

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA

Dublin Division

IN RE:) Chapter 7 Case
) Number 99-30214
BURNETTE WEEKS OGLESBY, and)
LYDIA STRUTHERS-OGLESBY)
)
Debtors)
_____)
SCOTT J. KLOSINSKI, Trustee) FILED
) at 11 O'clock & 55 min. A.M.
Plaintiff) Date: 9-27-00
)
vs.) Adversary Proceeding
) Number 99-03011A
SOUTHEASTERN NEUROLOGIC)
ASSOCIATES. P.C.,)
)
Defendant)
_____)

ORDER

Scott J. Klosinski, the Chapter 7 trustee ("Trustee") in the Debtors' Chapter 7 case, filed this adversary proceeding to recover funds paid to Defendant Southeastern Neurologic Associates, P.C. ("Defendant") as a preferential transfer under 11 U.S.C. Section 547(b). The matter was submitted on stipulated facts. This is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(F). I find that the funds are recoverable by the Trustee.

The following are the stipulated facts. Debtor Burnette

Oglesby ("Debtor") sustained injuries in a car accident on September 9, 1998. After the accident, Defendant began treating Debtor for his injuries. Debtor retained attorney Jason Craig to represent him in regard to the personal injuries Debtor sustained as a result of the accident. On October 14, 1998, under attorney Craig's representation, Debtor executed two documents in favor of Defendant: 1) a document titled "Doctor's Lien", and 2) a document titled "Subrogation Agreement and Creation of Lien." The relevant language of the Doctor's Lien document is as follows:

I hereby give a lien to said doctor (Group) on my settlement, claim, judgment or verdict as a result of said accident/illness, and authorize and direct you, my attorney/insurance carrier, to pay directly to said 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 said doctor adequately. I fully understand that I am directly and fully responsible to said doctor (Group) for all bills submitted for services rendered me, and this agreement is made solely for said doctor's (Group) additional protection and in consideration of awaiting payment. And I further understand that such payment is not contingent on any settlement, claim, judgment, or verdict by which I may eventually recover the amount of said bills.

The relevant language of the "Subrogation Agreement and Creation of Lien" document is as follows:

The undersigned does hereby agree that Southeastern Neurologic Associates, P.C., shall be and is subrogated and the undersigned patient hereby acknowledges the right of subrogation of Southeastern Neurologic Associates, P.C., to the right of recovery the undersigned patient. . . has against the alleged negligent person or firm named above. This right of subrogation shall only be to the extent of the value of medical services rendered to the undersigned patient. . . The undersigned acknowledges that he or she will be required to pay

Southeastern Neurologic Associates, P.C., out of the monies the undersigned. . . receives from the person or firm named above or his, her or its insurance company as a result of judgment, settlement or otherwise. . . The purpose of this subrogation is to help provide medical services at reasonable rates. This agreement does not effect, nor is it intended to effect, an assignment of a cause of action but only to create a valid and enforceable right of subrogation. . . the undersigned does hereby grant Southeastern Neurologic Associates, P.C. a lien in and to any monies or proceeds owed as a result of injuries to the undersigned. . . The undersigned agrees that this subrogation and lien agreement may be filed with the Clerk of Superior Court of the County of residence of the undersigned.

. . .

The body of the Subrogation Agreement did not identify the tortfeasor or person allegedly causing injury, and the document was not notarized or witnessed. The documents were not recorded by Defendant. Defendant treated Debtor from approximately September 18, 1998, through February 24, 1999, and the total charges during this period were \$5,191.00. At some point, Defendant agreed to discount the value of its services by fifteen percent (15%) and to accept \$4,412.35 as payment in full. On or about April 27, 1999, Mr. Craig, Debtor's attorney, issued a check in the amount of \$4,412.35 to Defendant in payment of Debtor's account. Debtor filed for protection under Chapter 7 of the Bankruptcy Code on May 7, 1999, ten (10) days after the issuance of the check.

I. THE VALIDITY OF THE DOCUMENTS

I must first determine the validity and legal effect of the

documents signed by Debtor. Defendant contends that the documents effectuated an assignment of Debtor's right of recovery of the settlement proceeds, as opposed to an assignment of the cause of action. Defendant contends that the transfer of this right of recovery occurred when the documents were executed in October 1998, which is outside the ninety day preference period of §547(b). The Trustee argues that the documents are not valid for several reasons. The Trustee contends that the "Subrogation Agreement and Creation of Lien" document cannot be an assignment because it specifically includes a provision disclaiming that it is an assignment. The Trustee also contends that the document could not be a subrogation agreement because subrogation follows only upon payment and requires a payment prior to the agreement. The Trustee argues that Defendant had not provided any services to Debtor prior to Debtor's signing the agreement and there was no pre-existing payment of a debt. Thus, the agreement cannot be a subrogation agreement.

Under Georgia law one cannot assign a right of action for personal tort. O.C.G.A § 44-12-24 provides:

Except for those situations governed by Code Sections 11-2-210 and 11-9-402, a right of action is assignable if it involves, directly or indirectly, a right of property. A right of action for personal torts or for injuries arising from fraud to the assignor may not be assigned.

"Under Georgia law, a right to bring or maintain a personal injury action cannot be assigned, because at common law such

rights are not assignable.” Peoples v. Consolidated Freightways, Inc., 486 S.E.2d 604, 605 (Ga. App. 1997) (other citations omitted). Defendant argues that the documents assign Debtor’s right of recovery in the settlement proceeds from the unnamed tortfeasor, not the cause of action itself. The Georgia Supreme Court has not addressed the scope of the prohibition against assigning a cause of action for personal injury.

Defendant relies on the case of Santiago v. Klosik, 404 S.E.2d 605 (Ga. App. 1991) to support its argument that Georgia courts recognize such a distinction. In Santiago, the Georgia Court of Appeals held that a chiropractor could not enforce written “assignment” and “doctor’s lien” documents to recover from settlement proceeds of a personal injury claim for services rendered to a patient because there was a failure of consideration between the chiropractor and the patient’s attorney, the defendant in the lawsuit. In reaching this holding, the Court of Appeals analyzed the assignment document and disagreed with the defendant’s contention that the document assigned a right of action. Defendant relies on the following statement in dicta to support its argument: “[t]he assignment at issue does not purport to authorize the appellant to bring suit against the tortfeasor to recover for Duncan’s [the patient’s] injuries but purports only to give him an enforceable interest in any recovery Duncan may obtain as the result of her own

pursuit of her personal injury claim.” Id. at 606 (emphasis added). I am not persuaded that Klosik is controlling for several reasons. First, the document under scrutiny in Klosik was labeled an “assignment”, not a “Subrogation Agreement” as here. Second, the Georgia Court of Appeals did not reach the issue of whether the purported assignment was valid under state law. It found that the assignment of the document was not an assignment of a cause of action for personal injuries prohibited under O.C.G.A. §44-12-24, but because it found a lack of consideration it did not reach the question of whether the assignment was effective as between the patient and medical provider.

I have examined other cases relied upon by Defendant that purportedly distinguish an assignment of a right or cause of action from a right of recovery. I do not believe the cases stand for this proposition. In the case of Sheppard v. State Farm Fire & Casualty Co., 475 S.E.2d 675 (Ga. App. 1996), the Georgia Court of Appeals found that an insurance policy provision requiring the insured to reimburse the insurance company for medical expenses from settlement proceeds was enforceable. The Court of Appeals examined the language of the insurance policy and found that it was not an assignment of a personal injury cause of action. The Sheppard court found that the provision in the insurance policy contemplated that the recovery of medical

expenses would be a portion of the recovery of damages against the tortfeasor and that the insured was contractually required to reimburse the insurer from such recovery for medical benefits which were previously paid. There simply was no assignment in Sheppard as there was no assignment here. Finally, in the case of Santiago v. Safeway Insurance Co., 396 S.E.2d 506 (Ga. App. 1990), the Georgia Court of Appeals found that written assignments of insurance benefits by three patients to Dr. Santiago was enforceable against the insurance company and allowed the physician to recover for the value of health care services he provided to patients. The Court of Appeals determined that the assignment of the insurance proceeds occurred after the loss and did not assign the policy itself or affect the risk insured by the policy. In that case, the policy was a contract between the insurance company and the patients whereby the company assumed an obligation, for a premium which was paid by the patients, to reimburse the patients for losses covered under the policy. Santiago dealt with the enforcement of an assignment of a chose in action, the claim of the insured after loss on the policy of insurance. Id. at 500. Here, the chose in action, the claim of the Debtor after loss was for "personal torts" prohibited under O.C.G.A. §44-12-24. None of the cited Georgia cases apply here.

After examining the documents at issue in this case to

determine their intent, I am not persuaded by Defendant's argument that the documents are in the nature of an assignment of the right of recovery. Both documents are on Defendant's letterhead and were a contractual undertaking between Defendant and Debtor. While the document titled "Subrogation Agreement and Creation of Lien" disclaims that it is intended to effect an assignment of a cause of action, it specifically states in the body of the document that Defendant is subrogated to the right of recovery of Defendant and that its intent is to create a valid and enforceable right of subrogation. The terms used in the document and the intent of the parties clearly contemplate subrogation, not assignment.

Defendant's argument essentially treats assignment and subrogation as being the same thing. I disagree. Assignment and subrogation are different legal concepts. An assignment is defined as "a transfer or making over to another of the whole of any property, real or personal, in possession or in action, or of any estate or right therein." Black's Law Dictionary 109 (5th ed. 1979). Subrogation is defined as "the substitution of one person in the place of another with reference to a lawful claim, demand or right, so that he who is substituted succeeds to the rights of the other in relation to the debt or claim, and its rights, remedies, or securities." Id. at 1279. "While an assignment is a formal transfer of property or property rights,

'subrogation' is an equitable remedy in which one steps into the place of another and takes over the right to a claim for monetary damages to the extent that the other could have asserted it." 6 Am. Jur. 2d Assignments §2 (1999). An assignment of a claim and subrogation of one's rights arising from a personal injury are different because:

subrogation secures contribution and indemnity, whereas assignment transfers the entire claim; the consideration in subrogation moves from subrogor to subrogee, whereas in an assignment the consideration flows from assignee to assignor; assignment contemplates the assignee being a volunteer, whereas subrogation rests on a contractual duty to pay; assignment normally covers but a single claim, whereas subrogation may include a number of claims over a specific period of time; subrogation entails a substitution, whereas assignment is an outright transfer.

Imel v. Travelers Indemnity Co., 281 N.E.2d 919, 921 (Ind. App. 1972) (citations omitted).

"Any language, however informal, will be sufficient to constitute a legal assignment, if it shows the intention of owner of the right to transfer it instantly, so that it will be property of the transferee.'" First State Bank v. Hall Flooring Co., 118 S.E.2d 856, 857 (Ga. App. 1961) (citing Southern Mutual Life Insurance Assn. v. Durdin, 64 S.E. 264, (Ga. 1909)). I find that the documents at issue do not meet the essential elements for an assignment: intent to assign and immediately to relinquish control over the property. First, the intent specifically stated in the document is to create a right of subrogation. Defendant's

assertions that the documents effectuate an assignment contradicts the terms of its own document. Second, Debtor did not relinquish control over his right of recovery because further action was required by Debtor in order to obtain any recovery against the unnamed tortfeasor. In order to receive payment for medical services under the agreement, Defendant had to rely on further acts by Debtor in pursuing the recovery from the unnamed tortfeasor. The recovery of these medical expenses would be part of Debtor's claim for damages in the action against the unnamed tortfeasor. Finally, there was nothing that immediately transferred when the documents were executed because there was no debt yet owed by the unnamed tortfeasor to Debtor. At the time the documents were executed, Defendant agreed to provide medical services in exchange for Debtor's promise to pay for the services out of the monies, if any, which Debtor may receive in the future from the unnamed tortfeasor. "A contract to make a future assignment of a right, or to transfer proceeds to be received in the future by the promisor, is not an assignment." Restatement (Second) of Contracts §330 (1979). I find that the now claimed assignment of the right of recovery in the documents was ineffective.

I will also examine whether the document constitutes a valid and enforceable subrogation agreement. "Subrogation is the substitution of another person in the place of a creditor, so

that the person in whose favor it is exercised succeeds to the rights of the creditor." Cornelia Bank v. First National Bank of Quitman, 154 S.E. 234, 236 (Ga. 1930). Subrogation does not assume the continued existence of the debt but follows upon its payment. Maryland Casualty Co. v. Brown, 321 F.Supp. 309, 312 (N.D.Ga. 1971). "Two kinds of subrogation are known to the law, legal and conventional. Legal subrogation arises by operation of law. Conventional subrogation depends upon a lawful contract, and occurs where one having no interest or any relation to the matter pays the debt of another, and by agreement is entitled to the securities and rights and remedies of the creditor so paid." Lee v. Holman, 183 S.E. 837, 838 (Ga. App. 1936) (other citations omitted). In this case, the "Subrogation Agreement" attempts to subrogate Defendant for Debtor in his claim against the unnamed tortfeasor. One condition precedent of subrogation is that there is a payment of the obligation owed the third party. Federal Ins. Co. v. Tamiami Trail Tours, 117 F.2d 794, 796 (5th Cir. 1941). At the time Debtor signed the "Subrogation Agreement" Defendant did not pay the debt, if any, due Debtor from the unnamed tortfeasor. There was no contractual obligation of Defendant to do anything on behalf of Debtor which arose as a result of the injuries he received from the accident. Defendant only provided medical services to Debtor. Providing such services did not substitute Defendant in place of Debtor in an

action against the unnamed tortfeasor.¹ Under these facts, there was not a valid subrogation.

Both documents signed by Debtor purport to attach a lien in favor of Defendant. Georgia law recognizes a lien in favor of a hospital or nursing home on a cause of action accruing to an injured person for costs of care and treatment of injuries. O.C.G.A. §44-14-470 (1986). O.C.G.A. §44-14-320 establishes and enumerates certain other liens, including tax liens, judgment liens, as well as liens in favor of landlords, mechanics and materialmen. Georgia law does not establish a lien in favor of a doctor or physician. In addition, O.C.G.A. §44-14-320 specifically provides that all liens which are not provided for in that chapter shall be defined as nonconforming and shall be

¹The language found in the "Subrogation Agreement" at issue in this case is similar to the language found in the insurance provision addressed by the Georgia Court of Appeals in the case of Shook v. Pilot Life Insurance Co., 373 S.E.2d 813 (Ga. App. 1988). The Court of Appeals found that the language of the subrogation provision in the insurance policy did not purport to effect an assignment of a cause of action, but created a valid and enforceable right of subrogation and gave the insurer a right to be reimbursed for benefits paid on behalf of the insured from settlement proceeds. A critical distinction between the Shook case and this case is that the insurance company sought reimbursement from the settlement proceeds for benefits that were actually paid pursuant to the contract of insurance for medical expenses incurred by the insured. The insured disputed the right of subrogation and sought to retain the settlement funds, in addition to having the medical services paid by the insurer. Whereas, in this case, Defendant provided the medical services to Debtor and did not and was not contractually obligated to pay the debt of the unnamed tortfeasor.

a nullity with no force or effect.² Defendant's reliance on In the matter of Carroll 89 B.R. 1007 (Bankr. N.D. Ga. 1988) is misplaced. In Carroll, the bankruptcy court found that a "Doctor's Lien" document constituted a transfer of an interest in the proceeds of the personal injury claim, not of the claim itself. The specific language of the "Doctor's Lien" document in Carroll asserted a lien against "any and all proceeds of any settlement, judgment or verdict which may be paid. . ." Id. at 1008. Although the Carroll court held that the Debtors could not avoid the doctor's lien under §522, the court noted that since the doctor's lien was not perfected, it could have been avoided by the Chapter 7 Trustee under §544. Carroll predates O.C.G.A. §44-14-320(b) which renders Defendant's nonconforming lien a nullity. Accordingly, the Court finds that the purported lien created by the documents signed by Debtor is not valid under

² O.C.G.A. §44-14-320(b) provides:

(b) All liens provided for in this chapter or specifically established by federal or state statute, county, municipal, or consolidated government ordinance or specifically established in a written declaration or covenant which runs with the land shall be exempt from subsection (c) of this Code section. All other liens shall be defined as nonconforming liens. Each nonconforming lien shall be nullity with no force or effect whatsoever, even though said nonconforming lien is filed, recorded, and indexed in the land records of one or more counties in this state.

Georgia law.

II. THE TRANSFER OF THE PROCEEDS

I must now consider whether the transfer of the settlement proceeds to Defendant constituted a preferential transfer which is recoverable by the trustee. In this case, the settlement proceeds in the amount of \$4,412.35 were transferred to Defendant ten (10) days prior to the filing of the Chapter 7 petition. In order to be recoverable as a preferential transfer under §547(b), the following elements must be proven by the Trustee:

- (1) a transfer of property of the debtor;
- (2) to or for the benefit of a creditor;
- (3) on account of an antecedent debt;
- (4) made within 90 days of bankruptcy or one year if the transfer is to an insider;
- (5) while the debtor is insolvent; and
- (6) with the effect of giving the creditor a greater return on his debt than would have been the case had the transfer not taken place and had there been a distribution under the liquidation provisions of the Code.

3 Norton Bankr. L. & Prac. 2d §57:3 (2000). The Trustee carries the burden to establish each element of a preferential transfer under Section 547(b) by a preponderance of the evidence. 11 U.S.C. §547(g); In re Roblin Indus., Inc., 78 F.3d 30, 34 (2nd Cir. 1996) (other citations omitted).

The only element in dispute is whether the transfer of the settlement proceeds from Attorney Craig to Defendant constituted

a "transfer of property of the debtor." Defendant argues that Debtor relinquished control over any funds he received by settlement of the personal injury action at the time he executed the documents in favor of Defendant in October 1998. Defendant also contends that because the settlement proceeds were disbursed by Attorney Craig upon receipt, Debtor did not have control over the funds paid to Defendant. Defendant relies on the "control test" outlined by the Eleventh Circuit Court of Appeals in Nordberg v. Sanchez (In re Chase and Sanborn Corp.), 813 F.2d 1177 (11th Cir. 1987). In that case, the Court stated, ". . . any funds under the control of the debtor, regardless of the source, are properly deemed to be the debtor's property, and any transfers that diminish that property are subject to avoidance." Id. at 1181. Defendant argues that since Debtor could not exert control over the settlement proceeds, then the proceeds cannot be challenged as a preferential transfer.

I am not persuaded by Defendant's argument that the payment from the settlement proceeds was not a transfer of an interest of the Debtor in property. A "transfer" is broadly defined in the Bankruptcy Code as "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property, including retention of title as a security interest and foreclosure of the debtor's equity of redemption." 11 U.S.C. §101(54). I held

supra that the documents executed by Debtor did not constitute a valid assignment nor a valid right of subrogation. I also held supra that the purported lien created by the documents was not valid under Georgia law. The transfer occurred when the funds were paid to Defendant in April 1999, not when the documents were executed in October 1998. In addition, the settlement proceeds received by Attorney Craig were Debtor's property and held in trust for Debtor's benefit, not Defendant's benefit. See Santiago v. Klosik, 404 S.E.2d 605 (Ga. App. 1991) (the Georgia Court of Appeals found that settlement proceeds obtained by an attorney from a personal injury claim were held in trust by the attorney on the client's behalf and the attorney was acting as the client's legal representative when attempting to recover damages on the client's behalf). Debtor retained control over the settlement proceeds and governed the disbursement of the proceeds to Defendant. Accordingly, the settlement proceeds are property of the Debtor and the transfer of the settlement proceeds to Defendant constituted a "transfer of property of the debtor" under §547(b).

Defendant also argues that the "Earmarking Doctrine" applies here to defeat the preferential transfer. "Earmarked" funds are ones which are never in a debtor's control, are marked by a third party for payment to a particular creditor and are not considered to be the debtor's funds. The transfer of "earmarked" funds

would not deplete the debtor's estate. 3 Norton Bankr. Law and Prac. 2d §57:4 (2000). Defendant contends that the settlement proceeds were earmarked for Defendant's benefit and held in trust for Defendant as a result of Debtor executing the documents. Defendant's "earmarking" contention does not apply here because the funds transferred to Defendant were Debtor's property held in trust by attorney Craig for Debtor's benefit. The documents do not create a valid assignment, subrogation or lien nor do they earmark monies paid. Rather, the funds were within Debtor's control as the funds were paid to Defendant at the Debtor's direction. See Sun Railings, Inc. v. Silverman (In re Sun Railings, Inc.), 5 BR. 538, 539 (Bankr. S.D.Fla. 1980). The "Earmarking Doctrine" does not apply in this case.

Finally, Defendant argues that it would not be equitable for the transfer to be set aside and to allow all creditors to share in these settlement proceeds which were generated by Defendant's medical services. It is important to recognize that focus of a preferential transfer is on the economic impact of the transfer and not on the intent, motive or good faith of the Debtor in making the transfer. In considering the issue of fairness of preferential transfers, the Fifth Circuit Court of Appeals stated:

The very purpose of the preference law. . . is to restore equality among creditors of the debtor's estate by limiting the debtor's ability to prefer the interests of some

creditors over others as he slides into bankruptcy. While it always seems 'unfair' that creditors . . . must lose the benefit of a transaction they accomplished with the debtor just prior to bankruptcy, on a more general level, it is fairer to distribute the maximum amount of assets among all creditors in accordance with the distribution principles established in the Bankruptcy Code.

Sommers v. Burton (In re Conrad Corp.), 806 F.2d 610, 612 (5th Cir. 1986).

Trustee has carried his burden on proving all of the elements under 11 U.S.C. §547(b). As previously outlined, the transfer of the settlement proceeds to Defendant constituted a transfer of property of the Debtor. The transfer was made for Defendant's benefit on an antecedent debt at a time when Defendant was an unsecured creditor. The transfer was made within ninety (90) days of bankruptcy and during the time period when Debtor is presumed to be insolvent under §547(f). Finally, the effect of the transfer was to give Defendant a greater return on its debt, payment in full, than had the transfer not taken place, with distribution in the Chapter 7 case of less than 100 percent on unsecured claims.

In conclusion, the Court finds that the payment made to Defendant in the amount of \$4,412.35 is recoverable by the Chapter 7 Trustee. The documents signed by the Debtor did not constitute a valid assignment or subrogation agreement, nor did they create a valid lien on the settlement proceeds. At the time Defendant received the funds, Defendant was an unsecured creditor

of Debtor. The Trustee has carried his burden to establish that the payment to Defendant constitutes a preferential transfer and is recoverable by the Trustee. Pursuant to 11 U.S.C. Section 550(a) the Trustee is entitled to recover these funds for the benefit of the bankruptcy estate.

Accordingly, it is hereby ORDERED that judgment is entered in favor of Plaintiff Scott J. Klosinski, Chapter 7 trustee, and against Defendant Southeastern Neurology Associates, P.C. in the amount of \$4,412.35 together with future interest as provided by law.

JOHN S. DALIS
CHIEF UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia
this 27th day of September, 2000.