

Not Reported in F.Supp.2d, 2004 WL 203090 (E.D.N.Y.), 51 Collier Bankr.Cas.2d 1101
(Cite as: 2004 WL 203090 (E.D.N.Y.))



United States District Court,
E.D. New York.
In re: Peter PLAGAKIS, Debtor-Appellant.
Peter PLAGAKIS, Debtor-Appellant,
v.
Stuart P. GELBERG, et al., Appellees.
No. 03 CV 0728(SJ).

Jan. 27, 2004.

Background: Chapter 13 trustee moved to dismiss debtor's case, and the United States Trustee requested that dismissal be nunc pro tunc to date and time of petition filing. Debtor moved to convert case from Chapter 13 to Chapter 11. The United States Bankruptcy Court for the Eastern District of New York, [Jerome Feller, J.](#), dismissed petition nunc pro tunc and denied motion to convert. Debtor appealed.

Holdings: The District Court, [Johnson](#), Senior District Judge, held that:

- (1) debtor was ineligible for Chapter 13 relief;
- (2) debtor's bad faith in filing justified dismissal of petition nunc pro tunc, so as to validate mortgage foreclosure sale; and
- (3) debtor's bad faith in filing petition warranted denial of his motion to convert case.

Affirmed.

West Headnotes

[1] Bankruptcy 51 [2233\(2\)](#)

51 Bankruptcy
51III The Case
51III(B) Debtors
51k2222 Who May Be a Debtor
51k2233 Individual Debt Adjustment
Cases
51k2233(2) k. Regular Income.
[Most Cited Cases](#)

Bankruptcy 51 [2233\(3\)](#)

51 Bankruptcy
51III The Case
51III(B) Debtors
51k2222 Who May Be a Debtor
51k2233 Individual Debt Adjustment
Cases
51k2233(3) k. Amount of Indebtedness.
[Most Cited Cases](#)

Debtor with disposable income of \$500 per month and prima facie noncontingent, liquidated, secured debts totalling \$910,127.46 at the time he filed his petition was ineligible for Chapter 13 relief, inasmuch as his disposable income was insufficient for confirmable plan requiring payments of approximately \$6,000 per month, and he exceeded statutory ceiling of \$871,500 for noncontingent, liquidated, secured debts. Bankr.Code, 11 U.S.C.A. §§ 101(30), 109(e); Fed.Rules Bankr.Proc., Rule 3001(f), 11 U.S.C.A.

[2] Bankruptcy 51 [3716.30\(5\)](#)

51 Bankruptcy
51XVIII Individual Debt Adjustment
51k3716 Conversion or Dismissal
51k3716.30 Dismissal
51k3716.30(4) Involuntary Dismissal; Request by Creditors or Other Parties in Interest
51k3716.30(5) k. Grounds or Cause in General; Bad Faith. [Most Cited Cases](#)

Bankruptcy 51 [3716.30\(8\)](#)

51 Bankruptcy
51XVIII Individual Debt Adjustment
51k3716 Conversion or Dismissal
51k3716.30 Dismissal
51k3716.30(7) Proceedings
51k3716.30(8) k. In General. [Most Cited Cases](#)
Debtor's bad faith in filing for Chapter 13 relief justified dismissal of petition nunc pro tunc, so as to

validate mortgage foreclosure sale, given that debtor filed skeletal petition minutes before foreclosure sale, after years of not making mortgage payments, debtor did not make plan payments or propose feasible plan meeting statutory requirements, debtor's disposable income was insufficient to fund plan, proposed reorganization essentially involved dispute between debtor and mortgagee, petition was filed solely to obtain automatic stay of foreclosure proceedings, debtor failed to appear at creditors meeting, and debtor engaged in improper prepetition conduct, including purported transfer of his real property by quitclaim deed for \$10. Bankr.Code, 11 U.S.C.A. §§ 341(a), 362, 1307(c), 1322(a)(1), 1325(a)(1, 3, 6).

[3] Bankruptcy 51 3716.20(2.1)

51 Bankruptcy

51XVIII Individual Debt Adjustment

51k3716 Conversion or Dismissal

51k3716.20 Conversion

51k3716.20(2) Voluntary Conversion;
Request by Debtor

51k3716.20(2.1) k. In General.

Most Cited Cases

Debtor's bad faith in filing Chapter 13 petition, which included filing petition minutes prior to foreclosure sale to obtain stay of that sale, after years of not making mortgage payments, warranted denial of debtor's motion to convert case to one under Chapter 11. Bankr.Code, 11 U.S.C.A. § 1307(d). Peter Plagakis, Bayside, NY, pro se.

Rashel M. Mehlman, Manton, Sweeney, Gallo, Reich & Bolz, LLP, Rego Park, NY, for Citibank, N.A. 11-2795187.

MEMORANDUM AND ORDER

JOHNSON, Senior J.

*1 On May 6, 2003, Peter Plagakis ("Debtor" or "Appellant") brought this appeal from an order of the United States Bankruptcy Court for the Eastern

District of New York ("Bankruptcy Court"), Jerome Feller, B.J., ("Judge Feller") dated December 30, 2002. Judge Feller's order ("Order") dismissed, *nunc pro tunc*, Appellant's petition filed pursuant to Chapter 13 of the United States Bankruptcy Code, 11 U.S.C. §§ 1301-1330, and denied Appellant's motion to convert the Chapter 13 case to Chapter 11 pursuant to 11 U.S.C. § 1307(d). Appellant brings this appeal pursuant to 28 U.S.C. § 158, which grants this Court jurisdiction to hear appeals from the bankruptcy courts of the Eastern District of New York. For the reasons stated herein, the Court affirms the Order.

FACTUAL AND PROCEDURAL BACKGROUND

Until June 28, 2002, Debtor was the record owner of real property located at 38-73 Douglastown Parkway, Douglastown, New York, 11363 ("Douglastown Property"). (Order at 2; Appellee Citibank, N.A.'s Record on Appeal in Support of Dismissal ["AE Rec."], Ex. E, Schedule ["Sch."] A.) The Douglastown Property was encumbered by a mortgage held by Citibank upon which Debtor had been in default since 1995. (Order at 2; AE Rec., Ex. G at 2.) Citibank obtained a judgment of foreclosure against Debtor on May 13, 2002 and scheduled a foreclosure sale for June 28, 2002 at 9:00 a.m. (Order at 2; AE Rec., Ex. D, ¶ 7; AE Rec., Ex. E, Statement of Financial Affairs, ¶ 4; AE Rec., Ex. G at 2.)

While Citibank was engaged in foreclosure proceedings before the state court, Debtor executed and delivered on or about December 1, 2000 a quitclaim deed to John Bouzas in exchange for ten dollars. (AE Rec., Ex. D, ¶ 11; U.S. Trustee's Memorandum of Law ["U.S.T. Memo.,"] at 4.) On January 16, 2001, the deed was recorded in the City Register of Queens County. (AE Rec., Ex. D, ¶ 11.)

In 2002, after Citibank obtained the judgment of foreclosure, Mr. Bouzas filed an order to show cause as to why the judgment was not defective due

to the fact that, as the transferee of the Douglastown Property, he was a necessary party who had never been served. (U.S.T. Memo. at 4-5.) Justice John A. Milano of New York Supreme Court, Queens County, denied the order to show cause. (*Id.*)

Debtor filed a motion before the state court for a stay of the foreclosure sale. (Order at 2.) This motion was denied, and the Douglastown Property was sold on June 28, 2002 at approximately 9:00 a.m. to Core Holdings, Inc. for \$1.1 million. (*Id.* at 3.)

On June 28, 2002 at 8:47 a.m., thirteen minutes before the foreclosure sale, Debtor filed a Chapter 13 Bankruptcy Petition (“Petition”) that did not include a plan, Schedules A through J, summary of schedules, declaration concerning Debtor’s schedules, or statement of financial affairs. (*Id.*) That same day, the Clerk of the Court informed Debtor by written notice that the Petition was deficient because these documents had not been filed. The notice directed Debtor to file these missing documents by July 15, 2002. Debtor subsequently received two extensions of time, and was ultimately ordered to file a Chapter 13 plan and other documents by August 15, 2002.

*2 On July 17, 2002, Citibank N.A. (“Citibank”) filed a motion for an order pursuant to 11 U.S.C. § 362 annulling the automatic stay *nunc pro tunc* (“Lift Stay Motion”). On July 22, 2002, the Chapter 13 Trustee, Stuart P. Gelberg, Esq. (“Chapter 13 Trustee”), filed a motion pursuant to 11 U.S.C. § 1307(c) to dismiss Debtor’s case. On August 9, 2002, Debtor filed his opposition to Citibank’s Lift Stay Motion and his amended Petition.

In Schedule A of the amended Petition, Debtor stated that he owned the Douglastown Property. (AE Rec., Ex. E, Sch. A.) In Schedule D, he listed Citibank as holding a secured claim of \$772,375. (*Id.*, Sch. D.) In Schedule B, Debtor claimed ownership interest in a joint venture with an estimated value of \$350,000. (*Id.*, Sch. B.) In Schedule F, Debtor listed two unsecured nonpriority creditors: a

credit card company with a claim of \$2,901, and John Bouzas, whose claim was not enumerated. (*Id.*, Sch. F.) In the Statement of Financial Affairs, Debtor listed his income for the tax years 2000 and 2001 at \$0. (*Id.*) In Schedules I and J, Debtor reported that he had been employed for six months and that his net income was \$3,000 per month, with monthly expenses of \$2,500. (AE Rec., Ex. E, Sch. I, J.)

On August 16, 2002, J. Papapanayotou filed a notice of appearance on behalf of Debtor and a motion pursuant to 11 U.S.C. § 1307(d) to convert Debtor’s case to a Chapter 11 case (“Conversion Motion”). On August 23, 2002, Citibank opposed Debtor’s Conversion Motion, and on August 28, 2002, Citibank filed an objection to the confirmation of the Chapter 13 reorganization plan. On October 18, 2002, Core Holdings, Inc. filed an affidavit in support of the Lift Stay Motion.

The hearing was adjourned twice to permit the United States Trustee’s Office, at the Bankruptcy Court’s request, to review and respond to the motions and correspondence.^{FN1} On November 26, 2002, The United States Trustee for the Eastern District of New York filed a memorandum of law in support of the Chapter 13 Trustee’s motion and requested that the dismissal be *nunc pro tunc* to the date and time of the filing of the petition. Debtor did not file written opposition to the Chapter 13 Trustee’s motion.

^{FN1.} 11 U.S.C. § 307 provides: “The United States trustee may raise and may appear and be heard on any issue in any case or proceeding under this title but may not file a plan pursuant to section 1121(c) of this title.”

A hearing was held on December 3, 2002 at which the Bankruptcy Court denied Debtor’s Conversion Motion and dismissed, *nunc pro tunc*, Debtor’s Chapter 13 case. The Bankruptcy Court noted in its Order that Debtor “made no plan payments and ... no post-petition mortgage payments,” and that

Debtor's proposed Chapter 13 plan "provide[d] for no plan payments...." (Order at 3.) The Bankruptcy Court found that Debtor's proposed Chapter 13 plan failed to comply with 11 U.S.C. § 1322(a)(1) and 11 U.S.C. § 1325(a)(6) and that Debtor was ineligible for Chapter 13 relief pursuant to 11 U.S.C. § 109(e). (*Id.* at 4.) The Bankruptcy Court also found that Debtor's Chapter 13 Petition and Conversion Motion were filed in bad faith. (*Id.* at 3-4.)

*3 On January 8, 2003 and May 8, 2003, Debtor, *pro se*, filed the instant appeal and a supporting memorandum of law with this Court.^{FN2} Debtor seeks reversal of the Bankruptcy Court's denial of his motion to convert his case from Chapter 13 to Chapter 11. (Brief of Appellant Peter Plagakis ["AP Rec."] at 19.) Alternatively, Debtor requests that this Court grant the Chapter 13 Trustee's motion to dismiss, but not *nunc pro tunc*, as the Bankruptcy Court held. (*Id.* at 2.) Ordinary dismissal, Debtor argues, would allow him to refile the action as Chapter 11 case. (*Id.* at 19.) Finally, Debtor contends that the Bankruptcy Court's finding that Debtor's Chapter 13 filing and Conversion Motion were made in bad faith is clearly erroneous and constitutes reversible error. (*Id.* at 1-2.)

FN2. An attorney who subsequently represented Debtor was permitted by this Court on May 9, 2003 to withdraw from his representation of Debtor.

STANDARD OF REVIEW

The standard governing a district court's review of a bankruptcy judge's order is established by Bankruptcy Rule 8013. *Fed. R. Bank. P.* 8013. While a bankruptcy judge's legal conclusions are reviewed *de novo*, a bankruptcy judge's factual findings may not be set aside unless clearly erroneous. See *Robert Casse v. Key Bank Nat'l Assoc.*, 198 F.3d 327, 334 (2d Cir.1999); see also, *In re Fischer*, 202 B.R. 341, 345 (Bankr.E.D.N.Y.1996). Under the deferential "clearly erroneous" standard, a reviewing court may not "reverse the finding of a trier of

fact simply because it is convinced that it would have decided the case differently." *Anderson v. City of Bessamer City*, 470 U.S. 564, 573, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985). The standard applies both to credibility assessments and "physical or documentary evidence or inferences from other facts." *Id.* at 565.

DISCUSSION

I. Dismissal *Nunc Pro Tunc*

A. Ineligibility for Chapter 13 Relief

[1] Under the United States Bankruptcy Code (the "Bankruptcy Code"), 11 U.S.C. § 101 *et seq.*, "[o]nly an individual with regular income that owes, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts of less than [\$290,525] and noncontingent, liquidated, secured debts of less than [\$871,550] ... may be a debtor under Chapter 13." 11 U.S.C. § 109(e).

The first requirement of a valid Chapter 13 petition is that the debtor be an individual with "regular income," as defined in 11 U.S.C. § 101(30). *Id.* During the bankruptcy hearing, the Bankruptcy Court noted that such income must be "sufficiently stable and regular to enable [an] individual to make payments under a plan." (AE Rec., Ex. K, at 31.) Debtor's disposable income at the time of filing was \$500 per month, a "woefully insufficient" amount for a confirmable Chapter 13 plan which, in this case, would require payments of approximately \$6,000 per month. (See *Id.*, AE Rec., Ex. E, Sch. I, J; Order at 3.)

Another requirement of a valid Chapter 13 petition is that the debtor have noncontingent, liquidated, secured debts of less than \$871,550. 11 U.S.C. § 109(e). At the time Debtor filed his Chapter 13 petition, Citibank and Rosemary Quiros held secured claims against Debtor for \$860,865.76 and \$49,261.70, respectively.^{FN3} (Order at 3.) Debtor

therefore has *prima facie* noncontingent, liquidated, secured debts totaling \$910,127.46, which exceeds the statutory ceiling of \$871,550. See 11 U.S.C. § 109(e); *Fed. R. Bank. P.* 3001(f).

FN3. Although Debtor's Petition did not list Ms. Quiros as holding a secured claim against him, this fact was revealed in the bankruptcy proceedings, and the Bankruptcy Court found this to be a valid claim. (Order at 3.) Furthermore, the Bankruptcy Court found that Citibank held a secured claim against Debtor of \$860,865.76—not \$772,375, as listed in Debtor's Petition. (*Id.*) Although Debtor disputes the Bankruptcy Courts findings, see Appellant's Reply Brief at 12-13, he offers little to support his position. Accordingly, this Court adopts the findings of the Bankruptcy Court.

*4 As a result, this Court finds that the Bankruptcy Court did not err in its conclusion that Debtor was ineligible for Chapter 13 relief at the time of filing.

B. Bad Faith

[2] The Bankruptcy Code requires a Debtor proposing a plan for confirmation to exercise “good faith” in filing. 11 U.S.C. § 1325(a)(3). A good faith determination focuses on the “totality of the circumstances” in determining whether the debtor displayed “honesty of intention,” and “requires a bankruptcy court to ‘inquire whether the debtor has misrepresented facts in his plan, unfairly manipulated the Bankruptcy Code, or otherwise proposed the plan in an inequitable matter.’” *In re Klevorn*, 181 B.R. 8, 10 (Bankr.N.D.N.Y.1995); *In re Johnson*, 708 F.2d 865, 868 (2d Cir.1983) (citations omitted). A bankruptcy court's determination of “bad faith” is a question of fact, and thus is reviewable under the clearly erroneous standard. See *In re Barbieri*, 226 B.R. 531, 535 (Bankr.E.D.N.Y.1998), *rev'd on other grounds*, 199 F.3d 616 (2d Cir.1999); *United States Fidelity & Guar. Co. v. DJF Realty*

& *Suppliers*, 58 B.R. 1008, 1011 (Bankr.N.D.N.Y.1986).

Pursuant to 11 U.S.C. § 1307(c), a bankruptcy court may dismiss a Chapter 13 case “for cause.” Courts have held that bad faith in filing for Chapter 13 relief constitutes “cause” under § 1307 sufficient to warrant a dismissal. See *In re Setzer*, 47 B.R. 340, 347 (Bankr.E.D.N.Y.1985) (holding that Debtor's failure to present a confirmable Chapter 13 plan evidenced bad faith and provided grounds for dismissal with cause); *In re Charles D. Eatman*, 182 B.R. 386, 392 (Bankr.S.D.N.Y.1995) (“although 11 U.S.C. § 1307(c) does not expressly equate bad faith with ‘cause,’ the bankruptcy court can also dismiss the petition or convert the case under section 1307(c) if the debtor files his petition in bad faith”); *In re Prud' Homme*, 161 B.R. at 749.

Courts have found bad faith in Chapter 13 cases in the following circumstances: 1) the debtor has few or no unsecured creditors; 2) the debtor has previously filed for bankruptcy; 3) the debtor's pre-petition conduct was improper; 4) the debtor's petition allows him or her to evade court orders; 5) the debtor has few debts to non-moving creditors; 6) the petition was filed on the eve of foreclosure; 7) the foreclosed property was the sole or major asset of the debtor; 8) no possibility exists for reorganization; 9) the debtor's income is insufficient to operate; 10) there is no pressure from non-moving creditors; 11) reorganization essentially involves the resolution of a two-party dispute; and 12) the debtor filed solely to obtain an automatic stay. See *In re Patricia Jean Powers*, 135 B.R. 980, 981 (Bankr.C.D.Cal.1991) (citing *In re Grieshop*, 63 B.R. 657 (Bankr.N.D.Ind.1986)). Courts also consider whether: 1) the petition contains deficiencies or inaccuracies meant to mislead the court; 2) payments are fundamentally fair in timing and amount; 3) debtor had an improper motive in seeking relief; and 4) under the “totality of the circumstances,” the debtor has abused the provisions, purposes, and/or spirit of Chapter 13. See *In re Prud'Homme*, 161 B.R. 747, 749-50 (Bankr.E.D.N.Y.1993); *In re*

Powers, 135 B.R. at 992-93 (citations omitted); *In re Johnson*, 708 F.2d at 868.

*5 Nearly all of the indicia of bad faith described above are present in this case. Debtor filed his Chapter 13 petition thirteen minutes before the June 28, 2002 foreclosure sale. Debtor has few unsecured creditors and has unreasonably delayed his secured creditors by failing to make payments or present a confirmable Plan. Debtor did not propose a feasible Chapter 13 plan that meets the requirements of 11 U.S.C. § 1325(a)(6) and 11 U.S.C. § 1322(a)(1); his plan is therefore not confirmable pursuant to 11 U.S.C. § 1325(a)(1). Debtor's disposable income of \$500 per month is an insufficient amount for the purposes of his petition, which would require monthly payments of approximately \$6,000. Debtor's major asset was the foreclosed property. The proposed reorganization essentially involves the resolution of a two-party dispute between Debtor and Citibank. Debtor filed his petition solely to obtain the automatic stay of the foreclosure sale.^{FN4} Lastly, in failing to appear at a meeting of creditors under 11 U.S.C. § 341(a) or to provide the Trustee with any of the documents required by E.D.N.Y. LBR 2003-1, Debtor failed to comply with the most minimal responsibilities of a person legitimately seeking bankruptcy protection.

FN4. At the Bankruptcy Court proceeding, Debtor's counsel conceded that the purpose of the Chapter 13 filing was "to buy time" by invoking the automatic stay. (AE Rec., Ex. K, p. 17, 24.)

Furthermore, Debtor's pre-petition conduct was improper. He made no mortgage payments for over seven years and filed improper motions before the state court during foreclosure proceedings. During the foreclosure proceedings, and without the knowledge and consent of Citibank, Debtor purported to transfer the property in question by quitclaim deed to John Bouzas for ten dollars. Later, in his Chapter 13 petition, he claimed ownership of the property and proposed a plan wherein he would sell the property and distribute the proceeds to creditors

holding allowed or undisputed claims. (AE Rec., Ex. E, Sch. A, Form 3082.) These facts belie Debtor's representation that he had transferred his interest in the property to Mr. Bouzas, and indeed suggest that the purported transfer was, as the U.S. Trustee put it, "a sham in order to avoid and delay Citibank in its efforts to obtain a Judgment of Foreclosure." (U.S.T. Memo. at 13.)

As the Bankruptcy Court summarized, Debtor "filed a skeletal petition minutes before a foreclosure sale after years of litigation, after years of not making payments on a mortgage." (AE Rec., Ex. K, at 32.) "The filing of a bankruptcy petition merely to prevent foreclosure, without the ability or the intention to reorganize, is an abuse of the Bankruptcy Code." *In re Felberman*, 196 B.R. 678, 681 (Bankr.S.D.N.Y.1995). Here, as in *Felberman*, the Bankruptcy Court correctly found that Debtor's bad faith in filing for Chapter 13 relief justified dismissing his petition *nunc pro tunc* in order to validate the mortgage foreclosure sale. *Id.* at 688.

II. Denial of Conversion Motion

[3] Section 1307(d) of the Bankruptcy Code provides that at any time before confirmation of a plan, on request of a party in interest and after notice and a hearing, the court may convert a Chapter 13 case to a Chapter 11 case. 11 U.S.C. § 1307(d). In determining whether to grant a request for conversion, the court should use its sound discretion and consider, *inter alia*, whether the debtor: 1) filed the initial bankruptcy petition and sought to convert in good faith, 2) is able to effectuate a plan, and 3) has caused prejudicial delay to creditors. *H. Rept. No. 95-595*, p. 428; *In re Hanson*, 282 B.R. 240 (Bankr.D.Colo.2002); *In re Funk*, 146 B.R. 118 (Bankr.D.N.J.1992).^{FN5}

FN5. In determining whether to grant or deny a conversion motion pursuant to § 1307(d), courts often consider §§ 1112(b) and 1307(c) as well. Under 11 U.S.C. § 1112(b), inability to effectuate a plan, a

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debtor's unreasonable and prejudicial delay, and a lack of good faith have been found to constitute cause for dismissing a Chapter 11 case. *See, e.g., In re C-TC (4th Ave. P'ship*, 113 F.3d 1304, 1310-11 (2d Cir.1997); *Little Creek Dev. Co. v. Commonwealth Mortgage*, 779 F.2d 1069, 1072-73 (5th Cir.1986). Under 11 U.S.C. § 1307(c), dismissal of a Chapter 13 case is appropriate for reasons similar to those used in dismissing a Chapter 11 case. *See supra*, Sec. I.B.; *See also In re Funk* at 122; *Anderson v. U.S. on Behalf of Small Bus. Admin.*, 165 B.R. 445, 448 (Bankr.S.D.Ind.1994).

Courts have found that “[b]ad faith depends on the facts and circumstances of the case, and may include filing to frustrate the legitimate rights of the secured creditors as well as the failure to file a plan timely, to reveal changes in financial condition or to make post-petition mortgage payments.” *In re Tornheim*, 181 B.R. 161, 169 (Bankr.S.D.N.Y.1995), *appeal dismissed*, 1996 WL 79333 (S.D.N.Y.1996) (citations omitted); *Anderson*, 165 B.R. at 447-48.

*6 For the reasons discussed above, *see supra*, Sec. I.B., the Bankruptcy Court acted within its discretion and correctly found that the bad faith contained in Debtor's Conversion Motion justified denial of that motion pursuant to 11 U.S.C. § 1307(d).^{FN6}

FN6. It is unnecessary to list a second time all of the bad faith factors present in this case. Suffice it to say that Debtor's bad faith, described in detail earlier in this opinion, merits the dismissal of both the Chapter 13 Petition and the Conversion Motion.

CONCLUSION

This Court affirms the Bankruptcy Court's dismissal of Debtor's Chapter 13 case *nunc pro tunc* to June 28, 2002 at the moment of filing and denial of Debtor's Conversion Motion. The Clerk of the Court is directed that this Order closes this case.

SO ORDERED.

E.D.N.Y.,2004.

In re Plagakis

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