

# In the United States Bankruptcy Court

## for the Northern District of Iowa

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KATHY A. DOANE  
Debtor.

Bankruptcy No. 92-21736LD  
Chapter 7

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JOSEPH GORCHANA, PATRICIA GORCHANA  
Plaintiffs

Adversary No. 92-5268LD

vs.

KATHY A. DOANE  
Defendant.

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### ORDER OF DISMISSAL

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The above-captioned matter was scheduled for trial pursuant to assignment on January 18, 1994 at 9:00 a.m. At the time scheduled for trial, the Defendant Kathy Doane appeared in person with Attorney Corliss Baty.

The Plaintiffs, Joseph Gorchana and Patricia Gorchana, were originally represented by Attorney Jeffery Taylor. Pursuant to an Order of October 29, 1993, Attorney Taylor was allowed to withdraw as counsel for good cause shown. The trial dates and all other discovery dates remained as previously set even though Attorney Taylor had been allowed to withdraw as counsel. For the purposes of this record, it is noted that an attempt was made to have Mr. & Mrs. Gorchana on a telephone conference call for hearing when Attorney Taylor withdrew as counsel. However, the AT&T operator was only able to reach an answering machine message and the Gorchana's did not participate in these proceedings.

On the date set for this trial (January 18, 1994), Mr. & Mrs. Gorchana did not appear for trial at the date and time indicated. The Court waited approximately 1/2 hour after the trial was due to commence at which time the scheduling clerk placed calls to Mr. & Mrs. Gorchana on two separate occasions. On both occasions, the scheduling clerk was again only able to reach an answering machine for Mr. & Mrs. Gorchana. No direct contact was made on the date of trial with the Gorchana's.

The file did not reflect any Motion to Continue or any other reason why this matter should not proceed to trial. Neither the Court, nor the Defendant, nor the Defendant's counsel has had any contact with the Plaintiffs since at least the time of the Motion to Withdraw as Counsel by Mr. Taylor in October of 1993.

As the Plaintiffs are the moving parties and commenced this action and as the Plaintiffs have failed to appear to prosecute this action, the Defendant moves, through counsel, to dismiss this action for failure to prosecute. The burden of proof is upon the Plaintiffs to prove their allegations by a preponderance of evidence. This was filed as a complaint to deny discharge to the Defendant pursuant to 11 U.S.C. 727. As the Plaintiffs have failed to appear and prosecute this action, the Defendant's Motion to Dismiss this complaint is GRANTED.

The Defendant asks, in addition to dismissal and court costs assessed against the Plaintiffs, that the Defendant be awarded attorney's fees based upon the conduct of the Plaintiffs in failing to prosecute this action requiring a substantial expenditure of attorney's fees by the Defendant above those which she would have spent in these proceedings. As discussed, the Court has already determined that the Defendant's Motion to Dismiss must be granted and court costs on this adversary proceeding assessed against the Plaintiffs.

The Defendant has asked for the award of attorney's fees. As a general proposition under American Jurisprudence, attorney's fees are not allowed to the prevailing party in any litigation context. However, Federal Courts have gradually recognized areas where it is practical to award attorney's fees to prevailing parties. Courts, including the U.S. Supreme Court, have carved out an exception to the general rule which now allows Courts to assess attorney's fees when the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons. See Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 258 (1975). The Supreme Court further clarified some of the language involving the bad faith issue when it upheld an award of attorney's fees due to the losing party's failure to comply with discovery and unnecessarily protracting the litigation. See Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980). In a bankruptcy context, at least one Bankruptcy Court has held that it is proper to award attorney's fees when the losing party has met the bad faith tests established by the U.S. Supreme Court in Alyeska. See In re Plunkett, 47 B.R. 172 (Bankr. D. Wis. 1985). It is the conclusion of this Court that attorney's fees are appropriate if the losing party establishes bad faith based upon misconduct of the losing party. Here, Attorney Baty has asked the Court to award attorney's fees based on the conduct of the Plaintiffs. The Court has asked Mr. Baty to submit an attorney fee application setting out the amount of time which he has expended in this case and his ordinary and reasonable hourly rate for such services. Based upon the authority cited herein, it is the conclusion of this Court that before an award of attorney's fees may be made, however, the Court must hold an independent hearing to determine whether all or part of the attorney's fees sought should be awarded based on the bad faith of the Plaintiffs in pursuing this action.

**WHEREFORE**, for the reasons set forth herein, and based on the failure to prosecute by the Plaintiffs, this adversary proceeding is dismissed with prejudice. The Court only retains jurisdiction to determine attorney's fees as set out hereafter.

**FURTHER**, the Court costs of this action are assessed to the Plaintiffs Joseph Gorchana and Patricia Gorchana.

**FURTHER**, the Court shall consider the award of attorney's fees for bad faith of the Plaintiffs by a telephone conference hearing scheduled for the \_\_\_\_\_ day of \_\_\_\_\_, 1994 at \_\_\_\_\_ M. This matter shall be by **TELEPHONIC CONFERENCE** initiated by Attorney Baty at which time the Court will consider arguments on the issue of bad faith as it relates to the award of attorney's fees under the authority previously cited herein.

Parties should be ready and available to accept said call. The telephone number for Judge Kilburg's chambers is **(319) 365-9507**. **NOTE: THIS HEARING WILL BE TAPED ON ELECTRONIC RECORD EQUIPMENT.**

**SO ORDERED** this 21<sup>st</sup> day of January, 1994.

Paul J. Kilburg  
U.S. Bankruptcy Judge