

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

IN RE DIAMOND MANUFACTURING)	
COMPANY, INC.,)	
)	FILED
Debtor)	U.S.DIST.COURT
)	SAVANNAHDIV.
WILLIAM H. MOORE, JR.)	JUN 7 4 07 PM '94
)	
Appellant,)	
)	
vs.)	No. CV 492-314
)	
W. JAN JANKOWSKI, CHAPTER 7)	
TRUSTEE, SIGNET COMMERCIAL)	
CREDIT CORPORATION, and the)	
THE UNITED STATES TRUSTEE,)	
)	
Appellee.)	
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DONALD E. AUSTIN,)	
)	
Appellant,)	
)	
vs.)	No. CV 493-004
)	
W. JAN JANKOWSKI, CHAPTER 7)	
TRUSTEE, SIGNET COMMERCIAL)	
CREDIT CORPORATION, and the)	
UNITED STATES TRUSTEE,)	
)	
Appellee.)	

O R D E R

Appellant William H. Moore, Jr., has an attorney's fee lien in proceeds from a settlement obtained by debtor Diamond Manufacturing Company, Inc., in litigation. He appeals the bankruptcy court's award of \$123,127.25 in attorney's fees. The bankruptcy court initially found that appellant Donald E. Austin, CEO of Diamond at the relevant time, also had an attorney's fee lien in the settlement proceeds in the amount of \$123,127.25. Upon a motion

for reconsideration, the bankruptcy court vacated its award to Austin, finding that his status as CEO of Diamond prevented him from recovering attorney's fees. The bankruptcy court rejected Moore's contention that he also was entitled to the \$123,127.25 awarded to Austin. For the reasons described below, the bankruptcy court's ruling will be affirmed.

BACKGROUND

During the course of the Magann litigation,¹ Diamond was represented by Lewis, Babcock, Gregory, and Pleicones ("the Lewis firm"), Moore, and Austin. Diamond ultimately received \$1.7 million to settle its claims, and set aside \$566,666.67, one-third of the Magann settlement, to compensate its attorneys. The Lewis firm, which represented Diamond on a hourly basis with a ten percent bonus, was awarded \$320,292.17 by the bankruptcy court. The dispute arises over the remaining \$246,374.50.

On June 5, 1992, the bankruptcy court found that Moore and

¹Prior to filing for Chapter 11 bankruptcy protection, Diamond litigated a contract dispute with W. F. Magann Corporation in South Carolina federal court. In 1984, the district court entered judgment in favor of Diamond for \$1.5 million plus interest. See W. F. Magann Corp. v. Diamond Mfg. Co., 580 F. Supp. 1299 (D.S.C. 1984). The Fourth Circuit affirmed in part, reversed in part, and remanded the case to the district court. See W. F. Magann Corp. v. Diamond Mfg. Co., 775 F.2d 1202 (4th Cir. 1985). On remand, the district court recalculated the damages recoverable, and entered judgment in favor of Diamond for \$1.7 million plus interest. See W. F. Magann Corp. v. Diamond Mfg. Co., 678 F. Supp. 1197 (D.S.C. 1988). While a second appeal was pending in the Fourth Circuit, the parties settled all claims for \$1.7 million. The Lewis firm acted as Diamond's lead counsel in the Magann litigation, and was assisted by Moore and Austin. During the course of the Magann litigation, Diamond filed for Chapter 11 bankruptcy protection, and the bankruptcy court subsequently converted the case into a Chapter 7 proceeding.

Austin had valid, enforceable attorney's fee liens attaching to the proceeds of the Magann litigation, and awarded \$123,187.25 each to Moore and Austin.² Moore filed to modify or amend the judgment, claiming that the award to Austin was void given the bankruptcy court's earlier finding that Austin performed work for Diamond in his capacity as CEO. Moore also sought the \$123,187.25 awarded to Austin. In a November 13, 1992, order, the bankruptcy court found that no fees should be awarded to Austin, but refused to award Austin's portion to Moore. Diamond's fee agreements with Moore and Austin were never memorialized. In limiting its award to Moore to \$123,187.25, the bankruptcy court relied in large part on testimony from a July 18, 1990, hearing held on Moore's petition for appointment as special counsel in the Magann litigation. Moore testified as follows: "I was to get a third of the total attorney's fees or...one-ninth of the recovery because, in my view, there were two other lawyers or law firms that had to be taken care of out of that." Tr. of Hrg., p. 108. Moore admitted that his recovery would be diminished if

²The bankruptcy court's determination that Moore and Austin had valid, enforceable attorney's fee liens occurred after a fairly extensive amount of litigation. On June 6, 1990, that court initially denied claims of attorney's fee liens filed by Moore and Austin for their services in the Magann litigation since Moore failed to perfect his lien and Austin's work for Diamond was done in his capacity as its CEO. Moore then filed for appointment nunc pro tunc as Diamond's special counsel in the Magann litigation. The bankruptcy court granted his motion on November 2, 1990, and awarded Moore \$57,485.61. Meanwhile, Moore successfully appealed the bankruptcy court's order denying him an attorney's fee lien. See Moore v. Diamond Mfg. Co. (In re Diamond Mfg. Co.), 123 B.R. 125 (S.D. Ga. 1990) (Edenfield, C.J.), aff'd, 959 F.2d 972 (11th Cir. 1992) (per curiam). Moore voluntarily dismissed and withdrew his petition to be appointed special counsel on May 12, 1992.

the Lewis firm's fee exceeded its allocated portion. Id., p. 109. In response to questioning, Moore further clarified the arrangement that resulted after his meeting with Diamond's management committee:

Q. So, you understood that your maximum fee would be one-ninth of the recovery?

A. Of the recovery...

Q. ...And, who else would have been sharing in that; Mr. Austin and anyone else?

A. If would have been Mr. Lewis, Mr. Austin, and myself. I say Mr. Lewis and his law firm.

Q. ...Was your understanding then, the way it would go is if you could take one-third of the recovery, deduct one-third or a greater amount if the Lewis, Babcock firm actually wound up incurring a fee greater than a third -

A. Right.

Q. -- and, then, you would be dividing the difference by two -

A. By two.

Q. -- between Mr. Austin and yourself?

A. That is correct.

Id., pp. 109-110.³

³Moore reiterated his position in a motion filed on November 12, 1990:

Another construction of the [fee] agreement would allow the Court to compute the maximum attorney's fee exposure of \$566,666.67, deduct the Lewis firm award of \$320,292.17 leaving a balance of \$246,374.50 as the maximum recoverable by Austin and Moore, and to divide that sum in half and allow Mr. Moore a fee of \$123,137.25. This is perhaps the most reasonable construction of the fee agreement and would more accurately reflect Mr. Moore's contribution to the success of

In sum, the bankruptcy court determined that the fee agreement between Diamond and its attorneys provided for a maximum exposure of one-third of the Magann settlement, with the Lewis firm receiving payment on an hourly basis with a bonus and with Moore and Austin splitting the remainder.

DISCUSSION

On appeal, Moore contests the bankruptcy court's failure to award him the entire \$246,374.50 remainder in light of the fact that Austin has no valid attorney's fee lien in the proceeds of the Magann settlement. The Court has jurisdiction of these appeals⁴ pursuant to 28 U.S.C.A. §158(a) (1993). It reviews the bankruptcy court's findings of fact under the clearly erroneous standard, and reviews the bankruptcy court's conclusions of law de novo. Equitable Life Assurance Soc'y v. Sublett (In re Sublett), 895 F.2d 1381 (11th Cir. 1990). A factual finding is clearly erroneous when the reviewing court, after assessing the evidence, "'is left with a definite and firm conviction that a mistake has been committed.'" Worthington v. United States, F.3d ___, ___, 1994 WL 171615 at *1 (11th Cir. May 23, 1994), citing United

the litigation, while still benefitting the Estate by substantially reducing the fees which might have been awarded to Mr. Austin had he been entitled to receive same.

Moore's R. 90-91 (emphasis added).

⁴On March 1, 1993, the Court denied Austin's request to participate in these consolidated appeals because he failed to appeal the bankruptcy court's June 6, 1990, order denying him an attorneys fee lien. His failure to appeal the earlier order renders him without an interest in the current appeal.

States v. United States Gypsum Co., 333 U.S. 354, 395 (1948).

Moore's claim of entitlement to Austin's share of the attorney's fees rests upon his argument that he and Austin were partners or joint venturers who entered into a "private agreement" to evenly split the remainder of the attorney's fee fund following payment of the Lewis firm. See Br. of Appellant, p. 6. Two problems arise with Moore's appellate argument, however: He raises it for the first time on appeal, and his sworn testimony and pleadings clearly support the bankruptcy court's determination of the terms of the fee agreement between Diamond and its attorneys.

Moore never advanced that he and Austin were partners or joint venturers before the bankruptcy court. Before that court, his claim to the \$123,127.25 initially awarded to Austin was premised only on the fact that Austin was entitled to nothing. See Moore's R. 106-107, 110-111. An appellate court generally will not review a legal theory not presented to the trial court unless the issue is a pure question of law and failure to consider it would result in a miscarriage of justice. N.A.A.C.P. v. Hunt, 891 F.2d 1555 (11th Cir. 1990). In any event, Moore's testimony and his characterization of the fee agreement between Diamond and its attorneys throughout the course of the bankruptcy proceedings clearly indicate that Moore's fee agreement with Diamond contemplated a discrete award of one-ninth of the Magann settlement to him.

The bankruptcy court determined that Diamond provided

for a maximum exposure of one-third of the Magann settlement to cover attorney's fees. At the July 18, 1990, hearing, Moore testified

that after meeting with the Diamond management committee, he understood that his maximum fee would be one-ninth of the recovery since he had to split the fee fund with Austin and the Lewis firm.⁵ Tr. of Hrg., pp. 109-110. Moore's subsequent pleadings supported his testimony at the hearing. In his first appellate brief before this Court, Moore stated that his "agreement for compensation originally was to be paid on an hourly basis, but was later changed to be one-third (1/3) of any recovery..., to be shared with other associated counsel, including the Lewis firm." Moore's R. 39. In a November 12, 1990, motion and brief, Moore asked for one-ninth of the recovery as attorney's fees, and identified \$123,127.25 as "perhaps the most reasonable construction of the fee agreement." Moore's R. 85-86, 90-91. Neither Moore's testimony nor representations indicate that he and Austin entered a "private agreement" to share the remainder of fee

⁵Moore attempts to disavow this testimony by arguing that it occurred before he was given an attorney's fee lien by this Court's December 14, 1990, order, and that the question of his compensation "was not even involved in the hearing. Br. of Appellant, p. 8. Although this hearing occurred prior to Moore's lien, Moore nonetheless testified about the fee agreement between Diamond and its attorneys, a matter which would establish the amount of his lien. While the record does not indicate whether Moore's compensation was to be a subject of the hearing, Moore's attorney questioned him about the fee arrangement with Diamond, see Tr. of Hrg., pp. 88-89, and did not object to the Trustee's questions on this matter, see Tr. of Hrg., pp. 108-110. Thus, Moore's attempts to diminish the effect of his testimony are unpersuasive.

fund; instead, he consistently discusses this split in terms of his agreement with Diamond.

Testimony at that hearing also indicates that Diamond's fee agreements with the attorneys were discrete arrangements. Lewis testified that he "never had any idea what [Moore's] arrangements were whatsoever." Tr. of Hrg., p. 54. Austin initially retained Moore to represent Diamond on an hourly fee basis. When Diamond could not pay Moore, Diamond's management committee, of which Austin was not a member, arranged a different fee agreement. p. 123. Austin did not know of the arrangement Moore made with Diamond's management committee until Moore discussed it with him. Id.

This Court is not left with "a definite and firm conviction" that the bankruptcy court committed an error in determining the terms of the fee agreement between Diamond and its attorneys. The evidence, including Moore and Lewis' testimony, clearly supports the bankruptcy court's finding that the attorneys' arrangement with Diamond contemplated a maximum exposure of one-third of the Magann settlement, with the Lewis firm being compensated hourly and with Moore and Austin splitting the remainder. Since an attorney's fee lien permits an attorney to recover the fees due to him for his services, see Law Office of Tony Center v. Baker, 366 S.E.2d 167 (Ga. Ct. App. 1988), Moore may recover the fees for which he contracted with Diamond -- one-ninth of the Magann settlement less money due to the Lewis firm, or \$123,127.25. Accordingly, the

November 13, 1992, order of the bankruptcy court is affirmed.

SO ORDERED this 7th day of June, 1994.

B AVANT EDENFIELD, CHIEF JUDGE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA