

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

In re:

JAMES F. BRENNAN,

Case No. 05-10004

Chapter 13

Debtor(s).

APPEARANCES:

ROCHE, CORRIGAN, MCCOY

Scott W. Bush, Esq.

& BUSH, PLLC

Attorneys for Mark S. Pelersi

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ANDREA E. CELLI, ESQ.

Chapter 13 Standing Trustee

350 Northern Blvd.

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Hon. Robert E. Littlefield, Jr., U.S. Bankruptcy Judge

**MEMORANDUM-DECISION
AND ORDER**

This Memorandum-Decision and Order constitutes the court's Findings of Fact and Conclusions of Law on its order, entered November 21, 2007, requiring Mark S. Pelersi, Esq. to appear and show cause as to why he should not be sanctioned including, but not limited to, suspension from practicing in this court until further order of the court for allowing his professional judgment on behalf of his client, James F. Brennan (the "Debtor"), to be affected by his own financial, business, property, or personal interests in violation of D.R. 5-101(A), for

failing to zealously represent his client pursuant to D.R. 7-101, and for failing to act competently in his representation of the Debtor pursuant to D.R. 6-101 (No. 57). Hearings were conducted before the court on November 6, 2006, November 13, 2006, and November 20, 2006.

Thereafter, numerous conferences were held in connection with this matter. The court has considered the letter to the court from the Debtor filed October 3, 2006 (No. 52), the affidavit of Scott W Bush, Esq., sworn to on November 30, 2006, filed on behalf of the Debtor (No. 63), the affidavit of Mr. Pelersi, sworn to on November 30, 2007 (*id.*) and the letter to the court from Mr. Pelersi, Esq., dated November 16, 2006, attached thereto and incorporated by reference (*id.*), the affirmation of Leigh Hoffman, Esq., sworn to on December 5, 2006, filed on behalf of the Debtor (No. 64), and the accounting produced by Attorney Pelersi (No. 67).

The court, having considered all of the pleadings and proceedings before it, makes the following findings of fact:

1. The Debtor retained Mr. Pelersi in connection with his filing of a voluntary petition under chapter 13 of the Bankruptcy Code on January 3, 2005, as reflected in the Rule 2016(b) Statement filed with the petition. (No. 1.)
2. The Debtor listed his residence located at 2 Angles Court, Wynantskill, New York (the “Wynantskill Property”) as an asset on schedule A of his petition. (*Id.*)
3. Chase Manhattan Mortgage Corp. (“Chase”) is listed on schedule D of the Debtor’s petition as a creditor holding a mortgage lien against the Wynantskill Property. (*Id.*)
4. An order was entered on January 26, 2006, terminating the automatic stay pursuant to 11 U.S.C. § 362(d)(1) as to Chase’s lien interest in the Wynantskill Property due to the Debtor’s failure to keep current with his post-petition mortgage payments to Chase. (No. 37.)

5. Mr. Pelersi, on behalf of the Debtor, commenced an adversary proceeding on April 19, 2006, seeking reimposition of the automatic stay under 11 U.S.C. § 362 (Adv. No. 06- 90123, No. 1) with respect to Chase's mortgage lien against the Wynantskill Property to permit the Debtor to sell the Wynantskill Property and satisfy Chase's mortgage from the proceeds of sale (the "Adversary Proceeding").
6. In the context of the Adversary Proceeding, Mr. Pelersi filed a motion pursuant to Federal Rule of Bankruptcy Procedure 7065 for a preliminary injunction staying Chase's foreclosure sale of the Wynantskill Property scheduled for May 16, 2006. (Adv. No. 06-90123, No. 3.)
7. A hearing on the preliminary injunction motion was held on May 11, 2006. At the conclusion of the hearing, the court directed that (1) Chase's foreclosure sale of the Wynantskill Property scheduled for May 16, 2006, be stayed temporarily, and (2) the motion be adjourned until June 8, 2006. An interim order was entered June 8, 2006, over the opposition of counsel for Chase, in conformance with the court's oral ruling on May 11, 2006. (Adv. No. 06-90123, No. 7.)
8. An order was entered on June 14, 2006, in conformance with the court's oral ruling of June 12, 2006, whereby the court declined to issue any further stay of Chase's foreclosure of the Wynantskill Property. (Adv. No. 06-90123, No. 8.)
9. Chase's foreclosure sale of the Wynantskill Property was held on June 13, 2006.
10. Mr. Pelersi attended the foreclosure sale on June 13, 2006, and bid on the Wynantskill Property on behalf of a limited liability company owned by his wife. The limited liability company was the successful bidder of the Wynantskill Property at the foreclosure sale.
11. There was no disclosure by Mr. Pelersi to the Debtor that (1) Mr. Pelersi attended the foreclosure sale on June 13, 2006, (2) Mr. Pelersi bid on Wynantskill Property on behalf of a

limited liability company owned by his wife, and (3) the limited liability company was the successful bidder of the Wynantskill Property at the foreclosure sale.

12. Mr. Pelersi was still representing the Debtor in his chapter 13 case and the Adversary Proceeding on June 13, 2006.

13. The Adversary Proceeding was closed on July 27, 2006.

14. The Debtor's chapter 13 case was dismissed by order entered August 16, 2006 (No. 48), in connection with the chapter 13 trustee's motion to dismiss due to the Debtor's failure to make his required plan payments (No. 36).

15. A sua sponte order of the court was entered on November 21, 2006, vacating the order dismissing the Debtor's case for the limited purpose of allowing the court to retain jurisdiction to investigate the alleged professional misconduct on the part of Mr. Pelersi during the course of his representation of the Debtor in this court. (No. 56.)

16. The Wynantskill Property was sold by the limited liability company owned by Mr. Pelersi's wife to a third party.

17. Leigh Hoffman, Esq., of Deily, Mooney & Glastetter, LLP, was substituted as counsel for the Debtor in place of Mr. Pelersi by order entered December 7, 2006. (No. 66.)

18. Mr. Pelersi produced an accounting of all monies received from the Debtor or on his behalf. (No. 67.)

19. Mr. Pelersi disgorged the legal fees paid to him by the Debtor for legal services rendered in connection with his bankruptcy case.

The court has jurisdiction over this core proceeding pursuant to 28 U.S.C. § § 157(b)(1) and (b)(2)(A), 158(c) and 1334. Local Rule 83.4 of the U.S. District Court for the Northern

District of New York sets forth the procedure for disciplining attorneys appearing in the Northern District of New York. The bankruptcy court does not have a separate disciplinary process. Local Rule 83.4(j) of the U.S. District Court for the Northern District of New York provides that “[t]he court shall enforce the N.Y.S. Lawyers’s Code of Professional responsibilities, as adopted from time to time by the Appellate Division of the State of New York and as interpreted and applied by the United States Court of Appeals for the Second Circuit.” N.D.N.Y. LR 83.4(j). Under the circumstances presented here, the court concludes that an order imposing sanctions pursuant to its inherent authority contained within 11 U.S.C. § 105¹ should be entered based upon Mr. Pelersi’s violation of Disciplinary Rule 5-101(A) of New York’s Code of Professional Responsibility.² Given the severity of Mr. Pelersi’s conduct, the court determines that appropriate sanctions include disgorgement of fees paid by or on behalf of the Debtor, which has already been accomplished, and completion of Continuing Legal Education course work in Ethics and Professionalism. In levying these sanctions, the court recognizes that

¹Section 105 of the Bankruptcy Code provides, in part, “[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process. 11 U.S.C. § 105(a).

²The court originally directed that Mr. Pelersi appear and show cause as to why he should not be sanctioned for violating D.R. 5-101(A), D.R. 7-101, and D.R. 6-101. During the proceedings it came to the court’s attention that the Debtor filed a complaint regarding Mr. Pelersi’s conduct with the New York Committee on Professional Standards for the Third Department and that he may wish to proceed with other state court remedies. For that reason, the court chose only to address Mr. Pelersi’s violation of D.R. 5-101(A) and makes no specific findings of fact or conclusions of law with respect to Mr. Pelersi’s violation, if any, of D.R. 7-101 or D.R. 6-101.

Mr. Pelersi cooperated with the court in connection with its order to show cause and related proceedings, this is the first time Mr. Pelersi has been sanctioned by this court, and the New York Committee on Professional Standards for the Third Department will also be reviewing Mr. Pelersi's conduct. Thus, the court believes the sanctions imposed are adequate at this juncture.

WHEREFORE, it is hereby

ORDERED, that Mark S. Pelersi, Esq. shall attend Continuing Legal Education courses and obtain 10 credit hours in the area of Ethics and Professionalism during calendar year 2007 and provide the certificates of attendance to the court, the receipt of which the court hereby acknowledges (No. 76); and it is further

ORDERED, that whether further findings of specific acts of professional misconduct or disciplinary proceedings are warranted shall be left to the discretion of the New York Committee on Professional Standards and/or the U.S District Court for the Northern District of New York; and it is further

ORDERED, that a copy of this Order shall be sent by the Clerk of the Bankruptcy Court to Chief Judge Norman A. Mordue of the U.S. District Court for the Northern District of New York; and it is further

ORDERED, that a copy of this Order shall be sent to New York Committee on Professional Standards for the Third Department.

DATED: November 5, 2007

/s/ Robert E. Littlefield, Jr.

Hon. Robert E. Littlefield, Jr.
U.S. Bankruptcy Judge