IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OHIO
Eastern Division

IN RE:	**IN PROCEEDINGS UNDER CHAPTER 7**
ARTER & HADDEN LLP,	**CASE NO. 03-23293**
Debtor.	
MARC P. GERTZ, TRUSTEE,	
Plaintiff,	**ADV. PROC. NO. 05-1774**
v.	
HBR TECHNOLOGIES,	
	JUDGE RANDOLPH BAXTER
Defendant.	

MEMORANDUM OF OPINION AND ORDER

The matter before the Court is the Trustee Marc P. Gertz's Motion for Summary Judgment Against Defendant HBR Technologies. Defendant opposes the Motion. The Court acquires jurisdiction over this proceeding pursuant to 28 U.S.C. § 1334, and General Order Number 84 of this District. After conducting a hearing on the matter and considering the pleadings filed by the respective parties, the following findings of fact and conclusions of law are rendered:

The Trustee seeks summary judgment on his complaint against Defendant seeking payment of unpaid legal fees and accrued interest in the amount of $47,709.67. In support of his Motion, the Trustee attaches invoices sent to Defendant by Arter & Hadden and responses by Defendant to interrogatories and requests for admission. Defendant opposes the Motion. Included in Defendant's

opposition is a cross-motion for summary judgment and a request for dismissal based on the alleged lack of jurisdiction of this Court over the claims alleged against Defendant.

Defendant's request for dismissal based on this Court's lack of jurisdiction is not well-premised and his hereby denied. Defendant alleges the Trustee's complaint should be dismissed because the breach of contract, action on account and unjust enrichment claims are state law matters and are therefore non-core. Defendant is correct that the matters raised in the Trustee's complaint are non-core matters. *See Gertz v. Echo Rock Ventures, LLC*, 339 B.R. 445, 452 (Bankr.N.D. 2006). HBR has not filed a proof of claim against the Debtor and accordingly, the claims alleged against HBR for breach of contract, open account and quantum meruit, are non-core state law claims. *Id.* at 452. This Court, however, has the authority to hear this adversary proceeding pursuant to 28 U.S.C. § 157(c)(1), which states in pertinent part that:

> (c) (1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such a proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings of fact and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

A civil proceeding is "related to" a bankruptcy case where "the outcome of the proceeding could conceivably have any effect on the estate being administered in bankruptcy." *Wolverine Radio Co,* 930 F.2d 1132, 1142 (6th Cir. 1991). Herein, the relief sought in the Trustee's complaint is related to the Debtor's bankruptcy estate because any recovery will impact distribution to the estate's creditors.

Although this Court is precluded from entering a final order or judgment with respect to HBR, the denial of a motion for summary judgment is not a final order. *Archie v. Lanier*, 95 F.3d

438, 442 (6th Cir. 1996). 28 U.S.C. § 157(c)(1) speaks only to "final" orders or judgments and the plain language of that provision dictates that this Court has the authority to enter interlocutory orders in non-core proceedings. Courts have consistently held such to be within the power of the bankruptcy court. *See In re Quality Care Medical Equipment, Co., Inc.*, 92 B.R. 117, (Bankr. E.D. Pa. 1988)("bankruptcy courts, in non-core matters, may enter only interlocutory orders, absent the consent of all parties."); *In re Kennedy*, 48 B.R. 621, 623 (Bankr.D.Ariz. 1985)("[w]hile not defined, Congress' use of the familiar legal expression 'final order' connotes its intent that the words be given their usual legal meaning and bankruptcy interlocutory orders in noncore proceedings need not be submitted to the district court."); and *In re One-Eighty Investments*, Ltd., 72 B.R. 35, (N.D.Ill. 1987)(striking objections to bankruptcy court's findings of fact and conclusions of law denying motion for summary judgment because "Congress did not intend to impose the burden on the district court that would result if bankruptcy courts could not enter interlocutory orders.") Accordingly, the findings of fact and conclusions of law are rendered herein consistent with this Court's authority to enter an interlocutory order in a non-core, related-to, proceeding.

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Summary judgment is appropriate where there is no genuine issue as to any material fact. *See* Fed. R. Civ. P. 56(c)(made applicable by Fed. R. Bankr.P. 7056); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Rule 56, states in pertinent part that:

> (c) Motion and Proceedings thereon. . . . the judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.
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> (e) Form of Affidavits; Further Testimony; Defense Required. Supporting and

> opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. . . . When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Initially, the movant bears the burden of pointing out to the Court the basis for the motion and the elements of the causes of action upon which the non-movant will be unable to establish a genuine issue of material fact. *Celotex,* 477 U.S. at 323. The burden then shifts to the non-movant to establish the existence of a material fact. *Id.*

The non-movant "must do more than simply show that there is some metaphysical doubt as to the material facts" by "com[ing] forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586-87. The non-movant's bare assertions, standing alone, are insufficient to create a material issue of fact and defeat a motion for summary judgment. *Id.* at 247-48. Further, a "mere scintilla of evidence in support of the non-moving party will not be sufficient." *Nye v. CSX Transportation,* 437 F.3d 556, 563 (6th Cir. 2006).

Rather, the non-movant "must present significant probative evidence in support . . . to defeat the motion for summary judgment." *Copeland v. Machulis*, 57 F.3d 476, 479 (6th Cir. 1995). A defendant bears the burden of proof on affirmative defenses. *See Fonseca v. Consolidate Rail Corporation*, 246 F.3d 585, 590 (6th Cir. 2001). Therefore, if a moving defendant fails to meet its burden on an affirmative defense, a plaintiff need not "proffer any additional evidence in order to rebut the . . . defense." *Id.* at 591.

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As the movant, the Trustee bears the initial burden of proving that no genuine issue of fact remains for trial. Rule 56(c), Fed.R.Civ.P. The Trustee seeks to recover property of the Debtors' estate, specifically, the unpaid legal fees. Property of the bankruptcy estate includes "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. §541(a)(1). Property interests are "created and defined by state law." *Butner v. United States*, 440 U.S. 48, 55 (1979). It is the Trustee's duty to "reduce to money the property of the estate." 11 U.S.C. § 704(a)(1). Consistent with that duty, Bankruptcy Rule 6009 authorizes a trustee to "commence and prosecute any action or proceeding in behalf of the estate before any tribunal."

Herein, the Trustee has failed to meet his burden with respect to proving that no genuine issue of fact remains for trial. Attached to the Trustee's Motion are the Defendant's responses to interrogatories and requests for admission. For example, the Trustee's Request for Admission No. 1 states "Admit that you did not dispute the amount of money owed as evidenced by the account statement attached to the Complaint as Exhibit A, before July 15, 2003." In response, Defendant denies that request. Following Request for Admission No. 1 is Interrogatory No. 5, which states:

> If your response in the Request for Admission No. 1 was not an unqualified admission, identify each and every time you disputed the amount of money owed as evidenced by the account statement attached to the Complaint as Exhibit A.

Answer:

> Ms. Weissenborn and I had numerous discussions about fees or potential billings in light of Arter & Hadden's duplicative staffing, overstaffing and failure to provide valuable service. She assured me repeatedly that it was all taken care of and that HBR would not be billed for all of these people and duplicative services.

Similarly, the Trustee's Interrogatory No. 7 states:

> Identify each and every reason why you have not paid the account statement attached to the Complaint as Exhibit A.

Answer:

> Some invoices were paid at a discounted rate that was verbally agreed to by myself and Ms. Weissenborn. Some invoices were re-creations of "time" that were manufactured over six months after the firm was closed. I had explicitly been told by Ms. Weissenborn that I would not be billed for all of the extra people touching my accounts and that the duplicative work and first year associate education was not going to be billed to HBR.

It is clear from the evidence attached to the Trustee's Motion that a disputed issue of fact remains with respect to the amount, if any, owed by HBR. Accordingly, the Trustee's Motion for Summary Judgment is not well-premised and is hereby denied.

With respect to HBR's cross-motion for summary judgment, such motion was untimely filed in violation of this Court's scheduling order. Pursuant to this Court's December 20, 2007 scheduling order, the dispositive motion deadline was March 12, 2008. HBR filed its cross-motion on March 27, 2008. Accordingly, cross-motion is time-barred.

Even if the Court were to consider the cross-motion, however, it is not well-premised. Although the specific request for relief is unclear from the cross-motion itself, at the hearing on the cross-motion, HBR indicated that a judgment finding it owed the Debtor nothing would be appropriate. Having reviewed the attachments to the cross-motion as well as the late-filed affidavit of former Arter & Hadden partner Marci Wesissenborn, the Court finds that it has not been conclusively established that HBR owes nothing to Arter & Hadden. Accordingly, HBR's request for entry of judgment in its favor is denied.

Finally, at the hearing on the motions, the Trustee stated that certain facts were not in dispute and that this Court should, pursuant to Rule 56(d), Federal Rules of Civil Procedure, enter an order

finding that HBR entered into a contract with Arter & Hadden for legal services and that Arter & Hadden was to be paid on an hourly basis. The Trustee's request for this Court to find such matters are not in dispute is denied. To the extent there are undisputed facts that the parties have agreed to, the parties may submit stipulations to the Court.

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Accordingly, the Trustee's Motion for Summary Judgment is not well-premised and is hereby denied.. The Defendant's opposition thereto is hereby sustained. HBR's cross-motion for summary judgment and request for dismissal are also not well-premised and are hereby denied. The Trustee's opposition to HBR's cross-motion and request for dismissal is hereby sustained. Each party is to bear its respective costs.

IT IS SO ORDERED.

Dated this 24th day of April, 2008.

JUDGE RANDOLPH BAXTER
UNITED STATES BANKRUPTCY COURT