

**In the United States Bankruptcy Court
for the
Southern District of Georgia
Savannah Division**

In the matter of:)	
)	Chapter 13 Case
ELIZABETH ANNA DIMEO)	
)	Number <u>04-21056</u>
<i>Debtor</i>)	

MEMORANDUM AND ORDER

On July 6, 2004, Elizabeth Anna Dimeo (“Debtor”) filed for relief under Chapter 13 of the Bankruptcy Code. On January 13, 2005, Debtor filed a Motion to Approve Tort Attorney Representation and Tort Settlement. Dr. Edward S. Kaszans, d/b/a Glynn Chiropractic Associates, filed an objection to Debtor’s motion on January 31, 2005. A hearing in this matter was held on February 8, 2004. This Court has jurisdiction over this core proceeding pursuant to 28 U.S.C. § 157(b)(2). Pursuant to Federal Rule of Bankruptcy Procedure 7052(a), I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

Debtor engaged the services of Dr. Kaszans on February 13, 2004, for the treatment of injuries sustained in an automobile collision. On February 17, 2004, Debtor signed a form entitled Patient Records and Doctor’s Lien (hereinafter “Doctor’s Lien”).

The Doctor's Lien contained a section that was signed by Debtor¹ and stated:

I do hereby authorize the above doctor to furnish you, my attorney, with a full report of his case history, examination, diagnosis, treatment, and prognosis of myself in regard to my accident which occurred on 12-24-03. I hereby give a lien to the doctor on any settlement, claim, judgment, or verdict as a result of the accident, and authorize and direct you to pay directly to the doctor such sums as may be due and owing him for services rendered to me, and to withhold such sums from such settlement, claim, judgment or verdict as may be necessary to protect the doctor adequately. I understand that these fees will be paid directly from your office. I also fully understand that I am directly responsible to the doctor for all bills submitted for services rendered me, and that this agreement is made solely for the doctor's additional protection. I fully understand that such payment is not contingent on any settlement, claim, judgment, or verdict by which I may eventually recover said fee.

Dr. Kaszans's Ex. 1

The parties in this action have stipulated that the services provided by Dr. Kaszans to Debtor are to be valued at \$1,541.40.

When Debtor filed her petition, she listed an unsecured, nonpriority claim in the amount of \$1,732.00 as payable to Glynn Chiropractic Associates on Schedule F of her voluntary petition. She showed a Tort Insurance Claim-Vehicular Collision in the amount of \$10,000.00 as personal property on Schedule B. Further, she listed the same claim on Schedule C as property claimed as exempt pursuant to Georgia law. Finally, in paragraph four of her Statement of Financial Affairs Debtor listed the claim as pending.

¹The Doctor's Lien also contained a section that was directed to Debtor's attorney. While there was a line for the attorney's signature, the attorney did not sign it.

Glynn Chiropractic Associates, operated by Dr. Kaszans, was provided with notice of Debtor's bankruptcy petition and supporting schedules. The § 341 Meeting of Creditors in this case was held on August 4, 2004, after which Debtor amended Schedule C of her petition on August 12, 2004, to correct the code section relied upon to claim an exemption for the tort settlement.²

Debtor has now reached a settlement in her tort action against Lindsey Talley and Georgia Farm Bureau that resulted from the automobile collision. Thus, she has filed a Motion to Approve Tort Attorney Representation and Tort Settlement in which she noted that she desired to settle the case for \$15,000.00, \$5,000.00 of which would be allocated to Debtor's attorney in the tort action.³ Debtor wishes to retain the remaining \$10,000.00 as it was previously classified as exempt. In her motion, Debtor did not allocate any of the settlement proceeds to satisfy Dr. Kaszans's claim. Instead, Debtor intends to classify the amounts due to Dr. Kaszans as an unsecured claim.

Dr. Kaszans objects to Debtor's motion on the grounds that he is entitled to be paid from the proceeds of the tort settlement pursuant to the Doctor's Lien. In support of his position, Dr. Kaszans cites In re Preston, No. 6:03-bk-00697-6B7, 2005 Bankr. LEXIS 22, at *2 (Bankr. M.D. Fla. Jan. 5, 2005), in which the court held that an "assignment divested the Debtor of her interest in the cause of action, to the extent of the

²When originally filing her petition, Debtor relied on O.C.G.A. § 44-13-100(a)(5) to claim the tort settlement as exempt. The August 12, 2004 amendment correctly referenced O.C.G.A. § 44-13-100(a)(11). No other changes were made to Schedule C.

³At the February 8, 2005 hearing, Dr. Kaszans did not object to the \$5,000.00 being paid to Debtor's attorney in the tort action.

medical bill, and vested it in [the treating rehabilitation center].”

On February 15, 2005, I filed an Interim Order in this case stating as follows:

THE TORT ATTORNEY’S FEE OF \$5000.00 IS APPROVED AND MAY BE DISBURSED, AND DEBTOR HAVING PROPERLY LISTED AND EXEMPTED HER PORTION OF THE SETTLEMENT OF \$10,000.00; MAY HAVE ALL OF IT DISBURSED BUT \$1541.50 (DR. KASZAN’S [sic] BILL) WHICH SHALL BE HELD BY DEBTOR’S ATTORNEY, RICHARD H. TAYLOR IN HIS TRUST ACCOUNT UNTIL FURTHER ORDER OF THIS COURT.

The central issue to be resolved in this case is who is entitled to the \$1,541.50 that is currently held in trust by Richard Taylor.

CONCLUSIONS OF LAW

I must first determine the validity and legal effect of the Doctor’s Lien signed by Debtor which is a matter of Georgia law. Despite the language of the Doctor’s Lien, Dr. Kaszans has acknowledged that in Georgia there is no such thing as a physician’s lien.⁴ Of course a lien may be created by contract independent of a specific statute. That is what occurred in this case, but the lien was not perfected in any way because there is no

⁴At the time the Doctor’s Lien was executed, February 17, 2004, O.C.G.A. § 44-14-470 only provided liens for, “[a]ny person, firm, hospital authority, or corporation operating a hospital or nursing home or providing traumatic burn care medical practice.” Effective July 1, 2004, O.C.G.A. § 44-14-470 was amended to allow a physician practice to file a lien on a cause of action accruing to an injured person for the costs of care and treatment arising out of the cause of action.

statute providing a mechanism for perfecting such a lien. As a result, the purported lien is not entitled to secured status since it is avoidable under 11 U.S.C. §§ 544⁵ or 545.⁶ Debtor also concedes that the Doctor's Lien did not amount to assignment of the right to bring the tort action in question.⁷ See O.C.G.A. § 44-12-24 ("A right of action for personal torts or for injuries arising from fraud to the assignor may not be assigned."). Instead, Dr. Kaszans contends that the Doctor's Lien constituted an assignment of Debtor's right to recover from the proceeds of the personal injury suit.

⁵ 11 U.S.C. § 544(a) provides as follows:

The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by--

(1) a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists;

(2) a creditor that extends credit to the debtor at the time of the commencement of the case, and obtains, at such time and with respect to such credit, an execution against the debtor that is returned unsatisfied at such time, whether or not such a creditor exists; or

(3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists.

⁶ 11 U.S.C. § 545 provides in relevant part as follows:

The trustee may avoid the fixing of a statutory lien on property of the debtor to the extent that such lien . . . (2) is not perfected or enforceable at the time of the commencement of the case against a bona fide purchaser that purchases such property at the time of the commencement of the case, whether or not such a purchaser exists.

⁷ One court has described the public policy reason against allowing the assignment of personal injury causes of action by saying:

It is possible and indeed probable that victims could be taken advantage of and deprived of personal injury rights for inadequate sums. The buying and selling of these personal injury rights could lead to persons other than the injured party becoming enriched while parading the injured victim before an unsuspecting jury.

Covert v. Liggett Group, Inc., 750 F.Supp. 1303, 1309 n.35 (M.D. La. 1990)

In Georgia, “[a]ny language, however informal, will be sufficient to constitute a legal assignment, if it shows the intention of the owner of the right to transfer it instantly, so that it will be the property of the transferee.” First State Bank v. Hall Flooring Co., 118 S.E.2d 856, 857 (Ga. App. 1961) (citing Southern Mut. Life Ins Ass’n v. Durdin, 64 S.E. 264 (Ga. 1909)). In order for language to constitute an assignment, the language must contain words sufficient to pass title to the property. Washington Loan and Banking Co. v. Guin, 225 S.E.2d 318, 320 (Ga. 1976). Here the language was insufficient to clearly convey title. It only conveyed a lien while the property remained property of the Debtor subject to the lien. Since the lien is voidable under §§ 544 or 545, it becomes an unsecured lien.

The Doctor’s Lien also did not create an equitable assignment in favor of Dr. Kaszans. An equitable assignment is an absolute appropriation of, or transfer of a present interest in, a fund or chose in action to the assignee, but in a manner that for one reason or another does not amount to a legal assignment. Bank of Cave Spring v. Gold Kist, Inc., 327 S.E.2d 800, 802 (Ga. App. 1985). For example, if what is assigned is a contingent interest, expectancy, or other thing not *in esse*, but resting in mere possibility it is more likely to be an equitable assignment. Id. (citing 6 Am.Jur.2d 185). However, as with a legal assignment there must be an “immediate change of ownership.” Jones v. Glover, 21 S.E. 50 (Ga.1893). Here there was no immediate change of ownership in favor of Dr. Kaszans such that no equitable assignment was created.

The Fifth Circuit did not find a legal or equitable assignment in a situation applicable to the instant case. See Hanes v. Crown Camera Sales, Inc., 468 F.2d 1318 (5th Cir. 1972).⁸ In Hanes, a contractor gave its supplier a letter stating in relevant part that, “[i]t is agreed that the contract monies received from the Atlanta Hawks basketball office for lighting Alexander Memorial Coliseum will be put in full for payment for these fixtures and lamps.” Id. at 1319. The supplier argued that the letter created an assignment. The Fifth Circuit discussed the relevant Georgia standards for legal and equitable assignments. However, it found that the language of the letter showed that the contractor intended to receive the contract monies and then to apply such monies as payment to the supplier. Therefore, it held that the, “letter was an agreement to pay in the future from a particular source and not an assignment.” Id. at 1321.

Relying on the holding of the Fifth Circuit in Hanes, the court in In re Flanders, 45 B.R. 222, 223-25 (Bankr. M.D. Ga. 1984), held that a document executed by a tobacco farmer in favor of the United States Department of Agriculture (FmHA) did not constitute an assignment. Specifically, the document stated that, “it is proposed to use the proceeds [of the lease] as follows: To apply to FmHA indebtedness as an extra payment.” Id. at 225. Based on such language, the court found that the document in question did not manifest an intention to transfer title to the proceeds, but was instead an agreement by the debtor to pay FmHA in the future when he was paid pursuant to the lease. Based on the foregoing, I hold that the Doctor’s Lien did not create a valid assignment of the right to

⁸In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), the Eleventh Circuit adopted as binding precedent all Fifth Circuit decisions handed down prior to the close of business on September 30, 1981.

recovery, but merely a promise to pay from a particular source. Therefore, Dr. Kaszans does not have a security interest in Debtor's settlement proceeds such that he is properly classified as an unsecured creditor who is only entitled to payment pursuant to the terms of Debtor's Chapter 13 plan.

ORDER

Pursuant to the foregoing, IT IS THE ORDER OF THIS COURT that Elizabeth Anna Dimeo's Tort Settlement in her suit against Lindsey Talley and Georgia Farm Bureau is APPROVED, and Richard Taylor shall turn over to Elizabeth Anna Dimeo the \$1,541.50 currently held in trust. IT IS FURTHER ORDERED that Dr. Edward S. Kaszans's Objection to Approve Tort Attorney Representation and Tort Settlement is DENIED.

Lamar W. Davis, Jr.
Chief United States Bankruptcy Judge

Dated at Savannah, Georgia

This 9th day of May, 2005.