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

In the matter of:)
)
-----) Chapter 7 Case
)
Debtor) Number _____

MEMORANDUM AND ORDER
ON TRUSTEE'S MOTION TO DISGORGE ATTORNEY'S FEES
AND SETTLEMENT PROCEEDS

This matter comes before the Court on the Trustee's Motion to Disgorge Attorney's Fees and Settlement Proceeds. For the reasons set forth below, the Motion will be granted.

FINDINGS OF FACT

Debtor filed a voluntary petition under Chapter 7 of the Bankruptcy Code on September 8, 1992. In her Statement of Financial Affairs, Debtor indicated that she had been involved in an automobile accident on December 26, 1991, that she was entertaining the possibility of filing suit, and that she had retained -----, Esq. to represent her in that matter. Debtor did not, however, list the cause of action as an asset in her Schedule "B", Personal Property, nor claim her interest therein as exempt in her Schedule "C", Property Claimed as Exempt.

At the 341 Meeting held in Debtor's case on October 13, 1992, the Chapter 7 Trustee appointed in Debtor's case, -----, discovered that the Debtor had filed suit based upon the automobile accident and thereafter demanded information regarding this claim from the Debtor's bankruptcy attorney, -----, as well as -----, who continued to represent Debtor in the prosecution of the suit. The Trustee alleges that he received little or no cooperation from either attorney in this regard; however, ----- contends that he made the Debtor's file available to the Trustee and his assistants.

Whether or not ----- made his file available to the Trustee, it is clear that the personal injury action was prosecuted without the approval or consent of the Trustee. ----- ultimately settled the suit for \$6,000.00, disbursing \$3,594.41 to Debtor and retaining the rest of the money as attorney's fees and compensation for expenses incurred. All of this occurred without the Trustee's consent, the filing of a motion to employ an attorney to represent the estate in the personal injury action, or court approval of a motion to compromise the claim.

Based on this state of facts, the Trustee seeks an accounting and turnover of the proceeds derived from the settlement of the personal injury action, including the money that ----- retained as his attorney's fees.

CONCLUSIONS OF LAW

This lawsuit has been prosecuted and settled in contravention of so many bankruptcy provisions, that it is difficult to know where to begin. In a nutshell, a lawsuit,

which was clearly property of the estate,¹ was prosecuted by an attorney who was never appointed (who in fact never even sought appointment) to represent the bankruptcy estate;² the

¹ That a pre-petition cause of action becomes property of the bankruptcy estate upon the filing of a petition is a proposition so fundamental that it hardly needs citation of authority. See e.g., In re Rothwell, 159 B.R. 374, 377 (Bankr. D.Mass. 1993) ("It is beyond cavil . . . that the cause of action that was pending at the time of the Debtor's bankruptcy filing was property of the bankruptcy estate. See 11 U.S.C. § 541(a)(1)").

² Section 327 of the Bankruptcy Code, in relevant part, provides:

(a) Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title.

(e) The trustee, with the court's approval, may employ, for a specified special purpose, other than to represent the trustee in conducting the case, an attorney that has represented the debtor, if in the best interest of the estate, and if such attorney does not represent or hold any interest adverse to the debtor or to the estate with respect to the matter on which such attorney is to be

lawsuit was then improperly settled without authority of this court because no motion to compromise was ever filed;³ and finally, the money derived from the settlement, which, again, was clearly property of the estate, was disbursed to the Debtor, even though no claim of exemption has been made,⁴ and to ----- as attorney's fees, even though no fee application has ever been submitted to this Court.⁵ Incredibly, all of this occurred without any consultation with or notice to the Trustee.⁶ Suffice it to say that this it not how the game is

employed.

11 U.S.C. §§ 327(a) and (e). This provision plainly requires the trustee to obtain court approval before hiring an attorney to represent the estate.

³ See Rule 9019(a) of the Federal Rules of Bankruptcy Procedure, which provides:

(a) COMPROMISE. On motion by the trustee and after a hearing on notice to creditors, the United State trustee, the debtor and indenture trustee as provided in Rule 2002 and to such other entities as the court may designate, the court may approve a compromise or settlement.

Fed.R.Bankr.P. 9019(a).

⁴ The Debtor could have sought to exempt the lawsuit from property of the estate. See 11 U.S.C. § 522(b); O.C.G.A. § 44-13-100. As previously noted, however, no such claim of exemption has ever been made. Accordingly, the lawsuit, and any proceeds derived therefrom, remain property of the bankruptcy estate.

⁵ See 11 U.S.C. §§ 327, 330.

⁶ See ¶ 6 of Respondent, -----
----- Opposition to Trustee's Motion to Disgorge Attorney Fees and Settlement Proceeds, wherein ----- avers that he "advised Trustee that the case was settled after subsequently receiving a telephone call from the Trustee."

played.

The net effect of all this is that ----- has settled a case without consent of the client. The bankruptcy estate, as represented by the Trustee, became the real party in interest with respect to the lawsuit the moment Debtor filed her Chapter 7 petition. Thus, unless the Trustee decides to abandon the lawsuit,⁷ it is the Trustee who is responsible for prosecuting the suit, which responsibility includes choosing counsel and deciding an appropriate settlement value (with approval of this court). ----- was representing a client, the Debtor, who no longer had an interest in the lawsuit,⁸ and certainly had no authority to consent to its settlement.

"A settlement agreement is unenforceable without notice of the settlement to creditors or a court order approving it." In re Rothwell, 159 B.R. 374. Clearly, the settlement in this case is unenforceable because the Trustee, as the real party in interest, has not consented to it. Moreover, the payment of the settlement proceeds to Debtor and ----- constitutes an unauthorized post-petition transfer of property of the estate that is avoidable by the Trustee under section 549(a) of the Code. Accordingly, the Debtor and her attorney, -----, must account for and turnover all proceeds derived from the settlement of the lawsuit. The

⁷ See 11 U.S.C. § 554. A motion seeking to compel the Trustee to abandon the lawsuit could have been brought. Of course, the Trustee could not and would not have abandoned the lawsuit in this case because the Debtor did not claim any exemption in it. Therefore, any favorable settlement or verdict derived from the suit would yield a dividend to the estate.

⁸ Again, Debtor may or may not have an exemptible interest in the suit, had she claimed it. As twice noted, however, she has not claimed an exemption and therefore has no interest in the suit.

Trustee can thereafter evaluate whether to revoke the settlement or take other action in the interest of the estate, after which all interested parties can bring any relevant motions or applications with respect to the settlement, which will be considered, with any objections thereto, by the Court.

ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that Debtor, -----, and her attorneys, -----, account and remit instanter all monies representing proceeds from the settlement of the case styled -----, previously pending in the Superior Court of -----, Georgia.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ___ day of April, 1995.