

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

HARRY R. DORSAGNO
DONNA M. DORSAGNO

CASE NO. 94-62141

Debtors

APPEARANCES:

GUSTAVE DeTRAGLIA, ESQ.
Attorney for Debtors
1425 Genesee Street
Utica, New York 13501

CAROLYN COOLEY, ESQ.
Trustee
405 Mayro Building
Utica, New York 13501

MICHAEL COLLINS, ESQ.
Office of U.S. Trustee
10 Broad Street
Utica, New York 13501

Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

The Court considers herein a motion by Carolyn J. Cooley, the former Trustee ("Trustee") in this case, which was originally filed as a voluntary case pursuant to Chapter 7 of the Bankruptcy Code (11 U.S.C. §§101-1330)("Code") on August 9, 1994. Also before the Court is a cross motion filed by Debtors former counsel, Gustave J. DeTraglia, Jr. ("DeTraglia"). Both motions essentially sought sanctions against respective counsel; however, the Trustee's motion also sought contempt as against the Debtors.

Both motions were orally argued before this Court on September 27, 1994. The Court orally denied the Trustee's motion

insofar as it sought to hold the Debtors in contempt due to lack of personal service of the Court's August 15, 1994 Order on them. The remainder of the relief sought in the motions was submitted for decision on that date.

JURISDICTIONAL STATEMENT

The Court has core jurisdiction of this contested matter pursuant to 28 U.S.C. §§1334(b), 157(a), 157(b)(1) and (2)(A)(E) and (O).

FACTS

On September 15, 1994, with both the Trustee and DeTraglia before it, the Court entered an oral order directing the Debtors, inter alia, to immediately surrender to the Trustee their liquor license maintained in connection with Debtors' pre-petition operation of an establishment known as "Comacho's", together with the keys to and possession of said establishment ("Surrender Order").

On the afternoon of September 15, 1994, following the Court's execution of the Surrender Order, the Trustee called DeTraglia's office and was advised by his secretary that the Debtors had been orally advised of the terms of the Surrender Order and were told to go to Comacho's and arrange for the surrender of the keys and liquor license. At or about the same time, the Trustee served a copy of the Surrender Order on DeTraglia's office

and also attempted, unsuccessfully, to serve a copy of the Order on the Debtors at the address listed in their Petition.

The Debtors did not comply with the Surrender Order on September 15, 1994 and, in fact, DeTraglia mailed the keys and liquor license to the Trustee on or about September 20, 1994. On September 16, 1994 the Trustee obtained an Order to Show Cause bringing the instant motion before the Court on September 27, 1994. DeTraglia filed a cross-motion seeking sanctions against the Trustee for commencing frivolous litigation.¹

ARGUMENTS

The Trustee contends that the Debtors, with the assistance of DeTraglia, purposely avoided compliance with the Surrender Order. She asserts that during a phone conversation with DeTraglia on the morning of September 16, 1994, DeTraglia advised the Trustee that he could not let the Debtors' business be closed down. The Trustee then filed the instant motion and obtained an Order to Show Cause. She alleges that only then did she receive the keys and the liquor license on or about September 20, 1994, some five days after the date of the Surrender Order.

DeTraglia argues that for his part he did advise his former clients of the terms of the Surrender Order and that to his

¹ The Court notes that on September 19, 1994, DeTraglia presented an Order to Show Cause to the Court which sought an order allowing the Debtors to "withdraw" their Chapter 7 petition. As a part of the Order to Show Cause, DeTraglia also sought a stay of closing of Debtors' business. The Court in signing the Order to Show Cause deleted the proposed stay from the Order.

knowledge Comacho's was closed between the date of the Surrender Order and the date on which the keys and liquor license were turned over to the Trustee.

The United States Trustee ("UST"), who appeared in support of the Trustee's motion, argued that the Debtors had a fiduciary duty to assist the Trustee in recovering property of the estate and that DeTraglia had a duty to facilitate that assistance and insure that Debtors complied with the Surrender Order. The UST also asserted that it does not appear that DeTraglia facilitated compliance, at least not for a period of five days after the effective date of the Surrender Order and, therefore, if the Court's orders are to have any meaning, DeTraglia must be sanctioned.

DISCUSSION

Code §105(a) provides that a bankruptcy court "may issue any order, process or judgment that is necessary or appropriate to carry out the provisions of this Title". This section is generally recognized to be the source of a bankruptcy court's civil contempt power. See Burd v. Walters (In re Walters) 868 F.2d 665 (4th Cir. 1989). The Fourth Circuit Court of Appeals observed that civil contempt is "a sanction to enforce compliance with an order of the court or to compensate for losses or damages sustained by reason of noncompliance..." Id. at 668, quoting McCob v. Jacksonville Paper Co. 336 U.S. 187, 191, 69 S.Ct. 497, 499, 93 L.Ed. 599 (1949).

While the Trustee herein stopped short of seeking a

contempt order against DeTraglia, a reading of her moving papers suggests that in seeking sanctions she grounds her request for relief on what she alleges to be contemptuous conduct on the part of DeTraglia in counselling his clients to initially ignore the mandates of the Surrender Order.

DeTraglia at oral argument did not deny having a conversation with the Trustee on the morning of September 16, 1994 to the effect that he could not allow his clients' business to be shut down though he contends that the Trustee misinterpreted the conversation as a refusal on DeTraglia's part to advise his clients to comply with the Surrender Order. DeTraglia argues that, in fact, he believes that his clients did not open Comacho's for business between September 15th and September 20th when they finally turned over the keys and the liquor license to his possession. Thus, while they may not have complied with the letter of the Surrender Order, they complied with its spirit. The Court also considers the fact that on the morning of September 19, 1994, some three full days after the effective date of the Surrender Order, DeTraglia requested that the Court execute an order to show cause seeking in effect a dismissal of the Debtors' Chapter 7 case, together with a temporary restraining order which sought to stay the implementation of the Surrender Order.

Finally, the Court recalls that at the September 15, 1994 hearing it advised DeTraglia that immediate implementation of the Surrender Order was necessary even though DeTraglia indicated that he had to travel to Syracuse, New York that afternoon to represent other clients. The Court's advice was grounded upon what it

perceived was a complete lack of cooperation shown by the Debtors toward the Trustee since the filing of the Chapter 7 case on August 9, 1994.

The conclusion is inescapable. DeTraglia did not make the effort required of him, as an attorney, admitted to practice before this Court, to insure that his clients "immediately" complied with the terms of the Surrender Order. This does not appear to be a case where the Debtors ignored DeTraglia's advice. This is a case where the Debtors were led to believe that they need only comply with the spirit of the Surrender Order ignoring, in the process, its specific mandates. See In re Damon, 40 B.R. 367, 374-375 (Bankr. S.D.N.Y. 1984).

This Court will not tolerate such conduct and, therefore, concludes that, in accord with Code §105(a), it finds DeTraglia to have acted in a manner constituting a contempt of the Surrender Order and will sanction DeTraglia by requiring him to pay over to the Chapter 13 Trustee, Mark Swimelar, Esq., the sum of \$500.00, said sum to be paid with 30 days of the date of this Order.²

DeTraglia's cross-motion against the Trustee for having instituted frivolous litigation is denied.

IT IS SO ORDERED.

² On October 12, 1994 the Court ordered this case converted from Chapter 7 to Chapter 13 on the motion of James E. Selbach, Esq., Debtors' current attorney. A consent to change attorney was filed with the Court October 24, 1994.

Dated at Utica, New York

this day of January 1995

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge