

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA

Savannah Division

IN RE:) Chapter 7 Case
) Number 85-40555
DIAMOND MANUFACTURING CO., INC.)
) FILED
Debtor) at 4 O'clock & 14 min. P.M.
Date 6-6-90

ORDER

Movant, William H. Moore, Jr., filed this motion to enforce compromise regarding attorney fees claimed by Moore, Donald E. Austin, and George Pahno arising out of the settlement of a legal action brought by the debtor, Diamond Manufacturing Co., Inc. After consideration of the briefs, arguments of counsel, and evidence presented at the hearing, the court makes the following findings of fact and conclusions of law.

In 1984, the United States District Court for the District of South Carolina, Charleston Division entered a judgment in favor of debtor against W. F. Magann Corporation and Aetna Casualty and Surety Company (hereinafter referred to collectively as "Magann"). See, W. F. Magann Corp. v. Diamond Manufacturing Co., 580 F. Supp. 1299 (D.S.C. 1984). The judgment was affirmed in part and reversed in part by the Fourth Circuit Court of Appeals. See, W. F. Magann Corp. v. Diamond Manufacturing Co., 775 F.2d 1202 (4th Cir. 1985). On remand, the District Court entered judgment in favor of debtor

in the sum of One Million One Hundred Seventy-One Thousand Seven Hundred Eighty and 59/100 (\$1,171,780.59) Dollars plus interest at the rate established by 41 U.S.C. §611 from December 11, 1979. W. F. Magann Corp. v. Diamond Manufacturing Co., 678 F. Supp. 1197 (D.S.C. 1988). Magann, again, appealed the judgement to the Fourth Circuit Court of Appeals.

Debtor filed for protection under Chapter 11 of the Bankruptcy Code on August 29, 1985. The case was converted to case under Chapter 7 by order of this court on August 26, 1988. The Chapter 7 trustee in this case, W. Jan Jankowski, filed with this court a motion to approve a compromise and determine extent and validity of liens against proceeds of the Magann judgment. By order of October 19, 1989, this court approved the compromise of the Magann litigation in the sum of One Million Seven Hundred Thousand and No/100 (\$1,700,000.00) Dollars, but made no determination as to the extent and validity of liens asserted by various claimants.

All parties were provided an opportunity to brief their positions on claims and liens to the court. Moore filed on October 2, 1989, a proof of claim for One Hundred Sixty-Eight Thousand Eight Hundred Eighty-Eight and No/100 (\$168,888.00) Dollars. Pahnó filed a proof of claim for Seventeen Thousand Six Hundred Twenty-Five and No/100 (\$17,625.00) Dollars, and Austin filed a proof of claim in the amount of One Hundred Twenty Thousand and No/100 (\$120,000.00) Dollars. By order entered March 19, 1990, the court decided the extent and validity of all liens and claims

against the proceeds,

except the claims of Moore, Pahnó, and Austin. While the trustee's motion to determine the extent and validity of liens was under advisement, Moore through counsel filed this motion to enforce compromise. The court withheld ruling on the claim of lien of Moore, Austin, and Pahnó until resolution of the motion to enforce compromise.

The debtor was represented in the Magann litigation by the law firm of Lewis, Babcock, Pleicones, & Hawkins (hereinafter "Lewis firm") which was approved by the bankruptcy court as special counsel for the debtor. By order of this court entered October 17, 1989, this firm was awarded Three Hundred Twenty Thousand Two Hundred Ninety-Two and 17/100 (\$320,292.17) Dollars in attorney fees from the Magann settlement proceeds.

In 1981, prior to the debtor seeking the protection of this court, debtor's president and chief executive officer, Austin, agreed orally to compensate attorney Moore in some "reasonable" amount for any legal work performed by Moore on the Magann litigation. Based upon this agreement Moore expended time, effort and money on behalf of the debtor in assisting the Lewis firm for which he asserts an attorney's lien against the settlement proceeds. No written fee agreement was entered into by the debtor and Moore. Moore did not seek appointment as attorney for the debtor in the Chapter 11 Case as did the Lewis firm.

Debtor's president and chief executive officer, sole shareholder, and a member of the bar of this court, Austin,

asserts

an attorney's lien against the Magann proceeds for work he performed on behalf of the debtor in the litigation.

Attorney Pahno represented the debtor in the debtor's Chapter 11 proceedings before this case was converted to proceeding under Chapter 7 of the Bankruptcy Code. Pahno asserts an attorney's lien against the settlement proceeds for legal services rendered in an adversary proceeding in this court involving Magann. By order entered April 20, 1990 nunc pro tunc August 29, 1985, Pahno was appointed by this court as attorney for the debtor-in-possession.

The Chapter 7 trustee and Moore, Pahno, and Austin entered into negotiations to resolve the claims of Moore, Pahno, and Austin against the Magann settlement proceeds. Moore for himself, Pahno, and Austin, contends that the trustee agreed to compromise their aggregate claims for the sum of One Hundred Eighty Thousand and No/100 (\$180,000.00) Dollars and seeks to have the court force the trustee to honor the agreement and settle their claims in this amount. The trustee maintains that no compromise agreement was entered into between himself and Austin, Pahno, and Moore.

Pursuant to Bankruptcy Rule 9019(a), this court may approve a compromise or settlement on motion by the trustee after hearing on notice to creditors, the debtor and indenture trustees. This motion to enforce compromise brought by Moore is an action to

force the trustee to seek court approval of a compromise of the claims of Moore, Austin, and Pahno against the Magann settlement

proceeds in the sum of One Hundred Eighty Thousand and No/100 (\$180,000.00) Dollars. The trustee maintains that he had indicated to Moore, Moore's attorney, Mr. Julian H. Toporek, Austin, and Pahno on November 21, 1989, that he "would consider recommending" to the court a compromise of the aggregate claim of all attorney fees in the Magann litigation of Five Hundred Thousand and No/100 (\$500,00.00) Dollars including the fees paid to the Lewis firm, but no offer of compromise was made by him. The trustee also contends that even if the court finds that he made such an offer of compromise, counteroffers by Moore, Austin, and Pahno revoked any such offer.

Assuming that the trustee made an offer of settlement at the meeting between the trustee, Moore and Moore's counsel, Austin and Pahno, held November 21, 1989, the evidence is clear that the offer was rejected and numerous counteroffers were made to the trustee. By letter dated November 28, 1989, Toporek notified the trustee of a proposal to settle the claims of Moore, Austin, and Pahno for a total sum of Two Hundred Five Thousand and No/100 (\$205,000.00) Dollars. In the letter dated November 28, 1989, Toporek referenced a prior offer made by the trustee at the November 21, 1989 meeting to settle their claims for One Hundred Eighty Thousand and No/100 (\$180,000.00) Dollars. By letter dated December 11, 1989, Toporek , on behalf of Moore, withdrew the

offer to settle

his claim made in the letter of November 28, 1989. By letter of February 2, 1990, Pahno, for himself, Austin, and Moore notified the

trustee of their intention to settle their claims for One Hundred Eighty Thousand and No/100 (\$180,000.00) Dollars, and included the following paragraph:

I hope the total compromise fees, to wit:
\$180,000, is acceptable and that you will move
the court to approve a compromise on behalf of
the debtor's estate with claimant's attorney.

By the letter of November 28, 1989, Moore, Austin, and Pahno offered to settle their claims in an amount in excess of the alleged prior offer of the trustee. Such an offer constituted counteroffer. "[A] counteroffer operates to reject the offer and to terminate the power of acceptance (Peerless Cas. Co. v. Housing Authority & C. of Hazlehurst, 228 F.2d 376 (5th Cir. 1955), Corbin, Contracts, §90 (1963), the initial offer was no longer outstanding and could not later be accepted unless renewed." Duval & Co. v. Malcom, 233 Ga. 784, 214 S.E.2d 356 (1975). See also South Atlanta Associates v. Strelzik, 192 Ga. App. 574, 385 S.E.2d 439 (1989). No evidence was presented that any prior offer by the trustee was renewed by the trustee after the counteroffer was made. Pahno's letter of February 2, 1990 is an additional offer by Moore, Austin, and Pahno to settle their claims, not an acceptance by them of an outstanding offer made by the trustee. No binding, enforceable agreement to settle the claims of Moore, Austin, and

Pahno was entered into with the trustee. The counteroffer of Moore, Austin, and Pahno terminated any prior offer of the trustee.

In order for a settlement of a disputed claim to be binding on the parties, there must be a meeting of the minds of the parties on the terms of the settlement. Pesso v. Poulos, 74 Ga. App. 288, 39 S.E.2d 702 (1946). The trustee testified that he said he would consider recommending a settlement of the aggregate claims of all attorney fees for Five Hundred Thousand and No/100 (\$500,000.00) Dollars which included the claims of Moore, Austin, and Pahno, but no agreement was reached to settle the claims of Austin, Moore and Pahno for One Hundred Eighty Thousand and No/100 (\$180,000.00) Dollars. Moore, Austin, and Pahno contend the trustee agreed to recommend such a compromise to the court. All documentary evidence presented indicates that Moore, Austin, and Pahno made counteroffers or new offers to the trustee after the initial meeting. The parties never had a "meeting of the minds" which would create a binding settlement contract.

Having determined that no binding settlement was entered into between the trustee, and Moore, Pahno, and Austin, the court must resolve the issue of whether Moore, Austin, and Pahno have valid attorneys' liens against the Magann settlement proceeds, and if so, the amount of such liens. Moore asserts that a valid attorney's lien under Georgia law arose in favor of Austin and

himself at the time the pleadings were filed in the Magann litigation. Pahno asserts a claim for attorney fees against the Magann settlement proceeds because of his representation of the debtor-in-possession in the Magann litigation. The court concludes

that neither Moore, Austin or Pahno have valid attorney's liens against the Magann settlement proceeds.

"The nature, extent and validity of the statutory lien are matters governed by state law. (citations omitted)."

Pierce v. Aetna Life Insurance Co. (In re: Pierce), 809 F.2d 1356 (8th Cir. 1987). Moore contends that Georgia law applies to determine the nature, extent, and validity of their liens against the Magann proceeds as the agreement between the lawyers and the debtor was entered into in Georgia, and the Magann settlement proceeds are under the control of this court and the trustee located in Georgia even though the legal action was filed and litigated in South Carolina. For purposes of this order, the court will assume that Moore is correct and determine the validity of the liens under Georgia's lien statute.

The applicable statutory provision in Georgia is O.C.G.A. §15-19-14 which provides:

(a) Attorneys at law shall have a lien on all papers and money of their clients in their possession for services rendered to them. They may retain the papers until the claims are satisfied and may apply the money to the satisfaction of the claims.

(b) Upon actions, judgments, and decrees for money, attorneys at law shall have a lien superior to all liens except tax liens; and no person shall be at liberty to satisfy such an action, judgement, or decree until the lien or claim of the attorney for his fees is fully satisfied. Attorneys at law shall have the same right and power over the actions, judgments, and decrees to enforce their liens as their clients had or may have for the amount due thereon to them.

(c) Upon all actions for the recovery of real or personal property and upon all judgments or decrees for the recovery of the same, attorneys at law shall have a lien for their fees on the property recovered superior to all liens except liens for taxes, which may be enforced by mortgage and foreclosure by the attorneys at law or their lawful representatives as liens on personal property and real estate are enforced. The property recovered shall remain subject to the liens unless transferred to bona fide purchasers without notice.

(d) If an attorney at law files his assertion claiming a lien on property recovered in an action instituted by him, within 30 days after a recovery of the same, his lien shall bind all persons.

(e) The same liens and modes of enforcement thereof which are allowed to attorneys at law who are employed to bring an action for any property, upon the property recovered, shall be equally allowed to attorneys at law employed and serving in defense against such actions in case the defense is successful.

(f) This Code section shall not affect the rights of attorneys under Code Section 15-19-13 and decisions of the Supreme Court and Court of Appeals thereon. (Ga. L. 1873, p. 42 §16; Code 1873, §1989; Ga. L. 1880-81, p. 63, §3; Code 1882, §1989; Civil Code 1895, §2814; Civil Code 1910, §3364; Code 1933, §9-613.)

Moore, for all three attorneys, asserts a lien under paragraph (b)

of the statute.

A lien is created in favor of the attorney at the time he files suit on behalf of his client. Middleton v. Westmoreland, 164 Ga. 324, 138 S.E. 852 (1927). Therefore, an attorney's lien was created in favor of Moore on the date that he filed suit against Magann on behalf of the debtor. The issue to be resolved is whether

this lien was properly perfected.

Subsection (d) of the attorney lien statute requires an attorney at law to file his assertion claiming a lien on property recovered in an action instituted by him within 30 days after recovery of the same in order for the lien to bind all persons. O.C.G.A. §15-19-14(d).¹

The purpose of our recording statutes is to protect both the lienholder and innocent persons acting in good faith but without means of discovering the lien of another. An attorney is given the privilege of protecting his lien by recording his claim thereto, and his failure to avail himself of such privilege brings upon him the same disaster that befalls other lienholders who neglect to record the lien as authorized by law.

Johnson v. Giraud, 191 Ga. 577, 13 S.E.2d 365 (1941).

Moore took no action to record a lien, but maintains

¹While the parties have cited no authority, and this court can find none, in which the Georgia courts have decided when recovery of a judgment occurs for the purposes of recording an attorney's lien under O.C.G.A. §15-19-14(d) or the method under state law for recording such a lien, resolution of these issues is not required since Moore took no action to record his lien.

that the recording provision of the attorney's lien statute only applies to liens asserted against real or personal property. Moore bases this contention on the history of the act. Moore maintains that the recording provision was amended in 1981 to remove the requirement that all attorney's liens be recorded in the same manner as

materialmen's and mechanics' liens.² While Moore is correct that the reference to the materialmen's and mechanics' lien statute was removed from the attorney's lien provision by amendment in 1981, the recording requirement still exists within the statutory lien provision. Omitted from the statute was the requirement that the lien perfection comply in form with the materialmen's and mechanic's lien statute. No distinction is drawn within the statute between liens for real property or other property recovered in a suit, and the Georgia courts have not drawn such a distinction. The statute requires the filing of a claim of a lien, and absent such a filing, the lien is unperfected.

²The prior recording provision of the Georgia attorneys lien statute provided:

If an attorney at law shall file, as provided in section 67-2002, his assertion claiming lien on property recovered in suit instituted by him within 30 days after recovery of the same, then his lien shall bind all persons. (Underlined portion omitted in 1981 amendment).

The trustee in bankruptcy, under 11 U.S.C. §545(2), may avoid the fixing of a statutory lien on property of the debtor to the extent that such lien was 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. Moore's lien was unperfected at the time of the filing and at the time that the case was converted to a case under Chapter 7. Moore's lien against the

Magann settlement proceeds, therefore, may be avoided by the trustee as it was not perfected prior to filing. Dabney v. Information Exchange (In re: Information Exchange), 98 B.R. 603, 604 (Bankr. N.D. Ga. 1989); Anderson v. Burnham (In re: Burnham) 12 B.R. 286, 291 (Bankr. N.D. Ga. 1981) (applying the prior attorney lien statute).

Under the provisions of 11 U.S.C. §327(e), Moore could have sought court approval as counsel for the debtor for a specified purpose, as debtor's co-counsel in the Magann litigation. Such application may be made after the services were rendered, and the court may approve preappointment fees if the court, exercising its discretion, finds the fees necessary and reasonable. See, In re: Morgan, Ch. 11 Case No. 89-40074 (Bankr. S.D. Ga. Aug. 11, 1989); In re: Munsayac, Ch. 7 Case No. 87-20054 (Bankr. S.D. Ga. Feb. 6, 1990). The application for fees must set forth a detailed statement of the services rendered, time

expended, and expenses incurred. See Bankruptcy Rule 2016(a). Such attorney fees are then paid as an administrative expense claim under the provisions of 11 U.S.C. §503(b)(2) and §507(a)(1).

The Lewis firm, lead counsel for the debtor in the Magann litigation, filed on October 17, 1989, a detailed application complying with Bankruptcy Rule 2016. The application contained detailed time entries specifying each service rendered on behalf of the debtor. The application was reviewed by this court, and the fees were approved. Moore has presented no detailed time entries,

but rather depends on vague sworn testimony as to the services rendered by him in the Magann litigation on behalf of the debtor to justify payment of his claim. The court cannot under these circumstances approve the appointment of Moore and authorize payment of any pre-appointment fees. Moore, however, may seek appointment as co-counsel for debtor in the Magann litigation, but any fee application for services rendered must comply with Bankruptcy Rule 2016. See also Hensley v. Eckerhart, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983); Norman v. Housing Authority of City of Montgomery, 836 F.2d 1292 (11th Cir. 1988); Davis v. Federal Land Bank of Columbia (In re: Davis), Ch. 11 Case No. 87-50208, Adv. No. 88-5006, Slip op. at 34-50 (Bankr. S.D.Ga. Sept. 8, 1989). Apparently, Moore has chosen to pursue payment as a creditor and filed a proof of claim in this case in the amount now sought, which is an unsecured claim, rather than as attorney

retained for special purpose under §327(e).³

To the extent that Austin has any claim for attorney's fees in the Magann litigation, the above analysis would serve to allow the trustee to avoid his lien, also. However, the court concludes that all of Austin's work in the Magann litigation was

done in his capacity as the debtor's chief executive officer and not in his capacity as an attorney. No contract was entered into by the debtor and Austin for legal representation. Under applicable provisions of the Bankruptcy Code, Austin would not have been approved as attorney for the debtor by this court. See 11 U.S.C. §327(e). The court may not approve an attorney under §327(e) who holds an interest adverse to the debtor's estate.

[T]o hold an interest adverse to the debtor's estate means:

(1) To possess or assert any economic interest that would tend to lessen the value of the bankruptcy estate or that would create either an actual or potential dispute in which the estate is a rival claimant; or

(2) to possess a predisposition under circumstances that render such a bias against

³At least one decision by the Georgia Court of Appeals has affirmed a lower court ruling which held that when a contract between a client and an attorney is "ambiguous as to what would be chargeable to" the client, the client may not be bound by the contract. Roan v. Cranston, 173 Ga. App. 747, 327 S.E.2d 856 (1985). The contract, if any, between the debtor and Moore was to say the least ambiguous.

the estate.

In re: Al Gelato Continental Desserts, 99 B.R. 404, 407 (Bankr. N.D. Ill. 1989). See also In re: Roberts, 46 B.R. 815, 827 (Bankr. D. Utah 1985).

Austin was at the time of filing of this bankruptcy proceeding an equity security holder and an officer and director of the debtor. Austin who is also a debtor in this court, In re: Austin, Ch. 11 Case No. 85-40639, (Bankr. S.D. Ga. 1985), has an interest in protecting his own Chapter 11 estate, an interest adverse to his representation of the debtor's Chapter 7 estate.⁴ Austin has argued

in many hearings that certain property claimed by the Chapter trustee as property of the estate of the debtor was actually property of his personal Chapter 11 estate. Austin has found himself several times in disputes in which the debtor's estate and trustee were rival claimants. Austin, therefore, could not have been approved by this court as counsel for the debtor for specified special purpose. Austin's work with the court approved

⁴This court is aware that the Honorable Herman W. Coolidge, Bankruptcy Judge of this Court, over objection, appointed Austin as attorney for the debtor in the matter of Rose Marine, Inc., wherein Austin was an officer, director, ninety percent shareholder and guarantor of at least \$500,000.00 of Rose Marine, Inc. debt.

However, the appointment provided "that Donald E. Austin shall serve as attorney for Rose Marine, Inc. without compensation so long as Rose Marine, Inc. shall remain in this court as a debtor under Chapter 11 of the Bankruptcy Code. In re: Rose Marine Inc., Ch. 7 Case No. 86-40143, Slip op. at 2 (Bankr. S.D. Ga. August 27, 1986).

counsel for the debtor was done in Austin's capacity as the debtor's president and chief executive officer. Austin is not entitled to the recovery of any attorney's fees from the Magann litigation.

The lien against the Magann settlement asserted by Pahno is for post-petition legal work done in his capacity as the attorney for the debtor-in-possession. By order of this court, Pahno has been approved as the attorney for the debtor-in-possession. The court after notice and hearing may award the debtor's attorney reasonable compensation for actual, necessary services rendered by the attorney and reimbursement for actual, necessary expenses. 11 U.S.C. §330(a). Pahno, however, has not submitted to the court an application setting forth a detailed statement of (1) the services rendered, time expended and expenses incurred, and (2) the amounts

requested. See Bankruptcy Rule 2016(a). The court may not award such compensation without compliance with the applicable code provisions and rules. Additionally, Pahno has established no basis which would give rise to an attorney's lien against the Magann settlement proceeds. Pahno may have an administrative claim under 11 U.S.C. §503(b)(2) and §507(a)(1) for attorney's fees because of his representation of the debtor-in-possession during the course of this bankruptcy proceeding in matters related to the Magann

litigation, but such claim is not sufficient to give rise under state law to an attorney's lien against the settlement proceeds. However, if Pahno chooses to file an application for attorney fees with the court, he must withdraw his proof of claim filed in the case. He may not proceed with an application for an administrative expense and as an unsecured creditor.

It is therefore ORDERED that the motion to enforce compromise is denied; and

Further ORDERED that the claim of lien of William H. Moore, Jr., Donald E. Austin, and George Pahno against the Magann settlement proceeds is denied.

JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia
this 6th day of June, 1990.