

DEC 14 2007

UNITED STATES BANKRUPTCY COURT  
 NORTHERN DISTRICT OF GEORGIA  
 ATLANTA DIVISION

IN RE: ) CHAPTER 7  
 )  
 TIMOTHY L. ALLEN, ) CASE NO. 01-82408-MHM  
 )  
 Debtor. )

ORDER DENYING TRUSTEE'S MOTION TO APPROVE  
 CONDITIONAL ABANDONMENT

This case is before the court on Trustee's motion to approve the conditional abandonment of a tort claim to Debtor. Trustee's motion has a complicated and somewhat tortured evolution.

STATEMENT OF FACTS

This case commenced April 30, 2001. The subject of Trustee's motion is a legal malpractice claim (the "Claim")<sup>1</sup> against Debtor's former attorney, Ira Gingold ("Gingold"), which arose prior to the filing of this case.<sup>2</sup> The Claim was

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<sup>1</sup> Debtor may have or intend to assert more than one tort claim against his former attorney, but for ease of reference, all tort claims that are property of the estate arising from the relevant operative facts will be referred to as the Claim.

<sup>2</sup> The legal malpractice complaint filed by Debtor in state court alleges that, while acting as Debtor's bankruptcy attorney prior to commencement of the bankruptcy case, Debtor's then-attorney, Ira Gingold, negligently advised Debtor to stop payment on two outstanding checks to creditors; that Debtor relied on this advice and stopped payment on the checks; that these actions established probable cause for his arrest on felony charges of theft by deception; and that he was subsequently arrested and jailed on felony theft by deception warrants obtained by the creditors. Although Debtor was not arrested and jailed on the warrants until after the discharge order was entered in this bankruptcy case, the relevant acts (the alleged negligent advice to stop payment on the checks, the actual stop payment by Debtor, and the felony arrest warrants obtained by the creditors after the stop payment) all occurred prior to the April 30, 2001 commencement of the bankruptcy case. See *Gingold v. Allen*, 272 Ga. App. 653, 613 S.E. 2d 173 (2005).

not listed in Debtor's bankruptcy schedules<sup>3</sup> and was not disclosed at the §341 meeting of creditors. Debtor's Schedules listed unsecured claims totaling \$59,221.96. Trustee filed his No Distribution Report June 13, 2001. Debtor's discharge order was entered and the case was closed August 22, 2001.

In October, 2001, Debtor employed an attorney to assert the Claim against Gingold and a state court lawsuit was filed May 7, 2003. Gingold moved for judgment on the pleadings on the grounds that the Claim was property of Debtor's bankruptcy estate; as a result, the real party in interest is the Chapter 7 bankruptcy trustee. The Georgia Court of Appeals agreed and remanded the case to the trial court to give Debtor a reasonable time either to secure an abandonment of the Claim by the Trustee or to substitute Trustee as the plaintiff.

As a result of the order by the Georgia Court of Appeals, Debtor filed a motion to reopen this case. Gingold opposed reopening this case, but an order was entered granting Debtor's motion May 27, 2005. Thereafter, Trustee filed a motion for authority to sell the Claim to the party making the highest offer (the "Motion to Sell"). Gingold had offered to purchase the Claim for \$25,000. Debtor had offered to purchase the Claim for \$9,383.27, which represented \$25,000 net of 40% attorneys fees and expenses payable to the attorney for Debtor who filed the Claim in state court.

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<sup>3</sup> Bankruptcy Rule 1007 requires a debtor to file schedules of assets and liabilities, a schedule of current income and expenditures, a schedule of executory contracts and unexpired leases, and a statement of financial affairs (the "Schedules").

In his response to Trustee's Motion to Sell, Gingold asserted that abandonment by Trustee of the Claim is inappropriate because the Claim is not burdensome or of inconsequential value. Gingold also asserted that Debtor's attorney is not entitled to attorneys fees because the fees were not listed in Debtor's bankruptcy Schedules and because the attorney had not been employed by Trustee, the real party in interest. Gingold also asserted that Debtor's attorney was not entitled to recover fees under a *quantum meruit* theory because the attorney had not been working as an agent of Trustee or the estate.

At the hearing on Trustee's Motion to Sell, the court agreed with Gingold that the Debtor's offer of purchase, net of the attorneys fees and expenses, was unacceptable. Debtor increased his purchase offer to \$25,000 plus 10% of the net recovery on the Claim. The hearing was continued to allow Trustee to more fully investigate the value of the Claim.

Following the hearing, further negotiations ensued. Trustee offered to settle the Claim with payment by Gingold of funds sufficient to pay all creditors, approximately \$60,000, which Gingold declined, but Gingold offered to settle for \$35,000. Trustee's investigation of the value of the Claim convinced Trustee that \$35,000 was not a reasonable offer of settlement. Trustee filed a motion to sell the Claim to Debtor (the "Second Motion to Sell") for payment of \$10,000 with the proceeds from the recovery on the Claim to be disbursed as follows: the first 40% would be paid to Debtor's attorney, plus expenses; the next \$25,000 would

be paid to Trustee, plus administrative expenses; and the remainder would be divided evenly between Trustee and Debtor up to an amount to pay all unsecured creditors.

At the hearing on the Second Motion to Sell, the court concluded that it contravened Georgia law and could not be approved. In the case of *United Technologies Corp. v. Gaines*, 225 Ga. App. 191, 483 S.E. 2d 357 (1997), the Georgia court concluded that when, under the Bankruptcy Code, a Chapter 7 Trustee acquires a debtor's tort claim, the Trustee becomes the real party in interest and alone possesses the right to pursue the claim. Assignment by the Trustee of the claim to the debtor would violate O.C.G.A. §44-12-24, which prohibits the assignment of such tort claims. Another Georgia case concluded that although the assignment of such claim by the Trustee to a debtor violates O.C.G.A. §44-12-24, the Trustee's abandonment of the claim, even following payment by the debtor to the estate, does not violate O.C.G.A. §44-12-24. *Denis v. Delta Air Lines, Inc.*, 248 Ga. App. 377, 546 S.E. 2d 805 (2001).

Therefore, Trustee amended his Second Motion to Sell to change the title to Motion for Conditional Abandonment. In connection with the Motion for Conditional Abandonment, Trustee showed that the administrative expenses already exceeded the cash on hand,<sup>4</sup> that timely-filed proofs of claim total

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<sup>4</sup> Trustee currently has on hand approximately \$15,000 obtained by avoidance of a transfer of property from Debtor to his mother-in-law.

approximately \$4,066, and that all claims filed in this case total approximately \$21,000.<sup>5</sup> Debtor and Trustee agree that the value of the Claim likely substantially exceeds the amount of the estate's administrative expenses and unsecured debt, estimating a recovery of more than \$100,000.<sup>6</sup> Therefore, the \$35,000 settlement amount proposed by Gingold does not constitute a fair settlement. Debtor argues that because the Claim is worth so much more than the claims against the estate, it would be inappropriate for Trustee rather than Debtor to pursue the Claim.

Trustee proposes to abandon the Claim on the following conditions: Debtor will pay to the estate \$10,000, nonrefundable; Debtor will be substituted as Plaintiff in the lawsuit against Gingold; the complaint against Gingold will be amended to add claims for misuse of confidential information; the proceeds of any recovery on the Claim will be disbursed 40% plus litigation expenses to Debtor's attorney; \$25,000 to Trustee; the remainder divided equally between Debtor and Trustee up to the amount of accrued administrative expenses and

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<sup>5</sup> The bar date for filing proofs of claim was July 21, 2006. Since the expiration of the bar date, Trustee has sent two additional notices to creditors who failed to file timely proofs of claim, notifying them of the discovery of an asset that may provide funds sufficient to pay all claims and soliciting late filing of proofs of claim.

<sup>6</sup> Debtor offers to waive his discharge in order to receive the proceeds from the litigation against Gingold. Debtor's discharge, however, was entered in August 2001. Grounds to revoke the discharge do not appear to exist. Therefore, waiver of the discharge does not appear possible.

filed claims; Debtor offers to waive his discharge<sup>7</sup> if Debtor's share of the recovery is more than the aggregate amount of unsecured debt for which no proof of claim is filed, thereby implying that such creditors may seek and obtain payment from Debtor.

In support of his proposal, Trustee showed that the funds currently on hand plus the \$10,000 from Debtor would be sufficient to pay current administrative expenses and the timely-filed proofs of claim. If additional funds were realized, Trustee would then send notice to creditors advising them of additional assets and providing a deadline to file proofs of claim.

Gingold opposes Trustee's Motion for Conditional Abandonment, pointing out that Trustee cannot abandon the Claim while retaining an interest in the recovery. Additionally, Gingold points out that the Trustee has failed to satisfy the statutory requirements for abandonment by failing to show the Claim is burdensome to the estate or of inconsequential value. Gingold also argues that Debtor's interest in the Claim is not entitled to protection by Trustee and that Trustee should be required to accept Gingold's settlement offer, which would provide more than sufficient funds to pay all administrative expenses and all timely-filed proofs of claim.

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<sup>7</sup> See footnote 5. As Debtor's discharge has already been entered, waiver at this point does not appear to be possible.

## DISCUSSION

The Bankruptcy Code, §554, provides:

After notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.

"Abandonment" is not defined in the Bankruptcy Code. Black's Law Dictionary defines "abandonment":

The relinquishing of a right or interest with the intention of never again claiming it.

BLACK'S LAW DICTIONARY, Seventh Edition, West Publishing Co. (1999).

Abandonment is an absolute term. One cannot slightly abandon, partially abandon, or conditionally abandon an asset of the estate. No case law has been found or cited by the parties to support a proposal to "conditionally abandon" an asset, *i.e.*, abandon the asset while retaining an interest in its proceeds. Just as Trustee could not abandon the estate's interest in a tangible asset of the estate while retaining the right to share in the proceeds from a sale, Trustee cannot abandon the Claim while retaining the right to share in the proceeds of the recovery.

Additionally, although the Claim is unliquidated, all parties agree that the Claim has significant value, probably in excess of the aggregate amount of all claims against the estate. The Bankruptcy Code, §554, requires that before abandonment of an asset can be allowed, the trustee or the court must conclude

that the asset is burdensome to the estate or of inconsequential value and benefit. No such finding is possible in this case.

The Bankruptcy Code, in §726, sets forth the order of priority in which property of the estate is distributed in a Chapter 7 case:

- First, in payment of claims entitled to priority under §507;
- Second, in payment of timely-filed,<sup>8</sup> allowed unsecured claims;
- Third, late-filed unsecured claims;
- Fourth, in payment of claims for any fine, penalty, or forfeiture, or multiple, exemplary, or punitive damages that are not compensation for actual pecuniary loss;
- Fifth, in payment of interest on the above claims at the legal rate; and
- Sixth, to the debtor.

Therefore, the Bankruptcy Code recognizes the debtor's interest in proceeds from the liquidation of an asset of the estate to the extent that the value of such asset exceeds the total amount of the claims payable under §726(a)(1)-(5).

The posture of this case is somewhat unique and unlikely to recur often. Occasionally, a trustee discovers assets with value sufficient to pay all claims and return a dividend to a debtor. Such overage or surplus is an asset of any debtor that cannot and should not be artificially reduced to the detriment of its ultimate

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<sup>8</sup> Section 727(a)(2)(C) deems a late-filed claim timely if the creditor had no notice or actual knowledge of the case in time to file a timely claim.

owner. Had Trustee discovered oil on Debtor's homestead, he would be bound to return the remainder property over to Debtor after payment of claims in accordance with the priorities set forth in the Bankruptcy Code.

A trustee's power and obligation to liquidate assets of the estate is not unlimited. Under §326, the trustee's statutory fee is based upon the moneys disbursed or turned over to parties in interest, excluding moneys turned over to the debtor under §726(a)(6). Additionally, a trustee should not liquidate property in excess of the liabilities of the estate merely to generate administrative expenses. *Grant v. George Schumann Tire & Battery Company*, 908 F.2d 874 (11th Cir. 1990).

Therefore, the instant case presents a dilemma: Abandonment of the Claim, conditionally or otherwise, is not supported by the law. Georgia law will not permit Trustee to assign the Claim or part of the Claim to Debtor. The only option left is to require Trustee to prosecute the Claim on behalf of the estate. The estate's interest, however, is limited by its liabilities and, thus, Trustee's financial incentive to maximize the Claim may also be limited. The nature of the claim, itself, however, ameliorates that dilemma. Any attorney employed by Trustee<sup>9</sup> would be employed on a contingency fee basis, so that the litigation costs of prosecuting the Claim would be borne by the estate and by Debtor in

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<sup>9</sup> Trustee may employ the attorney who has been prosecuting the Claim up to this time on behalf of Debtor. The interests of Debtor and Trustee would appear to be aligned, so that no conflict of interest exists.

proportion to their respective eventual recoveries, thus eliminating any obstacle presented by *Grant v. George Schumann Tire & Battery Company, supra*. Any proposed settlement of Claim would require approval by the bankruptcy court,<sup>10</sup> which, recognizing Debtor's interest in maximizing the claim, would protect Debtor from any proposal that failed to sufficiently acknowledge Debtor's interests. Therefore, the only disposition of Trustee's Motion for Conditional Abandonment is denial and direction that Trustee be substituted as Plaintiff in the state court proceeding. In that proceeding, the Trustee may consult with Debtor as respects Debtor's interest in the outcome. Accordingly, it is hereby

ORDERED that Trustee's Motion for Conditional Abandonment is denied. Trustee is directed to undertake measures necessary to be substituted as Plaintiff in the state court proceeding on the Claim and to prosecute that claim to resolution.

**The Clerk, U.S. Bankruptcy Court, is directed to serve** a copy of this order upon Debtor, Debtor's attorney, the Chapter 7 Trustee, and all creditors and parties in interest.

IT IS SO ORDERED, this the 14<sup>th</sup> day of December, 2007.

  
MARGARETH. MURPHY  
UNITED STATES BANKRUPTCY JUDGE

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<sup>10</sup> Rule 9019.