on February 5, 1999. The District Court's docket shows that the Defendants withdrew as attorney of record for the plaintiff in that case by Order dated May 23, 2000. (*Bentley v. Glickman*, No. 99-CV-00169 (No. 24).) It is undisputed that the Debtor did not recover anything from that lawsuit.

2, 1997, Agway's counsel moved for an order authorizing AFI to incur post-petition debt (1) not to exceed \$60,000 for the purchase of supplies from Agway for the 1997 season, and (2) not to exceed \$20,000 for the purchase of seed from the Pioneer Seed Company for the 1997 corn crop (the "Agway Deal"). (Ch. 12 Case No. 97-10023, No. 17.) The agreed upon terms of the Agway Deal were as follows: (1) Agway obtained a security interest in AFI's 1997 corn crop and administrative priority status for its claim; and (2) Agway obtained a security interest in AFI's equipment to secure its \$80,000 pre-petition debt. The Debtor and AFI had no other source to obtain materials for the 1997 farming season (*Debtor's Dep.* at 226-28, Dec. 16-17, 2003), and the court approved the Agway Deal by Order dated May 8, 1997 (Ch. 12 Case No. 97-10023, No. 17). The Debtor was able to satisfy only \$60,000 of the Agway debt prior to the filing of his individual bankruptcy petition by delivering his 1997 corn crop to Agway pursuant to their post-petition financing agreement. (*Debtor's Dep.* at 246, Dec. 16-17, 2003.)

As of the date of filing of the Debtor's Chapter 12 voluntary petition, the Debtor's Schedule A—entitled Real Property—listed six parcels of real property: (1) a 102-acre parcel, 60 of which was crop land, that included a drying system; (2) a 229-acre wooded parcel; (3) a 4-acre homestead; (4) a 5.5-acre parcel with 2 silos; (5) a 112-acre parcel, 30 of which was crop land and 82 of which was woods; and (6) a camp parcel. The Debtor listed the aggregate market value of the real property as \$771,000. According to Clements, however, the aggregate appraised value of the real property ranged from \$400,000 to \$480,000. (*See Reply Aff. of Thomas G. Clements* ¶¶ 12-13, Mar. 3, 2000, Ex. 34 to the *Gromet Aff. in Supp.*)⁶ The Debtor's Schedule D—entitled Creditors Holding Secured

⁶ In an attempt to provide the full factual background underpinning the parties' relationship, the court observes that the referenced Affidavit was filed in the context of a state court action, *The Clements Firm v. Annaquasicook Farm, Inc.*, Index No. 38889, Warren County

Claims—identified First Pioneer Farm Credit, ACA (“First Pioneer”) as a mortgagee with a lien on the Debtor’s real property and equipment in the amount of \$262,000. On Schedule B—entitled Personal Property, the Debtor listed fourteen pieces of farming equipment with an aggregate value of \$130,100. The Debtor’s Schedule D, however, indicated that certain pieces of equipment were secured; the Debtor’s secured debt, excluding the mortgage held by First Pioneer, totaled \$171,858.17. The Debtor specifically identified seven liens on either real property or farming equipment, including: (1) the \$7,633.77 lien of Case Credit collateralized by a 1486 International Harvester Tractor valued at \$12,000; (2) the \$8,690.40 lien of Case Credit collateralized by a 1996 Land Commander Chisel Plow with Discs valued at \$7,000; (3) the mortgage held by First Pioneer; (4) the \$17,000 mortgage held by Holden Corp. for corn purchased; (5) the \$80,000, 1997 planting supplies mortgage held by Agway, Inc.; and (5) the \$40,000 lien of New Holland Credit collateralized by a J.D. 4850 Tractor valued at \$35,000. Finally, the Debtor listed on Schedule F—entitled Creditors Holding Unsecured Nonpriority Claims—total unsecured debt in the amount of \$102,404.92.

A comparison of the Debtor’s Schedules reporting income and expenditures shows that the Debtor did not have sufficient funds on a monthly basis to meet his monthly expenses: the Debtor’s Schedule I—entitled Current Income of Individual Debtor(s)—listed total monthly income from Social Security in the amount of \$1,000; the Debtor’s Schedule J—entitled Current Expenditures of Individual Debtor(s)—listed total monthly expenses in the amount of \$2,022. The Debtor did not

Supreme Court, wherein the Defendants sought an Order of Attachment as to the real property of AFI in order to satisfy AFI’s outstanding legal bills for services rendered by the Defendants. The parties filed a Stipulation Discontinuing that Action, however, on April 4, 2000. (Ex. 35 to the *Gromet Aff. in Supp.*)

include installment payments for any of his farming equipment on Schedule J. The Debtor reported under Question 1 of his Statement of Financial Affairs (the "Statement") gross income for 1994 from the operation of AFI in the amount of \$4,655, a loss from the operation of AFI in 1995 in the amount of \$64,763, and gross income for 1996 in the amount of \$37,734. Under Question 2 of the Statement, the Debtor reported 1997 income from Social Security benefits in the amount of \$6,000. Under Question 4a of the Statement, the Debtor listed one lawsuit against him, captioned AmeriGas vs. Bentley, which resulted in a Judgment against him. In response to Question 5 of the Statement, the Debtor reported that Case Credit had repossessed a 1486 I.H. Tractor and Plow valued at \$12,000 in October 1997.

The Debtor's first proposed Chapter 12 Plan (the "Plan") contemplated funding by the Debtor of \$192,600 over a sixty month term, with lump sum payments ranging from \$30,000 to \$72,600 in June of each year from 2000 through 2003. (No. 11.) The Plan was filed on July 14, 1998, and it provided, *inter alia*, for: (1) monthly "interest-only (contract rate) payments" to First Pioneer in the amount of \$1,853.98 to be made inside the Plan; (2) four lump sum payments of \$20,000 in September of each year from 1998 through 2001 to Agway; (3) surrender of certain equipment to Case Credit; and (4) a 50% distribution to holders of allowed, joint unsecured claims, and a 10% distribution to holders of allowed, unsecured claims for which Mrs. Bentley was personally liable. Through the Plan, the Debtor also sought to reject a real estate brokerage contract with Classic Homes. That Plan, however, was never confirmed.

According to counsel for First Pioneer, McNamee, Lochner, Titus & Williams, P.C. (Kevin Laurilliard, Esq.), First Pioneer worked cooperatively with the Debtor at the inception of AFI's bankruptcy case and through the filing of the Debtor's individual case. (*See Affirmation in Opp'n*

of *Kevin Laurilliard* ¶ 4, July 23, 1999 (No. 44).) Specifically, First Pioneer agreed to lower its monthly payments during the term of the bankruptcy proceedings from \$2,564.74 stated in its promissory note (Ex. 18 to the *Gromet Aff. in Supp.*) to \$1,853.98 and it agreed to a fixed rate of interest in order to facilitate the Debtor's successful reorganization. (*See Affirmation in Opp'n of Kevin Laurilliard* ¶ 4, July 23, 1999.) In addition, First Pioneer agreed to subordinate its existing lien of the Debtor's machinery and equipment to Agway, who, under terms discussed *supra*, agreed to provide additional financing to AFI to cover AFI and the Debtor's 1997 operating expenses. (*Id.* ¶ 5.)

Notwithstanding, on June 3, 1998, First Pioneer moved for relief from the automatic stay, *see* 11 U.S.C. § 362, in order to enforce its state court rights under its note and mortgage (the "First Pioneer Motion"). (No. 5.) First Pioneer alleged that cause existed to lift the stay because the Debtor had defaulted in making monthly post-petition payments and the Debtor and Mrs. Bentley were due for May and June 1998. First Pioneer's counsel included the standard default language, *see* Federal Rule of Bankruptcy Procedure 9014 and former Local Bankruptcy Rule 9013-4,⁷ and, in the event opposition was filed so as to require appearances, scheduled the hearing for June 18, 1998 (No. 5). Opposition, if any, was due on or before June 15, 1998. On June 16, 1998, Clements filed opposition on behalf of the Debtor to the First Pioneer Motion in the AFI case (Ch. 12 Case No. 97-10023, No. 72), but he did not file opposition in the Debtor's individual bankruptcy case. On June 18, 1998, the court signed a default Order granting the First Pioneer Motion (No. 7), thereby allowing First Pioneer to commence a state court foreclosure action in the New York State

⁷ Former Local Bankruptcy Rule 9013-4 provided for default motion practice with respect to motions to terminate or modify the automatic stay pursuant to 11 U.S.C. § 362(d). *See* Local Bankruptcy Rule 9013-4(a) and (b)(23) (effective Jan. 1, 1998).

Supreme Court, Washington County, against the Debtor and other necessary defendants. (*See Ex. 25 to the Gromet Aff. in Supp.*)

Upon Clements' request, the court issued an Order to Show Cause on November 4, 1998 (No. 24) as to why First Pioneer should not be enjoined from continuing its foreclosure action upon the recommencement of monthly mortgage payments to First Pioneer. The Order to Show Cause was resolved by Stipulation and Order dated December 7, 1998 (No. 31). The Stipulation and Order provided, *inter alia*, for: (1) withdrawal of the Debtor's request to enjoin First Pioneer from continuing with its foreclosure action; (2) permission for First Pioneer to proceed with its foreclosure action to the point where First Pioneer would take a judgment of foreclosure against the Debtor; (3) payment of attorney's fees to First Pioneer's counsel in the amount of \$3,405.49; and (4) ongoing monthly payments by the Debtor to the Trustee in the amount of \$2,000 in order to satisfy the monthly mortgage payments to First Pioneer in the amount of \$1,853.98. On March 5, 1999, Clements wrote to the court asking for a comfort order for the Trustee to allow the Trustee to disburse payments to First Pioneer on a monthly basis prior to confirmation of the Debtor's Plan. On March 8, 1999, the court entered an Order (No. 35) essentially confirming the terms of the parties' prior Stipulation and Order. First Pioneer ultimately obtained an enforceable judgment of foreclosure in the state court action on March 23, 1999. (*Id.*)

On June 11, 1998, shortly after the First Pioneer Motion was filed, Agway also moved to lift the automatic stay (the "Agway Motion"). (No. 6.) Agway's counsel included the standard default language, *see* Federal Rule of Bankruptcy Procedure 9014 and former Local Bankruptcy Rule 9013-4, and, in the event opposition was filed so as to require appearances, scheduled the hearing for June 25, 1998 (No. 6). Opposition, if any, was due on or before June 22, 1998. Clements filed opposition

to the Agway Motion on behalf of the Debtor on June 22, 1998 (Nos. 8, 9), and the court heard the Agway Motion on June 25, 1998. The parties represented that the matter had been settled, and the court directed submission of a consent order on or before July 25, 1998. The settlement included an adequate protection payment to Agway in the amount of \$20,000 on or before September 1, 1998, and the Debtor was able to make that payment by virtue of a \$30,000 settlement with Cambridge Valley Eggs, Inc. of AFI's collection action for AFI's \$70,000 account receivable, which Clements was able to negotiate in August 1998 (*See Ex. 11 to the Bush Aff. in Supp.*).⁸ According to the Debtor, he sold certain equipment in the latter half of 1998 in order to generate funds to make payments to Agway. (*Debtor's Dep.* at 299-302, Jan. 9, 2004.) On October 2, 1998, however, the court issued an Order revoking its oral ruling and denying the Agway Motion for failure to submit the agreed upon order. (No. 17.)

On the same date, the Debtor filed an Amended Chapter 12 Plan (the "Amended Plan"). (No. 17.) The Amended Plan provided for the Debtor's payment of future earnings to the Trustee in the amount of \$96,000, to be paid over sixty months under the following payment schedule: payments of \$2,000 per month for the first two years; payments of \$500 per month for the next three years; lump sum payments of \$7,000 in June of 2000 and 2001; and lump sum payments of \$8,000 in June of 2002 and 2003. The payment provisions for First Pioneer remained unchanged, but the claim of Agway was reduced by \$20,000. The Debtor remained obligated to make \$20,000 payments to Agway on September first of each year from 1999 through 2001. Moreover, the total distribution to allowed, general unsecured claims was reduced to 10%. The Amended Plan was

⁸ It does not appear that a settlement motion, *see* FED. R. BANKR. P. 9019(a), was ever filed in either the AFI case or in the Debtor's individual case, but the parties do not dispute that Clements settled the claim against Cambridge Valley Eggs, Inc. for \$30,000.

confirmed as modified by Order dated October 1, 1999. (No. 49.) The Order of Confirmation provided for thirty-six monthly payments by the Debtor to the Trustee in the amount of \$500, annual payments of \$7,000 in June of 2000 and 2001, and annual payments of \$8,000 in June of 2002 and 2003. The Confirmation Order further provided for direct payment outside the Plan to First Pioneer, whose claim was estimated at \$400,000, and to Agway, whose claim was estimated at \$60,000, and it further provided for the secured creditors to retain their liens until their respective claims were satisfied in full. Specifically, the Confirmation Order stated, “[t]hat the claim of First Pioneer . . . holding a lien against 492 acres of real property shall be paid interest-only payments of \$1,853.98 per month until collateral is sold. Confirmation does not re-impose automatic stay.” Agway was scheduled to receive annual payments of \$20,000 on September of each year from 1999 to 2001.

On April 23, 1999, prior to confirmation of the Amended Plan, Agway filed a second § 362 motion. (No. 36.) Clements’ timely opposed Agway’s second motion to lift the stay (No. 37), and the parties apprised the court at the May 13, 1999 hearing that they had agreed to settle the matter via submission of a Conditional Order. For reasons discussed *infra*, however, the parties never submitted the Order and the motion was withdrawn by Order dated August 24, 1999. (No. 48.)

On July 12, 1999, the Debtor filed an omnibus motion to approve the sale of substantially all of the Debtor’s real property, to re-impose the automatic stay against First Pioneer, and to settle a confirmation order. (No. 41.) In support of the motion, the Debtor submitted a Purchase and Sale Agreement between himself and AFI as sellers and The Trust for Public Land, a non-profit California public benefit corporation, as the buyer. (Ex. 1 to the *Aff. of Thomas G. Clements*, July 8, 1999 (No. 41).) Attorney Clements stated that the sale of substantially all of the Debtor’s farm, excepting the Debtor’s homestead parcel, was necessary because the Debtor had not received the

much needed FSA loan. (*Aff. of Thomas G. Clements* ¶ 2, July 8, 1999.) He further stated that the sale price for the property was sufficient to fully satisfy the mortgage on the property held by First Pioneer, the mortgage held by Agway, the mortgage held by Holden Inc., and a small judgment against the property. (*Id.* ¶ 4.) Finally, Clements represented that the sale price of \$480,000 was reasonable given a recent appraisal of the Debtor's real property, in its entirety, at \$400,000. (*Id.* ¶ 6.) By Order dated August 24, 1999, the Debtor's motion to sell the property was approved and both the Debtor's motion to re-impose the stay against First Pioneer and Agway's motion to lift the stay were withdrawn. (No. 48.) In contemplation of the proposed sale, the Debtor entered into a Forbearance Agreement with First Pioneer on September 7, 1999 (Ex. 24 to the *Gromet Aff. in Supp.*). At the request of the Trust for Public Land, the court issued an Amended Order on April 24, 2000 (No. 67) granting the sale and clarifying that such sale was free and clear of all liens and encumbrances except as to any liens and encumbrances of record, including real property taxes, and that all such liens and encumbrances were to be satisfied from the sale proceeds at closing.

The sale allowed the Debtor to retain his homestead parcel and property on which he had multiple corn silos, a corn drying system, and truck scales. (*Aff. of Thomas G. Clements* ¶ 5, July 8, 1999.) In addition, the proceeds of the sale allowed the Debtor to satisfy several debts in full, including those to First Pioneer in the amount of \$304,568.04, Amerigas in the amount of \$15,135.02, Agway in the amount of \$55,436.40, and Holden, Inc. in the amount of \$20,211.11. (Ex. 19 to the *Bush Aff. in Supp.*) After payment of taxes and attorney's fees, the Debtor realized surplus proceeds of approximately \$55,352.51. (*Id.*)

Because of the unfortunate turn of events, the Debtor did not plant corn in 1998. (*Debtor's Dep.* at 55, Dec. 16-17, 2003.) The Debtor did, however, resume farming in 1999 using the proceeds

from the sale of his property. In 2000 and 2001, the Debtor rented land and paid laborers to plant and harvest his crop. (*Debtor's Dep.* at 34, 38, Jan. 9, 2004.) In 2002, the Debtor grew approximately 220 acres of corn on rented land with the assistance of paid laborers and borrowed equipment (*id.* at 20-23), and he sold that corn in 2003 for \$18,000 (*id.* at 20). At the time of his deposition, the Debtor anticipated that he would sell another \$33,000 worth of corn from the 2002 harvest, and that he personally would gross an additional \$15,000 from that sale. (*Id.* at 33.) He could not recall the amount of operating costs and, thus, did not know whether he would turn a profit from the 2002 season.

On September 9, 2002, the Trustee moved to dismiss the Debtor's bankruptcy case for failure to make plan payments in compliance with the Order of Confirmation. (No. 70.) The Trustee, however, withdrew his motion and the court entered an Order to that effect on February 4, 2003 (No. 88). The Order required the Debtor (1) to make payments to the Trustee of no less than \$100 per month beginning on January 15, 2003, and (2) to provide business records and tax returns for the 2002 tax year to the Trustee at the time of timely filing of the return. (*Id.*) The court further ordered that the "case shall remain open pending the adversarial proceeding" now under consideration. (*Id.*) It is therefore undisputed that the Debtor has complied with the terms of the Order of Confirmation.

The Parties' Recollection of the Case

The Debtor did not recall learning about the June 1998 First Pioneer and Agway Motions until July 1998. (*Aff. of Melvyn Bentley in Supp. of Second Am. Compl.* ¶ 7, Apr. 8, 2003, Ex. 26 to the *Gromet Aff. in Supp.*) He did not recall any conversations with Clements about First Pioneer's ability to foreclose. He stated that he first learned First Pioneer had been granted stay relief on October 24, 1998, when his wife was served at their home with the Summons and Complaint in the

state court foreclosure action. (*Id.*) The Debtor further testified that he did not remember whether he discussed any of the motions made in his bankruptcy case with Clements. (*Debtor's Dep.* at 353, Jan. 14, 2004, Ex. 7 to the *Bush Aff. in Supp.*)

The Debtor claimed to have spoken with Clements on June 26, 1998, at which time Clements told the Debtor that he was obligated to make a \$20,000 payment to Agway on or before September 1, 1998. (*Aff. of Melvyn Bentley* ¶ 3, Mar. 3, 2004, Ex. 30 to the *Gromet Aff. in Supp.*) When deposed by the Defendants' counsel, however, the Debtor testified that he understood the terms of the Agway Deal (*Debtor's Dep.* at 238, Dec. 16-17, 2003), and he knew at the time of the closing that the loan would have to be collateralized and that Agway would require an immediate payment of \$20,000. (*Debtor's Dep.* at 314-15, Jan. 9, 2004.) The Debtor was able to make that payment, but he had to sell several pieces of his farming equipment in order to make the additional, required payments to Agway. (*Id.* ¶ 5.) As a result, the Debtor stated that he could no longer continue in the custom farming business of harvesting and storing other landowners' crops. In addition to losing the custom farming income, the Debtor also netted approximately 50% less from the sale of his own crop because he had to pay for labor and equipment to plant and harvest his crop. (*Id.* ¶¶ 7-11.)

According to Clements, the Debtor's ability to reorganize depended entirely upon the Debtor or AFI's receipt of the FSA loan. (*Aff. in Opp'n of Thomas G. Clements* ¶ 8, Mar. 5, 2004 (No. 64).) Clements did not prepare or submit the FSA Application on behalf of AFI (*id.* ¶ 4), but he did prepare forms for submission to the FSA based on information provided to him by the Debtor (*id.* ¶ 7). Clements states that the Debtor was aware of the First Pioneer and Agway motions shortly after they were filed because the Debtor was served by the movant in each instance. (*Id.* ¶ 9.) In addition, Clements states that he advised the Debtor of the Agway Motion. (*Id.* ¶ 13.) Generally,

Clements recalls “numerous conversations, meetings, and telephone calls with the [Debtor] about all the various aspects of his bankruptcy proceedings.” (*Id.* ¶ 14.) Clements asserts that the Debtor “was kept advised of all proceedings. He knew about the motions.” (*Id.* ¶ 15.) In sum, Clements writes: “I did not neglect [the Debtor]. I did not neglect to respond to him. I did not fail to communicate with him. He was kept apprised of everything going on.” (*Id.* ¶ 18.)

The Second Amended Complaint

The Second Amended Complaint identifies six alleged acts of malpractice committed by the Defendants in connection with their representation of the Debtor. First, the Plaintiffs allege that Clements improperly prepared and submitted the Chapter 12 Plan, which was dependent, by its own terms, on the granting of the FSA Application. (Second Am. Comp. at 2.) Second, the Plaintiffs allege that Clements submitted one or more applications to the FSA that could not have been approved as submitted under the FSA Guidelines. (*Id.*) Third, the Plaintiffs allege that Clements failed to reduce, or cram down, the interest rate of First Pioneer pursuant to 11 U.S.C. § 1222(b)(5). (*Id.*) Fourth, the Plaintiffs allege that Clements failed to timely object to the First Pioneer Motion. (*Id.* at 3-4.) Fifth, the Plaintiffs allege that Clements failed to consult with the Debtor about the First Pioneer and the Agway Motions. (*Id.* at 4.) Finally, the Plaintiffs allege that Clements acted without authority when he settled the First Pioneer and Agway Motions. (*Id.*)

The Second Amended Complaint also seeks treble damages as sanctions for the Defendants’ alleged violation of New York Judiciary Law § 487, which provides:

An attorney or counselor who:

1. Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party; or
2. Willfully delays his client’s suit with a view to his own gain; or, willfully receives any money or allowance for or on account of any money which he has not laid out, or becomes answerable for,

Is guilty of a misdemeanor, and in addition to the punishment prescribed therefor by the penal law, he forfeits to the party injured treble damages, to be recovered in a civil action.

N.Y. JUD. LAW § 487 (2005). In this respect, the Plaintiffs allege that the Defendants engaged in a chronic, extreme pattern of deceit with the intent to deceive the Debtor as to the likelihood of his successful reorganization.

The Defendants filed an Answer to the Second Amended Complaint on April 17, 2003 (No. 23), wherein they denied every substantive allegation of negligence and malpractice. In addition, the Defendants interposed several affirmative defenses. The court, however, elects to treat the matter on the merits of the Second Amended Complaint and need not address the affirmative defenses.

ARGUMENTS

The gravamen of the Plaintiffs' case is the failed FSA Application. The Plaintiffs admit that "the success of [the Debtor] as [a] farmer hinged on his access to funds to make the adequate protection payments called for in the respective bankruptcies, and fund the crop planting and harvesting in each year when Defendants represented Plaintiff." (Second Am. Compl. ¶ 79.) They contend that, "[i]n the absence of Defendants' actions and inactions . . . [the Debtor] could have sold equipment, lumber, and self-financed his operations: his own and those of his wholly owned corporation AFI." (*Id.* ¶ 80.) Specifically, the Plaintiffs argue that the Defendants' failure to timely oppose the First Pioneer Motion was malpractice *per se* (*id.* ¶ 89), which resulted in a forced sale of the Debtor's real property (*id.* ¶ 90). They argue that the Debtor's loss of his farm land inevitably led to the loss of annual income in excess of \$100,000. (*Id.* ¶ 92.)

The Plaintiffs also argue that the Defendants' alleged failure to inform the Debtor of

numerous events and occurrences in connection with his bankruptcy case violated New York State Judiciary Law § 487. Specifically, the Plaintiffs argue that the Defendants failed to inform the Debtor of information which they were required to disclose, and that they repeatedly acted without the authority of the Debtor; all of this, according to the Plaintiffs, led to deception and the Debtor's false belief that he would successfully reorganize and continue in the farming business. (*Id.* ¶¶ 105-107.) The Plaintiffs' alleged damages consist of "lost income stream, lost equipment, loss of accrual of equity in the family farm as debt is amortized, loss of quality of life, time, and health." (*Pls.' Mem. of Law* at 4 (No. 69).)

The Defendants argue that the court is compelled as a matter of law to grant judgment in their favor because the Plaintiffs cannot demonstrate the requisite causation to sustain their malpractice claim, i.e., the Plaintiffs cannot show that the Debtor would have been successful in the FSA action or that he would have been able to continue farming if Clements' actions had been different. (*Def.' Mem. of Law* at 16.) Furthermore, the Defendants assert that the Plaintiffs' entire case is based on speculation that had certain things occurred, including receipt of the FSA loan, the Debtor would have been able to continue his farming business. (*Id.* at 18.) The Defendants contend that this is a simple case of insufficient funding—the Debtor did not have the financial means to overcome the disaster years that struck in the mid-1990's. Equally important, the Defendants assert that the Debtor was not harmed at the hands of the Defendants by any alleged negligence or malpractice because the Debtor was able to sell his property in an arms length transaction for fair market value. (*Aff. of Scott W. Bush in Opp'n* ¶ 18 (No. 65).) The Defendants point out that, in the end, the Debtor paid his debt such that he is entitled to a discharge, and he retained both his home situated on a 3-1/2 acre parcel of real property free and clear of liens and a second unencumbered

parcel of real property. (*Id.* ¶ 18.)

In response to the Plaintiffs' claim that the Defendants should be sanctioned for an alleged violation of Judiciary Law § 487, the Defendants argue that there is no basis upon which the court could find that they are guilty of deceit or collusion with the intent to deceive the Debtor or that they willfully delayed the Debtor's bankruptcy proceeding for their own gain. (*Id.* at 8.) They caution that Judiciary Law § 487 is reserved only for cases of gross misconduct (*id.* at 10), and that it clearly does not apply here.

DISCUSSION

In deciding a motion for summary judgment, the court must determine if there is an absence of any genuine issue of material fact. FED. R. CIV. P. 56(c); FED. R. BANKR. P. 7056; *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). The threshold inquiry is “whether there is a need for trial—whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.” *Liberty Lobby*, 477 U.S. at 250. “As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under governing law will properly preclude the entry of summary judgment.” *Id.* at 248. At the summary judgment stage, the court must view all the evidence in the light most favorable to the non-moving party, *Barhold v. Rodriguez*, 863 F.2d 233, 236 (2d Cir. 1988), and draw all inferences in the non-movant's favor. “This is true even though the court is [presented] with cross-motions for summary judgment; each movant has the burden of presenting evidence to support its motion that would allow the . . . court, if appropriate, to direct a verdict in its favor.” *Id.* (citing *Eastman Machine Co. v. United States*, 841 F.2d 469, 473-74 (2d Cir. 1998)); *see also* 10A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, &

MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2720 (3d ed. 1998 & Supp. 2005) (“Both motions must be denied if the court finds that there is a genuine issue of material fact.”) (footnote omitted). A cause of action based on attorney malpractice is a matter of state substantive law; therefore, New York law applies. *Barry v. Liddle, O’Connor, Finkelstein & Robinson*, 98 F.3d 36, 39 (2d Cir. 1996).

In order to prevail in a legal malpractice action under New York law, a plaintiff must establish three elements: (1) the attorney failed to exercise the degree of care, skill and diligence commonly possessed and exercised by an ordinary member of the legal community; (2) that such negligence was the proximate cause of the actual damages sustained by plaintiff; and (3) that but for the attorney’s negligence, the plaintiff would have been successful in the underlying action. *Carney v. Philipponne*, 332 F.3d 163, 167 (2d Cir. 2003) (citations omitted); *see also Barry*, 98 F.3d at 39 (“Under New York law, legal malpractice claims require a showing that negligence on the attorney’s part proximately caused actual damage. The causation element includes a ‘but for’ requirement, i.e., that ‘the plaintiff would have been successful in the underlying action if the attorney had exercised due care.’”) (internal citation omitted). All three elements must be satisfied in order for the plaintiff to prevail on a legal malpractice claim. “A defendant’s conduct may have been negligent (or imprudent), but if that conduct caused plaintiff no injury, plaintiff will recover nothing.” *LNC Investments, Inc. v. First Fidelity Bank*, 2000 WL 1024717, at *2 (S.D.N.Y. July 25, 2000).

“For a defendant in a legal malpractice case to succeed on a motion for summary judgment, evidence must be presented in admissible form establishing that the plaintiff is unable to prove at least one of the essential elements.” *Philipponne*, 332 F.3d at 167 (internal quotation marks and citation omitted.) For the following reasons, the court finds that the Defendants at hand have met

this standard so as to entitle them to judgment as a matter of law on the Plaintiffs' malpractice claim.

The Plaintiffs' Second Amended Complaint fails for lack of causation and damages. The Plaintiffs point out several alleged errors committed by the Defendants during the course of their representation of the Debtor, including the Defendants failure (1) to demand a release as a term of the Agway Deal; (2) to lower the interest rate paid to First Pioneer during the pendency of the case; and (3) to timely oppose the First Pioneer Motion. As stated *supra*, with respect to Agway, the court's jurisdiction extends only to the Agway Motions, and not to the parties' dealings at the negotiation table. Even so, the Debtor's own testimony makes clear that Agway dictated the terms of the Agway Deal, which the Debtor was free to reject if he so chose.

The Plaintiffs' allegation concerning the First Pioneer interest rate also fails against the weight of First Pioneer's counsel's representations that First Pioneer cooperated with the Debtor and, as shown by the Forbearance Agreement, First Pioneer agreed to fix the interest rate at 8.5%. (Ex. 24 to the *Gromet Aff. in Supp.*) Given the Debtor's prospects for financial success at the time, that interest rate does not appear excessive when the acceptable standard for setting the rate was prime, or approximately 6% (Ex. 19 to the *Gromet Aff. in Supp.*), plus an unknown risk factor. Seemingly, the most serious alleged offense was the Defendants' failure to timely oppose the First Pioneer Motion, but even that must fail given the circumstances that the Defendants had to work with.

While the court certainly does not condone the Defendants' failure to timely respond to the First Pioneer Motion, the Plaintiffs cannot prove that the Debtor would have benefitted economically if the Defendants had acted prudently and opposed the same. The principal question the court must

ask is whether the Debtor could have retained his land and, at the same time, achieved a successful reorganization. To answer this question, the court must look at the circumstances as they existed when the Defendants undertook representation of the Debtor in May 1997, i.e., when the Debtor was clearly overextended, lacked working capital, and the FSA loan was purely speculative.

There is no question that the Debtor's plans for reorganization were wildly optimistic, though perhaps attainable with the assistance of the FSA. The FSA's denial of emergency assistance to either AFI or the Debtor, however, was not caused by the Defendants' negligent representation. In fact, the record tends to support the opposite conclusion; the Defendants' achieved some success at the appellate level and, because the Debtor's appeal to the Second Circuit was abandoned, it is unknown whether the Debtor would have ultimately prevailed on the merits of his discrimination suit against the USDA. Without the FSA funds, the Debtor's only option was to make use of the equity cushion in his real property. As evidenced by the Debtor's rejection of a brokerage contract at the inception of his case, he had contemplated the sale of all or a portion of his real property prior to the Defendants' involvement. Without selling the real property, the Debtor would not have been able to avoid bankruptcy or, alternatively, to fund a reorganization plan through completion. The Debtor simply did not have the cash available to fund a plan and to make adequate protection payments to preserve the equity cushion in his real property and certain pieces of equipment.

The sale of the Debtor's real property occurred only as a last resort. First Pioneer's counsel agreed to work with the Debtor during the pendency of his case and, in the end, the lift stay order did not result in a foreclosure sale. While the Debtor may not have been pleased with the overall outcome of his case, the Plaintiffs' allegations of a "forced sale" are antithetical to the Debtor's prior representations to the FSA and to this court; the Debtor on numerous occasions stated that he

contemplated the sale of real property as a means of keeping his farming operation afloat. In fact, the Debtor received a \$70,000 purchase offer in September 1997 from Gerald Dark for the purchase of lumber (Ex. 14 to the *Bush Aff. in Supp.*), but he rejected the same because he had offered to sell the real property, or a portion thereof, to certain individuals. (*Debtor's Dep.* at 484, Jan. 14, 2004.) That sale, however, never materialized.

Under the circumstances, there can be no genuine dispute as to whether the Defendants' conduct caused economic harm to the Debtor. Even if the Defendants were negligent in their actions, which the court does not concede, the end result of the Defendants' representation was the Debtor's successful completion of the Amended Plan, the Debtor's entitlement to a discharge, and retention of the Debtor's homestead free and clear of liens and encumbrances. In sum, the court therefore concludes that there is no basis upon which the Plaintiffs could establish liability.

By the same token, the Defendants are also entitled to judgment as a matter of law on the Plaintiffs' claim made pursuant to Judiciary Law § 487. The Plaintiffs' claim rests upon allegations of a "chronic, extreme pattern of legal delinquency" by the Defendants, *see, e.g., Izko Sportswear Co., Inc. v. Flaum*, 2006 WL 45723, at *2 (N.Y.A.D. 2 Dept. Jan. 10, 2006) (citing cases), which the record does not support. "On a motion for summary judgment, the plaintiffs must raise a triable issue of fact that they sustained damages as a result of the deceitful act." *Id.* at *3. As the court has already determined that the Debtor was not damaged by the Defendants' conduct, there is no genuine dispute so as to necessitate trial on the Plaintiffs' Judiciary Law § 487 claim.

CONCLUSION

The record is devoid of any material questions of fact and the evidence, even when viewed in the light most favorable to the Plaintiffs, overwhelmingly supports the granting of summary

judgment to the Defendants. Accordingly, it is hereby

ORDERED, the Defendants' motion for summary judgment is granted; and it is further

ORDERED, the Plaintiffs' motion for summary judgment is denied; and it is further

ORDERED, that the Second Amended Complaint is hereby dismissed.

Dated: 2/16/06
Albany, New York

/s/ Robert E. Littlefield, Jr.

Hon. Robert E. Littlefield, Jr.
United States Bankruptcy Court