

The document below is hereby signed.

Signed: June 3, 2011



S. Martin Teel, Jr.

S. Martin Teel, Jr.
UNITED STATES BANKRUPTCY COURT Judge
FOR THE DISTRICT OF COLUMBIA

In re)	
)	
JOHNNY ANDREW MOORE, SR.,)	Case No. 10-00515
and MARIA FORD MOORE,)	(Chapter 7)
)	
Debtors.)	
_____)	
)	
MARC E. ALBERT, as trustee,)	
)	
Plaintiff,)	
)	Adversary Proceeding No.
v.)	11-10002
)	
CHAIKIN SHERMAN CAMMARATA)	
SIEGEL P.C.,)	
)	Not for publication in
Defendant.)	West's Bankruptcy Reporter.

MEMORANDUM DECISION RE MOTION FOR SUMMARY JUDGMENT BY MARC E. ALBERT, TRUSTEE

This address the trustee's Motion for Summary Judgment on his turnover complaint. For the reasons that follow, I will grant turnover, but deny, without prejudice, the trustee's request to be allowed to pay a secured claim of the defendant out of the turnover funds.

The undisputed facts underlying the trustee's motion are as follows. On May 27, 2010, the debtors commenced a case under chapter 13 of the Bankruptcy, which was subsequently converted to a case under chapter 7 on October 25, 2010 (Dkt. No. 107). Prior to the commencement of the case, on October 28, 2007, Maria Ford Moore was involved in a car accident and sustained injuries. Compl. ¶ 5; Ans. ¶ 1. Moore retained the firm of Chaikin, Sherman, Cammarata, Siegal, P.C. (Chaikin, Sherman) to represent her in a personal injury action relating to the accident. Compl. ¶ 8; Ans. ¶ 1. Thereafter, Moore filed suit in the Prince George's County Circuit Court, Compl. ¶ 11; Ans. ¶ 1, and on October 6, 2010, Moore accepted an offer to settle the claim for \$48,000, Chaikan, Sherman Resp. at 2. Moore executed a release of her claim on October 28, 2010. Chaikan, Sherman Resp. at 2.

The retainer agreement Moore entered into with Chaikan, Sherman provided for a 40% contingency fee, for Moore to reimburse Chaikan, Sherman for costs, and for the firm to have a lien on the settlement proceeds or any amount otherwise recovered by the firm:

As full compensation for such legal services, the client conveys to the law firm and the law firm will receive 33 1/3% of the gross of any and all amounts recovered if the claim is settled prior to the filing of a lawsuit. Once a lawsuit is filed, the client conveys to the law firm and the law firm will receive 40% of the gross of any and all amounts recovered, whether by settlement, panel hearing, arbitration or trial. . . .

The client additionally agrees to be responsible to pay all costs and expenses incurred for investigation, preparation, litigation or trial which include, by way of example, court filing fees, court reporter fees for depositions and transcripts, travel expenses, expert witness fees, reproduction costs, messenger services, subpoena fees, and private process servers. . . . The expenses will be paid by the client or deducted from the amount remaining after the contingent fee has been deducted from the gross amount recovered. The law firm is authorized to withhold all of the above expenses from the proceeds of any settlement or judgment.

The client hereby gives the law firm a lien, for services rendered, on any settlement offer extended or on any amounts recovered by any means. This lien may be secured by notifying the insurance carrier for the defendant or the defendant's attorney.

Motion Ex. A. Based upon the settlement and retainer agreement, Chaikan, Sherman claims a lien on the recovery for \$19,200 in attorney's fees and \$1,794.16 in costs. Motion Ex. C; Chaikan, Sherman Resp. at 3. Moore also authorized the firm to pay directly from the settlement proceeds \$7,311.15 in medical expenses and \$2,500 to Ingenix. Chaikin, Sherman still holds the settlement proceeds. Chaikin, Sherman, Resp. at 1.

On January 12, 2011, the trustee commenced the above-captioned adversary proceeding seeking a turnover of all the settlement proceeds. Compl. at 3. Chaikan, Sherman timely filed an answer to the trustee's turnover complaint, and the trustee has now moved for summary judgment, to which both Chaikan, Sherman and the Moores have filed in opposition.

A party is entitled to summary judgment when there is no "genuine issue of material fact" and the undisputed facts warrant judgment for the moving party as a matter of law. Fed. R. Civ. P. 56 (a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). In addressing a motion for summary judgment, "the court must view the evidence in the light most favorable to the party against whom summary judgment is sought and must draw all reasonable inferences in [its] favor." *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Whether any disputed issue of fact exists is for the court to determine. *Balderman v. United States Veterans Admin.*, 870 F. 2d 57, 60 (2d Cir. 1989). The moving party has the initial burden of demonstrating the absence of a disputed issue of material fact. *Celotex v. Catrett*, 477 U.S. 317, 323 (1986). Once such a showing has been made, the non-moving party must either (1) cite to particular parts of materials in the record showing that a fact is genuinely disputed or (2) "show[] that the materials cited do not establish the absence . . . of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1). The party opposing summary judgment "may not rely on conclusory allegations or unsubstantiated speculation." *Scotto v. Almenas*, 143 F. 3d 105, 114 (2d Cir. 1998). Moreover, not every disputed factual issue is material in light of the substantive law that governs the

case. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude summary judgment." *Anderson*, 477 U.S. at 248.

III

In his motion, the trustee argues that summary judgment is appropriate because (1) there is no question that Chaikin, Sherman is in possession and control of the settlement proceeds, which is property of the estate, (2) Chaikin, Sherman has a lien on the settlement proceeds to the extent of the contingency fee and expenses, and the trustee seeks permission to pay the secured claim upon turnover of the proceeds, and (3) none of Chaikin, Sherman's affirmative defenses are sufficient to defeat the motion. I will address each argument in turn.

The trustee first contends that summary judgment on its complaint is appropriate because it is undisputed that Chaikin, Sherman currently has possession and control of the settlement proceeds and the proceeds are property of the estate. Motion at 5. Under § 542(a) of the Bankruptcy Code, "any entity, other than a custodian, in possession, custody or control, during the case, of property that the trustee may use, sell, or lease under section 363 of this title, or that the debtor may exempt under section 522 of this title, shall deliver to the trustee, and account for, such property or the value of such property, unless

such property is of inconsequential value or benefit to the estate." 11 U.S.C. § 542(a). Chaikan, Sherman does not contend that it is not in possession of the settlement proceeds or that the proceeds are not property of the estate. Rather, Chaikin, Sherman and the Moores oppose the motion on the sole basis that the Moores should be permitted to exempt the proceeds under § 522 of the Bankruptcy Code.

The debtors' initial, amended, and second amended schedule C did not list the settlement proceeds as exempt (Dkt. Nos. 6, 21 and 67). On May 4, 2011, however, the debtors filed a third amended schedule C, listing the proceeds as exempt under § 522(d)(11)(D) and (d)(11)(E) of the Bankruptcy Code. Based on this new exemption, they contend, turnover is inappropriate. Because, though, the debtors' exemptions have not become final, this argument fails.

Although the debtor's third amended schedule C seeks to exempt the settlement proceeds, that exemption does not operate to remove the proceeds from the trustee's control until the exemption becomes final, which will not occur until the time for objecting to exemptions has expired. See *In re Williams*, 249 B.R. 222, 223 (Bankr. D.D.C. 2000). In the bankruptcy case underlying this adversary proceeding, the court has extended, on the trustee's motion, the time to object to exemptions until June 21, 2011 (Dkt. no. 228) and the trustee has indicated that he

intends to object to the debtor's third amended exemptions.

Reply ¶ 5. Accordingly, this basis for defeating the trustee's motion for summary judgment fails.

The trustee next contends that summary judgment is appropriate because if the court orders turnover of the proceeds, "the Trustee requests authority to pay Chaikin Sherman's secured claim in the amount of \$20,994.16 without further order of the court." Motion at 9. For their parts, Chaikin, Sherman agrees and the debtors do not oppose the trustee's proposed treatment of the proceeds. Chaikin, Sherman Opp at 3. The Bankruptcy Code, however, requires a different treatment.

Both § 330 and § 725 contemplate notice and a hearing in the main case prior to paying off Chaikin, Sherman's secured claim. The court cannot approve a request sought in a motion for summary judgment in an adversary proceeding, without notice to creditors and the United States Trustee, to pay attorneys' fees for work partially done postpetition or to pay a lien. For these reasons, the trustee's request to pay Chaikin, Sherman's secured claim without further order of the court is appropriately denied.

Further, it bears noting that my denial of the trustee's request to immediately pay over Chaikin, Sherman's secured claim is not a basis for Chaikin, Sherman to retain the settlement proceeds. Nothing in § 542(a) limits the trustee's turnover rights when the entity holding the property has a secured claim

