

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF VERMONT

In re:

**Daly & Sinnott Law Centers PLLC,  
Debtor**

**Chapter 7  
Case #03-10011**



**John R. Canney, III, Trustee,  
Plaintiff,**

**v.**

**Adversary Proceeding  
#03-1014**

**Andrew Capoccia, Howard Sinnott,  
Tomas J. Daly, Shirley Dinatale,  
Roger Kolsky, Carol Capoccia,  
Carlo Spano, Eugene A. Bizzarro,  
and Debt Settlement Associates, Ltd.,  
Defendants.**

*Appearances:*      *John R. Canney, III, Esq.*  
                             *Rutland, VT*  
                             *Chapter 7 Trustee*

*Christopher O'C. Reis, Esq.*  
*Randolph, VT*  
*Attorney for Chapter 7 Trustee*

**ORDER DENYING EX PARTE ATTACHMENT and TRUSTEE PROCESS**

On March 19, 2003, the Chapter 7 Trustee (hereafter the "Trustee") moved for an *ex parte* order of attachment pursuant to V.R.C.P. Rule 4.1 and Fed R. Bankr. P. Rule 7064 and for an *ex parte* trustee process order pursuant to V.R.C.P. Rule 4.2 and Fed R. Bankr. P. Rule 7064. The Court held an emergency hearing on March 20, 2003 and, after hearing arguments of counsel and reviewing the decision issued by the United States District Court, District of Vermont (Murtha, J.) in United States of America v. Contents in Account NO. 059-644190-69, In the Name of or for the Benefit of Carol Capoccia, LLC, at Prudential Securities; et al., No. 1:02-CV-72, slip op. (D. Vt. Mar. 18, 2003), responding to objections raised by defendant Carol Capoccia and addressing a very similar motion, the Court denied the *ex parte* relief and authorized the Trustee to serve the motion and set the matter for hearing. This Order is issued to reiterate the grounds of the denial previously stated on the record.

This Court has jurisdiction over this proceeding under 28 U.S.C. §§ 157 and 1334.

Pursuant to Fed R. Bankr. P. Rule 7064, pre-judgment relief such as attachment and trustee process is available under the circumstances and in the manner provided by the law of the state in which the federal case is pending. Vermont law, therefore, determines the criteria which must be met in order for *ex parte* attachment and *ex parte* trustee process to be authorized. Vermont Rules of Civil Procedure Rule 4.1 essentially provides that, in order to obtain *ex parte* attachment, a party must demonstrate:

- (A) a reasonable likelihood that the plaintiff will recover judgment; and
- (B) either that there is
  - (i) a clear danger—shown by specific facts—that if notified in advance, defendant will remove or conceal the property, leaving insufficient attachable property, or
  - (ii) an immediate danger—shown by specific facts—the defendant will damage, destroy or sell the property, leaving insufficient attachable property.

The standard to be met for *ex parte* trustee process under V.R.C.P. Rule 4.2 is essentially the same.

At the March 20<sup>th</sup> hearing, the Court inquired of the Trustee's counsel as to whether the Trustee sought to attach any property beyond that which was included in the scope of the District Court ruling; counsel indicated that he did not. Counsel further indicated that, at this time, the Trustee seeks only to attach property of Andrew Capoccia and Carol Capoccia, *i.e.*, only a portion of the property encompassed by the District Court order.


Based upon the papers filed, the Court found that the Trustee had demonstrated the first prong of the test, namely, the reasonable likelihood that the plaintiff will recover judgment, but had failed to establish the second prong of the test, namely, the clear or immediate danger of losing the property or goods. The latter finding was based primarily upon the District Court's decision which, essentially, continued the government's forfeiture of defendant Carol Capoccia's assets for an additional thirty days (from March 18, 2003).

The Court finds that *ex parte* relief is a drastic remedy and should only be granted in extraordinary circumstances where there is not an opportunity for a hearing on notice. In this instance, since the assets in question cannot be removed or harmed for thirty days, there is an opportunity for a hearing on notice. Thus, the Court ordered that a hearing would be held on April 7, 2003 at 9:00 AM and directed the Trustee to issue notice of that hearing forthwith. The Court also directed the Trustee to supplement his papers with a precise description of the property which he seeks to attach and the trustee process which he seeks to enforce.

THEREFORE, IT IS HEREBY ORDERED that the *ex parte* relief sought by the Chapter 7 Trustee is DENIED, but that the Trustee is authorized to proceed with the motion on notice to all parties required to notice, provided that the Trustee supplements the motion with a precise description of the property he seeks to attach and the trustee process which he seeks to enforce, and that **a hearing will be held on such motion on April 7, 2003 at 9:00 AM at the U.S. Post Office and Federal Courthouse at 151 West Street in Rutland, Vermont.**

SO ORDERED.

March 24, 2003  
Rutland, Vermont

  
Colleen A. Brown  
United States Bankruptcy Judge