

**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 for Premier
Van Lines, Inc., RICHARD CORDERO,
ROCHESTER AMERICANS HOCKEY CLUB, INC.,
and M&T BANK,

Defendants

RICHARD CORDERO,
Third party plaintiff

-vs-

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

Third party defendants

RICHARD CORDERO,
Petitioner

case no: 03mbk6001L

-vs-

DAVID PALMER,
Respondent

CORDERO'S BRIEF
IN SUPPORT OF
MOTION FOR REHEARING
RE IMPLIED DENIAL OF MOTION
TO ENTER DEFAULT JUDGMENT
AND WITHDRAW PROCEEDING

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

1. Dr. Cordero received from the District Court a copy of the Decision and Order –the order entered on March 12, 2003, in *Richard Cordero v. David Palmer*, case 03-MBK-6001L. It affirms the recommendation of the Hon. John C. Ninfo, II, Bankruptcy Judge, to the District Court, that Dr. Cordero's application, dated December 26, 2002, to enter default judgment against David Palmer not be granted.

2. That order does not mention or make any reference whatsoever to Dr. Cordero’s motion, dated March 2, 2003, to enter default judgment against Mr. Palmer and withdraw the proceedings from the bankruptcy court to the district court. Therefore, it appears that the motion was either ignored or denied by implication.
3. Dr. Cordero draws the Court’s attention to that motion -which is hereby made an integral part of this one and is found on page 16 et seq., infra- and respectfully requests under Rule 8015 of the Federal Rules of Bankruptcy Procedure –FRBkrP- a rehearing of his arguments why it should be granted.
4. Given the time constraints to take action after the entry of an order, Dr. Cordero, a pro se litigant, assumes that his March 2 motion was denied by implication and 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.”

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I. There is no need to conduct an inquest into damages

5. In the second paragraph of its order (see page 9, *infra*), the District Court states that:

“Even if the adverse party failed to appear or answer, third-party plaintiff must still establish his entitlement to damages since the matter does not involve a sum certain.”
6. Dr. Cordero respectfully points out that the matter **does** involve a sum certain, namely, \$24,032.08, which he set out in his affidavit on page 5 of his application to enter a default

judgment, dated December 26, 2002 (see page 41, *infra*). If that is not a sum certain, what is?

7. In this context, it should be noted, as Dr. Cordero did in paragraph 57 et seq. of his March 2 motion, that the Rules even allow a computation to arrive at a sum certain:

“FRCivP Rule 55 [made applicable by Rule 7055 FRBkrP]

(b) Judgment. Judgment by default may be entered as follows:

(1) When the plaintiff’s claim against a defendant is for **a sum certain** or for **a sum which can by computation be made certain**, the clerk upon request of the plaintiff and upon affidavit of the amount due **shall** enter judgment for that amount and costs against the defendant, if the defendant has been **defaulted for failure to appear** and is not an infant or incompetent person.” (emphasis added)

8. Consequently and contrary to what the District Court stated in the third sentence of the second paragraph of its order, an inquest concerning damages before entering default judgment **is not** necessary because there is no legal provision requiring or authorizing the determination of damages before such entry when the sum is certain, as it is in the instant case.

9. What is more, such an inquest would be inappropriate because all the other legal requirements for entering default judgment were met, namely:

- a) the defendant, Mr. David Palmer, failed to appear or otherwise defend as provided by the rules of procedure, even though his lawyer, Raymond Stilwell, Esq.,¹ was served with process, and for good measure, Dr. Cordero served a copy of his application to enter default judgment on not only Mr. Stilwell, but also Mr. Palmer at his current address, despite the fact that under Rule 5(a) FRCivP, made applicable by Rule 7005 F.R.Bkr.P, there was no need to do so;
- b) the clerk of the bankruptcy court, Mr. Paul Warren, entered, although belatedly, Mr. Palmer’s default on February 4, 2003 (see bottom of page 36, *infra*); and
- c) Mr. Palmer is neither an infant or incompetent person.

¹ Raymond Stilwell, Esq., at Adair, Kaul, Murphy, Axelrod & Santoro, LLP, 300 Linden Oaks, Suite 220, Rochester, NY 14625-2883, tel. (585) 248-3800; fax (585) 248-4961. Mr. Stilwell represented Mr. Palmer’s company, Premier Van Lines, Inc., the Debtor in bankruptcy case no. 01-20692, from which this Adversary Proceeding arose. After Dr. Cordero spoke with Mr. Palmer several times in the first half of 2002 concerning Dr. Cordero’s property in storage with Mr. Palmer’s company, Mr. Stilwell sent Dr. Cordero a letter, dated May 30, 2002, (see page 33, *infra*) in which he purported to speak as Mr. Palmer’s attorney when giving assurances that the property was at Premier’s warehouse in Jefferson-Henrietta and safe. When that turned out not to be true, Dr. Cordero filed a third-party claim against Mr. Palmer.

II. Bankruptcy Court is not proper forum to conduct damages inquest

10. Contrary to what it appears to the District Court, according to the last sentence of its order's second paragraph, the Bankruptcy Court is not the proper forum to conduct an inquest into damages. Far from it and as Dr. Cordero pointed out in paragraphs 22 et seq. of his March 2 motion, the Bankruptcy Court has failed not only to conduct the inspection but also to secure as little as the date for inspecting Dr. Cordero's property (for its relevance, see Statement of Facts, page 16, *infra*) from the party presumably holding it now, Mr. James Pfuntner, the plaintiff in the Adversary Proceeding, even though:
 - a) at the pre-trial conference held last January 10, the Bankruptcy Court required Dr. Cordero to provide three dates when he could travel from New York City to Rochester to participate in the inspection;
 - b) on that occasion, the Bankruptcy Court stated that within two days of the receipt of such dates it would communicate with the other parties to establish and let Dr. Cordero know the date when all parties could participate in the inspection;
 - c) Dr. Cordero provided not three, but rather six dates on January 29 (see page 43, *infra*) not only to the court, but also to the other parties; and
 - d) the six dates, between February 19 and March 6, have already gone by without the court establishing any of the dates or taking any other measure to carry out the inspection that it had ordered.
11. It should be noted, as Dr. Cordero did on paragraph 26 of his March 2 motion, that Plaintiff Pfuntner brought the Adversary Proceeding, *inter alia*, to claim from Dr. Cordero storage fees for allegedly storing in his warehouse² Dr. Cordero's property. He would reasonably be expected to be eager to show the court that the property is in fact there in order to establish his claim.
12. If Mr. Pfuntner did not communicate his preferred date to the Bankruptcy Court, why did the court allow him to ignore its instruction?; if he did, why did the court not communicate it to Dr. Cordero and schedule the inspection?...particularly since Mr. Pfuntner's lawyer, David MacKnight, Esq.,³ stated at the January 10 pre-trial conference that his client was amenable to the inspection and the other parties stated at that time or since then that they would not participate in it!

² This warehouse is located at 2140 Sackett Road, Avon, NY 14414. It is referred to as the Avon warehouse and is said to be within half an hour by car from Rochester.

³ The lawyer of Mr. Pfuntner is David MacKnight, Esq., at Lacy, Katzen, Ryen & Mittleman, 130 East Main Street, Rochester, NY 14604, tel. (585) 454-5650, fax 585-454-6525.

13. Nor has the Bankruptcy Court even begun to conduct any other aspect of discovery whatsoever, even though:
- a) the summons bears the date of October 3, 2002, written by Bankruptcy Court Deputy Clerk Karen Tacy as well as the rubber stamp mark "RECEIVED OCT 04 2002," presumably placed there when the summons was received at the office of the Plaintiff's lawyer;
 - b) this Adversary Proceeding well exceeds the mere inspection of Dr. Cordero's property since Plaintiff Pfuntner sued four parties and Dr. Cordero counterclaimed the Plaintiff, cross-claimed two co-defendants, and brought in four third-parties;
 - c) since the January 10 pre-trial conference, the Bankruptcy Court has taken no action even to require disclosure, not to mention schedule discovery, thereby failing to attain, or perhaps even pursue, any of the conference objectives set out by Rule 16(a) FRCivP, made applicable by Rule 7016 FRBkrP such as "(1) expediting the disposition of the case" and "(2) establishing early and continuing control so that the case will not be protracted because of lack of management"; and
 - d) the bankruptcy court has provided evidence, as Dr. Cordero pointed out in paragraphs 35 et seq. of his March 2 motion, that it has pre-judged the outcome of both the inspection and the inquest into damages even before establishing the date of inspection.
14. Consequently, all the evidence available to the District Court is that the Bankruptcy Court is an improper forum to conduct an inquest into damages and, for that matter, anything else in this case. That is the reason why Dr. Cordero requested in section VI. Order Sought of his March 2 motion that the District Court withdraw to itself this case. On what legal or factual grounds does it appear otherwise to the District Court? Did it even read that March 2 motion before entering its order on March 12?!

III. Relief sought

15. On the strength of the foregoing, Dr. Cordero respectfully requests that the District Court:
- a) note Dr. Cordero's objections to its order entered on March 12;
 - b) grant the relief sought in his March 2 motion, to wit:
 - 1) find Judge Ninfo's recommendation lacking foundation in fact and in law, reject it, and enter default judgment against Mr. David Palmer as Dr. Cordero applied for it;
 - 2) vacate any order or decision that it may have already taken that denies or limits Dr. Cordero's application for default judgment, and grant the request in 1) above;

- 3) investigate and determine the circumstances under which Clerk Warren of the bankruptcy court failed to enter default upon the application therefor that Dr. Cordero timely mailed to him on December 26, 2002, and which Mr. Warren entered only on February 4, 2003;
 - 4) as provided under 28 U.S.C. §157(d) and for cause shown, including the disregard of the facts, the imposition of obligations with no foundation in law, the questions about impartiality, the pre-judgment and apparent dismissal of issues, the lack of any progress in this case, the dismissal of Dr. Cordero's claims against Trustee Gordon even before any discovery was had although other parties will assert the same or similar claims and defenses, etc., withdraw the entry and the carrying into effect of said default judgment and of the rest of the Adversary Proceeding from the bankruptcy court and bring it to itself.
- c) if it implicitly denied Dr. Cordero's March 2 motion, vacate such denial or otherwise, explicitly state its denial and set forth its reasoning and legal basis therefor; and
 - d) in the event of denying this motion, certify for appeal to the Court of Appeals for the Second Circuit the questions whether:
 - 1) where plaintiff by affidavit both applied for default judgment on grounds of defendant's undisputed failure to appear and set out a sum certain to be entered against the defendant, the court erred when it, without providing any legal basis therefor, suspended the application of Rule 55 FRCivP so as to deny entry of default judgment and required the conduct of an inquest to establish damages rather than enter such judgment and let the defendant come to court, if he dared or cared about it, to show cause why the default judgment should be set aside, as provided under Rule 60(b); and
 - 2) the court erred in not withdrawing a case from a bankruptcy court to itself although plaintiff applied under 28 U.S.C. §157(d) and showed cause therefor by discussing how the bankruptcy court, inter alia:
 - (a) disregarded the facts and the only evidence available when making a recommendation not to enter default judgment,
 - (b) disregarded the law when instead of entering default judgment for the sum certain that plaintiff had set out, it imposed on him the obligation to demonstrate damages despite its lack of any legal basis therefor,

- (c) gave evidence of lacking impartiality and pre-judging and apparently dismissing issues even before any disclosure or discovery whatsoever has taken place;
- (d) failed to manage the case and move it forward despite having conducted a pre-trial conference, so that the case is drawing to the close of its 6th month after it was brought, but no disclosure or discovery has taken place;
- (e) dismissed the plaintiff's cross-claims against a trustee even before any disclosure or discovery had taken place, although other parties would be free to assert the same or similar claims and defenses,
- (f) did not care even to review the evidence that the trustee had submitted false statements to it in an effort to avoid a review of his performance and fitness to serve as trustee; etc.

Certificate of Service

I, Dr. Richard Cordero, hereby affirm under penalty of perjury that I have mailed to the following parties a copy of my brief in support of my motion for a rehearing by the District Court concerning its implied denial of my motion to enter default judgment against Mr. David Palmer in Adversary Proceeding no. 02-2230 and withdraw said Proceeding:

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

Raymond C. Stilwell, Esq.
 Adair, Kaul, Murphy, Axelrod & Santoro, LLP
 300 Linden Oaks, Suite 220
 Rochester, NY 14625-2883
 tel. (585) 248-3800; fax (585) 248-4961

Kenneth W. Gordon, Esq.
 Chapter 7 Trustee
 Gordon & Schaal, LLP
 100 Meridian Centre Blvd., Suite 120
 Rochester, New York 14618
 tel. (585) 244-1070; fax (585) 244-1085

David D. MacKnight, Esq.
 Lacy, Katzen, Ryen & Mittleman, LLP
 130 East Main Street

Rochester, New York 14604-1686
 tel. (585) 454-5650; fax (585) 454-6525

Michael J. Beyma, Esq.
 Underberg & Kessler, LLP
 1800 Chase Square
 Rochester, NY 14604
 tel. (585) 258-2890; fax (585) 258-2821

Karl S. Essler, Esq.
 Fix Spindelman Brovitz & Goldman, P.C.
 2 State Street, Suite 1400
 Rochester, NY 14614
 tel. (585) 232-1660 fax (585) 232-4791

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 19, 2003
 59 Crescent Street
 Brooklyn, NY 11208-1515

Dr. Richard Cordero

Dr. Richard Cordero, pro se
 tel. (718) 827-9521