

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK**

In re PREMIER VAN LINES, INC.

Chapter 7 bankruptcy
case no. 01-20692

Debtor

JAMES PFUNTNER,

Plaintiff

Adversary proceeding
no. 02-2230

-vs-

KENNETH W. GORDON, as Trustee in Bankruptcy
for Premier Van Lines, Inc., RICHARD CORDERO,
ROCHESTER AMERICANS HOCKEY CLUB, INC.,
and M&T BANK,

Defendants

CORDERO'S
NOTICE OF APPEAL
from
ORDER OF DISMISSAL
OF HIS CROSS-CLAIMS
AGAINST TRUSTEE GORDON

RICHARD CORDERO

Third party plaintiff

-vs-

DAVID PALMER, DAVID DWORKIN, DAVID DELANO,
JEFFERSON HENRIETTA ASSOCIATES,

Third party defendants

NOTICE OF APPEAL

Dr. Richard Cordero, co-defendant, appeals under 28 U.S.C. § 158(a) from the order of the Hon. Judge John C. Ninfo, II, granting Trustee Kenneth Gordon's motion to dismiss Dr. Cordero's cross-claims against him, which was entered in this adversary proceeding on December 30, 2002.

The names, addresses, and telephone numbers of Trustee Gordon -there is no information about any attorney representing him- and of the other parties to the Chapter 7 case and the adversary proceeding are as follows:

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Chapter 7 Trustee
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Rochester, New York 14618
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Adair, Kaul, Murphy, Axelrod &
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Rochester Americans Hockey Club,
Co-defendant
Office of the President
100 Exchange Blvd.
Rochester, New York 14614
(phone number or attorney not known)

M&T Bank, Co-defendant and
David Delano, Third-party defendant,
Michael J. Beyma, Esq.
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David Dworkin and
Jefferson Henrietta Associates, Third-party
defendants,
Karl S. Essler, Esq.
2 State Street, Suite 1400
Rochester, NY 14614
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Kathleen Dunivin Schmitt, Esq.
Assistant U.S. Trustee
100 State Street, Room 6090
Rochester, New York 14614
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Together with this Notice, Dr. Cordero is filing attached hereto a separate Statement of Election to state that he elects the district court as the body to hear this appeal. Ten copies of that Statement and of this Notice are enclosed.

Payment of the prescribed \$105 filing fee is attached hereto.

Dated: January 9, 2003 Appellant Dr. Richard Cordero
59 Crescent Street
Brooklyn, NY 11208-1515
Dr. Richard Cordero
tel. (718) 827-9521

If a Bankruptcy Appellate Panel Service is authorized to hear this appeal, each party has a right to have the appeal heard by the district court. The appellant may exercise this right only by filing a separate statement of election at the time of the filing of this notice of appeal. Any other party may elect, within the time provided in 28 U.S.C. § 158(c), to have the appeal heard by the district court.

(Added Aug. 1, 1991; and amended Mar. 1995; Oct. 1, 1997.)

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK**

In re PREMIER VAN LINES, INC.,

Chapter 7 bankruptcy
case no. 01-20692

Debtor

JAMES PFUNTNER,

Plaintiff

Adversary proceeding
no. 02-2230

-vs-

KENNETH W. GORDON, as Trustee in Bankruptcy
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ROCHESTER AMERICANS HOCKEY CLUB, INC.,
and M&T BANK,

Defendants

CORDERO'S
STATEMENT OF ELECTION

RICHARD CORDERO,

Third party plaintiff

-vs-

DAVID PALMER, DAVID DWORKIN, DAVID DELANO,
JEFFERSON HENRIETTA ASSOCIATES,

Third party defendants

STATEMENT OF ELECTION

Dr. Richard Cordero, appellant, hereby states, pursuant to 28 U.S.C. §158(c)(1)(A), his election to have the district court hear his appeal from the order of the Hon. Judge John C. Ninfo, II, granting the motion brought by Kenneth Gordon, Esq., Trustee, to dismiss Dr. Cordero's cross-claims against him, which was entered on December 30, 2002.

Dated: January 9, 2003

59 Crescent Street
Brooklyn, NY 11208-1515

Appellant

Dr. Richard Cordero

Dr. Richard Cordero
tel. (718) 827-9521

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK
IN RE:

PREMIER VAN LINES, INC,

Debtor

JAMES PFUNTER,

Plaintiff,

vs.

ROCHESTER AMERICANS
HOCKEY CLUB, INC. AND M&T BANK,

Defendants and

RICHARD CORDERO, Co-defendant/Appellant and

KENNETH W. GORDON, AS TRUSTEE IN
BANKRUPTCY FOR PREMIER VAN LINES, INC., Co-defendant/Appellee.

RICHARD CORDERO,

Third Party Plaintiff,

vs.

DAVID PALMER, DAVID DWORKIN,
DAVID DELANO AND JEFFERSON HENRIETTA
ASSOCIATES,

Third Party Defendants

KENNETH W. GORDON affirms under penalties of perjury as follows:

1. I am the Chapter 7 Trustee appointed and designated as such in the above-referenced proceeding. I make this affirmation in support of my motion to dismiss Richard Cordero's appeal of the Order of Hon. John C. Ninfo, II dismissing Richard Cordero's claims against the Trustee.
2. The order appealed from was entered in the Bankruptcy Court Clerk's Office on the 30th day of December 2002. A copy of the Order is attached hereto as Exhibit A.
3. Pursuant to Bankruptcy Rule 8002, the Notice of Appeal needed to be filed with the clerk

03-CV-6021L

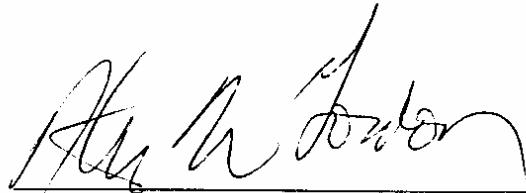
**APPELLEE'S STATEMENT
IN SUPPORT OF MOTION
TO DISMISS APPEAL FROM
BANKRUPTCY COURT**

"within 10 days of the date of the entry of the ... order ... appealed from."

4. The ten day period to file the Notice of Appeal expired on January 9, 2003.
5. Richard Cordero's notice of appeal was filed with the clerk on January 13, 2003. A copy of the Notice of Appeal is annexed hereto as Exhibit B.
6. The Notice of Appeal was not timely filed and it is respectfully submitted that the appeal should be dismissed. Failure to file the Notice of Appeal timely constitutes a jurisdictional defect.

WHEREFORE, it is respectfully requested that appeal of Richard Cordero be dismissed and that such other and further relief be granted by the Court as is deemed just and proper.

Dated: Rochester, New York
January 15, 2003



KENNETH W. GORDON
CHAPTER 7 TRUSTEE

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK**

In re PREMIER VAN LINES, INC.,
Debtor

Chapter 7 bankruptcy
case no. 01-20692

JAMES PFUNTNER,
Plaintiff

Adversary proceeding
no. 02-2230

-vs-

KENNETH W. GORDON, as Trustee in Bankruptcy for
Premier Van Lines, Inc., RICHARD CORDERO,
ROCHESTER AMERICANS HOCKEY CLUB, INC.,
and M&T BANK

Defendants

RICHARD CORDERO,
Defendant, Third party plaintiff

-vs-

DAVID PALMER, DAVID DWORKIN, DAVID DELANO,
and JEFFERSON HENRIETTA ASSOCIATES,

Third party defendants

RICHARD CORDERO
Appellant

case no. 03cv6021L

-vs-

KENNETH W. GORDON,
Appellee

**CORDERO'S BRIEF
IN OPPOSITION TO
TRUSTEE'S MOTION TO DISMISS**

Dr. Richard Cordero affirms under penalty of perjury the following:

1. Dr. Cordero, pro se appellant, opposes Appellee Kenneth Gordon's motion to dismiss because, contrary to his allegation, the notice of appeal was timely filed since at the hearing of the motion to dismiss Dr. Cordero's cross-claims against Appellee Gordon, Dr. Cordero gave notice in open court that he would appeal the bankruptcy court judge's ruling to grant the motion, which was entered by the clerk of the bankruptcy court on December 30, 2002, and the notice was mailed on January 9, 2003, and thus, within the period prescribed under Rules 8002(a) and 9006 of the Federal Rules of Bankruptcy Procedure (FRBkrP)

2. In the alternative, if the notice of appeal, though timely mailed, which is undisputed, were to be found not timely filed, the court can exercise its equitable and discretionary powers to achieve its first and ultimate objective of dispensing justice by upholding the superiority of Appellant Dr. Cordero’s substantial right of to have his day in court to seek redress, as oppose to allowing Appellee Gordon take advantage of the technicality of a timely mailed-untimely filed gap to avoid having to face responsibility in court for having defamed Dr. Cordero and performed negligently and recklessly as trustee.
3. Likewise, the court should apply a balancing test to the relative impact of denying or granting the motion to dismiss, which test will reveal the gross disproportionality of the prejudice to the relative prejudice that the parties would
4. Likewise, the court should weigh through a balancing test the equities that the conduct of the parties has given rise to, which test will reveal the gross disproportionality of the relative prejudice that the parties will sustain if the motion to dismiss is granted or denied.
5. Thus, if the motion to dismiss is granted, Pro se Appellant will not only be unable to obtain redress for the wrongs that Appellee has done onto him, but will also suffer the impairment of his defense against the plaintiff in the Adversary Proceeding that has yet to begin discovery in bankruptcy court; while if the motion to dismiss is denied, Appellee Trustee Gordon will only have to defend against Dr. Cordero just as he will have to defend against similar and related claims of the plaintiff in the Adversary Proceeding below.
6. In light of a reasonable construction of the rules of procedure in question and of the equity considerations at play, the court should exercise its equitable and discretionary powers to achieve substantial justice and fairness by not allowing that the filing four days after a timely mailing may cause such disproportionate prejudice on a pro se party seeking redress from a trustee who in spite of his status already comes into court with dirty hands, and to that end the court should deny the motion to dismiss.

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I. Statement of Facts

7. Looking for his property in storage, Dr. Cordero found out that the storage company storing it, Premier, had gone bankrupt and was in liquidation. He was referred to its trustee, Mr. Kenneth Gordon, Esq. Dr. Cordero contacted the Trustee, since it appeared reasonable that the trustee liquidating the company that had Dr. Cordero’s property under an income-generating contract would know where that property was. Far from assisting him in locating property related to a estate asset contract, Trustee Gordon did not even provide Dr. Cordero with information about

it, but rather bounced him back to one of persons that Dr. Cordero had already contact, to whom he had abandoned Premier' assets.

8. It took Dr. Cordero months to find out that his property was in another warehouse owned by Mr. James Pfunter. However, the latter refused to release Dr. Cordero's property lest Trustee Gordon sue him for disposing of estate property, and referred Dr. Cordero back to Trustee Gordon.
9. Dr. Cordero tried to contact Trustee Gordon, but once more, as at the earlier attempt, the Trustee would not take his calls or return them or reply to his recorded message or his letter. Dr. Cordero called Trustee Gordon a third time, but he would not take his call. Far from it, he sent Dr. Cordero a letter dated September 23, 2002, in which he made false and defamatory allegations and enjoined him not to contact his office again; and sent copies of it to the lawyers of parties involved in the liquidation, including the lawyer for Mr. Pfunter, to whom he had abandoned Premier's assets found in his warehouse, where Dr. Cordero's property was allegedly also found.
10. Dr. Cordero wrote on September 27, 2002, to the bankruptcy judge supervising the liquidation case, namely the Hon. John C. Ninfo, II. He complained that the Trustee, among other things, did not notify him of the liquidation of Premier, did not search for, let alone find, other Premier assets, such as Dr. Cordero's property under an income-generating storage contract, abandoned Premier assets found by others at Mr. Pfunter's warehouse, enjoined him not to contact his office despite both Mr. Pfunter' refusal to release the property to Dr. Cordero and referring him to the Trustee, and to top it off, had made false and defamatory statements about Dr. Cordero and published them to other parties. Dr. Cordero applied for the Judge to review the Trustee's performance and fitness to serve as trustee.
11. Trustee Gordon wrote a responsive letter, dated October 1, 2002, to the Judge in which he cast aspersions on Dr. Cordero's conduct, character, and competence so as to belittle him and persuade the Court as well as his supervisor, Assistant United States Trustee Kathleen Dunivin Schmitt, to whom he copied the letter, that "it is not necessary for the Court to take any action on Dr. Cordero's application" for a review of his performance and fitness as trustee.
12. Judge Ninfo referred the Application to Assistant Schmitt. Dr. Cordero sent directly to her a Rejoinder and Application for a Determination. The matter is now under review at the Executive Office for United States Trustees.
13. A few days later, Mr. Pfunter filed the Adversary Proceedings 02-2230, in which he named

Trustee Gordon, other parties, and Dr. Cordero as defendants. Dr. Cordero cross-claimed against the Trustee for defamation and negligent and reckless performance as trustee. The Trustee moved to have those cross-claims dismissed. He invoked no better grounds than that even if he defamed Dr. Cordero, he had a privilege under New York State law that immunized him from a defamation lawsuit –is this an ethical defense for a trustee, ‘I did it and you can’t touch me!’?-, and that looking for Dr. Cordero’s property was out of the scope of his duties.

14. Judge Ninfo granted the motion 1) even though discovery in the Adversary Proceeding had not even started; 2) despite the fact that the litigation of Mr. Pfuntner’s claims as well as of other counterclaims, cross-claims, and third party claims would necessarily bring into question Trustee Gordon’s performance; 3) notwithstanding the resulting impairment or preclusion while still at the starting line of Dr. Cordero’s defenses to Mr. Pfuntner’s claims; 4) disregarding the submission to the court by Trustee Gordon, an officer of the court and federal appointee, of false statements to obtain the personal benefit of avoiding a review of his performance and fitness as trustee; and 5) and not only without support in, but even contrary to, the facts and the evidence presented by Dr. Cordero, which went unchallenged by the Trustee himself.
15. At the hearing of the motion to dismiss and after granting it, Judge Ninfo told Dr. Cordero that he could appeal if he wanted. Dr. Cordero, who is appearing pro se and has never practiced as a lawyer, asked how he would obtain the papers necessary to file an appeal. Judge Ninfo said that Dr. Cordero would receive all the instructions later on. Dr. Cordero reasonably relied thereon since he had already received other instructions, such as the local rules and those for preparing third party summons as well as third party summons forms. Moreover, shortly after the hearing he also received the instructions for taking default judgment and for choosing among pre-trial options.
16. The order of dismissal was entered on December 30, 2002, and was mailed from Rochester to Dr. Cordero in New York City, where he lives. However, there were no instructions or forms of appeal accompanying the notice of the order. Therefore, Dr. Cordero had to call the Bankruptcy Court and asked for those instructions. Case Administrator Karen Tacy remembered that Judge Ninfo had referred to such instructions in open court at the hearing because she was there. She told Dr. Cordero that she thought that what the Judge had meant was appeal forms. Then she said that she would send them to Dr. Cordero by mail since the Bankruptcy Court neither accepts nor sends papers by fax.
17. Upon receipt of the forms, Dr. Cordero worked on them. It should be noted here that Dr.

Cordero is learning from books the intricacies of procedure under the rules applicable nationwide to all United States courts and the local rules adopted in the Western District. He checks and double checks every step and then checks once more in order to comply with all the requirements. Even so, Dr. Cordero mailed the notice of appeal within the required 10 days of the entry of the order, on Thursday, January 9, 2003. It was filed by the clerk of the bankruptcy court on Monday, January 13.

18. Thereupon, Trustee Gordon, filed a motion to dismiss the appeal alleging that the notice had been untimely filed, whereby by exploiting the technicality of the timely mailed-untimely filed gap he tries to avoid facing responsibility in court for his false and defamatory statements and his negligent and reckless performance as a trustee. Will the court let him get away with it?
19. Dr. Cordero would not. On January 27, 2003, he timely moved under Rule 8002(c)(2) for an extension of the time to file his notice of appeal. The hearing of the motion before Judge is scheduled for Wednesday, February 12, 2003.
20. In his Memorandum of Law in Opposition to Cordero's Motion to Extend Time to Appeal, Trustee Gordon unwittingly provides the motive for having handled Premier's liquidation negligently and recklessly: "As the Court is aware, the sum total of compensation to be paid to the Trustee in this case is \$60.00." He had no financial incentive to do his job...nor did he have a sense of duty!
21. Yet, it is way too 'untimely' for Trustee Gordon to complain that there is too little money in his job, particularly after having abandoned all Premier assets everywhere. Under §2-2.1. of the United States Trustee Manual, he had the duty to determine that right at the beginning: "the trustee should consider whether sufficient funds will be generated to make a meaningful distribution to creditors, **prior to administering the case as an asset case;**" (emphasis added). Only in Trustee Gordon's mind is it a defense to imply that he has no higher concern than getting paid, and if the money is not there, he will disregard his duties as a trustee and will feel no sense of responsibility toward the creditors and other parties in interest... 'may they fend for themselves!'
22. If the law were not sufficient to find that the notice of appeal was not only timely mailed, but also timely filed, would the equities suffice in the eyes of the District Court to use its discretion to ensure that such a person as Trustee Gordon does not wiggle himself from facing responsibility for his acts and attitudes?
23. For a broader background to the Statement of Facts, see the Appendix. [A:#]

II. Consistent & coherent construction of rules on notice of appeal

A. R.8002 allows for valid filing even if mistaken and delayed

24. FRBkrP Rule 8002 bears the heading “Time for Filing Notice of Appeal” and provides thus:

“Rule 8002(a) Ten-day period

The notice of appeal shall be filed with the clerk within 10 days of the date of the entry of the judgment, order, or decree appealed from.”

25. The Rule also makes it clear that the clerk it refers to is the clerk of the bankruptcy court. Thus, the last sentence provides that:

“Rule 8002(a)...If a notice of appeal is mistakenly filed with the district court or the bankruptcy appellate panel, the clerk of the district court or the clerk of the bankruptcy appellate panel shall note thereon the date on which it was received and transmit it to the clerk and it shall be deemed filed with the clerk on the date so noted.”

26. It also follows from that provision that there is nothing sacrosanct about filing with the bankruptcy clerk within ten days. The filing is not invalid even if the notice of appeal is filed with either of two wrong clerks in either of two wrong courts.

27. Nor is there a practical imperative that commands that the filing be strictly within the ten-day period. Legal uncertainty notwithstanding, parties cannot absolutely rely on checking the docket on the tenth day and seeing no entry of a notice of appeal filed by the clerk. They must still take into account the possibility that the notice may have been entered mistakenly but validly in either of two other courts. What is more, there is no time limit by which they can be absolutely certain, for the Rule does not require of any given party to discover the mistake by a certain time, or transmit the mistakenly filed notice by a certain time, or that the transmitted notice reach the bankruptcy clerk by a certain time, not even that such clerk enter the transmitted notice of appeal on the docket by a certain time. Nor can any party complain if the appellant mistakenly filed his notice with the clerk of the bankruptcy appellate panel, who mistakenly transmitted it to the clerk of the district court, who mistakenly sent it back to the panel clerk, who then transmitted it to the bankruptcy clerk, who mistakenly refused to file it because it mistakenly had the wrong heading for the bankruptcy appellate court or did not reach him within ten days. Whenever the clerk of the bankruptcy court gets it and files it, and if the parties are still checking the docket, then they will finally learn that in fact notice of appeal was given.

28. Does a provision that allows for such delays and so much legal uncertainty for unlimited time convey even the impression that filing within the ten day period is of such paramount importance for the system or the administration of justice that if an appellant, such as Dr. Cordero, timely mails the notice within the period, addressed to the right court, and the right clerk correctly files it but does so when he receives it after the period, the appellant should nevertheless be deprived of his substantial right to appeal? Of course not! That right is all the more substantial here, for it is to appeal from the dismissal of cross-claims before any discovery had taken place in the Adversary Proceeding in which they were brought. It is an appeal for the right to have one's day in court!

B. Rules of Construction of the Rules of Procedure and the Supreme Court

29. A construction of Rule 8002(a) that disregarded timely mailing in order to give precedence to filing within the ten-day period at the expense of the substantial right to appeal would not only be unjustifiable and senseless, but also transgress against the fundamental rule of construction of the Rules of both bankruptcy and civil procedure:

“FRBkrP Rule 1001. These rules shall be construed to secure the just, speedy, and inexpensive determination of every case and proceeding.”

“FRCivP Rule 1001. These rules shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.”

30. To construe the ten-day period rule justly one must read it together with the other rules of the FRBkrP and the FRCivP. Such a reading is mandated by the Supreme Court of the United States. Precisely in a bankruptcy case, namely, *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240, 103 L. Ed. 2d 290, 109 S. Ct. 1026 (1989), the Court stated the following rule of statutory construction: “as long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute.” There is such a coherent and consistent scheme of Rules for the construction of what a timely notice of appeal is. It is based on the Rules’ plain language.

C. The general rules for computing time applicable to notice of appeal

31. FRBkrP, Part IX is titled General Provisions, and contains rules of general applicability to the other rules. Thus, its rules are applicable to the rules of Part VIII generally, which is titled Appeals to District Court or Bankruptcy Appellate Panel, including Rule 8002 and its ten-day

period for filing a notice of appeal. Consequently, Rule 8002 is subject to the application of Rule 9006, which provides as follows:

”Rule 9006 Time

(a) Computation

In computing **any period** of time prescribed or allowed by **these rules** or by the Federal **Rules of Civil Procedure** made applicable by these rules, by the **local rules**, by **order of court**, or by **any applicable statute**, the day of the **act, event, or default** from which the designated period of time begins to run shall not be included....” (emphasis added)

32. In fact, the Supreme Court stated so much in its landmark case in the area of timely filing under the Bankruptcy Code, *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 13 S.Ct. 1489, 509 U.S. 380, 123 L.Ed.2d 74 (1993): “Rule 9006 is a general rule governing the computation, enlargement, and reduction of periods of time prescribed in other bankruptcy rules.”

D. R.9006’s broad scope of application

33. The plain language of the Rule makes clear its intent to have its method of computing time applied broadly. The Advisory Committee too makes this clear in its Note for subdivision (a): “This rule...governs the time for acts to be done and proceedings to be had in cases under the Code and any litigation arising therein.” No doubt, the rule’s scope is all acts, including an appealable order and an appeal from it, and the rule’s purpose is to explain how to compute the time for such acts.
34. Rule 9006 further provides specific methods for computing time. They include the following:
- ”Rule 9006(e) Service of process and service of any paper other than process or of notice by mail is complete on mailing.”
35. Dr. Cordero timely mailed his notice of appeal on Thursday, January 9, 2003. Therefore, pursuant to the plain language of Rule 9006(e), his service of notice of appeal was complete on that date.

E. Period of service by mail extended by three days

36. The fact that the notice of appeal arrived at the bankruptcy court and was filed by the clerk of the bankruptcy court on Monday, January 13, does not detract from the timeliness of Dr. Cordero’s filing.
37. Indeed, Rule 9006(f) can extend the time for filing the notice of appeal by three days. It

provides thus:

“Rule 9006(f) When there is a right or requirement to do some act or undertake some proceedings within a prescribed period after service of a notice or other paper and the notice or paper other than process is served by mail..., three days shall be added to the prescribed period.”

38. a. The right here in question is that provided under Rule 8001(a) Appeal as of right. The time prescribed by Rule 8002(a) is within ten days of the order appealed from, which in the instant case began to run on December 31, the day after the order of dismissal of the cross-claims was entered in the bankruptcy court. The ten-day period ran until Thursday, January 9, which Appellee Gordon admits to be so.

39. However, the notice of entry was served by the clerk of the bankruptcy court by mail. Consequently, three days were added to the ten-day period for giving notice of appeal. That additional time made Sunday, January 12, the last day for giving such notice. For such a case, the second sentence of Rule 9006(a) provides that:

“Rule 9006(a)...The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday,...in which event the period runs until the end of the next day which is not one of the aforementioned days.”

40. Therefore, Monday, January 13, was the last day for giving notice of appeal, even by mailing it. Four days before that last day Dr. Cordero actually gave notice of appeal by mail, on Thursday, January 9, which is all the more reason to deem his notice timely filed.

F. A clerk can and did serve a notice subject to the three additional days rule

41. a. That a clerk of court can ‘serve’ a paper generally and that the clerk of the bankruptcy court can ‘serve’ a notice of entry of order is absolutely indisputable. Rule 9022 states so:

“Rule 9022 Notice of Judgment or Order

B. Judgment or order of bankruptcy judge.

Immediately on the entry of a judgment or order the clerk shall serve a notice of entry in the manner provided in Rule 5(b) FRCivP on the contesting parties and on other entities as the court directs”

b. In turn, Rule 5(b) FRCivP provides, among other things, the following:

“FRCivP Rule 5(b)(2)(B) Mailing a copy to the last known address of the

person served. Service by mail is complete on mailing.”

42. a. That the clerk of the bankruptcy court gave Dr. Cordero notice of the entry of the order of dismissal of his cross-claim is undeniable. His very own rubberstamp affixed to the order reads thus:

“TAKE NOTICE OF THE ENTRY
OF THIS ORDER ON 12/30/02
PAUL R. WARREN, CLERK
U.S. BANKRUPTCY COURT

- b. Therefore, the clerk served notice of the order of dismissal on Dr. Cordero. By so doing, he triggered the provisions of Rule 9006(f) and extended the prescribed ten-day period for Dr. Cordero to give notice of appeal by three additional days. This allows the court to deem Dr. Cordero’s timely mailed notice of appeal to have been timely filed

G. Purpose of R.9006(f) is to compensate for time lost when “served by mail”

43. The applicability of the three additional day rule of subdivision (f) of R.9006 to the ten-day period for filing notice of appeal of R.8002(a) becomes patent in light of the purpose of the subdivision.
44. To begin with, the title of subdivision (f) is Additional time after **service by mail** (emphasis added). Likewise, that phrase in its context reads “after service of a notice or other paper ...**served by mail**,” (emphasis added). This plain language reasonably indicates that the purpose of subdivision (f) is to compensate a party that must do an act for the time lost because the notice or paper alerting it to the need to act was “**served by mail.**” What is at stake is the time that the party should have to act within a prescribed period, not the nature of the event from which the period begins to run.

H. Entry of order can’t be coherently and consistently excluded from R.9006(f)

45. Therefore, it would be incorrect to pluck out of context the phrase in Rule 9006(f) “after service of a notice or other paper” to make it mean that the Rule’s application is limited to rules providing that their prescribed periods run from service of notice or paper to the exclusion of any other type of event, such as the date of entry of an order.
46. For one thing, the purpose of the broadly worded Rule 9006 is to offer a method for computing “**any** period of time prescribed or allowed”, and that regardless of the nature of “**the act, event, or default** from which the designated period of time begins to run.” Hence, the entry of the

order of dismissal can mark the beginning of a period subject to the three additional days rule.

47. Only arbitrarily could one exclude from the scope of subdivision (f) the prescribed period of ten days within which to appeal on the grounds that it runs from the entry of the order appealed from. To do so, one would have to disregard the fact that the Rule's plain language makes no such expressed exclusion. But if so, the Supreme Court's requirement that a statutory scheme be construed in a coherent and consistent way would demand that one remove the notice of appeal period be altogether from the scope of the entire Rule 9006, for nowhere in its text does it expressly include periods that run from orders, or the entry of an order, let alone from the entry of an appealable order, not to mention an order to dismiss. It only expressly states "**act, event, or default.**"
48. That would be unwarranted by a coherent and consistent reading of Rule 9006. When that rule wants to exclude any Rule from its scope of application, it does so expressly, as in (b)(2), (b)(3), and (c)(2). It should be noted that both (b)(3) and (c)(2) make express reference to Rule 8002 on time for filing notice of appeal. Hence, it would be neither coherent nor consistent to limit the application of Rule 9006 when it expressly provides therefor, and even exclude it altogether from its subdivision (f) when it makes no express reference to it at all. As the Supreme Court observed: "It is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another;" *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537, 128 L. Ed. 2d 556, 114 S. Ct. 1757 (1994).
49. From this analysis flows the conclusion that Rule 9006 includes everything that it does not exclude expressly. This proposition too is consistent with the statement of the Supreme Court in *Pioneer*, footnote 4: "The time-computation and time-extension provisions of Rule 9006, like those of Federal Rule of Civil Procedure 6, are generally applicable to any time requirement found elsewhere in the rules unless expressly excepted."

I. Lost time compensated to avoid hardship due to too short a time to prepare

50. The reason why Rule 8002 must be within the scope of the three additional days rule of Rule 9006(f) flows from their purpose and plain language. Thus, the Advisory Committee Note for Rule 9006 (a) states that, "This rule is an adaptation of Rule 6 FRCivP" In turn, Rule 6 carries the following explanatory note that reveals its purpose:

"FRCivP Rule 6, 1985 Amendment

Rule 6(a) is amended to acknowledge that weather conditions or other events may render the clerk's office inaccessible one or more days. **Parties who are obliged to file something with the court during that period should not be penalized if they cannot do so.** (emphasis added)

The Rule also is amended to extend the exclusion of intermediate Saturdays, Sundays, and legal holidays to the computation of time periods less than 11 days. Under the current version of the Rule, **parties bringing motions under rules with 10-day periods could have as few as 5 working days to prepare their motions.** This **hardship** would be **especially acute in the case of Rules 50(b)** [Renewing Motion for Judgment After Trial; Alternative Motion for New Trial] and (c)(2) [New Trial Motion], 52(b) [on motion for the court to amend its findings], and 59(b), (d), and (e) [on motions for new trial and to alter or amend judgment], **which may not be enlarged** at the discretion of the court...." (emphasis added)

51. That explanatory note makes obvious the purpose of Rule 9006 of not penalizing parties that cannot file because of factors, such as weather conditions or non-business days, that reduce their time to do so. To that end, its subdivision (f) adds the factor that the notice on the running of a prescribed period has been served by mail, thereby shortening the party's time to prepare. To compensate for the loss time it adds three days.
52. It should now be easy to appreciate how applicable that explanatory note is, given the similarity of the factors mentioned, to Rule 8002 on notice of appeal at issue here. Thus, it expresses particular concern about rules with ten-day periods; with no possibility of enlargement at the court's discretion; yet subject to being reduced to as few as 5 working days; and concerning appeals for new trial or to alter or amend judgment.
53. In the instant case, the notice of the entry of the dismissal order and the notice of appeal had to travel between Rochester and New York City. The appeal instructions promised by the judge were not even accompanying the notice of entry when it arrived on Thursday, January 2, 2003. Yet, it was reasonable for Dr. Cordero to expect to receive these instructions, for others had been sent to him, such as the local rules and those for preparing third party summons, or were sent to him after the hearing, such as those for taking default judgment or for choosing among pre-trial options.
54. Dr. Cordero called the bankruptcy court to inquire about the instructions and forms. However, a

clerk stated that there were no such appeal instructions, only forms, and said that they would be sent by mail since the bankruptcy court neither accepts nor sends papers by fax. Obviously, they are not in a rush to receive or send anything. And for good reason too, since there are absolutely no legal grounds in the FRBkrP or in practical considerations for notice of appeal to be considered always an emergency matter that must be prepared and dashed out even within hours of the receipt of the order to be appealed from.

55. Hence, Dr. Cordero, a pro se appellant filing a notice of appeal for the first time ever, had less than 5 working days before the 10-day period ran out on Thursday, January 9, to prepare and mail the notice. No doubt this constituted the kind of acute hardship that Rule 6 intends to prevent and that Rule 9006(f) lessens by adding three days to the prescribed period. How much more of an unreasonable hardship it would have been if Dr. Cordero had had to mail the appeal forms, which in any event he did not yet have, so that they arrived back in Rochester by Thursday the 9th?
56. Consequently, at law and under the circumstances, he should be deemed to have, not only timely mailed, but also timely filed, the notice of appeal. This result derives from the plain language and purpose of the Rules. They allow for a reasonable construction that integrates them into a coherent and consistent scheme. Thus, Rule 9006(f), quoted above, can now be restated as follows:

"Rule 9006(f) When there is a right to appeal or requirement to file notice of appeal or undertake some proceedings within a prescribed period of 10 days after service of a notice of entry of an order dismissing cross-claims or other paper and the notice or paper other than process is served by mail by the clerk of the bankruptcy clerk from Rochester to New York City on December 30..., three days shall be added to the prescribed period ending on January 9 to extend it until January 12, which if a Sunday, the period shall be extended until Monday, January 13, so as to lessen the acute hardship of too short a time to prepare experienced by a pro se appellant and not penalize his substantial right to appeal for a new trial or judgment."

57. If thanks to the application of Rule 9006(f)'s three additional days rule to Rule 8002(a)'s ten-day period it would have been timely for notice of appeal to be mailed by Dr. Cordero even on the 13th, then it was all the more timely for the notice to be both timely mailed four days earlier on Thursday the 9th and received and filed by the clerk of the bankruptcy court on the 13th.

J. R. 8002(a) provides for notice to be deemed filed prior to when received

58. It is totally consistent and coherent with Rule 8002(a) to deem a notice of appeal filed in the bankruptcy court on a date prior to the date of actual filing by the bankruptcy clerk. The plain language of the Rule provides therefor:

“Rule 8002(a)...If a notice of appeal is mistakenly filed with the district court or the bankruptcy appellate panel, the clerk of the district court or the clerk of the bankruptcy appellate panel shall note thereon the date on which it was received and transmit it to the clerk and it shall be deemed filed with the clerk on the date so noted.”

59. Therefore, it is totally coherent and consistent with itself to construe its requirement:

“Rule 8002(a) Ten-day period

The notice of appeal shall be filed with the clerk within 10 days of the date of the entry of the judgment, order, or decree appealed from;”

coherently and consistently with the requirement:

“Rule 9006(e) Time of service

Service...of any paper...or of notice by mail is complete on mailing;”

to mean that the date of mailing of a notice of appeal can be deemed the date of filing by the clerk of the bankruptcy court.

K. Notice to be filed in the bankruptcy court, not the district court or BAP

60. If the rule in the FRBkrP is that service is complete on mailing and filing can be deemed to occur on a date prior to the actual filing date, then where does the notion come from that a notice must be filed strictly within the period for filing? It comes from a provision found in Rule 8008(a)

“Rule 8008(a) Papers required or permitted to be filed with **the clerk of the district court or the clerk of the bankruptcy appellate panel** may be filed by mail addressed to the clerk, but filing is not timely unless the papers are received by the clerk within the time fixed for filing, except that briefs are deemed filed on the day of mailing.” (emphasis added)

61. The phrase “by mail addressed to the clerk” means unequivocally “by mail addressed to the ‘clerk of the district court or the clerk of the bankruptcy appellate panel’” This is so because, as seen in the quote above, the very sentence that contains that phrase ends thus: “except that briefs are deemed filed on the day of mailing.” Those briefs are only filed with either the clerk of the

district court or the clerk of the bankruptcy appellate panel, as follows from Rule 8009 on filing appellate briefs in a district court or with a bankruptcy appellate panel.

62. Wait a moment! This filed-upon-receipt provision applies to papers filed in district court and with the bankruptcy appellate panel. The notice of appeal is neither required nor permitted to be filed with either the clerk of the district court or the clerk of the bankruptcy appellate panel, as follows from the last sentence of Rule 8002(a), quoted above, which considers it a mistake to do so. The filed-upon-receipt provision found in Rule 8008(a) is an exception!

L. Exceptional character of the filed-upon-receipt provision in R.8008(a)

63. Indeed, if it were the general rule of the FRBkrP that the timeliness of a filing was determined by whether the clerk received and docketed a notice or paper within the fixed filing time, then it would be superfluous for Rule 8008(a) to restate the obvious, for how else could it be?
64. The limited usefulness and consequent narrow scope of application of the filed-upon-receipt provision in Rule 8008(a) is underscored by the fact that it contains an exception within itself in order to allow the application of the general rule. As quoted above, it provides thus: “except that briefs are deemed filed on the day of mailing.”
65. No doubt, by its own plain language, the filed-upon-receipt provision is an exception, limited in scope to the filing of only some papers and only in district court or with the bankruptcy appellate panel. As such, it must be construed restrictively and applied only when a Rule expressly calls therefor; otherwise, the exception would gut the general rule.
66. What is more, the provision’s exception is further weakened by scooping out of it another exception. Thus, for Rule 8008 as a whole, rather than just that particular provision in it, the Advisory Committee Notes state that, “This rule is an adaptation of FRAppP Rule 25.” Appellate Rule 25 further narrows the exception with another exception that applies the complete-on-mailing general rule to appendixes. Its Notes provide the rationale that supports the rule of general applicability: “An exception is made in the case of briefs **and appendixes** in order to afford the parties the maximum time for their preparation,” (emphasis added).

M. Reasons for limiting scope of exceptional filed-upon-receipt provision

67. There is the rationale for the provision’s limited scope: It reduces the necessary time for adequate research and writing as well as for sound decision making. All that for no good reason at all. Hasty

filings under the duress of time constraints unjustified by law or practice only lead to rushing out appeals that are ill considered by both counsel and client and that end up clogging the judicial system. That can certainly not be the intent of the judges that administer that system or of the drafters in the Judicial Conference and Advisory Committee, let alone Congress, which would have to provide more funds to run a system overwhelmed by appeals filed just to beat the clock.

68. Moreover the exceptional filed-upon-receipt provision reduces the margin of timeliness by interjecting into the filing process an intermediary, namely the U.S. Postal Service or a commercial carrier, which following its own steps and timetable under its own internal and external constraints, finally delivers another of millions of packages to the clerk of court, who then must get to it and file it.
69. Because of its narrower margin of timeliness, the exceptional provision forces the filing party to avoid guessing and increase the safety margin by mailing the papers well ahead of time; otherwise, that party must resort to mailing them by overnight or express mail, which is much more costly and as such, contrary to the stated aim of the both FRBkrP Rule 1001 and FRCivP Rule 1 that their ‘rules must be construed and administered “to secure the just, speedy, and **inexpensive** determination of every action” and proceeding;’ (emphasis added).
70. Conversely, maximum time for preparing briefs and appendices allows for better research and writing as well as a more reflective process. This not only benefits the filing party, but also the court and the opposing party. No doubt, better prepared legal papers result in a greater good for the administration of the judicial system and the dispensation of justice. This greater good should be sought at every opportunity through the application of the complete-on-mailing general rule to serving and filing papers as well as by curing any harmless error in order to achieve such greater good.

N. General rule for R.8002 v. exception in R.8008(a)

71. If the exceptional filed-upon-receipt provision is to be read coherently and consistently with the rest of the Rules, then by contrast to it the general rule must be that, ‘A notice or other paper required or permitted to be filed with the clerk of the **bankruptcy court** may be filed by mail addressed to the bankruptcy clerk and is deemed filed on mailing.’ This conclusion is coherent and consistent with both the FRBkrP –Rules 7005 and 9006(e)- and the FRCivP –Rule 5(b)(2)(B), made applicable to adversary proceedings by Rule 7005- which provide that service

is complete on mailing.

72. Hence, the exceptional filed-upon-receipt provision in Rule 8008(a) does not apply to the filing of the notice of appeal, which is provided for under Rules 8001 and 8002, which in turn are governed by the broad Rule 9006 and its computation of time rules of general applicability, as stated in Pioneer.
73. That's it! The period for filing the notice of appeal can be added three days because the notice is to be filed in the bankruptcy court. That is the general rule of the Bankruptcy Rules generally intended for application in bankruptcy court. By contrast, when a paper is to be filed in a district court or with a bankruptcy appellate panel an exceptional provision is stated expressly to require filing within the fixed prescribed period, but only in some cases.

III. Equities of curing harmless error to preserve substantial right and prevent prejudice

A. The court's power and the parties' rights

74. It is not as an exception, but rather under a rule, set out in FRBkrP Rule 9005, that the court has ample power to cure any omission. What is more, under FRCivP Rule 61 it even has the obligation to disregard any error that does not affect the parties' substantial rights:

“FRBkrP Rule 9005 Harmless Error

Rule 61 FRCivP applies in cases under the Code. When appropriate, the court may order the correction of any error or defect or the cure of any omission which does not affect substantial error.”

“FRCivP Rule 61. Harmless Error

The court at every stage of the proceeding **must** disregard any error or defect in the proceeding which does not affect the substantial rights of the parties;” (emphasis added).

75. The substantial rights at stake in the instant case are the following:
- a. For Dr. Cordero it is the substantial right to appeal for his day in court after he, as a pro se appellant, reasonably relied on the plain language of, and substantially complied with, both the bankruptcy and civil procedure rules.
 - b. For Appellee Gordon it is the right to avoid legal action by claiming that the notice of appeal was untimely filed on Monday, January 13, although timely mailed on Thursday, January 9, 2003.

B. Giving priority to a substantial right over procedure

76. The right for a person to have his day in court so that he may seek justice and the court may dispense justice constitutes a substantial right that the court must safeguard through any coherent and consistent interpretation of the law.
77. By contrast, the procedure for a court to be seized of an action so that it may resolve it is just that, a procedure. The fact that an act, such as filing, triggers a provision that confers jurisdiction for a court to hear a case does not by itself determine how the period for undertaking such act is to be computed. Therefore, the complete-on-mailing rule can be applied to the provision for giving notice of appeal.
78. Calling a filing provision jurisdictional does not confer upon it such greater weight that it should tip the scale of justice in its favor when weighed on a balancing test against the substantial right to resort to that court. To reject this proposition would mean that the mechanism for perfecting an appeal takes precedence over the right to appeal itself. This should be held unacceptable, for it inverts the importance of rights relative to the procedure to secure them by turning observance of the procedure for running the courts into the objective of the system of justice while making the people and their right to have their claims resolved by those courts subservient to the procedure. Such a result defies reason and frustrates the courts' mission of securing justice. The right to take an appeal, particularly in a case like this, where the notice was mailed timely, should have priority over the right to be informed about it.
79. While Dr. Cordero is reasonable enough not to propose that the rules of procedure be dispensed with when a litigant appears pro se, he respectfully submits that if substantive law recognizes the right of any person to assert a claim in court by himself, then the rules of procedure should be interpreted so as to allow the effective exercise of that right.

C. Weighing the relative prejudice sustained by the parties

80. On a balancing test the prejudice to be redressed or prevented is this:
 - a. that sustained by Dr. Cordero through Appellee Gordon's defamatory statements and his negligent and reckless performance as trustee, further aggravated by the error of the bankruptcy court, which dismissed Dr. Cordero's cross-claims even before any discovery had taken place in the Adversary Proceeding no. 02-2230, commenced by Plaintiff James Pfuntner, in which the latter as well as other defendants, cross-

defendants, and third-party defendants will be able to take discovery of, and assert, the same or similar defenses and claims against Appellee Gordon, who will have to face them anyway, while Dr. Cordero will have to confront those parties after having been stripped at the outset of his defenses and claims.

- b. that which Appellee Gordon could sustain by losing the opportunity to exploit the technicality of the timely mailed-untimely filed gap and thereby having to stand in court to face the legal consequences of his wrongdoing.

D. Appellee Gordon's grab with Dirty Hands at promptitude from others

81. For Appellee Gordon that would not be a prejudice, but rather his deserts. As long ago as in his letter of October 1, 2002 to Judge Ninfo, he stated that he would "soon be issuing a No Distribution Report"...how else could it be since he abandoned the Debtor's assets in the Jefferson-Henrietta warehouse, failed to look in the Debtor's business files to find any others elsewhere, and when third parties did find others, abandoned them too. Since the Appellee had already washed his hands of liquidating the Debtor, whether the notice of appeal was timely mailed on January 9th or timely filed on the 13th has absolutely no prejudicial impact on his work as trustee. He is attacking the filing's timeliness just for the personal benefit of escaping responsibility in court for his wrongdoing.
82. In so doing, Appellee Gordon has the cheek to demand of both Dr. Cordero and the courts that he be given notice with promptitude about whether he has to face an appeal. Yet, he has shown such contempt for promptitude when it was his duty to perform promptly on behalf of others.
83. Indeed, although Appellee Gordon was appointed Chapter 7 trustee of Debtor storage company Premier Van Lines in December 2001, and had access to all its business files, he never contacted Dr. Cordero, even though Dr. Cordero's storage contract, still in force, with the Debtor was an income-generating asset of the estate. Therefore, Appellee Gordon could not properly liquidate the Debtor without adequately disposing of that contract and, for that matter, of all similar still income-generating contracts between the Debtor and its customers.
84. Likewise, after months of searching for his stored property Dr. Cordero was referred to Trustee Gordon. He had to call the Trustee several times in the first part of May 2002 before the Trustee finally took his call, the first and only time ever that the Trustee deigned to talk to party-in-interest Dr. Cordero. Although the Trustee agreed to send Dr. Cordero a letter stating the details of the

bankruptcy and current status of the storage company, he failed to do so. Dr. Cordero had to write to Trustee Gordon to remind him of the letter and request that he send it. But not even that was enough for the Trustee to respond. So Dr. Cordero had to call him again to ask whether he would answer the letter. Trustee Gordon neither took the call nor returned it. It was only by a cover letter dated June 10, 2002, that the Trustee answered to state the obvious, that is, that he was sending attached thereto a copy of his April 16 letter to the landlord of the warehouse used by the Debtor, followed by a short, I-can't-care-less,-fend-for-yourself: "I suggest that you retain counsel to investigate what has happened to your property." For that useless response, Dr. Cordero was made to wait a month. If after working on the case for six months that was all the Trustee had to say, how much had he worked?

85. That letter, dated April 16, 2002, was more incriminating of Trustee Gordon's tardiness than responsive to Dr. Cordero's request, for it simply stated that he would "not be renting or controlling the storage units or any of the assets at the Jefferson Road location [of the warehouse used by the Debtor]. Any issues renters may have regarding their storage units should be handled by yourself and M&T Bank [the lienholder]." It took four months since his appointment as trustee for Trustee Gordon to inform a key party in interest, the landlord in possession of the Debtor's assets, that he, the trustee, was washing his hands of those assets! What was Trustee Gordon expecting the landlord to do in the meantime with the Debtor's assets in his warehouse, since the Debtor had disappeared long ago? Did the Trustee take prompt action to secure those assets?
86. When other parties affected by the bankruptcy kept referring Dr. Cordero back to Trustee Gordon, Dr. Cordero faxed him a letter on August 26, 2002. There was no feedback. So Dr. Cordero had to call Trustee Gordon's office. But the Trustee would neither take nor return his calls, even though Dr. Cordero left messages on his answering machine and with his secretary. When the Trustee finally responded, it was almost a month later in a letter dated September 23, 2002, where he not only made defamatory statements that he published to other parties, but also issued an injunction to wash his hands of Dr. Cordero by stating this:

"Your continual telephone calls to my office and harassment of my staff must stop immediately. I have directed my staff to receive and accept no more telephone calls from you regarding this subject. As I have consistently maintained throughout my administration of this case, your efforts should be directed towards the landlord, his attorney and the bank

which has a lien on the assets of Premier Van Lines, Inc. I trust that you will not be contacting my office again.”

87. Trustee Gordon has neither justification at law nor merits in equity to demand a degree of promptitude that he never showed others although he has an official duty to communicate with them in order to attain his trustee’s “primary goals of ensuring the prompt, competent, and complete administration of chapter 7 cases,” as provided under United States Trustee Manual, Chapter 7 Case Administration §2.1.1, adopted by the Department of Justice and its United States Trustee Program.
88. Wash he may, but to no avail, for tardiness and unresponsiveness are the dirt still stuck to Appellee Gordon’s hands. He only affronts both Dr. Cordero and the district court when he comes into it with such dirty hands to ask that the appeal from the dismissal of the cross-claims against him be dismissed because notice of the appeal, instead of being filed by the clerk of the bankruptcy court on Thursday, January 9, was filed two business days later, on Monday, January 13, 2003. He is outrageous!

E. Weighing the equities of excusable neglect for achieving substantial justice

89. If Dr. Cordero, despite his good faith best efforts to comply with the Rules, made a mistake in the interpretation of those for filing a timely notice of appeal, it was only through excusable neglect. The Supreme Court has concluded that “determining what sorts of neglect will be considered ‘excusable,’...is at bottom an equitable [determination], taking account of all relevant circumstances surrounding the party’s omission;” *Pioneer*, 507 U.S. at 395, 113 S. Ct. at 1498.
90. The Court identified some factors to guide this determination:
1. “the danger of prejudice to the debtor”: here the Debtor, whose assets Trustee Gordon already abandoned, would not be affected at all if the Trustee’s motion to dismiss is denied and he is required to answer in court for his defamatory statements about Dr. Cordero and untruthful submissions to the court as well as his negligent and reckless performance as trustee, particularly since the Trustee will in any event have to defend against other parties in Adversary Proceeding 02-2230;
 2. “the length of the delay and its potential impact on judicial proceedings”: if the notice of appeal is found subject to the application of the general rules of complete-on-mailing and three additional days under Rule 9006(e) and (f), Dr. Cordero’s timely mailing was

timely filed and there was no delay; otherwise, there was a 4-day filing delay; which neither had nor will have any impact on the bankruptcy case or the Adversary Proceeding;

3. "the reason for the delay, including whether it was within the reasonable control of the movant": Dr. Cordero reasonably relied on the plain language of the Rules and their coherent and consistent construction; and just as he had received other instructions and forms, he reasonably expected to receive those for filing appeals that Judge Ninfo had said at the hearing would be sent to him with the order of dismissal; but there were no instructions and the forms were sent by mail, all of which was beyond his control;
4. "whether the movant acted in good faith": Dr. Cordero, a pro se appellant, exercised due diligence in following the Rules and as a matter of fact did mail the notice of appeal timely; if he somehow failed to meet the timely filing requirement, it was in spite of his best efforts.

91. *In re Pioneer* the Court stated that "erecting a rigid barrier against late filings attributable in any degree to the movant's negligence...is irreconcilable with our cases assigning a more flexible meaning to "excusable neglect"...[which] is a somewhat "elastic concept" and is not limited strictly to omissions caused by circumstances beyond the control of the movant."
92. In light of a) a consistent and coherent construction of the rules on notice of appeal, b) the court's obligation under the Rules to safeguard substantial rights by curing harmless error, and c) the equities of the situation where a pro se Appellant timely mailed the notice and an Appellee is seeking with dirty hands to fetch a technicality to escape facing the consequences of having wronged others, Dr. Cordero respectfully submits that the court should deny the motion to dismiss and allow Dr. Cordero to have his day in court, for "refusal to take such action appears to the court inconsistent with substantial justice," FRCivP Rule 61.

IV. Order sought

93. Appellant respectfully requests that the district court:
 - a) find that the notice of appeal was timely given by Appellant Dr. Cordero and filed by the bankruptcy court clerk;
 - b) deny Appellee Gordon's motion to dismiss the appeal;
 - c) in the event of denying the motion and requiring an appellate brief, extend the period

under Rule 8009(a)(1) for Dr. Cordero to serve and file it because by the time he receives the notice of the order and considering how early thereafter he would have to mail it, he would have fewer than 10 days to research and write the brief, which he, a pro se appellant, has never written before, so that it would take him a considerable amount of time and effort to accomplish that task adequately;

- d) in the event of requiring oral argument, allow Dr. Cordero to present his arguments by phone given the hardship in terms of cost and time that requiring his appearance in person would cause;
- e) in the event of granting the motion to dismiss, order the clerk of the Bankruptcy Court for the Western District of New York, Paul R. Warren, to refund to Dr. Cordero the \$105 fee for filing the appeal, for if the clerk knew that the notice was untimely, he could not take the money, and if he did not know, although he is a lawyer specialized in applying day in and day out the filing rules of the FRBkrP, why should Dr. Cordero, a pro se appellant, be held to a higher standard?; and order that the fee be applied toward the fee for filing an appeal to the Court of Appeals for the 2nd Circuit; and
- f) award Dr. Cordero reasonable attorney’s fees and the reimbursement of all expenses that he may incur concomitant with handling this motion hundreds of miles from his home, together with such other relief as may seem just and proper.

V. Table of Exhibits

- 1) Att. **Stilwell’s** letter of **May 30, 2002, to** Dr. Cordero[A:18]
- 2) Trustee **Gordon’s** letter of **June 10, 2002, to** Dr. **Cordero**[A:16]
- 3) Trustee **Gordon’s** letter of **April 16, 2002, to** Manager **Dworkin**[A:17]
- 4) Letter of Christopher **Carter**, owner of Champion Moving & Storage, of **July 30, 2002, to** Dr. **Cordero**[A:45]
- 5) Mr. **Carter’s** letter of **July 30, 2002, to** Vince Pusateri, **Vice President of M&T Bank**, general lienholder against Premier Van Lines[A:46]
- 6) Att. **Beyma’s** letter of **August 1, 2002, to** Dr. **Cordero**[A:352]
- 7) Trustee **Gordon’s** letter of **September 23, 2002, to** Dr. **Cordero**[A:13]
- 8) Dr. **Cordero’s** letter of **September 27, 2002, to** Judge **Ninfo**[A:7]

- 9) Dr. **Cordero's** Statement of Facts and Application for a Determination of **September 27, 2002, to Judge Ninfo**[A:8]
- 10) Dr. **Cordero's** letter of **September 27, 2002, to Trustee Gordon**.....[A:2]
- 11) Trustee **Gordon's** letter of **October 1, 2002, to Judge Ninfo and others**[A:19]
- 12) Judge **Ninfo's** order, entered on **December 30, 2002, to dismiss cross-claim** against Trustee Gordon.....[A:151]

Certification of Service

I, Dr. Richard Cordero, hereby affirm under penalty of perjury that at the same time I mailed to the District Court my brief in opposition to Appellee Kenneth Gordon's motion to dismiss my appeal from the Bankruptcy Court for the Western District of New York, I also mailed copies thereof on the following parties:

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February 25, 2003

Honorable David G. Larimer
United States District Court
1360 U.S. Courthouse
100 State Street
Rochester, New York 14614

RE: Motion to Dismiss Appeal
Cordero v. Gordon
03-CV-6021L

Dear Judge Larimer:

Enclosed please find my prior brief to Bankruptcy Court regarding the untimeliness of the Notice of Appeal and the Order Denying Dr. Cordero's Motion to Extend Time. I submit the enclosed regarding my pending motion to dismiss Dr. Cordero's appeal.

Respectfully submitted,



Kenneth W. Gordon
Chapter 7 Trustee

KWG/sem
Enclosures

p.c. Dr. Richard Cordero ✓

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

RICHARD CORDERO,

Appellant,

DECISION AND ORDER

v.

03-CV-6021L

KENNETH W. GORDON, ESQ.,

Appellee.

Richard Cordero ("Cordero") appeals from an order of United States Bankruptcy Judge John C. Ninfo, II, entered December 30, 2002. Cordero filed a notice of appeal on January 13, 2003.

The Trustee-Appellee moved to dismiss the appeal by Cordero on the grounds that it is untimely, having been filed more than ten days after entry of the order appealed from (Dkt. #2). Appellant, Cordero, submitted a brief in opposition to the motion to dismiss (Dkt. #6).

The motion to dismiss is granted. Rule 8002(a) of the Federal Rules of Bankruptcy Procedure provides that a "notice of appeal shall be filed with the clerk within 10 days of the date of entry of the judgment, order, or decree appealed from." Cordero's notice of appeal was therefore filed three days too late.

There are no other provisions in the Bankruptcy Rules that will excuse this untimeliness. Rule 8002(c) provides that "[t]he *bankruptcy* judge may extend the time for filing the notice of appeal" in certain circumstances (emphasis added), but it gives the district court no power to extend the ten-day period of subsection (a). See *In re Bond*, 254 F.3d 669, 675 n. 3 (7th Cir. 2001) (even if appellant had requested extension of time from district court, she would have been in

error, since Rule 8002(c) only allows the bankruptcy court to grant extensions of time for filing notice of appeal). In addition, Cordero did not move for an extension in the bankruptcy court within the time for doing so under subsection (c), so that provision could not apply in any event.

Rule 9006, dealing with computation of prescribed time periods, also does not help Cordero. First, although there were four weekend days and one federal holiday (New Year's Day) in the period between the entry of Judge Ninfo's order and the time that Cordero filed his notice of appeal, those days were not excluded from the ten-day period of Rule 8002(a). Rule 9006(a) states that Saturdays, Sundays, and legal holidays are excluded from computation only "[w]hen the period of time prescribed or allowed is less than 8 days." Since Rule 8002(a) sets forth a ten-day period, this provision of Rule 9006(a) is inapplicable.¹ *Williams v. EMC Mortgage Corp.*, 216 F.3d 1295, 1297 (11th Cir. 2000).

Rule 9006(b) also provides for enlargement of prescribed time periods in certain circumstances, but it expressly states that "[t]he court may enlarge the time for taking action under Rule[] ... 8002 ... only to the extent and under the conditions stated in [that] rule[]." As stated, Cordero failed to meet the conditions for obtaining an extension of time under Rule 8002.

Subsection (f) of Rule 9006 provides for an automatic three-day extension in certain cases, but that provision applies only when a time period begins running from the date of service of an order or judgment. The ten-day period in Rule 8002(a) for appealing an order of the bankruptcy court is not such a period, however, since it begins to run from the time of *entry* of the judgment, *not service*. See *In re Arbuckle*, 988 F.2d 29, 31 (5th Cir. 1993).

Finally, the fact that Cordero may have mailed the notice of appeal before the ten days had

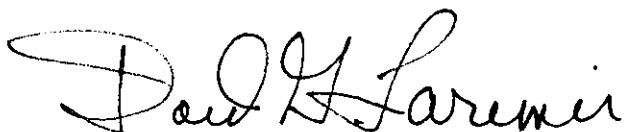
¹I also note that Rule 9006(a) states that if the last day of a prescribed time period falls on a Saturday, a Sunday, or a legal holiday, "the period runs until the end of the next day which is not one of the aforementioned days." Here, the ten-day period of Rule 8002(a) expired on Tuesday, January 10, which was not a holiday.

expired is inconsequential. “[A] notice of appeal is filed as of the date it is actually received [by the court], not as of the date it is mailed.” *Id.* (quoting *Matter of Robinson*, 640 F.2d 737, 738 (5th Cir. 1981)). Cordero’s notice of appeal was received and filed by the court thirteen days after the entry of the bankruptcy court’s order, and it is therefore untimely.

CONCLUSION

The Trustee’s motion to dismiss the appeal (Docket #2) is granted, and the appeal is dismissed.

IT IS SO ORDERED.

A handwritten signature in black ink, reading "David G. Larimer". The signature is written in a cursive style with a large, looped initial "D".

DAVID G. LARIMER
United States District Judge

Dated: Rochester, New York
March 12, 2003.

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK**

In re PREMIER VAN LINES, INC.,
Debtor

Chapter 7 bankruptcy
case no. 01-20692

JAMES PFUNTNER,
Plaintiff

Adversary proceeding
no. 02-2230

-vs-

KENNETH W. GORDON, as Trustee for Premier Van
Lines, Inc., ROCHESTER AMERICANS HOCKEY
CLUB, INC., M&T BANK, and RICHARD CORDERO,

Defendants

RICHARD CORDERO,
Third party plaintiff

-vs-

DAVID PALMER, DAVID DWORKIN, DAVID DELANO,
and JEFFERSON HENRIETTA ASSOCIATES,

Third party defendants

RICHARD CORDERO,
Appellant

case no. 03cv6021L

-vs-

KENNETH W. GORDON,
Appellee

NOTICE OF MOTION
FOR REHEARING OF
GRANT OF TRUSTEE'S MOTION
TO DISMISS NOTICE OF APPEAL

Madam or Sir,

PLEASE TAKE NOTICE, that Dr. Richard Cordero, pro se appellant, will move this Court at 1550 United States Courthouse on 100 State Street, Rochester, New York, 14614, at _____ on _____, 2003, pursuant to Rules 8015 and 9026 of the Federal Rules of Bankruptcy Procedure for a rehearing concerning its grant of Trustee Kenneth Gordon's motion to dismiss Dr. Cordero's appeal from the bankruptcy court's dismissal of the cross-claims against the Trustee.

Dated: March 20, 2003
59 Crescent Street
Brooklyn, NY 11208-1515



Dr. Richard Cordero
tel. (718) 827-9521

Affirmation of Service

I, Dr. Richard Cordero, hereby affirm under penalty of perjury that I have mailed to the following parties a copy of my notice of motion for a rehearing by the District Court concerning its grant of Trustee Kenneth Gordon's motion to dismiss my appeal from the bankruptcy court's dismissal of my cross-claims against him:

Mr. David Palmer
1829 Middle Road
Rush, New York 14543

Raymond C. Stilwell, Esq.
Adair, Kaul, Murphy, Axelrod & Santoro, LLP
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Kenneth W. Gordon, Esq.
Chapter 7 Trustee
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tel. (585) 232-1660
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Kathleen Dunivin Schmitt, Esq.
Assistant U.S. Trustee
100 State Street, Room 6090
Rochester, New York 14614
tel. (585) 263-5706
fax (585) 263-5862

Dated: March 20, 2003
59 Crescent Street
Brooklyn, NY 11208-1515

Dr. Richard Cordero

Dr. Richard Cordero
tel. (718) 827-9521

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK**

In re PREMIER VAN LINES, INC.,
Debtor

Chapter 7 bankruptcy
case no. 01-20692

JAMES PFUNTNER,
Plaintiff

Adversary proceeding
no. 02-2230

-vs-

KENNETH W. GORDON, as Trustee for Premier Van
Lines, Inc., ROCHESTER AMERICANS HOCKEY
CLUB, INC., M&T BANK, and RICHARD CORDERO,

Defendants

RICHARD CORDERO,
Third party plaintiff

-vs-

DAVID PALMER, DAVID DWORKIN, DAVID DELANO,
and JEFFERSON HENRIETTA ASSOCIATES,

Third party defendants

RICHARD CORDERO,
Appellant

case no. 03cv6021L

-vs-

KENNETH W. GORDON,
Appellee

CORDERO'S BRIEF
IN SUPPORT OF MOTION FOR
REHEARING OF GRANT OF
TRUSTEE'S MOTION
TO DISMISS APPEAL

Dr. Richard Cordero affirms under penalty of perjury the following:

1. Dr. Cordero, pro se appellant, moves under Rules 8015 of the Federal Rules of Bankruptcy Procedure (FRBkrP) for a rehearing of the District Court's grant of Appellee Kenneth Gordon's motion to dismiss his appeal from the bankruptcy court's dismissal of the cross-claims against the Trustee on grounds that the District Court failed to take into account material factual, legal, and equitable issues raised in Dr. Cordero's brief in opposition dated February 12, 2003.

2. Dr. Cordero also invokes FRBkrP Rule 9026 Objections Unnecessary, which makes applicable Rule 46 of the Federal Rules of Civil Procedure –FRCivP- so as to “make[] known to the court the action which [Dr. Cordero] desires the court to take or [his] objection to the action of the court and the grounds therefor.”
3. The District Court failed to consider, let alone exercise, its equitable and discretionary powers to achieve its first and ultimate objective of dispensing justice by upholding the superiority of Appellant Dr. Cordero’s substantial right to have his day in court to seek redress, as oppose to allowing Appellee Gordon take advantage of the technicality of a timely mailed-untimely filed gap to avoid having to face responsibility in court for having defamed Dr. Cordero and performed negligently and recklessly as trustee.
4. In so doing, the District Court also failed to give any weight to the fact that Dr. Cordero is a pro se litigant and that toward such class of litigants it has a duty to interpret procedural rules so as to make effective in practice the right to appear in court.
5. The District Court did not give any consideration to the statement of the Supreme Court in its landmark case in the area of timely filing under the Bankruptcy Code, *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 13 S.Ct. 1489, 509 U.S. 380, 123 L.Ed.2d 74 (1993), that “Rule 9006 is a general rule governing the computation, enlargement, and reduction of periods of time prescribed in other bankruptcy rules.”
6. Nor did it consider the Supreme Court in another bankruptcy case, namely, *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240, 103 L. Ed. 2d 290, 109 S. Ct. 1026 (1989), where the Court stated the rule of statutory construction that “as long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute.”
7. Had the District Court considered these statements, it could have found that the Bankruptcy Code does have a scheme for computation of time which is based on the general applicability of Rule 9006(e) and (f) to all other time provisions, including Rule 8002. Such a comprehensive scheme, as laid out in pages 7 et seq. of Dr. Cordero’s brief in opposition, cannot reasonably be defeated by plucking out of Rule 9006(f) the phrase “a prescribed period after service of a notice” to have it mean that it applies only to provisions concerning time with

reference to service rather than to filing. Had the Code and the Rules wanted to make that distinction, it would have done so explicitly, as it did in the particular case of Rule 8008(a).

8. Moreover, the meaningful phrase of Rule 9006(f) is not just “a prescribed period after service of a notice,” but rather it must be completed with its phrase “the notice or paper...**is served by mail.**” When both phrases are read as part of a whole, the meaning of the Rule becomes evident: It is intended to compensate for time wasted while the notice or paper is in transit in the mail. Thus, if the notice or paper is delivered by hand, there is no need for the three additional days and the Rule does not apply. By the same token, those that cannot file papers by hand because, as Dr. Cordero, live hundreds of miles away from the filing office, should not be penalized and forced to rush the preparation of their papers and scramble to mail them by costly express mail.
9. The District Court also preferred a mechanical application of rules rather than a just one that is not only intended to secure the ultimate objective of the courts, which is to dispense justice, but that is also mandated by FRBkrP Rule 1001 itself, which provides: “These rules shall be construed to secure the just, speedy, and inexpensive determination of every case and proceeding.”
10. It can hardly be just to deny his day in court to
 - 1) a pro se litigant,
 - 2) who made such a good faith effort to comply with the rules that he did mail the notice of appeal timely,
 - 3) after making an enormous effort to learn and reasonably construe the applicable Rules,
 - 4) in order to appeal from the baffling dismissal by the bankruptcy court of his cross-claims even before any disclosure or discovery whatsoever had taken place,
 - 5) just as the court ignored the false statements that the Trustee submitted to it in an effort to avoid a review of his performance and fitness to serve as trustee for the Debtor in this Adversary Proceeding,
 - 6) while the court allows other parties to assert the same or similar claims and defenses

7) in the context of this baffling case where the court has required only Dr. Cordero to take steps toward discovery, to wit, the inspection of his property, but not even from the Plaintiff, who would reasonably be expected to establish his claims by taking steps toward the same discovery.

11. Indeed, the pertinence to this motion of this issue of the inspection of Dr. Cordero's property and the circumstance surrounding it becomes apparent in Dr. Cordero's accompanying motion for a rehearing of the District Court's adoption of the bankruptcy court's recommendation to deny his application for default judgment against Mr. David Palmer. These two motions read together provide a picture marred with blotches of troubling questions. They warrant that the claims and applications put forward by Dr. Cordero be allowed to come to court so that some answers, and perhaps some justice, may emerge from this case.

Relief sought

12. Therefore, Dr. Cordero respectfully requests that the District Court:

- 1) take notice of his objection to the narrow grounds on which it granted Trustee Gordon's motion to dismiss his appeal from the bankruptcy court's order dismissing his cross-claims against the Trustee;
- 2) take into consideration the broader equitable, factual, and legal aspects of his brief in opposition to such motion;
- 3) vacate its order granting that motion and allow the appeal to go forward;
- 4) in the event of denying this motion, certify for appeal to the Court of Appeals for the Second Circuit the issue of the applicability of Rule 9006(e) and (f) to Rule 8002 and the equitable and factual grounds raised in support of allowing Dr. Cordero to bring his cross-claims to court on appeal.

Dated: March 20, 2003
59 Crescent Street
Brooklyn, NY 11208-1515



Dr. Richard Cordero
tel. (718) 827-9521

Affirmation of Service

I, Dr. Richard Cordero, hereby affirm under penalty of perjury that I have mailed to the following parties a copy of my notice of motion for a rehearing by the District Court concerning its grant of Trustee Kenneth Gordon's motion to dismiss my appeal from the bankruptcy court's dismissal of my cross-claims against him:

Mr. David Palmer
1829 Middle Road
Rush, New York 14543

Raymond C. Stilwell, Esq.
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Chapter 7 Trustee
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Kathleen Dunivin Schmitt, Esq.
Assistant U.S. Trustee
100 State Street, Room 6090
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tel. (585) 263-5706
fax (585) 263-5862

Dated: March 20, 2003
59 Crescent Street
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Dr. Richard Cordero

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Gordon & Schaal, LLP
Attorneys at Law

100 Meridian Centre Blvd., Suite 120
Rochester, New York 14618

Telephone (585) 244-1070
Facsimile (585) 244-1085

March 24, 2003

Honorable David G. Larimer
United States District Court
1360 U.S. Courthouse
100 State Street
Rochester, New York 14614

RE: Notice of Motion for Rehearing of Grant
of Trustee's Motion to Dismiss Appeal
Cordero v. Gordon
03-CV-6021L
Premier Van Lines, Inc.
Case No: 01-20692

Dear Judge Larimer:

Please be advised that I received Dr. Cordero's Motion for Rehearing with respect to the above-referenced matter and will rely on my previous submission.

Respectfully submitted,



Kenneth W. Gordon
Chapter 7 Trustee

KWG/sem

p.c. Dr. Richard Cordero ✓

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

FILED

03 MAR 27 PM 1:25

RICHARD CORDERO,

Appellant,

U.S. DISTRICT COURT
W.D.N.Y. ROCHESTER

DECISION AND ORDER

v.

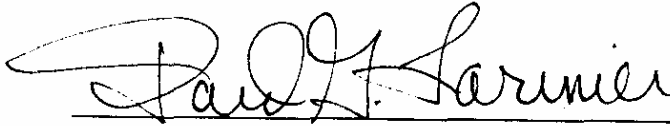
03-CV-6021L

KENNETH W. GORDON, ESQ.,

Appellee.

Richard Cordero moves for a rehearing or reconsideration of this Court's Decision and Order entered March 12, 2003 (Dkt. #7). The motion is in all respects denied.

IT IS SO ORDERED.



DAVID G. LARIMER
United States District Judge

Dated: Rochester, New York
March 27, 2003.

Dr. Richard Cordero

Ph.D., University of Cambridge, England
M.B.A., University of Michigan Business School
D.E.A., La Sorbonne, Paris

59 Crescent Street
Brooklyn, NY 11208-1515
tel. (718) 827-9521; CorderoRic@yahoo.com

COPY

January 23, 2003

Ms. Mary Dianetti
612 South Lincoln Road
East Rochester, NY 14445

[tel. (585) 586-6392]

Dear Ms. Dianetti,

As discussed earlier over the phone, I am interested in obtaining from you for the purpose of gathering the record on appeal, a transcript of the hearing held by the Hon. Judge John C. Ninfo, II, on December 18, 2002, of the motion brought by Kenneth Gordon, Esq., Chapter 7 Trustee, in Adversary Proceeding no. 02-2230, to dismiss my cross-claims.

After having checked your notes, you indicated that the transcript would run to some 25 pages, that each page costs \$3, and that the total cost would be between \$75 and \$80. I accept that estimate and would pay that amount upon your transferring the transcript to the clerk of court and your sending me a copy of it.

I thank you in advance for your efforts on my behalf and remain,

yours sincerely,

Dr. Richard Cordero

cc: Clerk of Court

NOTE: I received this transcript on Friday, March 28, 2003.

Page 19 was folded top over bottom and stuck in the left edge between the transparent plastic front cover and page 1. Page 19 is not dated. It is titled "Statement;" on its back and showing through the transparent plastic, the word "Statement" had been handwritten.

At the back of the transcript is page 18, which is titled "Reporter Certificate." It is dated March 12, 2003.

Both pages are signed Mary Dianetti.

Dated: March 30, 2003

Dr. Richard Cordero

Dr. Richard Cordero

S T A T E M E N T

1
2
3
4 TO: Dr. Richard Cordero
5 59 Crescent Street
6 Brooklyn, New York 11208-1515
7
8 FROM: Mary Dianetti
9 Bankruptcy Court Reporter
10 612 South Lincoln Road
11 East Rochester, New York 14445
12

13 Amount: \$51.00
14

15 For transcript of proceedings held on the 18th day
16 of December before The Honorable John C. Ninfo, II,
17 Bankruptcy Court Judge of the Western District of
18 New York, in the matter of PREMIER VAN LINES,
19 Debtor, BK. No. 02-2230.
20

21 Thank you.

22 
23 Mary Dianetti

24 Bankruptcy Reporter
25

Statement

1 UNITED STATES BANKRUPTCY COURT

2 WESTERN DISTRICT OF NEW YORK

3 -----x

4 In Re:

5 Premier Van Lines

6 Debtor.

7 -----x

8
9 A.P. No. 02-2230

10
11 Transcript of Proceedings

12 Before The Honorable John C. Ninfo, II

13 United States Bankruptcy Court Judge

14
15 Wednesday

16 December 18, 2002

17 Rochester, New York

18
19
20
21 Reported by:

22 Mary Dianetti

23 Bankruptcy Court Reporter

24 612 South Lincoln Road

25 East Rochester, New York 14445

(585) 586-6392

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APPEARANCES:

GORDON & SCHAAL

By: Kenneth W. Gordon, Esq.

100 Meridan Centre Boulevard

Rochester, New York 14618

MR. RICHARD CORDERO

59 Crescent Street

Brooklyn, New York 11208-1515

(Appearing telephonically)

KARIN TACY, CLERK

Bankruptcy Court Clerk's Office

Rochester, New York

1 THE CLERK: This is the matter of Premier Van
2 Lines and Dr. Cordero is on the phone.

3 THE COURT: Dr. Cordero --

4 MR. CORDERO: Hello, your Honor.

5 THE COURT: -- can you hear me?

6 MR. CORDERO: I can.

7 THE COURT: Okay. Good. Mr. Gordon just
8 walked in the courtroom.

9 Do you know anything about the whole status
10 of this adversary proceeding, Mr. Gordon, aside from
11 the fact that you're not necessarily involved in all
12 of it?

13 MR. GORDON: Well, your Honor --

14 THE COURT: What happened here? It was filed
15 in September, but it's never gotten to me for some
16 reason in terms of a pretrial.

17 MR. GORDON: Here's what I know Judge --

18 THE COURT: Why wasn't this pretried?

19 MS. TACY: Your Honor, for two reasons.

20 One, there is a third party complaint that was filed.

21 The answer has been submitted in that, but
22 Ms. Schmitt the Trustee would like to have a pretrial
23 before all the answers come in, so we're scheduled on
24 January 10th, but not with all the parties though.

25 THE COURT: I understand.

1 Today this is just the Trustee's motion,
2 Dr. Cordero, to dismiss your cross claim.

3 MR. CORDERO: Yes.

4 THE COURT: And your claim appears to be
5 two alleged causes of action; one for defamation and
6 one because you're alleging that the Trustee really
7 didn't do his job properly with respect to the stuff
8 that you have in storage formerly with Premier Van
9 Lines.

10 I guess your stuff now we know is in Avon;
11 Is that correct?

12 Or we don't know where it is?

13 MR. CORDERO: Where my -- it all was --
14 initially they were at the Jefferson warehouse in
15 Henrietta. They were in there.

16 The lawyer said that they were there, but
17 the Trustee Gordon abandoned them and the bank,
18 Manufacturer bank bought them from the Trustee and
19 he auctioned the containers and all the equipment to
20 a third party that - Champion Moving, any of those
21 product - containers eventually with my name.

22 So I asked them -- the owner of Champion
23 Moving, Christopher Carter, to look for them.

24 He went into the business files that were
25 among those assets in the different warehouse that

1 he found that the debtor also have all those assets
2 in another warehouse, and they -- now they say they
3 have at least one storage container, but hopefully two
4 storage containers with my name.

5 And the owner of that warehouse has filed
6 an adversary proceeding and said that he cannot release
7 the goods because the Trustee could sue him.

8 So right now all my goods are at the Avon
9 warehouse and where -- and at a different type
10 warehouse.

11 (Unintelligible) the Trustee Gordon had
12 performed his duty there would be -- at least the
13 warehouse in the Jefferson warehouse, there would be --
14 that were abandoned to the owner of the Jefferson
15 warehouse, there would be what goods were given to
16 the bank and were given to the warehouse, but
17 nothing of that was done.

18 And before it was (unintelligible) interest
19 and neglect of negating it and debtor cannot possibly
20 liquidate without talking -- the warehouse and they --
21 that while entrusted to the debtor and to give, against
22 the debtor or debtor --

23 MR. GORDON: Your Honor, if I may? This
24 was originally filed as a Chapter 11 and was
25 converted to Chapter 7.

1 THE COURT: Look --

2 MR. GORDON: Let me, if I could just address
3 what is before the Court, though, which is my motion
4 to dismiss two cross claims, your Honor.

5 The first of those cross claims is a claim
6 for defamation based upon two letters that I wrote, one
7 to the Court and one to Mr. Cordero.

8 In those letters I was addressing issues
9 raised by Mr. Cordero in the context of the bankruptcy
10 proceeding. I addressed those issues.

11 I had tried throughout this proceeding to
12 direct Mr. Cordero to the parties who I believe could
13 help him, those who are actually in possession of
14 what he says are his assets.

15 He has taken offense at some of the things
16 I have said in my letter.

17 I believe that the case law I cited to the
18 Court is very clear, that those letters, given that
19 they were in the context of the bankruptcy proceeding,
20 responding to Mr. Cordero's request for information,
21 are absolutely privileged and cannot legally in this
22 state form the basis of a defamation claim.

23 And so I believe that that particular claim,
24 the defamation claim, even if you take everything in
25 Mr. Cordero's complaint as true would not sustain a

1 cause of action and should be dismissed.

2 And secondly is the claim that there has
3 been negligence in the performance of the Trustee's
4 duties and that Mr. Cordero has suffered as a result of
5 it.

6 I understand Mr. Cordero's frustration that
7 he has not been able to recover his property, but his
8 property is not property of the estate.

9 At no time was his property either
10 administered by me or abandoned by me. It never
11 became property of the estate.

12 I think I cited case law to the Court
13 indicating that property stored and held as property
14 is not, in fact, property of the Debtor.

15 It would certainly have been inappropriate
16 of me to have sold Mr. Cordero's property or
17 administered it in any way.

18 So that his complaint which is essentially
19 that I have not diligently found his assets and
20 directed him to find his assets, even if you take those
21 allegations as true, they do not form the basis for
22 a cause of action for negligent performance of the
23 Trustee's duties since they're outside the scope of
24 the Trustee's duties.

25 It is not the duty of the Chapter 7 Trustee

1 to administer property of a third party. That is
2 essentially the issue before the Court today.

3 I think I could help shed some light on the
4 other issues, finding Mr. Cordero's property and what
5 we can do to get either Mr. Pfunter or Mr. Dworkin,
6 who are the two landlords involved here, to search
7 their warehouses and find everything that might be
8 Mr. Cordero's, and I also believe it would be
9 beneficial to Mr. Cordero to present to the Court
10 and the parties a list of his assets which he believes
11 were in storage so that those parties can actually look
12 for those assets.

13 That is the practical answer, Judge, and if
14 you will, my legal position on the motion to dismiss.

15 MR. CORDERO: I would like to respond.

16 THE COURT: Fine. Go ahead.

17 MR. CORDERO: On defamation and the
18 negligence case, first of all, I made a recent --
19 Trustee Gordon -- it may not be applicable at all for
20 the reason that currently - here are further -
21 Gordon is a appointed scheduled appointee.

22 He later goes to court, a Federal judge and
23 U.S. Trustee so that it may be that Federal law and
24 particularly, the interpretation of defamation of the
25 person in the case is the controlling thing in this

1 case.

2 Rather than New York law, the Federal
3 constitution has been interpreted to provide --

4 THE COURT: Dr. Cordero, before we even
5 get there, would you tell me what you think was
6 defamatory in these two letters?

7 Quite frankly, I don't find anything about
8 the letters defamatory at all.

9 MR. CORDERO: Your Honor, in here is that --
10 first of all I have asked them, but remains to
11 (unintelligible) but I -- while demands remains that I
12 made more than twenty phone calls to -- just to dispose
13 of the same thing, that you've taken the property of
14 the customers, and that I either -- or that application
15 or that I'm unable to receive that and all that is
16 (unintelligible) taken -- taken as a whole is in
17 danger by -- at my personal and professional competence
18 as to -- explain to you and prove from taking into
19 account of my application for a review of the
20 performance and for his removal as Trustee in this

21 Those were allegations. There's no way that
22 even if it were applicable the first allegation would
23 privileged.

24 Trustee Gordon is an officer of the Court
25 who is to make a truthful statement to the Court at all

1 times, and me.

2 The Court will -- who will -- nothing to
3 application that I made.

4 In fact, at this - in the last paragraph
5 of his letter not to take any action on my application,
6 Trustee Gordon, they do to use the Court to my
7 application.

8 Same thing. Same letter is the letter of
9 December 23rd and the letter of October 1st to other
10 parties, even parties who have nothing to do in either
11 of the cases now in existence. Somebody who at the
12 time wasn't even a party to anything.

13
14 THE COURT: Okay. Dr. Cordero, I'm going to
15 cut you off now because you explained all of this
16 stuff in your papers so it's already part of the
17 record.

18 You're just repeating what basically you have
19 in your papers which is fine.

20 I'm going to rule on the motion and then I'm
21 going to explain my ruling to you.

22 First of all, I'm going to grant the
23 Trustee's motion and I'm going to dismiss your cross
24 claims.

25 First of all, with respect to the defamation,

1 quite frankly, these are the kind of things that happen
2 all the time, Dr. Cordero, in Bankruptcy court.

3 They may not happen in your world, but they
4 do happen in Bankruptcy court and no one in the
5 bankruptcy system who would read those two letters -
6 either myself, my clerk, any lawyer in the bankruptcy
7 bankruptcy system - and for one second look at those
8 and say there is anything defamatory about them.
9 defamatory about them.

10 I mean, it's just not the case, and it's all
11 part really of the Trustee just trying to resolve these
12 issues.

13 With regard to the negligence issue, let me
14 really try to refocus and reframe you as to what the
15 problem is.

16 We in the system really do the best job
17 that we can, whether they be clerks in the bankruptcy
18 system, whether they be Judges, whether they be people
19 from the chamber's staff, Trustee, U.S. Trustee and
20 everybody, but we just deal with what we're given.

21 The real problem here isn't Mr. Gordon. The
22 real problem is the people who ran Premier Van Lines
23 who couldn't run it properly and ended up going
24 bankrupt and who don't have the best records in the
25 world and didn't prepare for their business demise the

1 way you would have liked them to, and who didn't think
2 as much of their customers as perhaps some others
3 would.

4 Over the thirty years, Doctor, that I have
5 been doing this I've seen all kinds of business
6 failures and I've seen all kinds of principals in
7 business who performed various services for their
8 demised businesses, depending on what kind of people
9 they are.

10 I have seen people who have worked for three
11 years after their company went bankrupt to try to sort
12 out records, and these people like yourself, not
13 necessarily in this business, at their own time and
14 expense, working a regular job and doing this at night
15 for three or four nights every month.

16 Those are the kind of people you run into
17 sometime and other people just walk away from these
18 businesses and just don't care, and there is a third
19 group that walk away because they're just so distraught
20 over it all and they have some emotional problems and
21 they're upset of the loss of their business and failure
22 of their family and that they can't just bring them-
23 selves to do anything.

24 There are all kinds of people in business
25 that go bankrupt and the trustees try to do the best

1 that they can, given what are horrible records
2 and people that are walking away and don't care
3 anymore, for one reason or another, and the trustees do
4 try to help people like yourself in these kind of
5 situations, but that really is not necessarily their
6 jobs.

7 Mr. Gordon is right. They have limited
8 duties to try to protect the creditors, to some extent
9 to try to get this resolved, but when there are other
10 parties - parties like secured creditors involved and
11 landlords and Debtors, they really defer to those
12 people also in the hopes that people like you will be
13 taken care of.

14 It doesn't always happen this way. That
15 appears to be a little bit of a mess, but it does
16 appear that everybody now is focused on it. They
17 brought it to my attention.

18 This motion for the first time has really
19 brought this meaningfully to my attention. We are
20 going to try to resolve some of these things for
21 people like yourself on January 10th when this
22 pretrial -- we'll try to get the landlords in to do
23 these kind of things. Maybe it should have been done
24 before, but it doesn't always happen that way.

25 But Mr. Gordon really did from the

1 correspondence that I read try to tell you early on
2 that your property was not property that he had to
3 administer and that you really need to get yourself
4 an attorney and get somebody involved in Rochester in
5 a proactive way to try to resolve those issues on your
6 behalf.

7 And the paper work that I read indicated to
8 me he gave you a heads up on that very early on. You
9 may not like that. It may be difficult for you.

10 It's a little bit like the medical profession
11 today in the medical world. If you go into the
12 hospital, you better have someone proactive on your
13 side to work yourself through the hospital and medical
14 staff and so forth.

15 If you're going to go and put yourself in
16 the hands of the medical staff, you're going to come
17 up short every time.

18 Here I think you had warning that you need
19 to get real proactive about this, but not necessarily
20 from a distance.

21 It would have been nice if you had someone
22 on board here in Rochester for a couple of days really
23 kind of seeing this thing through, but the point I'm
24 making to you is that I don't see anything in the paper
25 work that indicates to me that Mr. Gordon has done

1 done anything wrong given his duties a a Chapter 7
2 Trustee.

3 You may not like it. You may have preferred
4 that something different was done.

5 It would have been nice if everything just
6 just fell into place with the landlord and M&T Bank
7 and maybe if the Debtor had hung in a little bit
8 longer to try to help out, but it didn't happen,
9 Doctor.

10 But as I look at those two things, I don't
11 don't see defamation and I don't see the Trustee being
12 negligent so I'm going to dismiss.

13 MR. CORDERO: Your Honor, may I say
14 something?

15 THE COURT: Sure.

16 MR. CORDERO: Your Honor, it seems to me that
17 the Creditors -- this case before -- even they,
18 (unintelligible) the case indicates they have money
19 and the calculation there is no -- that would cover his
20 statement and any - there is no way possible that
21 they -- it -- I cannot understand how the Court would
22 accept that Mr. Gordon refuse in that the state action
23 because -- (unintelligible) therefore, it is premature.

24 Let discovery find out was -- on part of the
25 Trustee was trying to prevent instead of conveying an

1 an investigation as Trustee and from being removed as
2 Trustee.

3 As to the issue of the negligence and we are
4 conducting, nobody said -- I haven't even stated that
5 my belongings were part of the estate of the Debtor.
6 That is not the issue.

7 The issue is that Trustee Gordon is not
8 performing his duties under the Code and I --
9 collaboration for where he stated that the Trustee
10 has to be - investigate the financial affairs of the
11 Debtor, he has to take a proactive act, and if he had
12 done that he would he have found that somebody had
13 acted --

14 THE COURT: Doctor, if the Debtor had done
15 its job and looked out for his customers as it went to
16 demise, you would have had all of that information.

17 The real problem I'm trying to tell you is
18 not with Mr. Gordon. It's with these companies that
19 fail and don't do everything that they could for their
20 customers and their creditors.

21 At any rate, I've heard your arguments.
22 Your arguments are fine. They're in your papers. You
23 made your record.

24 If you wish to appeal this, you're more
25 than welcome to do that, but I made my ruling. I'm

1 sticking to it.

2 I'm going to grant the Trustee's motion.

3 So good luck to you, Doctor.

4 MR. GORDON: Judge, would you like me to
5 submit an order or will you be preparing --

6 THE COURT: You can submit an order.

7 Thank you, Doctor.

8 MR. CORDERO: Judge, may I ask you a
9 question?

10 THE COURT: Real quick because I have other
11 people -- this is not the only matter we have today.
12 We have four calendars today.

13 MR. CORDERO: Where do I get the information
14 for the appeal?

15 THE COURT: You can contact the Clerk's
16 office, the Bankruptcy Clerk's Office.

17 DR. CORDERO: That's fine. Thank you very
18 much.

19 THE COURT: Okay. Thank you, Doctor.

20 MR. CORDERO: Bye now.

21 MR. GORDON: Thank you Judge.

22

23 * * *

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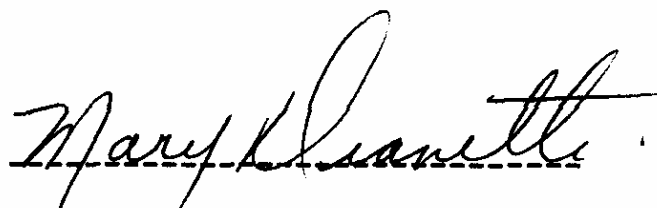
REPORTER CERTIFICATE

I, Mary Dianetti, do hereby certify that I did report in stenotype machine shorthand the proceedings held in the above-entitled matter;

Further, that the foregoing transcript is a true and accurate transcription of my said stenographic notes taken at the time and place hereinbefore set forth.

Dated: March 12, 2002

At Rochester, New York


Mary Dianetti

Dr. Richard Cordero

Ph.D., University of Cambridge, England
M.B.A., University of Michigan Business School
D.E.A., La Sorbonne, Paris

59 Crescent Street
Brooklyn, NY 11208-1515
tel. (718) 827-9521; CorderoRic@yahoo.com

March 30, 2003

Ms. Mary Dianetti
Court Reporter
612 South Lincoln Road
East Rochester, NY 14445

[tel. (585)586-6392]

CONFIDENTIAL

Dear Ms. Dianetti,

Last January 8 we first talked about the terms for making a transcript for appeal purposes of the hearing last December 18, before the Hon. John C. Ninfo, II, in which I was the respondent and Kenneth Gordon, Trustee, the movant. You stated that the transcript would run to some 25 pages, that each page costs \$3, and that the total cost would be between \$75 and \$80. You also stated that you could have it ready in about ten days or less, and that you could even prepare it on an expedited basis if I needed it sooner. I accepted the cost and normal delivery terms and confirmed my acceptance by letter to you of January 23.

However, weeks went by without your sending me a copy of the transcript or letting me know what was going on, or rather, what was not going according to our agreement. I called you and even recorded a message on your answering machine, but you did not return my call. Then on March 10, I called you again. Since I did not find you there, I began to record another message. As I was finishing by saying that I found the situation of your not sending me the transcript or returning my call very strange, you picked up the phone.

You assured me that I would receive the transcript by the end of the week, and made that most extraordinary comment that 'you want the transcript from the moment you came in on the phone.' I told you that I wanted everything and that I got the impression that other exchanges had taken place between the Judge and other parties before and after I was on the phone. You said that was not the case. However, when I asked you how long the transcript would run, you said that it would be only 17 pages. I brought to your attention what you had stated before.

Despite your assurance that I would receive the transcript by the end of that week, you failed to perform accordingly: I just received the transcript on Friday, March 28. It is very strange that your Reporter Certificate is dated March 12. Why did you not mail it on that day so that I could have it by the end of the week as you had assured me I would? Where did it linger so that I was deprived of it for more than two additional weeks? Also strange is the fact that there was another paper signed with your name but not dated.

I trust you are aware of the importance of a transcript for an appellant and that the circumstances under which this transcript has finally arrived are quite strange, to put it mildly.

Therefore, I request that you provide me, and copy the Court, with a dated and signed statement containing assurances and explanations concerning the following specific points:

1. a) that you submitted a transcript to the Bankruptcy Court, of which the one you sent me is an identical copy, and
b) that such transcript contains a complete and accurate written statement of all the statements made in court on December 18, 2002, at the hearing In re Premier Van Lines, case no. 02-2230, including those that were made while I was on the phone as well as those made before or after I was on the phone;
2. why, in spite of your experience, you estimated the length of the transcript to be between 25 and 27 pages but it actually came out at only 17 pages, which represents a mistake of almost 60%;
3. a) why although in the phone conversation that we held on March 10 you assured me that I would have the transcript by the end of that week, and your signed Reporter Certificate is dated March 12, the transcript was only mailed on March 26;
b) who had access to it in the meantime or thereafter; and
c) for what purpose.

Kindly add any other statement reasonably intended or necessary to provide full disclosure about, and to put to rest, the concerns that I have expressed about the untimeliness, content, and addressees of the transcript to which I am entitled under the Rules of Procedure and under our agreement.

So that this request may not be left without any action just as that for the transcript was for over two and half months, I ask that you reply within 10 days. That is a period of time that the Rules of Procedure applicable to you too consider reasonable for action to be taken timely in the context of court business. Consistent with the position that I have taken before, I consider that FRBkrP Rules 9006(e) and (f) are applicable to this request.

If I do not receive a timely answer, I will take it to mean that you acknowledge that you did not abide by our agreement and are giving up your claim to compensation.

Sincerely,

Dr. Richard Cordero

Certificate of Service

I, Dr. Richard Cordero, certify that on March 31, 2003, I sent the original of the accompanying letter to:

Ms. Mary Dianetti
Court Reporter
612 South Lincoln Road
East Rochester, NY 14445

Dated: March 31, 2003
59 Crescent Street
Brooklyn, NY 11208-1515

Dr. Richard Cordero

Dr. Richard Cordero
tel. (718)827-9521

April 11, 2003
612 South Lincoln Road
East Rochester, NY 14445

Dr. Richard Cordero
59 Crescent Street
Brooklyn, New York 11206-1515

Dear Mr. Cordero:

In reply to your letter dated March 30, 2003, the answers to your questions are as follows:

- 1.a) The transcript filed with the Bankruptcy Court is identical to yours and I am enclosing a copy that I had Ms. Tacy copy of said transcript.
- b) The transcript contains a complete and accurate written statement of all statements made in court on December 18, 2002, at the hearing In Re: Premier Van Lines, Case No. 02-2230, including those that were made while you were on the phone.
I should note here that in one of our conversations where you inquired if anything said before your matter began and after your matter ended that I got my notes and read to you the beginning and the end of the proceeding, and I assured you nothing was said before or after your proceeding regarding your matter.
- 2.a) In answer to your questions regarding my estimate of 25 pages, I informed you on the telephone that I always estimate high and that the attorneys when receiving their transcripts are happy about that. I previously made that remark to you. However, what I base my estimate on is the number of folds of the paper that I write on. I had 53 folds and I divided by 3, which means one page for three folds, and then I allow for the title page and appearance and certification pages, and I allow a little more for colloquy versus the question and answer format.
In my estimate it should have been four folds for one page because I had my spacing set a little farther apart than I realized.
- 3.a) In our phone conversation of March 10th I informed you the transcript was being typed and you would have it probably the end of that week. The certificate was dated the 12th and that is when I signed it and that is when I should have mailed it to you and filed it with the Bankruptcy Court. The other paper that was attached to your copy of the transcript which

was not signed was a certificate that I must have picked up inadvertently when I put the transcript in a folder.

The certificates on my transcripts all read the same, and I do have other transcripts that I produce, and I must have picked that up inadvertently, and obviously, didn't check your copy before I mailed it to you. The two copies filed with the Bankruptcy Court are dated March 12th.

- b) The answer to your question as to who had access to the transcript in the meantime or thereafter is as follows:

After proofreading the transcript I was concerned about the record that you made as not being complete as it was obvious that I had not picked up everything that you might have said. I went to the file in the Bankruptcy Court Clerk's Office and read some papers in the file to try and discern whether what you said would be understandable to anyone who read the transcript. I could not fix the record that I took because I can only transcribe the words that I have and not put in other words that I do not have in my notes.

I honestly do not know if it was the reception or your accent or if you were reading from a paper and not speaking right into the phone, but I was trying very hard to get down everything that you said.

You can see from the transcript that I put in the word unintelligible. I was concerned about doing that as the only time I ever do that is while transcribing tapes.

So in that time period from the 12th to when you received the transcript and the filing of them with the Bankruptcy Court Clerk's Office, I consulted with another reporter who had extensive experience. I was concerned about putting the word unintelligible in the transcript because I had never done that before. However, in other courts that I have worked there were never any telephonic proceedings.

Unfortunately, the reporter was on vacation and didn't get back to me for some time. The transcript was in my possession and I was inquiring about the telephonic proceeding and inability to hear every word and the correct procedure.

That is the explanation for the time lapse of the date on the certification and when you received it. And also the explanation of not reading it again and catching the unsigned certificate as I was trying to get it to you as fast as I could.

I would just add that I did not provide this transcript as timely as I could have as the circumstances were such - due to the telephonic appearance - that I really

was trying to resolve the problem of not being able to catch every word you said and inserting the word unintelligible.

When you asked me on the phone whether there was a problem, I should have said I had difficulty understanding you, but I waited to proofread the transcript and then went from there.

I apologize for any inconvenience this has caused you and I trust I have answered all of your questions to your satisfaction.

Very truly yours,

A handwritten signature in black ink that reads "Mary Dianetti". The signature is written in a cursive, flowing style.

Mary Dianetti
Bankruptcy Court Reporter

cc: Judge John C. Ninfo, II

Dr. Cordero,

Just a note
to tell you that
we were out of
power for 8 days
and therefore this
letter may be a
little late.

Mary Dianetti.

Docket no. 03-5023

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Richard Cordero,
Cross and Third party plaintiff-Appellant

v.

Kenneth Gordon,
Cross defendant-Appellee
and (no. 03-cv-6021L)

David Palmer,
Third party defendant-Appellee
(no. 03-MBK-6001L)

Appeal from the **United States District Court** for the Western District of New York

Opening brief and addendum
for and by

Dr. Richard Cordero
Appellant pro se
59 Crescent Street
Brooklyn, NY 11208
tel. (718) 827-9521

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