IT IS SO ORDERED.

Dated: 01:40 PM March 22 2007

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:	)	CASE NO. 02-50376
	)	
Mark L. Cuffman and Zondra M. Cuffman,	)	CHAPTER 7
	)	
DEBTOR(S)	)	
	)	ADVERSARY NO. 06-5136
Richard Wilson, Trustee,	)	
	)	JUDGE MARILYN SHEA-STONUM
PLAINTIFF(S),	)	
	)	
vs.	)	
	)	
Mark L. Cuffman, et al.,	)	**ORDER**
	)	
DEFENDANT(S).		

This matter comes before the Court on the complaint of Richard Wilson (the "Plaintiff" or "Trustee") seeking a judgment regarding the validity, priority and extent of a

lien and for turnover. In addition, Defendant Young & McDowall[1] filed a counterclaim seeking enforcement of an attorney charging lien. The Court conducted a trial in this adversary proceeding on December 15, 2006. Appearing at the trial were Michael Moran, counsel for Plaintiff, Harry Wittbrod, counsel for Defendants, Mark and Zondra Cuffman, and Warren Price, counsel for Defendant Young & McDowall. During the trial the Court received evidence in the form of exhibits and in the form of testimony from Richard Wilson, Mark Cuffman and Laura McDowall, a partner in and principal of Young and McDowall. At the conclusion of the trial, the Court allowed counsel the opportunity to file post-trial briefs on, *inter alia*, the application of the doctrine of *lis pendens* in the context of fee awards as sanctions for misconduct and its impact on the perfection of attorney charging liens.[2]

JURISDICTION

This proceeding arises in a case referred to this Court by the Standing Order of Reference entered in this District on July 16, 1984. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(H), (K) and (O) over which this Court has jurisdiction pursuant to 28 U.S.C. § 1334. In reaching its determination and whether or not specifically referenced in this Memorandum Opinion, the Court considered the demeanor and credibility of the

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1 The Plaintiff's Complaint names "Young & McDowell" (sic) as a defendant. As noted in the answer filed by Young & McDowall, the correct spelling of the defendant's name is "Young & McDowall."

2 Counsel filed post-trial briefs: Defendant's brief focused on the applicability of Lis Pendens and Plaintiff's brief focused on the issue of Latches. In addition, Defendant's counsel filed a motion to strike the Plaintiff's brief as beyond the scope of what the Court ordered at trial. The Court finds the motion to strike to be misplaced and it is, therefore, denied.

testifying witnesses. In addition, prior to the trial, Plaintiff and Defendants entered into certain stipulations (the "Stipulations") [docket # 22]. Based upon such Stipulations, the testimony and documentary evidence presented at the trial, the arguments of counsel, the pleadings in this adversary proceeding and pursuant to Fed. R. Bankr. P. 7052, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. On January 29, 2002 (the "Petition Date"), the Defendants Mark and Zondra Cuffman filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code commencing Case No. 02-50376 (the "2002 Case").

2. Richard Wilson, Plaintiff, was appointed interim trustee in the 2002 Case.

3. Prior to the Petition Date, National City Bank filed a lawsuit against Debtor Mark L. Cuffman commencing case no. cv99-03-1241 in the Summit County, Ohio Court of Common Pleas (the "Lawsuit").

4. Young & McDowall, by and through its partner and principal, Laura McDowall represented Mark Cuffman in the Lawsuit pursuant to the terms of a written fee agreement. Defendant's Exhibit 2. The written fee agreement did not specifically provide for an attorney charging lien.

5. During the Lawsuit, Magistrate John Shoemaker ordered National City Bank to appear and produce documents. On the date National City was to produce the documents, National City Bank dismissed its claims against Mark Cuffman without prejudice. Defendant's Exhibit 3.

6. Subsequently, Young & McDowall filed a motion for sanctions alleging discovery abuse by National City Bank and its lawyers and seeking recovery of attorneys' fees (the "Motion for Sanctions"). *See* Defendant's Exhibit 4. A hearing was held on September 8 and 29, 2000 on the Motion for Sanctions.

7. On January 29, 2001, Magistrate Shoemaker issued a decision on Young & McDowall's Motion for Sanctions awarding attorneys' fees in the amount set forth on Young & McDowall's time records (the "Award"). Defendant's Exhibit 6. Magistrate Shoemaker found the attorneys' fees to be "fair and reasonable as well as **necessary to Defendant's pursuit of the discovery matters only.**" Defendant's Exhibit 6, p. 6 ¶ 11 (emph. added). National City

Bank filed objections to the Award.

8. Before the Summit County, Ohio Court of Common Pleas ruled on National City Bank's objection, the Cuffman's filed the above-referenced voluntary petition. To date, the objection has not been ruled on nor has the Award been adopted, modified or rejected.[3]

9. The Cuffmans did not list the Lawsuit or the Award on their schedules or statement of financial affairs. Nor did they list Young & McDowall as a creditor on their schedules.

10. The Cuffmans understood that they had entered into a fee agreement with Young & McDowall and they understood that the claims of National City Bank had been dismissed.

11. The Debtors each executed two affidavits which were submitted as exhibits at trial: Defendants Exhibits 28 - Affidavit of Mark Cuffman dated June 17, 2005, Defendants Exhibit 29 - Affidavit of Zondra Cuffman dated June 17, 2005 and Plaintiff's Exhibit C - Affidavit of Mark and Zondra Cuffman dated August 10, 2005. The affidavits appear to be at odds with each other, one suggesting that the Debtors understood there to be a charging lien and one suggesting that they did not.

12. Mr. Cuffman also testified at trial. He stated that he understood that Young & McDowall were to be paid attorneys' fees. He said he was aware that the

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[3] The Debtors have filed several other bankruptcy cases. The Debtors filed a voluntary petition for relief under chapter 13 on February 23, 2005 commencing case no. 05-50895 (the "Third Case"). On July 12, 2005, the Court dismissed the Third Case. On March 28, 2006, the Court closed the Third Case. On August 25, 2005 the Debtors filed another voluntary petition for relief under chapter 13 commencing case no. 05-55379 (the "Fourth Case"). The Fourth Case was dismissed on February 2, 2006 and closed on March 15, 2006. On November 29, 2006, the Debtors filed another voluntary petition for relief under chapter 13, commencing case no. 06-52559 (the "Fifth Case"). The Fifth Case is pending on the Court's docket.

As a result, National City Bank's lawyers - Weltman, Weinberg & Reis ("WWR") - have filed various notices or suggestions of stay in the Lawsuit which have apparently stopped the Lawsuit from going forward. It is not within the purview of this Court to address the propriety of WWR's actions, a firm well versed in bankruptcy law, in contributing to the delay of the Lawsuit by filing misplaced suggestions of stay.

Lawsuit had been dismissed as to him and his wife, but he was unaware of the existence of the Motion for Sanctions and the Award at the time he and his wife filed their Chapter 7 case. Based on Mr. Cuffman's testimony the Court finds that Mr. Cuffman believed the Award to belong to Young & McDowall as it was for attorneys' fees.

13. Young & McDowall became aware that the Cuffmans had filed for bankruptcy because National City Bank's lawyers filed a Motion for Suggestion of Stay in the Lawsuit on June 4, 2002.

14. The Cuffmans received a chapter 7 discharge on June 21, 2002.

15. On June 27, 2002, Laura McDowall sent a letter to Trustee explaining the history of the Lawsuit, enclosing a copy of the Award and noting her belief that Young & McDowall holds a valid pre-petition attorney charging lien in the Award with priority over any bankruptcy interests. The Trustee received this letter and as a result indicated to Ms. McDowall that he agreed with her assessment and would not pursue the matter further.

16. On June 28, 2002 Young & McDowall filed a "Notice of Charging Lien on Potential Judgment" in the Lawsuit.

17. On August 5, 2002, the Trustee filed a no asset report and the Debtors' bankruptcy case was closed on September 18, 2002. No proofs of claim were filed in the Debtors' bankruptcy case.

18. The Trustee testified that it is his practice upon learning of an unscheduled asset of value to file an amended "Form 1 - Individual Estate Property Record and Report - Asset Cases and list the asset with an unknown value. The Trustee did not file an amended Form 1 before the Debtors' bankruptcy case was closed.

19. The Debtors filed a petition for relief under Chapter 13 on September 3, 2002. Young & McDowall sought relief from stay to proceed with the Lawsuit. An agreed order granting relief from stay in the Debtors' chapter 13 case was entered on October 6, 2004.

20. Thereafter, National City Bank's lawyers filed a notice to stay the Lawsuit with the Summit County Court of Common Pleas arguing that Young & McDowall needed to obtain relief from stay in the Debtors' first bankruptcy case.

21. This prompted Young & McDowall to contact the Trustee again. On

December 10, 2004, Rocco Yeargin of Young & McDowall sent a letter to the Trustee which reads as follows,

> As a follow up to our phone conference today, please prepare a letter stating that our claim for attorney fees in [the Lawsuit], has been abandoned by you as Trustee. This letter will avoid the need to call you as a witness in the state court action. I have enclosed our prior correspondence of June 27, 2002, for reference.

Defendant Exhibit 23.

22. On December 21, 2004, Mr. Yeargin sent a follow up letter.

23. On January 10, 2005, the Trustee moved to reopen the chapter 7 bankruptcy case (the "Motion to Reopen"). The Motion to Reopen was not served on Young & McDowall, nor did the Motion to Reopen mention the claim of Young & McDowall to the Award. The Motion to Reopen was granted on January 11, 2005.

24. The Trustee has not "notified the court that payment of a dividend appears possible, " therefore, no deadline for filing proofs of claim in this bankruptcy case has been set. No proofs of claim have been filed in this bankruptcy case.

DISCUSSION

The question before the Court is whether the award of attorneys' fees as sanctions is property of the debtors' estate and if it is property of the estate, whether Young and McDowall holds a security interest in the Award that has priority over the Trustee's interest.

What constitutes property of the estate is defined in 11 U.S.C. § 541. Property of the estate includes "all legal or equitable interests of the debtor in property as of the commencement of the case." However, to the extent the debtor holds only legal title in property and not an equitable interest, the property becomes property of the estate only to the extent of the debtor's legal title to the property, but not to the extent of any equitable interest

that the debtor does not hold." 11 U.S.C. § 541(d). In its proposed findings of fact and conclusions of law, Young & McDowall cites several cases allegedly in support of its position that an award of attorneys' fees belongs to the attorney and therefore, the Award is not property of the Debtors' estate. The Plaintiff assumes without citation to authority that the Award is property of the estate. The Court finds that the Award is property of the estate and that Young & McDowall has an equitable interest in the Award which is best described as an attorney charging lien.

Under Ohio law, an attorney is entitled to a lien upon judgment or other proceeds awarded to a client. *Cohen v. Goldberger,* 109 Ohio St. 22 (1923); *Corzin v. Decker Vonau, Sybert & Lackey, Co., L.P.A. (In re Simms Construction Services, Co.),* 311 B.R. 479, 487 (BAP 6th Cir. 2004).

> The right of an attorney to payment of fees earned in the prosecution of litigation to judgment, though usually denominated a lien, rests on the equity of such attorney to be paid out of the judgment by him obtained, and is upheld on the theory that his services and skill created the fund.

First Bank of Marietta v. Roslovic & Partners, Inc., 2004 WL 1172885 (Ohio App. 10th District). The right to a charging lien is enforced only in proper cases and "[t]he decision of what constitutes a proper case is left to the sound discretion of the court of equity, the exercise of which should be based on the facts and circumstances of the case." *Minor Child of Zentack v. Strong,* 83 Ohio App.3d 332, 335 *(*8th District 1992*).*

To establish the existence of an attorney charging lien, there must be an award and the attorney must have assisted in obtaining the award. *See First Bank of Marietta v. Roslovic & Partners, Inc.*, 2004 WL 1172885. In this instance there is an award by Magistrate

Shoemaker of attorneys' fees incurred as the result of the discovery misconduct by the lawyers for the other party to the Lawsuit. Young & McDowall prepared the Motion for Sanctions requesting the payment of fees and argued it before Magistrate Shoemaker. The record is clear that there is an award, and that Young and McDowall's services and skill created that award.

The Trustee argues that Ohio law also requires the attorney to show there was an agreement between lawyer and client for the charging lien. Although the Ohio Supreme Court in *Cohen v. Goldberg*, 109 Ohio St. 22, 28, found "no basis for the contention of counsel that lien cannot be asserted by attorneys, in the absence of an agreement with their client that they should have such lien," some Ohio appellate court decisions have looked for the existence of an agreement, written or oral. *See* Minor Child of Zentack v. Strong, *83 Ohio App.3d 332 (8th District 1992).* Ohio courts have not imposed a requirement that the fee agreement be hourly or contingent. *First Bank of Marietta v. Roslovic & Partners, Inc.*, 2004 WL 1172885, *11 (finding that if all of the other elements are met, an attorney may have a charging lien whether the fee agreement is hourly or contingent).

In this case, the fee agreement provides, in pertinent part,

> I will pay attorney fees only if a settlement, verdict or award is obtained in my case. In that event, I agree to pay Young & McDowall a fee for services rendered as determined by one of the following calculations, whichever is greater, ...
>
> (1) a fee calculated ... hourly ...
>
> (2) one third (33 1/3%) of the total amount recovered in my behalf.

Defedant's Exhibit 2. The Court finds that Young & McDowall made a showing sufficient to establish the existence of a charging lien. Although the fee agreement does not address the

existence of a charging lien and the Debtors may not understand the phrase "charging lien" or even the term "lien," the debtors understand the Award to belong to Young & McDowall. Mr. Cuffman testified that he was aware that as a result of the efforts of Young & McDowall the claims of National City Bank against him had been dismissed. Mr. Cuffman testified that he did not know of the Motion for Sanctions or the Award at the time he and his wife filed for bankruptcy in 2002. However, he noted his belief that the Award was for attorneys' fees and that Young & McDowall was entitled to those fees as a result of the work they had done on behalf of the Debtors. Based on his testimony, and the procedural posture of the Lawsuit at the time the award was made, and because the award is solely for attorneys' fees awarded as sanctions for discovery misconduct, the Court finds sufficient evidence of the existence of Young & McDowall's lien on the award.

The Trustee argues that even if Young & McDowall has a valid charging lien on the Award, the charging lien does not have priority over the interest of the Trustee because it was not perfected prior to the Petition Date. Under Ohio law, an attorney may enforce a charging lien by taking possession of the funds to which the lien has attached or by giving notice of the asserted lien to the judgment debtor. *In re Simms Construction Services Co., Inc.*, 311 B.R. at 487. Relying on *In re Simms Construction Services Co., Inc.*, the Trustee suggests that because Young & McDowall did not file its "Notice of Charging Lien" in the Lawsuit prior to the Petition Date, the interest of the Trustee in the Award is superior to that of Young & McDowall. The Court disagrees.

Ohio law does not specify what notice must be given or how the notice must be provided to the judgment debtor. In this case, the judgment debtor was placed on notice of

Young & McDowall's claim long before Young & McDowall filed a written "Notice of Charging Lien." The Award at issue is the result of proof by Young & McDowall of the outstanding amount of fees, calculated on an hourly basis, incurred in pursuit of discovery matters. Through its participation in the hearing on the Motion for Sanctions, the Court finds that the judgment debtor had actual notice of Young & McDowall's claim. Actual notice is sufficient under Ohio law, and, in this instance, it was provided prior to the Petition Date. *Bahas v. Sagen (In re Durkay)*, 9 B.R. 58, 62 (Bankr. N.D. Ohio 1981).

Further, the requirement for notice under Ohio law closely parallels the requirement stated in the Third Restatement of the Law Governing Lawyers with respect to notice. *See In re Simms Construction Services, Co., Inc.*, 311 B.R. at 487 - 88. Citing the Restatement (Second), Agency, comment e notes that the notice requirement is meant to prevent the uninformed third party from paying the judgment creditor rather than the holder of the charging lien. Restatement (Third) of the Law Governing Lawyers § 43(2000), comment e.

> An attorney who has obtained a judgment for his client, and who has not agreed otherwise, is entitled to have the judgment enforced and to receive from the proceeds thereof compensation for services performed and indemnity for payments made and obligations incurred in connection with the particular case. His right does not extend to compensation or indemnity on account of other transactions conducted by him for the client. **Unless the judgment is for costs only**, the right exists only if the attorney gives notification of his intent to enforce it either to the judgment debtor or to the court.

Restatement (Second) Agency, § 464, comment n. This suggests that the notice requirements to establish a lien on a judgment for costs alone are different than for a judgment consisting of more. In this instance, given the court's specific findings regarding the nature of the fees awarded, the Award may be more akin to an award for costs than to an award for damages.

This determination makes it unnecessary for the Court to address in any detail the issues of laches, status of the property in light of the plaintiff's filing of a no asset report agter having been informed of Young & McDowall's ongoing pursuit of the Award, or plaintiff's failure to serve his notice to reopen the chapter 7 case on Young & McDowall, each of which might provide a further basis for the decision entered today.

CONCLUSION

Based on the facts and circumstances of this case, the Court finds that Award is property of the estate, but that Young & McDowall has a perfected charging lien in the Award with priority over the Trustee's interest in the award.

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cc: Michael Moran, Counsel for Trustee
Warren Price, Counsel for Young & McDowall
Harry Wittbrod, Counsel for Debtors